

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

JAMES KWASNIESKI,)	
)	
Employee/Grievant,)	
)	
v.)	DOCKET NO. 22-06-836
)	
STATE OF DELAWARE,)	DECISION ON THE MERITS
DEPARTMENT OF TRANSPORTATION,)	AND ORDER OF DISMISSAL
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the “Board”) at 9:00 a.m. on April 5, 2023, at the Delaware Division of Professional Regulation, Hearing Room A, Silver Lake Plaza, Cannon Bldg., Second Floor, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Sheldon N. Sandler, Esq., Acting Chairperson, Joseph A. Pika, III, Ph.D., and Dinah M. Davis-Russ, Members, a quorum of the Board under 29 *Del. C.* § 5908(a).

APPEARANCES

Victoria R. Sweeney
Deputy Attorney General
Legal Counsel to the Board

Lance Geren, Esq.
O’Donoghue & O’Donoghue, LLP
on behalf of the Grievant

Kenneth S. Feaster, Jr.
Deputy Attorney General
on behalf of the Department
of Transportation

PROCEDURAL BACKGROUND

The Employee/Grievant, James Kwasnieski (“Grievant”) filed a grievance against the Department of Transportation (“Agency”) alleging he had been improperly paid for being called back to work prior to his core starting time on December 15, 2021, in violation of Merit Rule 4.16.1. Unable to resolve this grievance through the lower steps of the grievance procedure, it was advanced to the Merit Employee Relations Board for its consideration.

BRIEF SUMMARY OF THE EVIDENCE

The Grievant offered two (2) documents into evidence, both of which were admitted into evidence marked as Grievant Exhibits 1 and 2.

The Agency offered four (4) documents into evidence, of which two were admitted into evidence marked as Agency Exhibits A and C.

The Grievant testified on his own behalf. The Agency called Dina Burge, Human Resources Manager for the Department of Transportation (“DOT”) as its only witness.

FINDINGS OF FACT

At the time at issue in this grievance, Mr. Kwasnieski was employed by DOT as an Engineering, Planning, Surveying (“EPS”) Technician III.¹ He works within the DOT Materials and Research (“M&R”) Division. EPS Technicians are responsible to go to plants in Delaware and Maryland which produce asphalt (“hot mix”) to be used in roadway pavement repairs, maintenance and creation in Delaware. EPS Technicians run periodic tests on the materials being produced to ensure they are compliant with specifications. They report their test results into a DOT dataset. The assigned EPS Technician remains at the contractor’s plant until the

¹ Mr. Kwasnieski testified that a few weeks prior to this hearing he was promoted to the position of Lab Manager for the DOT Materials and Research Lab.

manufacturing process is complete and the hot mix has been shipped to the roadway construction site. At that point the EPS Technician returns to the office and then clocks out for that day.

EPS Technicians work irregular hours when they are assigned to report to contractor plants to monitor hot mix production. Although their core work hours are 8:00 a.m. to 4:00 p.m., this schedule only applies when an EPS Technician is not assigned to report to a contractor's plant. An overtime premium is paid to EPS Technicians who work more than eight (8) hours on any day.

Contractors are required to call in work orders including start times (and request an EPS Technician be assigned to monitor the hot mix production) by 3:00 p.m. the prior day. After the work orders are received, an M&R supervisor creates a work schedule for the following day which is usually posted between 3:30 and 4:00 p.m. The M&R Division also maintains a daily hot line into which EPS Technicians can call to get their work assignment for the following day. The Technicians are assigned based on individual overtime rankings. The Division seeks to equalize overtime opportunities, so Technicians with the lowest number of overtime hours on a particular day are assigned to the jobs which will require the most overtime hours (either due to early starts or expected late production hours). Occasionally, a schedule cannot be completed by 4:00 p.m. due to delayed requests from contractors, a supervisor's absence from the office, or other reasons. The hot line is always updated as soon as possible and EPS Technicians are expected to call in to get their assignments. If the schedule is changed for some reason, a supervisor will normally call or text the affected Technician(s).

On Tuesday, December 14, 2021, the Grievant was assigned to monitor a hot-mix plant. He reported to work at 6:45 a.m. and worked until 4:00 p.m. He was paid an overtime premium for the 1.25 hours he worked before his core hours of 8:00 a.m. to 4:00 p.m.²

² Grievant Exhibit 1.

When Mr. Kwasnieski returned to the Dover office and clocked out at 4:00 p.m., the schedule for reporting on Wednesday, December 15, 2021 had not been posted. He presumed he was required to report back to work at his core start time of 8:00 a.m. the next day. There was no supervisor in the office that afternoon to direct him to report to work sooner.

Later in the evening of December 14, 2021, Mr. Kwasnieski called the hot line and learned he had been assigned to report to a hot-mix plant at 6:30 a.m. the next morning. He reported to the plant at 6:30 a.m. and worked until 4:30 p.m. When he reported his time for December 15, 2021, he noted 2.5 hours of overtime³ and placed a notation of “CALLBACK PAY”.

When his time sheet was reviewed on December 17, 2021, Mr. Kwasnieski was requested to clarify why he had included the “CALLBACK PAY” notation. The email stated, “M&R has never had call backs,” and queried whether the notation was a mistake.

The M&R Supervisor then emailed the DOT Human Resources Manager:

We had a new timesheet item come up this morning and I am looking for your expertise. Our staff in hot-mix have core hours of 8am-4pm, but by 4pm each day a schedule is made to let them know what time to report on the following day. They work whatever hours the hot-mix plant is operating.

On this particular day (12/15) the staff worked until 4pm but the supervisor was not able to make the schedule until after 4 pm. When the staff called the hot-line later that evening to find out their reporting time, some of them were not starting at 8am. For instance in Jim’s case he was to report at 6am. Does this qualify for call-back pay?...⁴

The Human Resources Manager responded by email, also on December 17, 2021:

That would not constitute a call back. A call back is when an employee is called back for overtime services. This was simply a matter of the start time for a shift.⁵

³ Grievant Exhibit 1. The overtime was later corrected to 2.0 hours, to account for 1.5 hours worked before 8:00 a.m. and 0.5 hours after 4:00 p.m.

⁴ Grievant Exhibit 2.

⁵ Grievant Exhibit 2.

The email was forwarded to the Grievant with a request to update the time record.

Mr. Kwasnieski testified he believed he was entitled to call-back pay because he was required to return to work at 6:30 a.m., 1.5 hours prior to his normal start time and for which he was paid an overtime premium.

CONCLUSIONS OF LAW

Merit Rule 4.16.1 provides:

FLSA-covered employees who have left the work site at the end of their scheduled shift and are called back for overtime services shall be paid for such services in accordance with the provisions for overtime pay, provided that the minimum total payment is equal to four times their regular straight time hourly rate. Employees shall be paid according to this call-back provision or the overtime provision, whichever is greater, not both.

Merit Rule 18.3 provides:

An employee who is in a bargaining unit covered by a collective bargaining agreement shall process any grievance through the grievance procedure outlined in the collective bargaining agreement. However, if the subject of the grievance is nonnegotiable pursuant to 29 Del. C. 5938, it shall be processed according to this Chapter.

The parties do not dispute that this grievance is properly before this Board as the Grievant's entitlement to call-back pay, if any, arises under Merit Rule 4.16.1 and is not addressed in their negotiated collective bargaining agreement.

The Board concludes that the call-back provisions do not apply to the circumstances presented by this grievance. Mr. Kwasnieski was not called to return to work to perform overtime work after leaving at the conclusion of his duties on December 14, 2021. While the following day's schedule with employee assignments and start times was normally posted by 3:30 p.m., the fact that it was not posted does not convert his reporting for scheduled work the next day as a call-back. There is a difference between reporting for extra work after leaving at the end of the regular


work day and reporting the next day for scheduled work, even if an employee's irregular schedule requires him to report earlier than normal the following day.

CONCLUSION


It is this **1st** day of **June, 2023**, by a unanimous vote of 3-0, the Decision and Order of the Board to deny the grievance.



SHELDON N. SANDLER, ESQ., ACTING CHAIR



JOSEPH A. PIKA, III, PH.D., MEMBER



DINAH DAVIS-RUSS, MEMBER