

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

IN THE MATTER OF:)	
PATRICK M. BURK,)	
)	
Appellant,)	
)	DOCKET NO. 02-09-279
v.)	
)	
DEPARTMENT OF PUBLIC SAFETY,)	DECISION AND ORDER
)	ON TIMELINESS OF
Agency.)	GRIEVANCE FILING

BEFORE Brenda Phillips, Chairperson; Dallas Green, John F. Schmutz, John W. Pitts,
Members,
constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. §5908(a).

APPEARANCES:

For the Appellant:

Patrick M. Burk, Appellant
Michael Hertzfeld, Union Representative

For the Agency:

James Hanley, Esquire
Deputy Attorney General
Carvel State Office building
820 N. French Street
Wilmington, DE 19801

PROCEDURAL HISTORY

This grievance has proceeded through the steps of the Merit System grievance process culminating in a Step 3 grievance hearing on August 14, 2002 before LaTonya B. Ashley, the designee of the State Personnel Director. On August 30, 2002, the State Personnel Director's designee issued her written decision finding that the grievance by Mr. Burk was not timely filed but nevertheless opining that, without regard to the untimeliness, the grievance should be denied on the

merits. This appeal was received by the Merit Employee Relations Board ("MERB" or "Board") on September 27, 2002.

The matter came before the MERB for hearing on February 6, 2003. The Appellant appeared with assistance from his Union Representative, Michael Hertzfeld. The Agency was represented by Deputy Attorney General James Hanley. The Board was advised by Michael M. Tischer, Deputy Attorney General.

REQUEST TO DISQUALIFY AGENCY COUNSEL

Mr. Burk and Mr. Hertzfeld requested that Deputy Attorney General James Hanley, be disqualified by the Board from representing the Agency in this matter. It was contended that since Mr. Hanley was the Deputy Attorney General assigned to the Department of Public Safety he was also their attorney since they both worked as agents for the Division of Alcoholic Beverage Control and Tobacco Enforcement, ("DABCTE") within the Department of Public Safety.

Mr. Hanley responded that he represented the Department of Transportation in this matter in opposition to Mr. Burk's grievance. After hearing argument, the Board determined that Mr. Hanley did not have a conflict in this situation and voted unanimously to deny the request to disqualify Mr. Hanley.

UNION REPRESENTATION

Mr. Burk was advised that he was entitled to be represented by a lawyer at the MERB hearing. Mr. Hanley indicated to the Board that he did not have a problem with Mr. Burk being represented at the hearing by his non-attorney representative, Michael Hertzfeld. Board counsel advised that the position of the Department of Justice as articulated by both the State Solicitor and the Deputy State Solicitor was that until the Delaware Supreme Court rules on the issue of the

propriety of representation by a non-lawyer union representative there was a good faith argument that union representatives may represent their members in front of MERB. The Board was advised that several Superior Court decisions and the Delaware Supreme Court, in cases involving individuals who were not union representatives, had determined that other non-lawyers could not appear before state agencies in a representative capacity. The Board permitted Mr. Hertzfeld to assist and represent the Appellant during the hearing.

MOTION TO DISMISS APPEAL AS AN UNTIMELY FILED GRIEVANCE

The facts involved in the determination of the Motion to Dismiss the grievance as untimely were presented by the sworn testimony of Mr. Patrick Burk and Ms. Michelle Flanders, the Human Relations Manager for the Department of Public Safety. Additionally, the Appellant submitted Exhibits 1-6. The Appellant, an agent with the Division of Alcohol Beverage Control and Tobacco Enforcement ("DABCTE"), attended required training at the Police Academy from July 23, 2001 to December 19, 2001. Prior to his acceptance into his position with the DABCTE, Mr. Burk was employed by the Delaware Department of Corrections as a Corrections Officer for approximately a year and one-half. Shortly after notification of his status as the successful applicant for an agent position with DABCTE, Mr. Burk was directed to report to the Delaware State Police Training Academy for his initial law enforcement officer certification training. Mr. Burk was paid his regular salary without overtime for a 37.5 hour week during the entire period he attended the Training Academy.

Following completion of the Academy training in December, at the request of his immediate supervisor, Mr. Burk submitted in January time sheets for the period of his attendance at the academy and requested 1303.25 hours of overtime compensation. There was no prompt resolution of Mr.

Burk's overtime compensation request by the Department of Public Safety. Finally, on May 6, 2002, the Grievant received an e-mail from Deputy Director J. Jiles advising him that Human Resources had denied his request for overtime compensation. The Appellant filed his grievance on May 8, 2002 asserting, among other things, that the Agency is in violation of Merit Rule 5.13230 because he works in a position covered by the Fair Labor Standards Act ("FLSA") and worked in excess of 37.5 hours a week during the time he spent at the Training Academy for which he was not properly compensated.

The Department of Public Safety takes the position that the Appellant's filing is untimely. The Department also asserts that Mr. Burk, and all other employees who attend training at the Academy, are not entitled to overtime compensation based upon an FLSA exemption providing that attendance outside of regular working hours at training is not compensable overtime.

RELEVANT MERIT RULES

MERIT RULE 20.6 STEP I

Grievants shall file, within 14 calendar days of the date of the grievance matter or the date they could reasonably be expected to have knowledge of the grievance matter, a written grievance which details the complaint and relief sought with their immediate supervisor. The following shall occur within 14 calendar days of the receipt of the grievance: the parties shall meet with and discuss the grievance and the Step 1 supervisor shall issue a written reply.

MERIT RULE 5.1320 COMPENSATION FOR OVERTIME SERVICE

An employee with a standard work week of 37 ½ hours per week and in a position or a class covered by the Fair Labor Standards Act (FLSA) who is authorized to perform overtime service shall be compensated in cash at one and one-half times the regular rate of pay or granted one and one-half hours off for each one hour worked after 37 ½ hours per week. An employee with a standard work week of 40 hours and in a position or a class covered by the FLSA who is authorized to perform overtime service shall be compensated in cash at one and one-half times the regular rate of pay or granted one and one-half hours off for each hour worked after 40 hours per week. An employee with a standard work schedule in excess of one week as allowed by the FLSA and who is authorized to perform overtime service shall be compensated pursuant to the FLSA and this rule for hours worked in excess of the standard work schedule. Hours worked is defined for these purposes to include any form of scheduled paid leave used by the employee (e.g. annual leave, sick leave, holiday, etc.) as well

as hours actually worked by the employee. The method of compensation shall be agreed to in advance as cash payment is subject to availability of funds and or operational needs of the agency. Only hours worked over 40 hours per work week are covered by the overtime provisions of the FLSA. The regular hourly rate of pay for overtime payment purposes includes shift differential pay, stand-by duty pay and hazardous duty pay.

DISCUSSION

RE: MOTION TO DISMISS GRIEVANCE AS UNTIMELY

It is fundamental that the Merit Employee Relations Board can only hear and consider appeals which are timely and properly filed under the Merit Rules and applicable statutes. The Board's power and authority are derived from statute and the Merit Rules, and its jurisdiction extends only to those cases which are properly before it in compliance with the statutes and Merit Rules. *Maxwell v. Vetter*, Del. Supr., 311 A.2d 864 (1973), *Cunningham v. State of Delaware, Department of Health and Social Services*, Del. Super., C.A. 95A-10-003, Ridgely, P.J. (March 27, 1996) (ORDER).

In this appeal the Board must initially deal with the question of the timeliness of the Mr. Burk's appeal. The Agency contends that Mr. Burk was aware that he was not receiving overtime pay during the entire period of his attendance at the Training Academy from July 23 2001 to December 19, 2001 and therefore it was untimely for him to wait until May 8, 2002 to file his grievance seeking overtime compensation. The Agency points to e-mail correspondence dated April 26, 2002, from Mr. Burk to Ms. Flanders in the Human Relations section of the Department of Public Safety, where Mr. Burk threatens to file a grievance concerning his overtime compensation within five working days unless he received a response concerning his overtime compensation request. The Agency points to this as establishing that Mr. Burk was aware that he had a grievance matter in April or before, and that his May 8, 2002 grievance was untimely.

Under the facts of this case, the Board concludes that the grievance was timely filed. While

the Appellant was certainly aware that he was not receiving overtime pay for the period of time he attended the Training Academy, he specifically requested such compensation in January of 2002 shortly after the conclusion of the training. He was not, from the testimony of Mr. Flanders, expected to file overtime requests while attending the Academy. He filed his requests in January following the instructions of his supervisor and thereafter there were several contacts initiated by Mr. Burk attempting to get a resolution of this matter. It is clear that there was a lack of certainty within the Department of Public Safety concerning what, if any, overtime compensation was to be paid under the circumstances. Ms. Flanders responded to Mr. Burk's April 26th e-mail on April 27th and informed him that he would have a response to his request from the Department when the Department's Deputy Attorney General had completed his request of the overtime request. It was not until May 6, 2002 when Mr. Burk was notified that his request was denied and he filed his grievance on May 8th. Under these circumstances the Board views Mr. Burk's grievance as timely filed.

FURTHER PROCEEDINGS

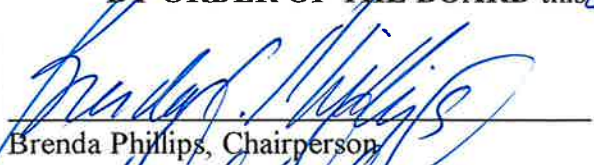
In his opening argument for the Agency, Mr. Hanley requested that if the Board determined that Mr. Burk's grievance was timely filed, that the Board should remand the matter to the parties for a calculation of any amount of allowable overtime.

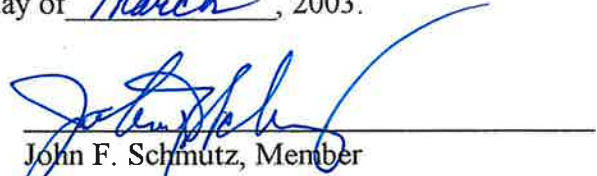
Having determined that the grievance should be viewed as timely, the Board turns to the question of whether or not Mr. Burk, under the Merit Rules, is entitled to overtime compensation for his Police Academy training. Based upon the presentations of the parties, the Board has unanimously determined to defer determination of this issue pending further discussions by the parties. Within sixty (60) days of the date of this hearing (February 6, 2003) the parties, through the attorney for the


Department, shall report back to the Board in writing on the status of the discussions between the parties and shall advise the Board if the parties intend to file briefs or memorandum of law on the entitlement of trainees at the Delaware State Police Academy for overtime compensation and whether further evidentiary hearings are necessary to determine the facts of this grievance.

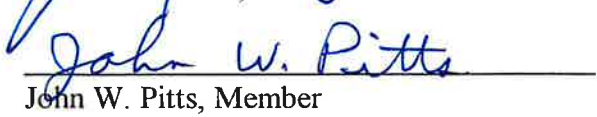
IT IS SO ORDERED.

BY ORDER OF THE BOARD this 26 day of March, 2003.


Brenda Phillips, Chairperson


John F. Schmutz, Member


Dallas Green, Member


John W. Pitts, Member

Mailing Date: April 2, 2003

Distribution:
Original: File
Copies: Appellant
Agency's Representative
Merit Employee Relations Board counsel