

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

DAVID GOMEZ, LISA HUDSON-BLUTO, AND)	
DAVID JOHNSON,)	
)	DOCKET Nos. 23-12-907
Employees/Grievants,)	23-12-908
)	23-12-909
v.)	
)	
DELAWARE DEPARTMENT OF CORRECTION,)	INTERIM DECISION DENYING
PROBATION & PAROLE,)	AGENCY’S MOTION TO
)	DISMISS
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the “Board”) at 9:05 a.m. on April 3, 2024 in the Delaware Public Service Commission Hearing Room, Silver Lake Plaza, Cannon Bldg., 1st Floor, 861 Silver Lake Boulevard, Dover, DE 19904. The hearing was open to the public.

BEFORE Jennifer Cohan, Chairperson; Sheldon N. Sandler, Esq., Joseph A. Pika, III, PhD, and Lester E. Johnson, Jr., Members; a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

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

Deborah L. Murray-Sheppard
Board Administrator

Anthony Delcollo, Esq.
Offit Kurman
Counsel to the Grievants

Michael H. Tipton
Deputy Attorney General
Counsel to the Agency

BACKGROUND

David Gomez, Lisa Hudson-Bluto, and David Johnson (collectively, the “Grievants”) filed individual grievances against the Delaware Department of Correction, Probation & Parole (the “Agency”), alleging that they were improperly compensated for hours they were required to work beyond their regular schedule, in violation of Merit Rule (“MR”) 4 and the Fair Labor Standards Act (“FLSA”, 29 *CFR* 541).

The Board convened on April 3, 2024 to hear the grievances. It considered, as a preliminary matter, the Agency’s Motion to Dismiss for lack of jurisdiction and the Grievants’ response thereto.¹ The Agency argued the Board lacked jurisdiction over these grievances “because the Grievants grieve their DHR² established job classifications.”³ The Agency further argued that the DHR Secretary is responsible to establish and maintain a method of classifying and reviewing all state employment positions pursuant to MR 3.1, and that employee classifications are not appealable to the Board.⁴ At the hearing, the Agency also argued that DHR was a necessary party to the grievances.

In opposing the Motion, the Grievants argued that they are “treated as hourly wage-earners for all practical purposes, but classified as FLSA-exempt by the Agency” and “have been improperly credited for time worked in excess of the standard work week with equal time off” under MR 4.13.5 rather than with overtime compensation as provided by MR 4.13.1.⁵ The Grievants clarified that they are not contesting their job classification or their assigned paygrade or rank. They are asserting their positions are improperly designated as FLSA exempt under both

¹ The Agency filed its Motion on March 19, 2024, and the Grievants filed their opposition on March 25, 2024.

² Department of Human Resources.

³ Agency’s Motion ¶ 7.

⁴ *Id.* ¶ 8.

⁵ Grievants’ Response in Opposition ¶¶ 2, 3.

DHR and Agency policies. The Grievants requested that if the Board decided DHR was a necessary party it permit the Grievants to amend their grievances to add DHR.

After reviewing and considering the parties' legal arguments, the Board denied the Agency's Motion to Dismiss, without prejudice. The parties were clear that the FLSA exempt designation of the Grievants' positions was made by DHR, and not by DOC. Consistent with its holding in *Kline v. DSHS*⁶, the Board directed the Department of Human Resources be joined as a proper party and the grievances be rescheduled for hearing.

DECISION AND ORDER

It is this **8th** day of **April, 2024**, by a vote of 4-0, the Decision and Order of the Board to deny the Agency's preliminary Motion to Dismiss, without prejudice. The Board further directs Department of Human Resources be joined as a party to this grievance and that these grievances be scheduled for a hearing on the merits.



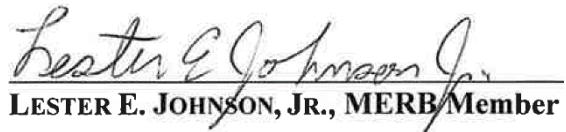
JENNIFER COHAN, MERB Chairperson



SHELDON N. SANDLER, ESQ., MEMBER



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



LESTER E. JOHNSON, JR., MERB Member

⁶ MERB Docket 08-12-435 (March 30, 2010) p. 5-6.