

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

MARK R. SCHAFER,)	
)	
Employee/Grievant,)	<u>MERB Docket No. 24-05-921</u>
)	
v.)	
)	DECISION AND ORDER
DELAWARE DEPARTMENT OF TRANSPORTATION,)	ON 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 9:00 a.m. on October 2, 2024, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Jennifer Cohan, Chair; Joseph A. Pika, III, Ph.D., 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

Mark R. Schafer, Grievant
Pro Se

George T. Lees, III
Deputy Attorney General
on behalf of DOT

BRIEF SUMMARY OF THE EVIDENCE

A hearing was convened by the Merit Employee Relations Board (“MERB”) on Wednesday, October 2, 2024, to consider the grievance of Mark R. Schafer (“Grievant”) against the Department of Transportation (“Agency”).

Prior to the hearing the Agency submitted a Motion to Dismiss, to which the Grievant provided a written response. The Motion, Response and the grievance were provided to and reviewed by the Board prior to the hearing.

The Board heard legal argument from the parties on the Agency’s motion at the hearing. This decision results therefrom.

BACKGROUND

Mark Schafer is an Engineering, Planning, Surveying (“EPS”) Technician IV employed by the Agency. He works in the Division of Construction and Materials, in the Materials and Research section.

Mr. Schafer filed a grievance on or about December 1, 2023 asserting the Agency had violated Merit Rule (“MR”) 4.18.1 by not providing him with Hazardous Duty Pay. Merit Rule 4.18.1 states:

4.18.1 Determination as to the positions eligible for hazardous duty pay shall be requested by agencies for the DHR Secretary’s approval. The agency shall notify the DHR Secretary when a substantive change occurs in the duties or work conditions of any position receiving hazardous duty pay. Compensation shall be set by the State Budget Act.

“Hazardous Duty Pay” (“HDP”) is defined in the Merit Rule Definitions:

“Hazardous Duty Pay”: uncontrollable circumstances that involve an unusual risk of serious physical injury, impairment to health or death resulting from accidental, negligent or intentional causes. Compensation for Exposure Levels A & B shall be set in the Budget Act. The following two degrees of exposure are recognized:

- **“Exposure Level A”:** Continuing exposure to hazards where the employee’s responsibility is to deal with the hazard as a function of assigned duties.
- **“Exposure Level B”:** Proximate exposure to hazards where it is not the employee’s stipulated job duty to deal with the hazard, or occasional exposure to hazards where the employee’s responsibility is to deal with the hazard as a function of assigned duties. The following definitions shall be used to determine eligibility for hazardous duty pay:
 - **“Continuing”:** frequency of exposure is normally more than 50% of employees’ working time.
 - **“Occasional”:** frequency of exposure is normally more than 5% but less than 50% of employees’ working time.
 - **“Uncontrollable”:** precautions, such as safety and life support equipment, are either impractical to be used continually or are insufficient to assure reasonable safety.
 - **“Proximate”:** the location of employee’s work site precludes evacuation as a means of avoiding exposure to serious physical injury, impairment to health or death resulting from accidental, negligent or intentional cause.

The grievance was denied at Steps 2 and 3. Following issuance of the Step 3 decision by the Department of Human Resources, Mr. Schafer made a timely appeal to MERB. The grievance asserted:

I believe that Hazard [*sic*] Duty pay in the Materials & Research section was not correctly applied and granted in accordance with Senate Bill 250.¹

¹ Senate Bill 250 is the FY 2023 Budget Act, which was effective July 1, 2022 through June 30, 2023. Section 30 of the FY 2023 Budget Act states:

Notwithstanding 29 Del. C. §5916, the Secretary of the Department of Human Resources shall have the authority to review and recommend which employee classifications ~~in the Department of Correction~~ are eligible to receive hazardous duty levels, including A-1 supplemental compensation. Employees covered by a collective bargaining agreement who have negotiated to have the hazardous duty levels, including A-1, supplement added to their base salary rate shall not be eligible for this supplement. Any recommendations for hazardous duty supplemental compensation must be approved by the Director of the Office of Management and Budget and Controller General. Any supplemental compensation approved under this section shall be effective on the first day of the full pay period following approval.

Section 5916 of the Merit System of Personnel Administration statute in Title 29 of the Delaware Code states, in relevant part:

On September 12, 2024 the Agency filed a motion to dismiss the grievance for lack of subject matter jurisdiction, asserting the grievance fails to state a claim on which relief can be granted. The Grievant provided a written response to the Agency’s motion on September 23, 2024.

CONCLUSIONS OF LAW

The Agency moved to dismiss the grievance asserting the Board lacks jurisdiction to hear a complaint because the Grievant does not contend that the Agency failed or refused to pay him a hazardous duty supplement to which he was entitled (in violation of MR 4.18.1), but rather that the Agency should have requested the Department of Human Resources (“DHR”) review his position and determine that it was eligible to receive a hazardous duty pay supplement. The Grievant, the Agency argues, is precluded from relief on this issue because the grievance challenges a policy determination made by the Agency concerning which positions it recommended for DHR review and approval for a hazardous duty wage supplement. The substance of the grievance, the Agency argues, violates MR 18.2, which states in relevant part:

... A grievance shall not deal with the substantive policies embodied in the

(e) No employee of any department or agency shall receive hazardous duty pay, except those specifically included in the following paragraphs:

- (1) Employees, otherwise qualified, who are employed by the Department of Correction (or its successor agency).
- (2) Employees, otherwise qualified, who are employed by the Delaware Psychiatric Center (or its successor agency) and who are assigned to programs for the criminally insane.
- (3) Employees, otherwise qualified, who are employed by the Department of Services for Children, Youth and Their Families (or its successor agency).
- (4) Casual seasonal employees performing the same job duties as those eligible employees identified in paragraphs (e)(1), (2), (3) of this section, shall also be deemed eligible. The amount of the monthly hazardous duty pay supplement shall be prorated based on the actual hours worked.
- (5) Employees employed in the Prison Education Program as authorized in Chapter 24 of Title 14 whose primary job location is within the institutions.

(f) Nothing in this section shall be construed or interpreted by the Merit Employee Relations Board or by the Secretary to include hazardous duty pay as coming within the definition of fringe benefits.

Merit System law.

The Agency requested DHR approve hazardous duty supplements for its employees whose work locations were “within or adjacent to roadway in the presence of vehicular traffic” and/or “within construction work zones in the presence of vehicular traffic.” Positions who spent more than 50% of their working hours in conditions which met these criteria were approved for Level A hazardous duty pay. Those positions who worked between 5% and 50% in those conditions were approved for Level B hazardous duty pay.²

As an EPS Technician, Mr. Schafer is responsible to check the hot-mix and other materials used in highway repairs. It is undisputed that Mr. Schafer may be exposed to hazardous substances in the testing of materials to be used in roadway construction and repairs and that his work requires that he test the materials in very busy locations where the materials are being manufactured or prepared, including material which has been loaded into dump trucks for transport to construction sites.

The Board’s power and authority are statutorily proscribed and limited to grievances which are properly before it. Mr. Schafer does not allege that the Agency has failed to pay him a hazardous duty supplement for which he has been determined to be eligible by DHR. The Merit Rules do not provide an avenue by which to compel the Agency to seek hazardous duty wage supplements.

Consequently, the Board does not have jurisdiction to hear this grievance.

The Board recommends, however, that the Agency examine its policy for requesting hazardous duty supplements to ensure that it is requesting a supplement in all circumstances where employees are exposed to “... uncontrollable circumstances that involve an unusual risk of serious physical injury, impairment to health or death resulting from accidental, negligent or intentional

² Exhibit C to the Agency’s Motion to Dismiss.

causes” and that its policy is consistently applied across all Department of Transportation positions.

ORDER

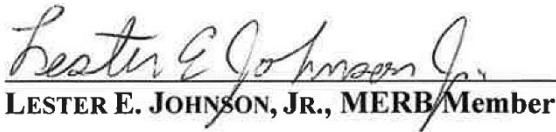
It is this 7th day of **October, 2024** by a vote of 3-0, the Decision and Order of the Board to grant the Agency’s Motion and to dismiss the grievance for lack of jurisdiction.



JENNIFER COHAN, MERB Chairperson



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



LESTER E. JOHNSON, JR., MERB Member