

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

WILLIAM E. LIKENS,)	
)	
Employee/Grievant,)	<u>MERB Docket No. 25-01-941</u>
)	
v.)	
)	DECISION AND ORDER
DELAWARE DEPARTMENT OF TRANSPORTATION,)	
)	
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 Wednesday, May 21, 2025, at the Delaware Public Service Commission, Silver Lake Plaza, Cannon Bldg., Suite 100, 861 Silver Lake Boulevard, Dover, DE 19904.

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

APPEARANCES

Jennifer M. Singh
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Christopher Ware, Staff Representative
AFSCME Council 81
on behalf of William Likens,
Employee/Grievant

George T. Lees, III
Deputy Attorney General
on behalf of the Department of Transportation

BRIEF SUMMARY OF THE EVIDENCE

A hearing was convened by the Merit Employee Relations Board (“MERB”) on Wednesday, May 21, 2025, to consider the grievance of William Likens (“Grievant”) against the Department of Transportation (“Agency”).

Following a prehearing conference conducted by the Board’s counsel, exhibits were admitted into the record, including four (4) exhibits offered by the Grievant and fourteen (14) offered by the Agency.

Prior to the hearing the Agency submitted a Motion to Dismiss, to which the Grievant provided a written response.

The Board was provided with copies of all the admitted exhibits, the Motion to Dismiss, and the Grievant’s written response for its review prior to the May 21, 2025 hearing. The Board heard legal argument from the parties on the Agency’s motion at the hearing. This decision results from its consideration of the record and arguments of the parties.

BACKGROUND

William Likens is an Engineering, Planning, Surveying (“EPS”) Technician III employed by the Agency. He works in the Division of Transportation Solutions in the Materials and Hot Mix Section.

Mr. Likens filed a grievance on or about December 1, 2023, asserting the Agency had violated Merit Rule (“MR”) 4.18.1 by not determining that he was eligible for 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.

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

I believe that Hazzard *[sic]* Duty pay in the Materials & Research section was incorrectly applied in accordance with Senate Bill 250.¹ The chief engineer of Materials & Research submitted my name for HDP and was denied by the Department Secretary thus violating the law set forth by SB 250 and our Merit Rules.²

On April 29, 2025, the Agency filed a motion to dismiss the grievance for lack of subject

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:

(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.

² The January 10, 2025 appeal of the DHR decision to MERB was appended to the Agency's Motion to Dismiss.

matter jurisdiction, asserting the grievance fails to state a claim on which relief can be granted, both because it was not timely filed and because this grievance is precluded by Merit Rule 18.2. The Grievant provided a written response to the Agency's motion on May 8, 2025.

CONCLUSIONS OF LAW

Merit Rule 18.6 states:

Step 1: 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 receipt of the grievance: the parties shall meet and discuss the grievance and the Step 1 supervisor shall issue a written reply.

Merit Rule 18.2 states:

A "grievance" means an employee complaint about the application of the Rules or the Merit System law (29 *Del. C.* Chapter 59), which remains unresolved after informal efforts at resolution have been attempted. A grievance shall not deal with the substantive policies embodied in the Merit System law.

There is no dispute that the list of Agency positions determined to be eligible for hazardous duty pay was issued by the Secretary of Transportation on January 12, 2023.³ The Deputy Secretary issued an email on February 8, 2023, in which he explained that only Maintenance and Research ("M&R") positions which worked in close proximity to live traffic (i.e., in uncontrollable environments) would receive hazardous duty pay. Although other M&R EPS Techs did receive hazardous duty pay, Mr. Likens did not because his position did not meet the hazardous duty pay criteria. In his email, the Deputy Secretary clarified hot mix plants are "controlled environments which follow OSHA regulations and well-established safety practices"; consequently, they were

³ Agency Exhibit N.

determined to be ineligible for hazardous duty pay.⁴

The Grievant did not dispute that this grievance was filed approximately ten months after learning that his position did not qualify for hazardous duty pay but argues that the Agency has waived its timeliness defense because the grievance was heard and decided at both Steps 2 and 3.

The time limits of the grievance procedure are jurisdictional and when a deadline has “passed, the Board ha[s] no jurisdiction to hear [the employee’s] grievance.” *Cunningham v. DHSS*, 1996 WL 190757, at *2 (Del. Super. Mar. 27, 1996), aff’d, 679 A.2d 462. The Board does not have jurisdiction to consider an untimely appeal. *Banner v. MERB and DHSS*, N13A-04-013 (Del. Super. Dec. 24, 2014), aff’d, 123 A.3d 472 (2015). A challenge to subject matter jurisdiction must be heard at any time it is raised; it is not subject to waiver. *Family Court of the State of Delaware v. Tucker and MERB*, C.A. No. N13A-10-007 ALR (Del. Super., Sept. 25, 2014).

The grievance, which was filed on December 1, 2023, was filed well beyond the 14-day time limit for filing a proper grievance under MR 18.6. Accordingly, the Board lacks subject matter jurisdiction to consider this grievance.

The Agency also moved to dismiss the grievance because it violates MR 18.2, which states in relevant part:

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

The facts of this case are nearly identical to the Board’s decision in *Shafer v. DOT* (24-05-921), which was issued on October 7, 2024. The Board concluded:

The Board’s power and authority are statutorily proscribed and limited to grievances which are properly before it. Mr. Shafer 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.




⁴ Agency Exhibit E.

... Consequently, the Board does not have jurisdiction to hear this grievance.⁵

The Board lacks jurisdiction to hear Mr. Likens' grievance for the same reason.

ORDER

It is this **3rd** day of **June, 2025** 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.

 SHELDON N. SANDLER, ESQ., ACTING CHAIR	 JOSEPH A. PIKA, III, PH.D., MEMBER
 LESTER E. JOHNSON, JR., MERB Member	

⁵ *Shafer v. DOT*, at p. 5.