

## Arbitration Decisions

# Labor Arbitration Decision, E. Bay Mun. Util. Dist., 2021 BL 501821, 2021 BNA LA 408

### Labor Arbitration Decision, E. Bay Mun. Util. Dist., 2021 BL 501821, 2021 BNA LA 408

Andrea L. Dooley, Arbitrator  
953 W. MacArthur Blvd. #12  
Oakland, CA 94608  
(510) 719-3089  
andrealdooley@gmail.com

IN THE ARBITRATION PROCEEDINGS

BETWEEN THE PARTIES

AMERICAN FEDERATION OF STATE, SMCS Case No. ARB-19-0237 COUNTY & MUNICIPAL EMPLOYEES, LOCAL 2019, AFL-CIO,

Union,

and

EAST BAY MUNICIPAL UTILITY DISTRICT,

Employer.

(Grievances of (REDACTED))

SMCS Case No. ARB-19-0237

### DECISION AND AWARD

April 19, 2021

Hide Headnotes

---

### BNA Headnotes

## LABOR ARBITRATION

### SUMMARY

#### [1] Work assignments - Higher-graded duties - Higher pay level - Prior awards

[▶ 100.08](#) [▶ 100.45](#) [▶ 100.70](#) [▶ 100.0783](#) [\[Show Topic Path\]](#)

Arbitrator Andrea L. Dooley ruled that the East Bay Municipal Utility District violated its MOU with AFSCME, when it assigned the work of the higher classification of a senior construction inspector to a construction inspector whenever he covered for senior inspectors on vacation/leave, and it failed to pay him their higher rate. The MOU unambiguously states that when “an employee temporarily replaces another employee in a higher classification, he/she shall be paid the appropriate higher rate for such work,” and in three prior awards under this MOU an arbitrator found that two job classifications which perform the same duties doesn’t trigger the higher wage rate, except when the lower paid employee is covering the distinguishing work of an employee in the higher classification. The grievant wasn’t entitled to the higher wage rate of a supervising construction inspector because the distinguishing work

of that classification involved supervising other employees and performing quality assurance work, and the grievant doesn't perform those duties.

---

## INTRODUCTION

These disputes involve the application and interpretation of the Memorandum of Understanding ("MOU") between the East Bay Municipal Utility District ("District" or "Employer") and American Federation of State, County & Municipal Employees, Local 2019, AFL-CIO ("AFSCME" or "Union"). Pursuant to an agreement between the parties, the undersigned Arbitrator was selected from a list provided by the State Medication and Conciliation Service to serve as the neutral decision-maker in this case. The matter came for hearing via video conference on January 25, 26, and 29, 2021. The parties submitted this matter to the Arbitrator after presentation of evidence and written closing briefs.

## APPEARANCES

For the Union:

Andy H. Baker, Esq.

Beeson Tayer & Bodine, LLC

483 9th Street

Oakland, California, 94607

For the Employer:

Suzanne Solomon, Esq.

Liebert Cassidy Whitmore

135 Main Street, #7

San Francisco, California, 94105

## ISSUE

The parties stipulated that the following two grievance issues are before the Arbitrator:

1. Did the District violate Section 4.2 or Section 6.4 of the Memorandum of Understanding between the parties by failing to pay work-out-of-class pay to the grievant for work grievant contends was the work of a Senior Construction Inspector; if so, what is the appropriate remedy?

2. Did the District violate Section 4.2 or Section 6.4 of the Memorandum of Understanding between the parties by failing to pay work-out-of-class pay to the grievant for work grievant contends was the work of a Supervising Construction Inspector; if so, what is the appropriate remedy?

## RELEVANT CONTRACT PROVISIONS

### ARTICLE 3 DISTRICT RIGHTS

#### 3.1 Definition of Rights

3.1.1 The rights of the District include, but are not limited to, the exclusive right to determine the missions of its constituent departments and divisions; set standards of services; determine the procedures and standards of selection for employment and promotion; direct and assign

its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of District operations; determine the method, means and personnel by which District operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work; provided, however, that the exercise of such District rights shall not conflict with the express provisions of this contract.

## **ARTICLE 4 NO DISCRIMINATION/HARASSMENT**

### **4.2. Harassment, Disparate Treatment and Inappropriate Behavior**

4.2.1 In addition to behavior which violates Section 4.1 above, the following behavior will not be permitted, tolerated or condoned; ... (e) Inequitable treatment regarding the application of District policies, District rules, this Contract, or those items listed in 4.1 above.

## **ARTICLE 6 SALARIES AND OTHER[\*2] PAY[\*2]**

### **6.4. Work-Out-of-Classification**

6.4.1. When an employee temporarily replaces another employee in a higher classification, he/she shall be paid the appropriate higher rate for such work. Assignments to perform the work of a higher classification, pursuant to this Section shall be tracked by hours worked and shall not exceed 480 hours in a calendar year. The District shall make reasonable efforts to distribute work out of class on an equal and rotational basis for qualified employees. If there are no volunteers for the work out of class assignment, the District will fill the position by reverse seniority on a rotational basis among qualified employees. By use of this Section, the District shall not attempt to avoid District Civil Service Rules and the filling of regular full-time positions.

6.4.2. The purpose of this section is not to restrict training opportunities but to encourage proper classification and compensation for work performed.

6.4.3. Nothing herein shall prohibit the training of an employee in work of a more advanced nature without additional compensation, as long as full duties are not substantially assumed.

6.4.4. Employees assigned to work out of class shall receive the beginning step of the new class or a calculated rate which is 5½ % of the employee's current base rate, whichever is the greater amount, provided that the amount does not exceed the range.

## **STATEMENT OF THE FACTS**

The grievant SJREDACTED transferred to a permanent position with EBMUD as Construction Inspector (CI) in 2002. Grievant was assigned to Special District 1, which is the Wastewater Division. At the time he was hired, he was the only Construction Inspector in Wastewater. No other CIs worked in the Wastewater Division while Grievant held that position. There were four Senior Construction Inspectors (Sr. CI) in the Division. There is also one Supervising Construction Inspector (SCI) in the Division.

The class description for the Construction Inspector states:

Under general supervision, performs field inspection of contract construction work related to water pipelines, applicant agreement contracts, and non-pipeline work; and performs related work as required. JX 7.

The class description for the Senior Construction Inspector states:

Under general supervision, performs lead and/or quality assurance inspection of contracted construction work related to wastewater/water collection, treatment and distribution facilities; performs journey level construction inspection duties; performs other related work as required. JX 8.

The Supervising Construction Inspector class description states:

Under direction, supervises the inspection of contract construction and East Bay Municipal Utility District (EBMUD) forces work related to water/wastewater pipelines and non-pipeline facilities work, and applicant and agency agreement contracts.

In the Wastewater Division, all construction projects are capital projects, meaning that the construction[\*3] work is done by outside[\*3] contractors instead of in-house labor. Each project is assigned a CI or a Sr. CI. According to the grievant, assignments are based on several factors including availability, proximity to people's homes, and whether specialized employee knowledge is necessary for the oversight of the project. For example, Grievant is the only inspector with a certificate for welding inspections from the American Concrete Institute. Sr. CI J.H. is a licensed electrical inspector. According to their specialty, they might be asked to take on certain projects or parts of projects to oversee. The number of projects undertaken by the Wastewater Division varies from year to year, and so the number of projects each Sr. CI or CI is assigned also varies. Each project is assigned a primary inspector and a backup inspector. Grievant performs work as a backup inspector for the Sr. CIs and the Sr. CIs act as backup for Grievant.

The District offers a differing perspective on how those assignments are made and the work that is performed by the CI and Sr. CI employees. In the District's view, projects are assigned based on complexity and needed expertise. Without defining what makes a project more or less complex, the District asserts that Sr. CIs get projects that are more complex and Grievant, the sole CI, gets projects which are less complex. The Supervising CI performs quality assurance work on all projects.

Grievant estimates that he has worked on 40-50 projects over the 20 years in his position. For each project, there is a weekly meeting, attended by the general contractor, Engineering Department employees, inspectors, the project manager, and a representative for operations. The backup inspector attends the weekly meetings to get familiar with the parts of the project they would be expected to review. In addition, the Wastewater Division conducts a bi-weekly staff meeting to discuss what projects will be starting, the status of existing projects, and to familiarize the staff with what everyone was working on.

Senior Construction Inspectors work with the third-party contractor that has received the bid for the construction job. The focus of the Sr. CI is "to assure that they are doing what's in the plans and specifications. That the work is done per the contract and meets the plans and meets the specifications. So documenting what gets done."

The third-party contractors are responsible for quality control, which is a process of inspecting specific tasks on a specific trade, by performing tests on that process.<sup>1</sup> This contrasts with the "quality assurance" that is performed by the Senior Construction Inspector who is making sure that all the tasks are getting done and fit together in the entire project. Senior Construction Inspectors document their work in a daily[\*4] diary which they then enter a daily construction report electronically, [\*4] and they also keep a photo journal of photos that are taken daily of the construction.

On a monthly basis, the Sr. CIs review the contractors' monthly report that estimates the amount of work that has been completed and reviews the report to ensure that it is accurate. Senior construction experts also review contractors' certified payroll and ensure that the actual wages paid match the prevailing wage and benefits on the payroll report. Senior Construction Inspectors also conduct pre-bid walks with potential bidders along with the project manager and engineer from the District. Senior Construction Inspectors also maintain the System Outage Request log (SOR) which documents contractor requests for systems outages. The Senior Construction Inspector also coordinates the system outages between contractor and District operations.

The grievant also performed these duties for all the projects for which he had been assigned. The Sr. CIs and Grievant often trained one another and consulted with one another on areas of their expertise on each of their projects. Grievant has been assigned as backup for Senior Construction Inspector E.J. and E.J. has been assigned as a backup for the grievant. J. testified that Grievant walked with him through his first plant shutdown and showed him how to do the full plant shutdown.

In the desk audit for the Construction Inspector position completed on September 6, 2019, L.W., Senior Human Resources Analyst, concluded that the Construction Inspector and the Senior Construction Inspector have both been historically allocated the same job responsibilities for the duties set forth in their job descriptions. JX 6. For example, L.W. notes that both classifications coordinate construction related system outages; have historically completed inspection work; been involved in informal lead work direction; make recommendations to contractors; confer with contractors' field representatives; perform specialized inspections; review contractor plans and ensure compliance to those plans; keep records of the construction progress; and inspect the delivery of materials. Id. 9-12. L.W. concluded that, although project "quality assurance" is a duty listed in the Senior Construction Inspector job description, it is performed by and the responsibility of the Supervising Construction Inspector. Id. 12, 17. L.W. also notes, "Inspectors (both CI and Sr. CI) are not

assigned to conduct inspections of works and construction disciplines that they do not have the requisite background and experience to inspect.

On each project, the general contractor is expected to hire independent testing labs to conduct quality control testing on the parts of the project which require it. For example, the Contractor would hire a testing lab to test the concrete to ensure that it was up to standard. The Sr. CI[\*5] and CI oversee the quality control inspectors hired by the contractors. According to the Sr. CI and Grievant, this is considered[\*5] "quality assurance," and is intended to ensure that the contractor is meeting all the requirements of the contract, including competent quality control oversight of the project. However, the District's desk audit identified quality assurance as the responsibility of the Supervising CI. L.W.'s desk audit was a part of Grievant's request for reclassification, which was denied.

The Wastewater Division projects vary in scope, with some being considered major projects and others minor. The District does not have a process for designating which projects are major or minor. Grievant testified that the factors which would go into whether a project was major or not was based not only the price of the project but also the complexity of the drawings, materials, and length of time the project might take. Based on the evidence, including the desk audit, Grievant's projects did not seem to be shorter, less expensive, or to require less expertise than other projects.

Grievant was trained on a yearly basis to make underground service area (USA) markings for contractors. The contractor would determine the area needed for a dig and provide the drawings to the District. The contractor would also mark the ground. The person conducting the USA markings, such as Grievant, would go check the contractor's work and use paint to designate which East Bay Municipal Utility District pipes were under the area of the dig. In 2008-2010, Grievant got his certification to mark utilities, and began to handle the north area while his supervisor, J.J., handled the south area. When D.S. became the supervisor, Grievant was responsible for USA markings. E.J. also does USA markings.

## DECISION AND AWARD

The Union bears the burden of persuasion in this contract interpretation case. In such cases, the Arbitrator's first obligation is to determine whether the disputed language is clear and unambiguous. If so, she must give the words their plain meaning, even if one party finds the result somewhat harsh or contrary to its initial expectations. If, however, the disputed language is found to be unclear and ambiguous, or sometimes silent, extrinsic evidence (bargaining history, past practice, etc.) may be used to help determine the parties' intent. In addition, words and phrases are rarely interpreted on their own. To give force and effect to the entire agreement, words and phrases must be interpreted in context with their paragraph, section, article, and the Agreement as a whole.

The operative language that is under review is:

**When an employee temporarily replaces another employee in a higher classification, he/she shall be paid the appropriate higher rate for such work.** Assignments to perform the work of a higher classification, pursuant to this Section, shall be tracked by hours worked[\*6] and shall not exceed 480 hours in a calendar year.

The Union argues that CI Grievant temporarily replaced Senior Construction Inspectors when he performed[\*6] the duties of a Sr. CI on assigned projects and when he covered for Sr. CIs on their vacations or other leaves of absence. The Union also argues that Grievant temporarily replaced the Supervising Construction Inspector when he performed USA marking work.

Section 6.4. of the MOU has been the subject of three prior arbitration awards. In the most recent case, Arbitrator Kathryn Harris determined that "there was no remedy under Section 6.4 for the pay inequity that occurred here when CIs and Senior CIs were paid differently for performing the same work on a third-party relocation project."<sup>2</sup> CIs in that case worked in the Pipeline Division where a CI and a Senior CI both intermittently performed the same duties on a third-party relocation, overseeing contractors who had been hired to relocate or modify District owned pipelines. Arbitrator Harris concluded that the CI was not "temporarily replacing" the Sr. CI when they performed the same work.

Arbitrator Harris relied on Arbitrator Ronald Hoh's decision concerning the assignment of a retired employee's duties to inspectors where those duties were "at least arguably contained within the job classifications of both the Inspector and Senior Inspector." In that case, "Arbitrator Hoh found no contract violation with respect to the assignment of the lower-level duties to the Inspectors." Harris Award, p. 16.

However, Arbitrator Hoh also found that "Inspectors were entitled to out of class pay for performing in Employee B's absence, duties formally performed by Employee A, which Employee B had been performing since employee A's retirement." The District was required to

make the affected Inspectors whole by paying them out-of-class pay plus interest at the rate of three percent. The District was also ordered to cease and desist from refusing to pay Inspectors out of class pay when they perform that portion of Employee B's duties previously performed by Employee A prior to his retirement. Id.

Arbitrator Harris also relied on the 2016 Alexander Cohn Award regarding Telephone Radio Operators who were performing the same responsibilities as the Dispatch Contact Center Representative classification. Arbitrator Cohn "reasoned that just because TROs and DCCRs performing the same job duties, this does not establish that TROs are working in the higher classification." He also found that "since the two classifications were performing duties on a continuous and indefinite basis and the TROs were not being asked to relieve the DCCRs, there was no evidence that TROs were 'temporarily replacing employees in a higher classification' (a prerequisite for out of class pay per section 6.4)." Id.

Although there is extensive testimony in **this** case about the differences and similarities of CI and Senior CI duties, it is also the case, as Arbitrator Harris noted, "Section[\*7] 6.4 of the agreement does not compel a comparison of CI and Senior CI duties as a prerequisite to the granting of[\*7] out of class pay." Notably, in this case, the desk audit and the testimony of the employees support the conclusion that the CI and Senior CI employees perform the same job duties, and that the Supervising CI performs the quality control oversight responsibilities that are listed in the Senior CI job description.

Notwithstanding the similarities between the CI and Senior CI positions in the Wastewater Division, the District insists that they are distinct due to the complexity of the projects which are assigned to the CI versus the Senior CI. The Employer argues that there is some distinction to be made between the Construction Inspector and the Senior Construction Inspector. However, the only difference between their job descriptions is the reference to quality assurance, which is fact performed by the Supervising Construction Inspector. The other stated difference relates to the complexity of the construction projects which are assigned to the Construction Inspector as opposed to the Senior Construction Inspector.

L.W., Senior Human Resources Analyst with East Bay Municipal District in the Recruitment and Classification Division, testified that Construction Inspectors are, "able to take a project of moderate scope and complexity and be the point person for that project." She also said, "A Senior can be identified by lead responsibility, could be identified by — performing construction support on projects of an advanced nature with advance complexities." By interviewing the grievant's supervisor and the Senior Civil Engineer, L.W. was "able to determine that Grievant was assigned project of moderate complexity with limited responsibility for the more complex skills trade such as electrical, mechanical, instrumentation, and controls. And where there were elements of those skilled trades within the projects, they were of a more limited complexity."

There is no evidence that the Sr. CIs perform lead work over the CIs as that term is meant in the job description. There's only one CI; there are four Sr. CIs. The CI is not subordinate to, or taking direction from, any Sr. CI. The main distinction between the two classifications that is asserted by the Employer concerns the complexity of the work assignments. Grievant is given "moderately complex" assignments. "Complex" seems like an absolute adjective, like "pregnant" or "dead," but it is not. There can be degrees of complexity. However, what criteria the District uses to determine the degree of a project's complexity is not in evidence here. In fact, when Grievant's assignments are evaluated against other projects, they are similar in terms of size, time, and budget to other projects.

However, as Arbitrator Harris noted, a comparison of the two positions (Sr. CI and CI) is not necessary to determine whether[\*8] the contract has been violated. In all prior cases under this MOU, two job classifications which perform the same duties do not entitle[\*8] the lower paid employees to the higher wage rate of the second classification **except when the lower paid employee is covering the work of an employee in the higher classification.**

That has happened in this case. Grievant has covered for Sr. CIs when they were not available to perform their own work. If the Sr. CIs are in fact overseeing more complex projects than the CI, then when the CI oversees those projects for an absent Sr. CI, he is entitled to the higher rate of pay pursuant to Section 6.4.1 up to 480 hours per year. For the foregoing reason, the first grievance is sustained in part, on the basis that the grievant was assigned the work of a higher classification when he was covering for Sr. CIs who were on vacation or leave. As in the previous case, the grievant is also entitled to 3% interest.

The record at hearing did not establish that Section 4.2.1 was violated. The District has the discretion to assign work within the job description for the position and did not act in a discriminatory or inequitable manner when it assigned work to Grievant.

Turning to the second issue, the Union argues that doing USA marking work is the duty of the Supervising CI and that Grievant should be compensated at the higher rate for the performance of this work. There is no evidence in the record that the USA Marking work is solely the work of the Supervising CI. What distinguishes the Supervising CI is the duties related to supervising other employees and, according to Worden, performing quality assurance work. REDACTED does not perform those duties. USA marking is an ancillary duty that can be performed by any classification, as long as the individual has received the appropriate training. Grievant,

E.J., and the Supervising CIs have performed this work as a part of their regular duties. For this reason, the grievance that alleges a violation of 6.4 for Supervising CI work is denied.

Dated: April 19, 2021.

Andrea L. Dooley, Arbitrator

---

<sup>fn</sup> 1 A desk audit of the CI positions conducted by L.W. concluded that "quality assurance" for the overall project is the responsibility of the Supervising CI, while "quality control" is the responsibility of the third-party contractors.

<sup>fn</sup> 2 AFSCME Local 2019 and EBMUD, Grievance No. 16-2019-029 (Harris).