

Arbitration Decisions

Labor Arbitration Decision, Contra Costa County, 2021 BL 501822, 2021 BNA LA 409

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IN THE ARBITRATION PROCEEDINGS

BETWEEN THE PARTIES

CONTRA COSTA COUNTY DEFENDERS' ASSOCIATION,

Union,

and

CONTRA COSTA COUNTY,

Employer.

(B.L. and A.H. Out-of-Class Grievances)

Case No. LA-902-2021

DECISION AND AWARD

August 1, 2021

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BNA Headnotes

LABOR ARBITRATION

SUMMARY

[1] Work assignments - Higher-graded duties - Higher pay level ▶ [100.08](#) ▶ [100.45](#) ▶ [100.70](#) [\[Show Topic Path\]](#)

Arbitrator Andrea L. Dooley found that Contra Costa County didn't violate its MOU providing higher pay for work in higher-graded positions when it assigned a number of felony cases to two public defenders' misdemeanor case load and failed to pay them at the higher rate. The PD position includes the duty of handling "less complex" felony cases while more complex cases are part of the PD II and III job descriptions, there is very little evidence that the cases assigned were complex, and there is no evidence that the grievants performed "a majority of the duties and responsibilities" of the higher-graded PD II position so as to qualify for higher pay under the MOU. Nor is there evidence that the grievants even performed some higher classification work a majority of the time. The county didn't violate the memorandum's

provision that it “make reasonable efforts to offer out of class assignments to interested employees on a voluntary basis,” since this conflates case assignment with “class assignment,” which involves the need to temporarily fill a higher-graded position, such as for a leave of absence.

INTRODUCTION

These disputes involve the application and interpretation of the Memorandum of Understanding ("MOU") between Contra Costa County ("County" or "Employer") and Contra Costa County Defenders' Association ("Association" or "Union"). Pursuant to an agreement between the parties, the undersigned Arbitrator was selected to serve as the neutral decision-maker in this case. The matter came for hearing via video conference on February 23 and April 26, 2021. The parties submitted this matter to the Arbitrator after presentation of evidence and written closing briefs.

APPEARANCES

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ISSUE

Union: Did the County violate the MOU by assigning work outside the DPD Fixed Term position to B.L. and A.H. by, including but not limited to, failing to seek volunteers to perform the work assigned to the grievants and by failing to provide additional compensation to the grievants based on their assignments to perform that work; if so, what shall be the remedy?

Employer: Does Section 5.12 of the MOU between the County and the Defenders' Association allow the grievants B.L. and A.H. to be compensated as DPD IIs or DPD IIIs rather than DPD FTs for work performance prior to July 6, 2020; if so, what shall be the remedy?

The parties have agreed that the Arbitrator can frame the issue. The Arbitrator frames the issue as follows: **Did the County violate Section 5.12 of the MOU by assigning the grievants work outside the DPD FT position and/or by failing to seek volunteers to perform the work assigned? If so, what shall be the remedy?**

RELEVANT CONTRACT PROVISIONS

SECTION 5 — SALARIES

5.12 **Pay for Work in Higher Classification.** When an employee in a permanent position in the merit system is required to work in a classification for which the compensation is greater than that to which the employee is regularly assigned, the employee shall receive compensation for such work at the rate of pay established for the higher classification pursuant to subsection 5.9 (Salary on Promotion) of this Memorandum of Understanding, at the start of the second full day in the assignment, under the following conditions. Payment shall be made retroactive after the completing the first forty (40) consecutive hours worked in the higher classification.

A. When an employee is assigned to a program, service or activity established by the Board of Supervisors which is reflected in an authorized position which has been classified and assigned to the Salary Schedule.

B. The nature of the departmental assignment is such that the employee in the lower classification performs a majority of the duties and responsibilities of the position of the higher classification.

C. Employee selection for the assignment will normally be expected to meet[*2] the minimum[*2] qualifications for the higher classification.

D. The County shall make reasonable efforts to offer out of class assignments to all interested employees on a voluntary basis. Pay for work in a higher classification shall not be utilized as a promotional procedure provided in this Memorandum of Understanding.

E. Higher pay assignments shall not exceed six (6) months except through reauthorization.

F. If approval is granted for pay for work in a higher classification and the assignment is terminated and later re-approved for the same employee within one hundred eighty days (180) no additional waiting period will be required.

G. Any incentives (e.g., the education incentive) and special differentials (e.g., bilingual differential) accruing to the employee in his/her permanent position shall continue.

H. During the period of work for higher pay in a higher classification, an employee will retain his/her permanent classification, and anniversary and salary review dates will be determined by the time in that classification; except that if the period of work for higher pay in a higher classification exceeds one year continuous employment, the employee, upon satisfactory performance in the higher classification, shall be eligible for a salary review in that class on his/her next anniversary date. Notwithstanding any other salary regulations, the salary step placement of employees appointed to the higher class immediately following termination of the assignment shall remain unchanged.

I. Allowable overtime pay, shift differentials and/or work location differentials will be paid on the basis of the rate of pay for the higher class.

SECTION 21 — GRIEVANCE PROCEDURE

21.2 Scope of Arbitration Decisions

B. No Arbitrator has the power to amend or modify this MOU or written agreements supplementary hereto.

SECTION 39 - SCOPE OF AGREEMENT AND SEVERABILITY OF PROVISIONS

39.1 **Scope of Agreement.** Except as otherwise specifically provided herein, this MOU fully and completely incorporates the understanding of the parties hereto and constitutes the sole and entire agreement between the parties in any and all matters subject to meet and confer. Neither party shall, during the term of this MOU demand any change herein, provided that nothing herein shall prohibit the parties from changing the terms of this MOU by mutual agreement. Any past side letters or any other agreements that are not incorporated into or attached to this MOU are deemed expired upon approval of this MOU by the Board of Supervisors. The Association understands and agrees that the County is not obligated to meet and confer regarding wages, hours or conditions of employment during the term of this extended agreement, except as otherwise required by law.

RELEVANT JOB DESCRIPTIONS

DEPUTY PUBLIC DEFENDER — FIXED TERM

Definition:

Under supervision, performs legal work with respect to the representation of indigent persons charged with criminal offenses, conducts legal research, [*3] prepares and presents cases[*3] in court and performs related work as required.

Distinguishing Characteristics:

This class is distinguished as a limited term employment class, incumbents of which are responsible for handling legal matters in the Public Defender's Office including the representation of indigent persons charged with misdemeanor, juvenile and less complicated felony offenses; the presentation of preliminary hearings; and research and writing on legal issues.

DEPUTY PUBLIC DEFENDER II

Definition:

Under supervision, to provide legal counsel and representation for indigent persons charged with crimes in Contra Costa County.

Distinguishing Characteristics:

This class is distinguished from Deputy Public Defender I by the greater difficulty of cases assigned and by the lesser degree of supervision received. The class is distinguished from Deputy Public Defender III in that the latter is assigned more complex cases and may advise Deputy Defenders I and II on legal matters.

DEPUTY PUBLIC DEFENDER III

Definition:

Under general supervision, to provide legal counsel and representation to persons charged with more complex and/or difficult criminal cases, such as those cases that involve multiple defendants, that necessitate the use of forensic and or mental health experts, or cases in which the client is charged with a serious or violent felony and/or is facing a sentence of more than six years in prison. Perform legal research. Perform related work as required.

Distinguishing Characteristics:

The work of positions in the class of Deputy Public Defender III is characterized by responsibility for representing Public Defender clients charged with complex and difficult criminal cases, e.g., those cases that involve multiple defendants, that necessitate the use of forensic or mental health experts, or cases in which the client is charged with a serious or violent felony and/or is facing a sentence of six years or more in prison. Incumbents of the class are expected to exercise sound judgment in counsel. Incumbents of the class are expected to advise Deputy Public Defender I and II's on legal matters.

This class is distinguished from Deputy Public Defender II by the complexity and difficulty of cases assigned. This class is distinguished from Deputy Public Defender IV in that the latter is responsible for the more complex cases and assignments in the Public Defender's Office and the latter may supervise subordinate staff.

STATEMENT OF THE FACTS

B.L. began working for the Contra Costa County Public Defender in August 2017 in a graduate law clerk position. In February 2018, he moved to a special assignment position, which at the time was the entry level position for a Deputy Public Defender (DPD). He was assigned to handle misdemeanor cases in the Richmond and Martinez offices.

A.H. was also hired as a graduate law clerk after graduating from law school in 2016.

[*4] In April 2017, she moved to a special assignment[*4] DPD position.

Following negotiations between the Union and the County, the entry level position was re-named DPD Fixed Term (DPD FT). The DPD FT position is fixed for 36 months, after which time, DPD FTs are expected to be promoted or to leave the Public Defenders' Office. After a new application process, B.L. and A.H. were hired in March 2019 as DPD FTs. In the FT position, both handled misdemeanor cases exclusively at that time.

At some time prior to February 2020, a DPD II position opened up in the Public Defender office. B.L., A.H., and another FT employee applied for the position, which was granted to the third employee.

On February 10, 2020, B.L. was transferred from Central County Misdemeanors to East County Felonies. On March 9, 2020, A.H. was transferred from misdemeanors to an assignment in Richmond Felonies. JX 5. Although both employees were expected to complete work on their existing cases, they were also expected to accept new felony assignments as they came in.

The County maintains a Caseload Point Matrix which assigns a point value to individual cases. CX B. Points are assigned based on complexity and seriousness of the charges. For example, a simple drug possession case is one to two points, while a simple drug possession with two or more prior strikes is three points. A serious or violent charge (non-sex) with two or more priors is six to ten points. Cases that could result in a life sentence are 10 points. Each job classification is assigned a Point Maximum, per the table below.

| Position | Point Max |
|----------------|-----------|
| DPD Fixed Term | 80 |
| DPD II | 85 |
| DPD III | 100 |
| DPD IV | 110 |

CX B

B.L. was assigned nine felony cases between February 19, 2020, and July 5, 2020. Three cases involved complaints against multiple defendants, although B.L. only represented one client in each case. In three cases, defendants faced a potential sentence of six years or more. In three cases, defendants were charged with a serious felony which could carry a strike. JX 13.

A.H. was assigned six felony cases between April 13, 2020, and May 17, 2020. In three of those cases, there were multiple factors which the Union considers complex, and the other three cases each had one complex characteristic. JX 13. At least one case involved conferring with an expert. Both attorneys had to handle the unique challenge of the COVID pandemic and its impact on the court.

The Public Defender does not require staff attorneys to track their time spent on specific cases. Instead, they rely on the Case Point Matrix to ensure that each attorney has a balanced caseload that is appropriate to the position. Attorneys who believe that their cases have not been assigned the correct number of points can bring that to their supervisor's attention. The supervisor has the discretion to adjust the points assigned to a case and thus the overall case/point load for the attorney. If attorneys hit the Point Max, the PD informs the court, who assigns new cases to a panel of private attorneys.

Because the PD does not track time, [*5] B.L. and A.H. could not calculate the number of hours [*5] spent on each felony case that was assigned in the relevant time period. B.L. estimated that his felony cases in that time period were one third of his caseload but more than one third of his work time. Both B.L. and A.H. were able to provide quality representation to their clients at all times.

In the relevant time period, B.L.'s point load for the assigned felonies was 24 points. In that period, A.H. had 20 or fewer clients, and approximately 15 points for the assigned felonies. A.H.'s supervisor, R.B., did not believe that A.H. could have spent 50% of her time on the five felonies A.H. was assigned.

According to Assistant Public Defender M. D., the tasks and knowledge required for the DPD FT and DPD II position are the same. In her practice of supervising attorneys, she ensures that the FT position has a lower caseload, and their points would be kept below 80. A DPD II has more cases and less supervision than a DPD FT. The DPD II has a point max of 85. The DPD III position has even less supervision than a DPD II but is assigned more complex cases. The distinguishing characteristic of the DPD III position is "to provide legal counsel and representation to persons charged with more complex and/or difficult criminal cases, such as those cases that involve multiple defendants, that necessitate the use of forensic and or mental health experts, or cases in which the client is charged with a serious or violent felony and/or is facing a sentence of more than six years in prison."

The DPD III job description is not an exhaustive or mandatory list; it is a set of examples that suggest a case might be more complex and/or difficult. These examples can apply to less complex cases. For example, even misdemeanor cases can have multiple defendants or require forensic evidence. The list in the DPD III job classification is not an exhaustive list of factors which make a case complex. A.H.'s supervisor J.L. does not use the factors listed in the DPD III classification for assessing complexity but does rely on each attorney's longevity, experience, skills, and ability. For example, he would not assign a DPD II a homicide case but would not apply other exclusions if that employee's caseload and skillset were appropriate to a case.

Both B.L. and A.H. had mentors in the DPD FT position. DPD IIs are mentored by DPD IIIs. Neither B.L. nor A.H. mentor other employees, although they, like other attorneys, share knowledge with co-workers about topics with which they are familiar and experienced.

B.L. and A.H. were both promoted to DPD II on July 6, 2020. JX 6.

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[*6] harsh or contrary to its initial expectations. If, however, the disputed language is found to[*6] 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 Union needs to demonstrate the assignment of individual felony cases to the grievants violated Section 5.12 of the MOU. There are two sections in particular at issue: Section 5.12.B and Section 5.12.D.

Section 5.12.B

B.L. was assigned nine felony cases in addition to his existing misdemeanor case load between February 19 and July 5, 2020. A.H. was assigned six felony cases in addition to her existing caseload between April 13, 2020, and May 17, 2020. JX 13. The Union argues that each of these cases involved an element which made the case "complex" as they believe that term is defined in the job description for PD III, which states:

The work of position in the class of Deputy Public Defender III is characterized by responsibility for representing Public Defender clients charged with complex and difficult criminal cases, e.g., those cases that involve multiple defendants, that necessitate the use of forensic or mental health experts, or cases in which the client is charged with a serious or violent felony and/or is facing a sentence of six years or more in prison.

The Union argues that between March 2020 and July 2020, the County assigned the grievants "more complex cases" than the DPD FT position typically performed but did not pay them at the DPD II rate of pay. While it is true that grievants began to receive felony assignments at that time, there is not sufficient evidence to conclude that the grievants performed "a majority of the duties and responsibilities of the position of the higher classification," which is required by Section 5.12.B.

The DPD FT job description permits employees in that position to do "less complicated felonies," which the Employer argues these assigned cases were. In the assigning supervisors' view, and in the view of the Public Defender, these cases were not complex and were well within the skillset of the grievants. In the view of the Employer, the complexity of the cases is in dispute because the supervising DPDs who assigned the case don't think that the "complex" factors described in the DPD III classification are *de facto* complex, particularly as here, where the grievants were capable of performing the work and felonies were a small part of their caseload.

Additionally, the points the grievants were assigned were far below the total number of points they were expected to carry.

It's likely the grievants who previously worked on misdemeanors saw these assignments are more[*7] challenging, even if the cases themselves were fairly straightforward. This all occurred in the context[*7] of the outbreak of the COVID-19 pandemic in Contra Costa County, which was itself a complicating factor.

As a general rule, when a lower paid classification position (employee A) performs the same duties of a higher paid classification (employee B), they are not entitled to higher pay for that work. The exception to that is when an employer assigns A to cover B's work, such as for B's leave of absence. As A.L. testified, work that is being performed in both classifications, i.e. when there are overlapping duties, is not work out of class.

Even if an employee is not given a specific assignment, employees in a lower paid classification are entitled to the pay of the higher paid classification if they perform the "distinguishing characteristics" of the higher class. These are the unique duties reserved to and actually performed by the higher class. In this MOU, they must do a majority of the distinguishing duties and responsibilities to qualify for Pay for Work in a Higher Classification.

While it's true that the felonies assigned to the grievants had one or more of those elements, there is very little evidence that these cases were in fact complex. The County disputes the complexity of these cases. Even assuming that these cases were in fact complex for the grievants, there is no evidence that the complex cases, along with their other duties, constituted "a majority of the duties and responsibilities of the position of the higher classification."

In this MOU, the employee must be performing a majority of the duties and responsibilities of the higher class. The Union agrees that grievants are not performing DPD II and DPD III duties of supervising or advising DPD FTs and DPD IIs. The supervisory and advisory roles are distinguishing and never performed by DPD FTs. In fact, the testimony at hearing suggests that the grievants were well supervised and had multiple mentors.

Finally, the number of points the grievants accumulated in the months in dispute supports the conclusion that they were not performing the majority of the DPD IIs duties. Both had point totals below half the DPD II point maximum. The Union's evidence at hearing does not meet the burden of persuading the Arbitrator that B.L. and A.H. were performing a majority of the duties of a higher classification, or even performing some higher classification work a majority of the time.

Section 5.12.D.

The Union argues that the County violated Section 5.12.D. by not offering class assignments to all interested employees on a volunteer basis. This argument confuses the difference between case assignment and job assignment. The Public Defender is under no obligation to offer new cases to employees on a volunteer basis. This is inefficient and could lead to attorneys cherry-picking cases; to mismatches between counsel and client;[*8] and to an imbalance in case assignments, which the PD avoids by maintaining the case point matrix.

A job assignment is essentially a job posting. Prior to these case assignments, the[*8] grievants applied to be PD IIs pursuant to a job posting. Another PD FT was given the position, but the grievants were both viewed as worthy candidates and were promoted relatively soon after their co-worker. The assignment referenced in Section 5.12.D is a higher job assignment.

A class assignment arises when the County needs to temporarily fill a position in a higher classification, such as for a leave of absence. In that case, the County "shall make reasonable efforts to offer out of class assignments to all interested employees on a voluntary basis."

It is significant that this be a temporary assignment, as the MOU specifically prohibits using work out of class assignments to avoid the regular promotion procedure. Based on these distinctions, and the fact that there were no temporary DPD II positions in need of coverage, the Union has not demonstrated that the County violated the MOU by not offering the felony cases to all interested employees on a voluntary basis.

For the foregoing reason, the grievances are denied.

Dated: August 1, 2021.

Andrea L. Dooley, Arbitrator