

# EVALUATING WORK-OUT-OF-CLASS GRIEVANCES IN THE PUBLIC SECTOR

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## I. INTRODUCTION

Even before COVID-19, many employers were calling on their employees to be more flexible, learn new skills, and take on tasks that were new to them or even novel to their workplaces.<sup>1</sup> Employees are often willing to take on these increased responsibilities in order to improve their skills, challenge themselves, and demonstrate commitment to their co-workers and jobs.<sup>2</sup> Because these increased efforts benefit the employer, it is reasonable for an employee to expect a corresponding increase in compensation.

On occasion, however, employees find their job descriptions no longer align with the work that they are performing, or believe they are due additional compensation. What happens when the employer disagrees?

This article describes how arbitrators evaluate grievances that allege violations of “work out of class” (also known as “assignment pay”) provisions in collective bargaining agreements (CBAs or agreements). With a focus on public sector cases, a framework has been introduced for approaching a common contract dispute about which little has been written. Following a review of the awards of several arbitrators and a survey of existing literature, this article concludes

that the factors arbitrators typically analyze include the following: CBA language, job descriptions, distinguishing characteristics, assignment and permission, substantial performance, and exceptions.

## II. “WORK-OUT-OF-CLASS” GRIEVANCES

Most CBAs reserve to the public employer the right to assign work, limited only by the terms of the CBA and any civil service rules in effect for that public entity.<sup>3</sup> In these cases, the union’s role is limited to bargaining over the terms and conditions of employment for the job classifications, including any negotiable impacts and effects. In other cases, classifications are created through bargaining.

If civil service rules allow, the process used to create job classifications usually includes reclassification, which evaluates the actual work employees perform to see whether the classification should be updated or whether employees should be moved into a different classification.<sup>4</sup> Reclassifications involve time studies, desk audits, and other specialized inquiries of the work in which employees are engaged. Reclassification decisions may or may not be subject to the grievance procedure of the CBA,

depending on the language in the agreement and/or the civil service rules.

Grievances arise when an employee, a group of employees, or their union believe employees are performing work of a higher-paid job classification and the employer disagrees. Anecdotally, this type of dispute has become more common during the COVID-19 pandemic.

## III. FACTORS FOR ASSESSING WORK-OUT-OF-CLASS GRIEVANCES

In the past, when such grievances arose, arbitrators took different views of these cases. However, recently, arbitrators have begun to find consensus around a few key principles and methodologies.<sup>5</sup>

### A. COLLECTIVE BARGAINING AGREEMENT

As with most disputes in the unionized workplace, the first source for evaluating work-out-of-class grievances is the CBA. Evaluation of the grievance under the terms of the CBA is essential to ensure that the arbitrator is acting within the scope of their authority and in accordance with the parties’ agreement when issuing an award. The management rights clause often gives the employer wide discretion to assign work, but that right may be limited by other sections of the CBA.<sup>6</sup>

The agreement's language may define what constitutes work-out-of-class, sometimes called "assignment pay" or "extra duty pay." (This is distinguished from "lead pay" or a "lead differential.")

## **B. JOB DESCRIPTIONS AND DISTINGUISHING CHARACTERISTICS**

Job descriptions are the second most important piece of evidence in a work-out-of-class dispute. In some cases, the required job duties of multiple classifications will overlap. For example, the Clerk I and Clerk II classifications may both require employees to answer the telephone, sort and deliver mail, and file documents. However, the Clerk II job description may also require incumbents to attend meetings with and take notes for upper-level managers. These higher level duties are the "distinguishing characteristics" of the Clerk II classification. If the Clerk I incumbent were to allege entitlement to the Clerk II wage rate, the distinguishing tasks of meeting attendance and note taking must form part of the Clerk I's duties.

As enunciated by the arbitrator in *Goodyear Tire & Rubber Co.*, in misclassification cases, arbitrators generally do not award extra duty pay unless the aggrieved employee performed the distinguishing tasks of the higher classification.<sup>7</sup>

In *Stockton Unified School District and CSEA*, the union filed a grievance seeking to reclassify employees working in the "Personnel Technician I" classification to the "Personnel Technician II" position based on the performance of payroll functions. The arbitrator found that the two classifications had some overlapping payroll functions. However, the higher classification required performance of confidential payroll duties that

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were not performed by the lower classification.<sup>8</sup> The arbitrator affirmed the employer's denial of the grievance based on the fact that the grievants did not perform the confidential duties required of the higher classification.<sup>9</sup>

Arbitrators also evaluate whether the distinguishing characteristics of a higher classification are actually performed within that class. Many job descriptions are out of date, no longer reflecting the actual work of the position. In *Youngstown Sheet & Tube Co.*, for example, the job descriptions were so outdated or non-descriptive that the arbitrator could not rely on them.<sup>10</sup> In such cases, testimony from employees in each job classification at issue is necessary to establish the actual job duties and distinguishing characteristics.

## **C. SUBSTANTIAL OR SIGNIFICANT PART OF WORK**

Some CBAs require that employees perform a "substantial" or "significant" part of the work of the higher classification to justify reclassification. For example, in *California Department of Motor Vehicles and SEIU Local 1000*, the CBA provided that an employee is working "out-of-class" when they spend more than fifty percent of their time over the course of two weeks performing higher level duties.<sup>11</sup> While some arbitrators

may apply the fifty percent rule, in the absence of such CBA language a strict formula is not always appropriate.

In *Wilson Jones Co.*, the arbitrator determined that the nature of the work itself can be "substantial," regardless of the amount of time spent doing that work.<sup>12</sup> For example, a grievant claiming to work out of class as a supervisor would not need to necessarily spend fifty percent of time on supervisory tasks because the nature of the work itself is significant enough to justify reclassification. In these cases, the tasks themselves can be so distinguished from the lower classification that their performance, rather than the amount of time taken, constitute the determining factor.

## **D. WORK ASSIGNED TO AGGRIEVED EMPLOYEE**

The next factor for consideration is whether the work was "assigned" to the aggrieved employee. Assignments can be written or verbal, permissive or directed. If an employee is not directed to undertake certain work, but does so with the employer's knowledge and without objection from the employer, an arbitrator may conclude that the work is an assigned duty, even if management later denies assignment of that duty.

## G. THE TRAINING EXCEPTION

Some CBAs exclude out-of-class pay for assignments that are given to train an employee on the tasks of the higher classification. Nonetheless, an employer cannot claim that out-of-class work was assigned solely for the purpose of “training” when the work continues indefinitely.

Ultimately, training intended to benefit the employee may be paid at the employee’s regular rate of pay. However, any assignment benefitting the employer that does not fall under the training exception may be considered work-out-of-class.

## IV. CONCLUSION AND BEST PRACTICES

An employee assigned the distinguishing tasks of a higher or different job classification is likely entitled to the higher wage rate of that classification, so long as the assignment is not a training exercise for the employer or *de minimus*. On the other hand, an employee who performs none or few of the distinguishing characteristics of the higher classification is unlikely to prevail at arbitration.

Ultimately, work-out-of-class claims can best be avoided by regularly reviewing job classifications through collective bargaining and civil service procedures.<sup>13</sup>

To avoid work-out-of-class violations, employers should engage in the following best practices:

- Conduct regular review of job classifications through collective bargaining and civil service procedures;
- Ensure consistency between written job descriptions and duties actually performed by employees;
- Ensure that employees are assigned job duties within their job classifications;
- Limit assignment of significant out-of-class duties, except for training purposes.<sup>14</sup>

### ENDNOTES

1. Scott Behson, *Increase Workplace Flexibility and Boost Performance*, HARVARD BUS. REV., March 2014, available at <https://hbr.org/2014/03/increase-workplace-flexibility-and-boost-performance> (last visited Sept. 16, 2021)
2. Becki Hall, *10 Ways to Improve Employee Satisfaction in Your Business* (May 2016), available at [www.interactsoftware.com/blog/10-ways-to-improve/](http://www.interactsoftware.com/blog/10-ways-to-improve/) (last visited Sept. 16, 2021).
3. ARTHUR A. KRANTZ & ERICH W. SHINERS, CALIFORNIA PUBLIC SECTOR LABOR RELATIONS, § 8.08 Classification/Reclassification (2021), notes 1-7. See *Alum Rock Union Elementary School District*, 11 PERB Dec. No. 322 (1983).

4. For example, see San Francisco Civil Service Com., Rule 209, Position Classification and Related Rules, available at <https://sfgov.org/civilservice/rule-209-position-classification-and-related-rules> (last visited Sept. 16, 2021); Los Angeles County Civil Service Com., Rule 5, Classification, available at [https://library.municode.com/ca/los\\_angeles\\_county/codes/code\\_of\\_ordinances?nodeId=TIT5PE\\_APX1CISERU\\_RULE\\_5CL](https://library.municode.com/ca/los_angeles_county/codes/code_of_ordinances?nodeId=TIT5PE_APX1CISERU_RULE_5CL) (last visited Sept. 16, 2021).
5. ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 702 (6th ed. 2003).
6. ELKOURI & ELKOURI, *HOW ARBITRATION WORKS*, 2010 Cumulative Supplement 274 (2010).
7. *Goodyear Tire & Rubber Co.*, 28 LA (BNA) 374, 377 (Thompson, 1957), cited in ELKOURI 703 (6th ed. 2003).
8. *Stockton Unified School District and CSEA*, 1987 WL 1482516 at \*8 (J. Gallagher, 1987).
9. *Supra*, note 5, at 701-2.
10. *Youngstown Sheet & Tube Co.*, 4 LA (BNA) 514, 520 (Miller, 1946). *Supra*, note 5, at 704.
11. *California Department of Motor Vehicles and SEIU Local 1000*, 34 LAIS 48, 2005 WL 7075864 at \*5 (M. Silver, 2005).
12. *Wilson Jones Co.*, 51 LA (BNA) 35 (Daugherty, 1968).
13. See also SAUL WALLEN, *The Arbitration of Work Assignment Disputes*, 16 IND. & LAB. REL. REV. 2, 193-199 (1963).