

CalHR Case Number 13-M-0124  
Appeal of Denial of Out-of-Class Claim  
Final Decision Adopted 5/30/14  
By: Richard Gillihan, Director

## **PROPOSED DECISION**

This matter was heard before Karla Broussard-Boyd, Administrative Law Judge (ALJ), Department of Human Resources (CalHR) at 9:00 a.m. on February 20, 2014 in Sacramento, California.

Appellant, was present and represented by Christiana Dominguez, Legal Counsel, Professional Engineers in California Government. Kevin A. Geckeler, Labor Relations Counsel, CalHR, represented the Department of Transportation (DOT), respondent.

### **I**

#### **JURISDICTION**

On October 3, 2013, the Labor Relations Division (LRD) of CalHR issued a preliminary determination denying appellant's out-of-class grievance. Appellant filed an appeal of the denial of his out-of-class grievance on November 8, 2013 with the Statutory Appeals Unit of CalHR. The appeal complies with the procedural requirements of Government Code section 19818.16. CalHR has jurisdiction over the appeal.

### **II**

#### **ISSUES**

Appellant contends he worked out-of-class for the period June 25, 2012 to March 28, 2013, and is entitled to reimbursement.

Respondent claims appellant was not working out-of-class and is not entitled to reimbursement.

The issues to be determined are:

1. Was appellant working out-of-class for the period June 25, 2012 to March 28, 2013?
2. Is appellant entitled to reimbursement for the out-of-class work performed?

### III

#### FINDINGS OF FACT

The evidence established the following facts by a preponderance of the evidence.

Appellant began his career with respondent on June 16, 1983 as an Engineering and Architectural Sciences Student Assistant. On June 17, 1996, he was appointed to his current classification of Senior Materials and Research Engineer. A Senior Materials and Research Engineer is generally responsible for evaluating engineering materials through testing in the lab. These materials include soil, rock, wood, plastics, metal castings, concrete and others.

Appellant is assigned to respondent's District 4 Toll Bridge Program, Design Division, Office of Structures Specifications and Estimates. In his current position, he oversees and writes specifications for bridges and is the liaison between design and bridge construction. Appellant claims to currently perform the duties and have the responsibilities of a Senior Bridge Engineer and has performed these functions since 1999. He recently filed this out-of-class appeal because of a pay inequity he believes began in 2008.

Appellant's supervisor is a Supervising Bridge Engineer for respondent's District 4. He is responsible for respondent's District 4 Toll Bridge Program to develop and issue structure specifications that accompany plans for toll bridge design. For example, his staff worked on the San Francisco-Oakland Bay Bridge eastern spans and produced ten (10) different contracts. They also worked with designers to produce the construction specifications that accompany plans used by bridge contractors.

Appellant was assigned work from his supervisor and also received engineering problems from the field which required design input. One such problem was the "traveler." In 2009, the appellant was assigned the responsibility for engineering the "traveler." The "traveler" is a very large platform structure manufactured by respondent. It is an intricate, problematic machine designed to travel below the bridge by a series of trolleys and motors for bridge repair and maintenance. The "traveler" becomes a permanent fixture on the bridge.

The appellant assisted with construction and wrote specifications for the "traveler" structure. He worked with the Mechanical Engineer and the Maintenance and Investigations Unit to coordinate activities associated with the "traveler" manufacture.

He also worked with designers to make sure the “traveler” ran properly under the bridge. In 2011, he relinquished his role to construction engineers, but was called upon periodically during the “traveler” install to assist in solving on-site issues.

In late 2012, the appellant was asked to investigate breaking joints on the Dumbarton Bridge and began work on the Seismic Joint project. He was later named respondent’s expert on seismic joints. A seismic joint is necessary to take up the movement of the bridge or the bridge will become unstable. The appellant evaluated and discovered why the bolts were breaking and in consultation with other engineers, determined the alignment of a particular component created the problem.

On January 29, 2013, the appellant prepared a report entitled Dumbarton Seismic Joint Field Adjustments to address and solve the seismic joint problem. The report detailed appellant’s determination that bending stress on the bolt could be prevented by using rubber washers and strips to relieve the stress between the joined metal plates. By relieving the stress on the bolt, the bolts would no longer break at the joint. He also recommended spacers be added on the back side of the joint to close the gap to match the adjacent plate. During this process, the appellant directed Bridge Engineers at the site to ensure construction was to Dumbarton Seismic Joint Field Adjustments specifications. Appellant would spend 80% of his time in any given week on the Dumbarton project, while the following week may require only 20% of his attention.

Because he does not work in a lab and his primary interaction is with other bridge engineers in the field, appellant believes the majority of his duties do not fit the Senior Materials and Research Engineer classification. He writes material specifications, functions as the primary contact for consultants working on structural design issues, and acts as design project manager on tasks which more appropriately conform to the Senior Bridge Engineer classification. He seldom conducts theoretical engineering work or testing in laboratory conditions and spends the majority of his time in the field.

Specifically in August 2012, the appellant made decisions on complex bridge engineering problems beyond the scope of concrete materials. The Senior Materials and Research Engineer duty statement indicates 64% of appellant’s duties should involve concrete. The appellant admits he is an expert on concrete and developed a report which was later used to develop concrete specifications. He also investigated,

evaluated and developed specifications on the properties of fast-setting concrete in the lab, which became the contract specifications for most of California.

Appellant believes that after his 1999 transfer from the lab, his job duties changed to that of a Senior Bridge Engineer because he no longer performed any work at the lab. In his current position, his duties and responsibilities require him to rely on lab results, not provide lab results and he denies performing the typical tasks of a Senior Materials and Research Engineer. He does not plan, direct, coordinate or perform field or laboratory investigations of engineering materials; nor is he involved with physical quality control and quality assurance testing and inspection of engineering and other materials; he does not test or develop areas of engineering materials or physical environmental parameters; and he does not do environmental impact assessment or mitigation.

Appellant explained he performs the following typical tasks of a Senior Bridge Engineer: makes preliminary design studies of various types of bridges, structures, or other transportation related building; makes original investigation in connection with the preparation of unusual or complicated designs; oversees structure projects being developed by local agencies and/or consultants; assigns resident engineers and inspectors to structure construction contracts and advises resident and assistant resident engineers concerning construction problems; makes the final inspection and acceptance of contracts as required; acts in a staff capacity and represents the department on complex special assignments and research studies.

Throughout 2012 and 2013, although he worked with materials, appellant did not test materials, evaluate or analyze materials in the lab. Instead of testing in the lab, he solved bridge construction problems on the structure. Appellant believes respondent has phased out his current classification of Senior Materials and Research Engineer in favor of Senior Bridge and Transportation Engineer classifications. His belief his current classification has become obsolete is based on a May 22, 2013 email he received from his Deputy Division Chief. The Deputy Division Chief, State Material Engineer, for respondent's Division of Engineering Services, Materials Engineering & Testing Services and Geotechnical Services division. The email stated:

“[y]es, the [Materials and Research Engineer] titles for the engineering classifications have been abandoned. The split [of Research and Materials] actually occurred in 1994. I

can't recalled (sic) when officially the classification was eliminated however mid 1990's is a good guess."

On March 27, 2013, the supervisor certified appellant's out-of-class grievance and concurred with appellant's belief he was working out-of-class. He assigned Senior Bridge Engineer duties to appellant as early as 2005 which continue through the present day. Specifically, he knew the work he assigned appellant had, "morphed over time" from developmental phase to implementation and construction phases. This included contract change orders, client specifications and estimates, field duties and interfacing with construction and contractors.

Appellant's supervisor believes appellant is working out-of-class because his duties and responsibilities are that of a Senior Bridge Engineer and comprise more than 50% of appellant's duties and responsibilities. He admits he worked appellant out-of-class for many years and acknowledges he should have recommended a change in appellant's classification to Senior Bridge Engineer years earlier.

A Senior Bridge Engineer, who works in respondent's District 3 Field Office, Division of Engineering Services, has technical responsibility for respondent's bridge and highway construction projects, and oversees contracts and specification development. Specification development is a term of art which refers to projects to develop or improve respondent's standard design specifications.

Like appellant, the Senior Bridge Engineer does not supervise staff, but each worked on projects which involved training large teams of engineers. Appellant and the Senior Bridge Engineer consulted and collaborated with each other on various projects in 2012 and 2013. An example is the grading of the "Hinge-K" self-anchored suspension project on the Bay Bridge. "Hinge-K" refers to area where the two bridge construction spans meet. He believes appellant performs the same functions of a Senior Bridge Engineer because each perform the same, similar or identical tasks for respondent.

The Senior Bridge Engineer also contacted appellant in the last year to consult on various issues. One particular issue was the Feather River Bridge project. The Feather River Bridge project was an emergency project requiring expertise in erosion issues, underwater concrete and numerous environmental impact issues. He called appellant not because he needed him to run tests in a lab, but because appellant had the technical knowledge of a Senior Bridge Engineer. He explained that very little of

appellant's work has to do with specific material, but rather construction support in Bridge, Electrical and Mechanical Engineering.

Respondent's Associate Personnel Analyst (APA), assists management in recruitment, job audits and out-of-class analysis. The APA completed the Human Resources Academy which involved seven (7) days of extensive training in: fundamentals of human resources, classification and compensation, job analysis, employee relations, business writing, and salary determination. She explained job audits are similar to an out-of-class analysis except that out-of-class is done for labor relations due to grievances, and job audits are done for informational purposes. She has completed approximately 6-8 out-of-class analyses.

In an out-of-class analysis, her role is to determine whether or not what the employee says they do – is "in line" with the class specifications of the employee's current job classification. If the duties are "in line," the employee is not working out-of-class. She was able to "line [appellant's duties] up," which is how she made the determination the appellant was not working out-of-class. No further analysis was necessary because the "duties lined up." Once she determines whether the duties fit into the employee's class specification, she does not proceed further.

She explained, "[I] only examined if what [appellant] said he did was "in line" with the class specification." About 50% of the time, she finds that an employee is working out-of-class, but denied appellant's out-of-class claim on two separate occasions. The first denial occurred in May of 2013, when the appellant's supervisor requested a change in appellant's classification. It was denied because respondent does not make it a general practice to reclassify its filled positions. She denied the second out-of-class grievance because the duty statement provided by appellant was not that of Senior Bridge Engineer.

In denying appellant's out-of-class grievance, she relied on the duty statement of appellant and compared his statement with the State Personnel Board (SPB) specification and duty statement of a Senior Materials and Research Engineer. She did not compare his duty statement with the Senior Bridge Engineer SPB specification. The APA's supervisor is the Classification and Hiring Services Branch Chief for respondent. She agreed with the APA's out-of-class analysis.

A Personnel Program Consultant for CalHR with thirty-four (34) years of personnel experience with the State of California testified. Twenty-five (25) of those

years were spent in classification related work and nine (9) years with respondent. She is familiar with engineering classifications and has prepared approximately twelve (12) out-of-class analyses. After the out-of-class denial by respondent, she performed an out-of-class analysis for CalHR.

She looked at the grievance claim and related documents, compared it to the appellant's class specification, and found he was not working out-of-class. She compared the duty statement to determine if it was properly allocated to the class specification of appellant. She believes all of appellant's out-of-class duties and responsibilities are related to materials engineering and, "he just happened to be working on the bridge project." Before she completed her analysis, she requested a new Senior Bridge Engineer duty statement from the Toll Bridge Design section.

She then compared the Senior Materials and Research Engineer duty statement of appellant with the new Senior Bridge Engineer duty statement and found "distinct differences" between the two. One distinct difference was that appellant's tasks do not have the same level of authority as the Senior Bridge Engineer. The focus of the work is different, because appellant is an expert on materials and does testing and investigating and is more centered on materials and writing specifications.

She further explained that overlapping duties do not count as out-of-class work. For example, writing specifications, participating in plans and estimates for project work, are duties that overlap most engineering classifications, as does serving as an expert or being part of a committee overlaps with other Engineering classifications. Because these are common duties, senior level engineers are expected to perform that particular kind of work. She contends even the seismic duties could be in his class specification because it appeared he was working on the materials aspect of the seismic joints.

She believes that even though appellant is not working in the lab, it does not preclude appellant from working in his class specification. The definition of the series within the SPB class specification states that his class is involved in providing the materials engineering services, including planning design and construction. She admits she does not know what a seismic joint is, or the purpose of a "traveler." She did not know the appellant wrote the specifications for the seismic joints or that he was responsible for the "traveler" on the San Francisco-Oakland Bay Bridge eastern spans, because her review is "strictly a document review." She could not explain how she

would determine what would not be considered a Senior Materials and Research Engineer task, except to say it would be maintenance and construction.

The parties stipulated to the following facts. The appellant's out-of-class grievance was signed on his behalf by his attorney of record, Christiana Dominguez; and the ninety (90) day difference is because she was attempting to settle the matter informally. June 25, 2013 is the actual grievance filing date. The three-months, March 29, 2013 to June 25, 2013, overlaps with this out-of-class appeal because respondent approved an out-of-class assignment<sup>1</sup> for one year beginning March 29, 2013.

The August 8, 2013 approval of appellant's out-of-class assignment was for the period March 29, 2013 through March 28, 2014. On October 3, 2013, a Labor Relations Officer of CalHR's Labor Relations Division (LRD), denied appellant's out-of-class grievance. LRD's method of investigation is to use the Personnel Management Division (PMD) analysis; no separate investigation or analysis is conducted. In the instant case, LRD relied on the consultant's out-of-class analysis of appellant's duties.

The ALJ took Official Notice of the SPB specifications for Senior Materials and Research Engineer and Senior Bridge Engineer. The Senior Bridge Materials and Research Engineer makes no mention of contract work and is primarily concerned with various engineering materials. The Senior Bridge Engineer makes preliminary design studies of various types of bridges; oversees structure projects being developed by local agencies; assigns resident engineers and inspectors to structure construction contracts and makes the final inspection and acceptance of contracts. Official Notice was also taken of appellant's out-of-class grievance and the analyses of respondent and CalHR's LRD.

#### **IV ANALYSIS**

Government Code section 19818.16(a) authorizes CalHR to review employee claims for additional reimbursement for the performance of duties outside the scope of their present classification and to authorize additional reimbursement for those duties. In order to prevail in his out-of-class appeal, appellant must prove by a preponderance of the evidence he performed out-of-class work as defined in Title 2, California Code of

---

<sup>1</sup>An out-of-class assignment differs from an out-of-class grievance as it is generally not paid in arrears.

Regulations, section 599.810, subd. (a)(2). (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826.)

Out-of-class work for excluded<sup>2</sup> employees is defined in Title 2, California Code of Regulations, section 599.810, subd. (a)(2), “as more than 50% of the time, performing the full range of duties and responsibilities allocated to an existing class and not allocated to the class in which the person has a current, legal appointment.” State agencies “fill civil service positions by appointment.” (Gov. Code, §19050.)

To obtain reimbursement, the appellant must show that his assigned work was in the higher classification, and he performed the duties and responsibilities of that higher classification more than 50% of the time. The personnel classification plan is defined in Government Code section 18800, and states in relevant part, “[t]he classes adopted by the [State Personnel] board, shall be known as the Personnel Classification Plan of the State of California. The classification plan shall include a descriptive title and a definition outlining the scope of the duties and responsibility for each class of positions.” The SPB specification is the result of Section 18800, and “specification” and “classification” are often used interchangeably.

#### Appellant was working out-of-class.

The appellant testified credibly his duties and responsibilities have changed from lab engineering to field engineering. The major change in his duties and responsibilities occurred in 1999 when he was transferred from respondent’s lab to its design division. The appellant’s supervisor, agrees with appellant’s assessment and knows appellant’s duties and responsibilities have “morphed” over time. Moreover, there have been no significant changes in appellant’s duties and responsibilities since his out-of-class assignment was approved by respondent in 2013. Respondent’s approval of appellant’s out-of-class assignment is sufficient to indicate respondent agrees that appellant is working out-of-class.

Similarly, this impartial assessment of the evidence leads to the same conclusion. It is clear the appellant has not worked in a lab setting since he was

---

<sup>2</sup>An excluded employee is an employee defined in section 3527(b) of the California Government Code (Ralph C. Dills Act) except those excluded employees who are designated managerial pursuant to section 18801.1 of the Government Code.” (Cal. Code Regs., tit. 2, § 599.810, subd. (a)(1).)

transferred to design in 1999. His job duties and responsibilities of making preliminary design studies of various types of bridges, structures, or other transportation related design; making original investigation in connection with the preparation of unusual or complicated designs; overseeing structure projects being developed by local agencies and/or consultants; assigning resident engineers and inspectors to structure construction contracts and advising resident and assistant resident engineers concerning construction problems; and making the final inspection and acceptance of contracts are not in the Senior Research and Materials Engineer classification.

Because none of these typical tasks are found in the specification of a Senior Materials and Research Engineer, appellant is working out-of-class. The consultant's contention "overlapping" duties are not considered working out-of-class is not supported by the evidence. The appellant provided credible evidence his duties and responsibilities involve bridge construction, not lab work. Most recently those duties and responsibilities included the San Francisco-Oakland Bay Bridge eastern span, the "Hinge-K" project and the "traveler" manufactured to service the bridge. Few, if any, of the duties and responsibilities of bridge construction projects overlap with the Senior Materials and Research Engineer specification.

Moreover, the appellant acted in a lead capacity and fulfilled the typical tasks of a Senior Bridge Engineer. Seismic joints and "travelers" are examples of Senior Bridge Engineer duties and responsibilities. The appellant reviewed plans, designs, quantities and specifications and the writing of reports as outlined in the specification of a Senior Bridge Engineer. In August 2012, appellant wrote the "Hinge-K" report and was exclusively involved in the complicated designs of the "traveler," the "Hinge-K" and the seismic joints. Appellant, his supervisor and respondent all agree over 50% of appellant's duties and responsibilities are that of a Senior Bridge Engineer.

Furthermore, respondent's approval of appellant's out-of-class assignment in August 2013, confirms he was, and is, working in the classification of a Senior Bridge Engineer. Although respondent initially denied appellant's grievance on two separate occasions, on August 8, 2013, it approved appellant's out-of-class assignment. Respondent's approval of the out-of-class assignment serves to vitiate the analyses of the APA and the consultant.

In justifying appellant's out-of-class assignment, respondent stated the purpose of the out-of-class assignment as, "[t]he employee is the acting liaison between design

and construction on specific critical design issues such as seismic joint seals, maintenance travelers, skid testing and other general construction issues.” This statement, together with the fact appellant’s duties did not change, serves to ratify his claim he was working out-of-class prior to respondent’s August 8, 2013 approval, and continues to perform the duties of a Senior Bridge Engineer.

Notwithstanding the approval of appellant’s out-of-class assignment, the analyses of the APA and the consultant do not provide the percentages necessary to determine whether out-of-class work was performed. Title 2, California Code of Regulations, section 599.810, subd. (a)(2) requires an employee to work, “more than 50% of the time.” The APA’s analysis concluded the appellant “has not completed any out-of-class duties,” but her report does not explain this conclusion. [Emphasis added.] Nor does she reconcile the work appellant performed on seismic joints, “travelers” or hinges which are duties outside the scope of a Senior Materials and Research Engineer specification.

Similarly, the consultant concluded appellant’s work on the seismic joints was nothing more than an engineering project which fit into the classification of a Senior Materials and Research Engineer. This conclusion is unusual because by her own admission, she did not compare appellant’s duties and responsibilities with the SPB specification of a Senior Bridge Engineer. She, like the APA, reviewed duty statements of a Senior Bridge Engineer, not the SPB specification.

To determine whether an employee is working out-of-class, a review of the SPB specification is required. Specifically, Title 2, California Code of Regulations, section 599.810, subd. (a)(2) requires an analysis of, “the full range of duties and responsibilities allocated to an existing class and not allocated to the class in which the person has a current, legal appointment.” [Emphasis added.] State employees are appointed to a classification.

As used in laws and rules governing civil service, the terms “position,” “class,” “appointment,” “salary,” “salary range,” “step,” “rate,” “promotion” and “demotion,” etc., are words of art specifically defined in the California Constitution, the State Civil Service Act (Gov. Code, § 18500 et seq.) and in the rules of the State Personnel Board. (*Geffakys v. State Personnel Board*) (1982) 138 Cal.App.3d 844.) Therefore, a meaningful review must include a review of the SPB specification of the Senior Bridge Engineer, not just a review of the duty statement.

Respondent argues the appellant has failed to meet his burden of proof and the testimony of the consultant should be given great weight because she has the experience to determine overlapping duties within respondent's engineering classifications. However, there is no legal authority which supports the premise overlapping duties should be a consideration in an out-of-class appeal. Moreover, respondent's approval of appellant's out-of-class assignment relates back to March 29, 2013<sup>3</sup> and serves to validate his claim he has been working out-of-class.

Finally, the duties and responsibilities performed by appellant during the out-of-class period fit well into the classification of a Senior Bridge Engineer, and not that of a Senior Materials and Research Engineer. The appellant's assessment of his job duties and responsibilities, coupled with the concurrence of his supervisor and the out-of-class assignment by respondent, all support one conclusion – the appellant was working out-of-class.

#### Appellant is entitled to additional reimbursement.

The parties stipulated that appellant's grievance was filed on June 25, 2013. "The department [CalHR] shall award employee claims under this section for a period no greater than one year preceding the filing of [an out-of-class] claim." (Gov. Code, § 19818.16(a).) The appellant would therefore be entitled to receive additional reimbursement for the period of June 25, 2012 to June 25, 2013, or one year preceding the filing of his grievance.

However, because respondent approved an out-of-class assignment for appellant for the period March 29, 2013 through March 28, 2014, he has already been compensated beginning March 29, 2013. Therefore the appellant is entitled to additional reimbursement for the period beginning June 25, 2012 through March 28, 2013.

---

<sup>3</sup>Appellant's first two grievances were denied by respondent in May 2013 and June 2013.

V

**CONCLUSIONS OF LAW**

Appellant proved by a preponderance of the evidence he was working out-of-class from June 25, 2012 to March 28, 2013. Appellant is entitled to out-of-class reimbursement for his out-of-class work.

\* \* \* \* \*

**THEREFORE, IT IS DETERMINED**, the out-of-class grievance appeal is granted. Appellant is entitled to reimbursement at the level of Senior Bridge Engineer from June 25, 2012 through March 28, 2013.