

CalHR Case Number 14-S-0124
Appeal of Denial of Out-of-Class Claim
Final Decision Adopted: 5/29/2015
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 March 5, 2015 in Sacramento, California.

The appellant, was present and represented by Katherine E. Regan, Esq., Labor Relations Representative, California Attorneys, Administrative Law Judges and Hearing Officers in State Employment. David M. Villalba, Labor Relations Counsel, CalHR, represented the California Department of Corrections and Rehabilitation, California Prison Industry Authority (CALPIA), respondent.

I

JURISDICTION

On July 10, 2014, the appellant filed an out-of-class grievance with the Labor Relations Division of CalHR. On September 23, 2014, the CalHR Labor Relations Division issued a preliminary determination denying appellant's out-of-class grievance. On October 24, 2014, the appellant appealed his out-of-class grievance denial to 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 July 11, 2013 through July 10, 2014 and is entitled to additional reimbursement.

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

The issues to be determined are:

1. Was the appellant working out-of-class for the period July 11, 2013 through July 10, 2014?

2. Is the appellant entitled to additional reimbursement for the out-of-class work performed?

III

FINDINGS OF FACT

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

The appellant began his career with the State of California on October 31, 2001. On January 10, 2005, he was appointed to an Attorney position; on April 7, 2006, he was appointed to an Attorney III position; and on September 1, 2008, he was appointed to a Supervising Attorney position. The appellant believes he has been working out-of-class since 2006. He uses the working title General Counsel; respondent's General Manager, introduces him as General Counsel; his business cards reflect the working title General Counsel; and respondent's June 4, 2014 Web site lists the appellant as its General Counsel. ([http://calpia.ca.gov/About PIA/General Manager.aspx](http://calpia.ca.gov/About%20PIA/General%20Manager.aspx) [as of June 4, 2014].)

The appellant reports to a General Manager, but does not report to an attorney explaining he handles all legal matters that, "walk through the door." If he encounters a legal issue which requires research, he has a "network of attorney friends" and will also hire outside counsel as necessary. He performs a wide variety of legal work of varying levels of complexity.

The ALJ took official notice of Government Code section 18547 which defines a Career Executive Assignment (CEA) and states in relevant part:

"Career Executive Assignment means an appointment to a high administrative and policy influencing position within the state civil service in which the incumbent's primary responsibility is the managing of a major function or the rendering of management advice to top-level administrative authority."

The appellant contends between July 11, 2013 and July 10, 2014, his duties were equivalent to a CEA Chief Counsel and likens his responsibilities to that of running a small company with 35 satellite offices and approximately 800 inmates and State of California employees. He is familiar with all the legal issues of respondent and it would be difficult for anyone to, "fill his shoes."

The appellant states he was instrumental in promulgating a regulation defining respondent's Executive Staff as the General Manager, General Counsel, Assistant General Manager, Administrative Division Chief, Chief Office of Financial Services, and Office of External Affairs. He explains he is the only non-CEA member of the Executive Staff and as primary legal counsel for respondent, participates and influences policy, legislative issues and agenda items for the Prison Industry Board (Board).

He accepted the respondent's Attorney position in 2006 with the understanding it was to be reclassified to a Chief Counsel. On December 3, 2012, in response to CalHR's allegations the appellant's Supervising Attorney position was misallocated, the respondent argued the appellant's position "should at least continue at the presently allocated Attorney III level, and if challenged in any fashion, the challenge should aim at increasing the senior level attorney position to the Attorney IV level so that the classification is commensurate with the actual level of the duties and responsibilities performed by CALPIA General Counsel."

The CalHR 2012 allegation was based on a classification rule, specifically, "Supervising Attorney should be supervising a minimum of five attorneys and there was no documentation to support a claim regarding the level of complexity of law practiced by the appellant." The appellant supervises an Executive Assistant, a 'junior'¹ attorney, a Staff Services Manager I (Specialist), two Auditors and has a vacant position.

The appellant is unable to quantify the time spent on litigation and government claims stating, "I'm not exactly sure I can put a percentage on this." He qualifies his response with, "it is hard to actually you know sit down and say how many hours a day do you do this how many hours a day do you do that, . . . I don't know that I can quantify a percentage number for something that occurs like this week or this month . . . I could probably describe to you that everything I do on a daily basis, to some extent, has a policy implication somewhere almost everything that I do at some level has policy implications on PIA [respondent]."

The appellant's Duty Statement indicates his essential job functions are: 40% supervising staff; 15% overseeing civil litigation; 10% advising management; 5% contract work and 5% policy work. He describes his supervisory duties as planning, promoting and reviewing the work of staff, reclassifying positions, evaluating staff during

¹ There is no SPB classification for a Junior Attorney.

probationary periods and annual reviews, and approving time off, explaining, “basically I do anything and everything that any other supervisor would do in the act of supervising.”

He oversees all civil litigation, relies on the Department of Justice to represent respondent as required by statute, hires independent counsel as necessary and the ‘junior’ attorney handles State Personnel Board (SPB) disciplinary hearings. The appellant believes he is the “final legal authority for everything at PIA [respondent.]” He advises the Board, which meets twice a year on the Open Meeting Act, conflicts of interest and advises individual Board members on problems they face as state employees.

This advice ranges from personnel or policy issues, program development, or how Penal Code sections 2800 through 2818 impact respondent. He counsels on any number of things stating, “basically anything that’s asked of me” for the Board or individual employees. He reviews his budget and explains his budget is “fluid” as it is not easy to forecast future legal issues. He created a regulations unit to avoid underground regulation issues, created a policy for state vehicle use and improved the personal firearms policy. He also created a conflict of interest regulation to define the separation of respondent from the California Department of Corrections and Rehabilitation.

A CalHR Personnel Management Division (PMD) Personnel Program Advisor, who has over 30 years of experience in personnel services with an emphasis on classification and pay within the State of California, has provided direction and guidance to state agencies on position classification issues for the last 7 years and serves as the state’s Out-of-Class Coordinator. In that capacity, she reviews out-of-class grievances in conjunction with CalHR’s Labor Relations Division.

Out-of-class grievances are first assessed by a PMD Analyst who prepares an initial report for the PMD Manager. As an Out-of-Class Coordinator, she performs a complete review of the file and then reviews the PMD Analyst’s work for accuracy and suggests edits as required. She has performed over 20 out-of-class grievances as an Analyst and approximately 100 as the final reviewer. During her tenure, she has found approximately 15% of employees to be working out-of-class.

In performing the out-of-class review for appellant, the Out-of-Class Coordinator relied on the SPB class specification² for his position of Supervising Attorney. Specifically, the ‘Distinguishing Characteristics’ portion which states in relevant part: “[t]he Supervising Attorney is distinguished from the next higher level class of Assistant Chief Counsel by the size and impact of the legal program, level and number of staff supervised, degree of general policy involvement, extent to which positions influence legal policy, and complexity of legal work for which responsible.”

She explained the state’s Attorney classification is the recruitment and development series, and the more advanced, specialized series is the Attorney III, Attorney IV, and Attorney V classification series. The Supervising Attorney classification adds the responsibility of supervising several attorneys. Conversely, she explained, the Chief Counsel series is focused more with the appointing power’s program, participation or evolution of its program policy, and the sensitivity and complexity of the legal work to be accomplished.

The Chief Counsel classification series stresses, “Factors Affecting Position Allocation: size of legal program, degree of general policy involvement, extent to which positions influence legal policy, complexity of legal work and impact of legal program.” A CEA Chief Counsel generally has broad responsibility for implementing policy affecting the appointing power’s mission with extensive participation in policy involvement, as opposed to administrative policymaking. The Out-of-Class Coordinator found the policies created by the appellant were more administrative in nature, like the conflict of interest, personal firearms and state vehicle use.

During her analysis, the Out-of-Class Coordinator compared the appellant’s out-of-class duties as described in his out-of-class grievance and relied on the appellant’s Duty Statement and respondent’s organizational charts. She found the appellant’s attendance at Board meetings twice a year “providing legal counsel on policy and procedural matters, open meeting laws, conflicts of interest, Form 700 financial interest disclosure and civil litigation involving CDCR inmates, employees, suppliers and contractors of CALPIA” to be in direct correlation with the Supervising Attorney class specification, not a Chief Counsel classification.

² The SPB specification is the result of Government Code section 18800, and “specification” and “classification” are often used interchangeably.

She also found the appellant's description of his duties conform to the typical tasks of the class specification of a Supervising Attorney. The typical tasks of a Supervising Attorney are:

“Plans, organizes, and directs the work of a small staff of attorneys; evaluates the performance of subordinate staff and takes or effectively recommends appropriate action; interviews and selects or actively participates in the interview and selection process for subordinate staff; develops strategy and tactics in the most complex disputes or litigation; and may personally perform the most difficult and complex litigation, negotiation, legislative liaison, hearings, legal research, and opinion drafting.”

She determined these typical tasks comport with the appellant's duties listed in his out-of-class grievance. Specifically, his claim the cases involve the most complex issues; he provides litigation strategy recommendations and he performs these tasks without supervisory assistance. She explained by providing legal counsel to the Executive Staff, the appellant is performing the typical tasks of a Supervising Attorney, because by definition, the Supervising Attorney class specification is, “under general direction, to supervise the work of lower level attorneys.”

Specifically, the Supervising Attorney definition of the appellant's classification states, “[m]ay personally perform the most difficult, complex and sensitive legal work.” She found that government claims, assisting with litigation strategy, discovery and settlement negotiations, providing assistance to Human Resources and Labor Relations staff and providing legal advice to CALPIA contract staff, are all tasks within the Supervising Attorney classification. The appellant's out-of-class grievance indicated he, “independently coordinates and supervises representation; directs case strategy and assists contract counsel or the Attorney General's (AG) office.”

Additionally, during the out-of-class review, she examined the 2012 CalHR exceptional allocation granting approval to allow the appellant to continue in the Supervising Attorney classification, appellant's Duty Statement and respondent's organizational charts. She views this exceptional allocation as evidence the appellant is not working out-of-class as a Chief Counsel and is properly allocated to a Supervising Attorney.

She concluded the appellant was performing supervisory duties relevant to respondent's legal services program and its most sensitive and complex legal work in conformity with the Supervising Attorney classification. She reasoned this was true with all of the appellant's duties, including, the Public Records Act and Statement of Economic Interests Coordinator; overseeing the CALPIA regulations process; and supervising the Analyst assigned to the promulgation of agency regulations.

She explained these tasks fall squarely within the Knowledge and Abilities section of the Supervising Attorney class specification, which states, "ability to draft and direct the drafting of opinions, pleadings, rulings, regulations, and legislation" as does the appellant's handling of all legal matters for respondent and its Board.

IV ANALYSIS

Government Code section 19818.16, subdivision (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 Regulations, section 599.810, subdivision (a)(2). (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826.)

Appellant was not working out-of-class.

Out-of-class work for excluded³ employees is defined in Title 2, California Code of Regulations, section 599.810, subdivision (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." The appellant's argument 100% of his time involves a policy implication for respondent and he is therefore working out-of-class is not persuasive.

First, this 100% of appellant's time argument is inconsistent with his Duty Statement indicating his essential job functions as: 40% supervising staff; 15% overseeing civil litigation; 10% advising management; 5% contract work and 5% policy work. The appellant admitted, "I do anything and everything that any other supervisor

would do in the act of supervising.” Supervision of employees does not necessarily involve policy implications. Second, many of the policies developed by the appellant were done outside the relevant time period of July 11, 2013 through July 10, 2014.

Moreover, these policies, though critical to the lawful operation of respondent, are relatively straightforward, heavily regulated by other state agencies, and not necessarily complex. The Fair Political Practices Commission Form 700 and the California Public Records Act policies are good examples of administrative policies, not policies involving the evolution of respondent’s program.

Third, and perhaps most important, the appellant is unable to quantify the time spent on certain tasks stating, “I’m not exactly sure I can put a percentage on this” when asked about government claims and civil litigation. He later quantified the time spent on reasonable accommodation and Human Resources as 15 – 20%, but qualified his response with, “it is hard to actually you know sit down and say how many hours a day do you do this how many hours a day do you do that.” The appellant’s diametric arguments that, 1) 100% of his time is spent on policy and; 2) he cannot put a percentage on his duties, do not assist him in meeting his burden of proof he was working out-of-class. The core issue in an out-of-class appeal is the percentage of time spent performing duties.

Furthermore, simply because the appellant uses the working title, General Counsel; he is referred to by his working title; his business cards reflect this working title and respondent’s June 4, 2014 Web site lists his working title, is insufficient to demonstrate he performs the work of a Chief Counsel classification. Merely publishing a working title is not proof the appellant spends 50% of his time performing duties of a higher classification, even though he does perform a wide variety of legal work of varying levels of complexity.

The Out-of-Class Coordinator compared the appellant’s duties to the relevant factors of policy development, complexity of legal work and size of the legal program. She found the appellant did no litigation, supervises only one attorney and his policy development, if any, was administrative in nature. More specifically, she explained a Chief Counsel generally has broad responsibility for implementing policy affecting the appointing power’s mission with extensive participation in policy involvement. The

³An excluded employee is an employee defined in section 3527, subdivision (b) of the California Government Code (Ralph C. Dills Act) except those excluded employees who are designated managerial

conflict of interest and personal firearms policies created by the appellant were merely administrative policies and did not affect the appointing power's mission.

Lastly, the appellant's 2012 CalHR exceptional allocation to the class of Supervising Attorney is indicative his duties are well-suited to the Supervising Attorney classification. Despite the appellant's claim he handles all legal matters for respondent that, "walk through the door," performs a wide variety of legal work of varying levels of complexity and it would be difficult for anyone to, "fill his shoes," the Chief Counsel classification series is more focused on the sensitivity and complexity of all the legal work accomplished and its impact on the appointing power.

The conclusion by the Out-of-Class Coordinator is sound and firmly based on the State of California classification system promulgated in Government Code section 18800 et seq. The appellant is not working out-of-class because his duties of assisting with litigation strategy, discovery and settlement negotiations; providing legal assistance to the General Manager, Human Resources, Labor Relations, and Contract staff; government claims; supervising one attorney; and administrative policy writing are within his class specification of a Supervising Attorney.

Appellant is not entitled to additional reimbursement.

To obtain additional reimbursement, the appellant must show that his assigned work was in the higher classification of a Chief Counsel and he performed those duties of that higher classification more than 50% of the time. The additional reimbursement shall not exceed one year. (Cal. Code Regs., tit. 2, § 599.810, subd. (d).) The appellant failed to prove by a preponderance of the evidence he performs the duties of a Chief Counsel more than 50% of the time. Therefore, he is not entitled to additional reimbursement for the period July 11, 2013 to July 10, 2014.

V

CONCLUSIONS OF LAW

The appellant failed to prove by a preponderance of the evidence he was working out-of-class from July 11, 2013 through July 10, 2014. Because the appellant was not working out-of-class, he is not entitled to out-of-class additional reimbursement.

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THEREFORE, IT IS DETERMINED, the out-of-class grievance appeal of the appellant is denied. Appellant is not entitled to additional reimbursement at the level of Chief Counsel from July 11, 2013 through July 10, 2014.