

# CSEA

**Are**



# **YOU**

**Working  
Out-of-Title?**

CSEA Legal Department

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## INTRODUCTION

Civil Service Law prohibits employers from assigning civil service employees to perform the duties of any title unless the employee holds that title. In the current employment arena, where employers' downsizing results in fewer staff and increased duties, we can expect an increased effort by employers to require staff to perform duties which are beyond the scope of their civil service titles. Since recent court cases have refined the statutory definition of "out-of-title" work, our grievances and appeals must also be refined. This publication seeks to guide Union members and staff in recognizing out-of-title situations, investigating and assessing complaints of out-of-title work, compiling evidence, and preparing grievances and responses in order to ensure employers' compliance with Civil Service Law.

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## DEFINITION OF "OUT-OF-TITLE" WORK

As always, the relevant collective bargaining agreement should be examined first to identify any negotiated definition of "out-of-title" work.

Civil Service Law § 61(2) defines out-of-title work as the performance of duties of a title other than the title that a Civil Service employee holds. The out-of-title duties being performed could be duties of a higher or a lower title than the title actually held. For example, if a Park Worker 3 (Grade 9) performs the duties of a higher title, an Administrative Aide (Grade 13), he or she could be performing out-of-title work. In addition, if a Park Worker 3 (Grade 9) performs the duties of a lower title, a Clerk 1 (Grade 6), he or she could also be performing out-of-title work.

A simple increase in workload does not constitute out-of-title work. For example: two out of three Clerks in a specific department are laid off, and the one remaining Clerk assumes extra Clerk duties. That Clerk is not performing out-of-title work because he or she is still performing the duties of the Clerk title.

Performance of an overlap of duties between titles does not constitute out-of-title work. Where Developmental Aide job specifications require direct care and Developmental Assistant 1 job specifications also require direct care, the DA is not performing out-of-title work in caring for consumers because the DA is performing duties contained in his or her own job specification.

## EXCEPTIONS

Out-of-title work may be allowed in two instances: (1) where a temporary emergency exists; (2) where the out-of-title work occurs irregularly and infrequently; and/or (3) where the out-of-title work is substantially related to the employee's job duties.

Civil Service Law § 61(2) does not define "temporary emergency". However, the relevant CSEA contract must be examined for a negotiated definition. For example, the CSEA State contracts define "temporary emergency" as a nonrecurring situation or circumstance of limited duration that might impair the agency's goals, interfere with the proper discharge of its responsibilities, or present a clear danger to persons or property, which does not exceed 60 days. Where no such contract language is available, the rule-of-thumb definition for "temporary emergency" is "an unforeseeable occurrence". Thus, where a Food Service Worker 3 (Grade 13) assumes the duties of his or her supervisor, a Food Service Specialist 2 (Grade 18) when the supervisor goes on medical leave for emergency surgery, that out-of-title work may be allowed. However, where the supervisor goes on medical leave for carpal tunnel surgery, an approved Workers Compensation injury for which the employer had advance notice, the Food Service Worker 3 may be entitled to relief.

The courts have held that where employees only occasionally perform duties beyond the scope of their own job specifications and those duties are substantially similar to their own duties, out-of-title work may be allowed. For instance, a court found that pharmacy technicians who were assigned to

push medical carts between buildings on an irregular and short term basis (when no LPNs were available to perform that duty were not performing out-of-title work.

## **TIME LIMITS, FORUMS AND REMEDIES**

Where the contract between CSEA and the employer contains provisions relating to out-of-title work, the contract language must be followed. This usually entails filing a contract grievance and appropriate responses within the time limits set forth in the contract. The final step of the grievance process is set forth in the contract, and often ends in binding arbitration.

Article 24 of the CSEA State contracts provides that an out-of-title grievance must be filed with the head of the appropriate agency. The agency must reply within 20 calendar days of receipt of the grievance, and CSEA may appeal that response to GOER within 10 calendar days of receipt of the response. The final step available is a lawsuit requesting that a court review the GOER decision. Such lawsuit must be filed in court within four months of receipt of the disputed GOER decision.

Where no contract language is available, the appropriate Labor Relations Specialist may forward a request for legal assistance to the CSEA Legal Department for review for a possible violation of Civil Service Law § 61(2). The procedures contained in the CSEA Legal Assistance Manual must be followed in forwarding such a request.

Contract language will also determine the available

remedies. Of special note, Civil Service Law does not provide for backpay as a remedy; only a cease and desist order is available. The remedy of backpay must be negotiated to apply.

In addition, reclassification and promotion are never appropriate remedies for out-of-title work. Where a member requests reclassification, he or she must file reclassification forms with the Civil Service Department. A member may file an out-of-title grievance or lawsuit at the same time he or she files a reclassification request; however, the Civil Service Department retains the right to place the reclassification request on hold pending the result of the out-of-title action. Remember that both GOER and the courts may rely upon the member's reclassification submissions in formulating their decisions as to the out-of-title claim. Therefore, we strongly suggest that members requesting reclassification seek the assistance of their CSEA representative when completing these submissions.

## STANDARDS OF LAW

If a lawsuit is filed where no contractual provisions exist, the court will be asked to find that the member is performing out-of-title work, which is prohibited by State law, and to issue a cease-and-desist order, removing the out-of-title assignment.

If a lawsuit is filed where state contract provisions are implicated, the court will be asked to overturn the agency's denial of the out-of-title grievance as irrational, and to grant all possible contractual remedies as well as a cease-and-desist order.

When considering CSEA's lawsuit, a court may only review evidence which was before the agency at the time it made its decision. Thus, in the case of a review of a GOER decision, no new evidence may be raised to the court. It is imperative that all specific arguments and evidence be raised at the agency level. A court normally defers to an agency's decision; the court will only set aside an agency decision upon a showing that the decision is wholly arbitrary or without any rational basis on the evidence as a whole.

Where the higher grade position involves primarily supervisory duties and the person holding the lower grade title only occasionally performs some of the complex duties without any of the supervisory duties, there is rational basis for a determination that the challenged duties come under the job description of the lower title. In cases where the duties alleged to be out-of-title are not actually listed in any job specification or where the employer argues that the duties are encompassed under the "performs other duties as required" language of the job specification, the court will examine whether the duties



being performed are "substantially related" to the title and description of the title held by the member.

The amount of time and frequency of performance of the higher duties is extremely relevant. In addition, a court will take a harder look when an agency's decision is inconsistent with its prior decisions. However, this "inconsistent decision" argument must first be raised before the agency so that the agency has an opportunity to explain why the decisions are inconsistent.

## SUBMISSIONS AND SUPPORTING EVIDENCE

For every specific argument listed in an out-of-title grievance or appeal or raised in court, specific evidence must be presented to the deciding agency to support those arguments. Some examples of appropriate evidence are as follows:

1. State Labor-Management minutes, available from the CSEA Contract Administration Department;
2. Notes from Labor-Management committee meetings or contract negotiations;
3. Letters of support from the complaining member's supervisor assigning the work and/or co-workers who witnessed the member performing that work;
4. Any agency policies that were violated by the agency's responses to the out-of-title grievance;
5. All job descriptions, title specifications, postings, evaluations and tasks and standards sheets that would indicate the duties required of or being performed by the member;
6. Copies of all reclassification requests submitted by the member.

## CONCLUSION

In order to best protect members' interests, the CSEA officers, field staff, Legal Department and Contract Administration Department work together to ensure that out-of-title submissions follow the guidelines of the statute and court decisions. Any questions in this regard should be submitted to the appropriate Labor Relations Specialist, who will contact the Legal Department with any issues he or she may have prior to submitting any materials to the employer.

## LRS' CHECKLIST

1. Identify the remedy requested by the member.
2. If the remedy requested is reclassification or reallocation, please refer to CSEA publication "Information for New York State Employees Seeking Reclassification/Reallocation", available from the CSEA Research Department.
3. If the remedy requested is a cease and desist order, continue this checklist. \* NOTE: the remedy of backpay must be negotiated to be available.
4. Collect any and all documentation/information regarding the member's performance of out-of-title work, including but not limited to:
  - a. Grievant's Checklist with attachments;
  - b. Other evidence (for suggestions, see "Submissions and Supporting Evidence", page 8)
5. Organize and submit the evidence to the appropriate agency with a cover letter which raises the member's specific arguments. You may utilize the applicable portions of the guideline below for your cover letter. *Please note that this is only a guideline. Please contact the Legal Department with any specific questions or issues.*

## CSEA LEGAL DEPARTMENT

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Dear \_\_\_\_\_:

Please accept this letter with attachments as CSEA's appeal of the agency denial of the out-of-title grievance filed by \_\_\_\_\_, numbered \_\_\_\_\_.

1. Grievant, \_\_\_\_\_, holds the title of \_\_\_\_\_, Civil Service Grade \_\_\_\_\_ (see attached title specification/tasks and standards sheets/postings which list duties/ evaluations which list duties, etc.).
2. Grievant has been performing the duties of the title of \_\_\_\_\_, Civil Service Grade \_\_\_\_\_ (see attached title specification/tasks and standards sheets/postings which list duties/ evaluations which list duties, etc.).
3. Grievant has been performing the duties of the higher/lower title from \_\_\_\_\_ to \_\_\_\_\_.
4. The out-of-title duties being performed, with the amount of time and frequency of performance of each duty, are as follows: (see attached reclassification request)
5. Grievant's work location has been changed from \_\_\_\_\_ to \_\_\_\_\_ as a result of the assignment of the out-of-title work.
6. The out-of-title duties listed above are more complex those contained in Grievant's title specification and require increased supervisory functions.
7. In support of this argument, attached please find \_\_\_\_\_ (supervisor's letters of support, witness statements, etc.)
8. Grievant supervises \_\_\_\_\_ staff, namely \_\_\_\_\_ (list staff being supervised).
9. The member regularly and consistently performs the following supervisory functions with the following amount of time and frequency of performance for each function:
10. In support of this argument, attached please find \_\_\_\_\_.
11. The denial of this grievance is in error because
  - a. It violates contract article \_\_\_\_\_ (see attached contract language);
  - b. It violates the labor-management agreement dated \_\_\_\_\_ (see attached minutes/ notes);
  - c. It violates agency policy number \_\_\_\_\_ in that it \_\_\_\_\_ (see attached policy);
  - d. It constitutes an inconsistent agency decision in that it cannot be distinguished from grievance number \_\_\_\_\_, in which \_\_\_\_\_ (see attached supporting documentation and decisions);
  - e. Any other argument you may be able to raise.

Based on the above, Grievant seeks the remedy of a cease and desist order (with back pay and other avenues of relief where applicable).

Please contact me at \_\_\_\_\_ with any questions. Thank you.

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CSEA Labor Relations Specialist

## ARE YOU WORKING OUT-OF-TITLE?

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### GRIEVANT'S CHECKLIST

*(For Internal Use Only)*

*Please provide the following information to your CSEA Grievance Representative as soon as possible. If you have any questions, please contact your CSEA representative.*

1. A copy of your current title specification/job description (available from your personnel department and/or Civil Service department);
2. A copy of the title specification/job description which you believe you are working under;
3. A comparison of the two title specifications, to be completed as follows:
  - a. Carefully review the two title specifications, comparing each "Distinguishing Features of the Class", "Typical Work Activities" and "Full Performance Knowledges, Skills and Abilities", as well as any other portions of the specifications;
  - b. List specific work activities of the higher or lower title specification which you have performed and/or are still performing (this list should show exactly what work activities you do or did which may be out-of-title);

- c. Keep your own diary of hours, days and weeks that you perform or performed those out-of-title tasks and convert the times and dates into a rough percentage of total work time those out-of-title work activities involved (e.g., 10%, 15% of your day, and how many days per week);
4. State the name of your current supervisor;
5. State the name of the person who directed you to perform the out-of-title tasks set forth in paragraph 3 above;
6. State the name of the person who supervised you while you performed the out-of-title tasks set forth in paragraph 3 above;
7. State whether or not you supervise anyone and the degree of supervisory responsibility assumed;
8. State what caused this assignment (e.g., did someone get sick, go on leave, get reassigned or promoted, unfilled vacancies, etc.);
9. State the start and end dates of such assignment.
10. State whether or not your work location has changed as a result of such assignment.

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## NOTES