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**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. When employers' decisions to downsize result in fewer staff and increased duties, we can anticipate an increased effort by employers to require staff to perform duties that are beyond the scope of their civil service titles.

Because New York courts have refined the statutory definition of "out-of-title" work, our grievances and appeals must also be refined. This publication seeks to guide CSEA-represented employees and CSEA 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 that employers comply 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 Section 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 Assistant (Grade 13), then she could be performing out-of-title work. In addition, if a Park Worker 3 (Grade 9) performs the duties of a lower title, Office Assistant 1 (Grade 6), then 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 Office Assistants (“OA”) in a specific department are laid off, and the one remaining OA assumes extra OA duties. That OA is not performing out-of-title work because 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 Direct Support Assistant (“DSA”) job specifications require direct care of service recipients and Developmental Assistant 1 job specifications also require that direct care, the DSA is not performing out-of-title work in caring for service recipients because the DSA is performing duties contained in his own job specification.

## EXCEPTIONS

Out-of-title work may be allowed in two instances: (1) where a temporary emergency exists, and/or (2) where the out-of-title work occurs irregularly and infrequently.

Civil Service Law Section 61(2) does not define "temporary emergency". However, the relevant CSEA contract must be examined for a negotiated definition. For example, the collective bargaining agreements between CSEA and the State define "temporary emergency" as "a nonrecurring situation or circumstance of limited duration which 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 Dietitian 2 (Grade 18) when the supervisor goes on medical leave for emergency surgery, that out-of-title work may be permissible. 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 out-of-title relief.

Also, New York courts have held that out-of-title work may be permissible where employees only occasionally perform duties beyond the scope of their own job specifications and those duties are substantially similar to their own duties. 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. *Matter of Gergis v Governor's Off. of Empl. Relations*, 206 AD2d 766 (3d Dept. 1994).

## **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 the 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 may end with binding arbitration.

Article 24 of the CSEA State contracts provide 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 the Governor's Office of Employee Relations ("GOER") within 10 calendar days of receipt of the response. If CSEA is dissatisfied with the grievance step responses, then a CPLR Article 78 proceeding may be filed in court to review the final, GOER decision. The Article 78 proceeding must be filed in court within four months of receipt of the GOER decision.

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

When an employer has violated Civil Service Law Section 61(2), contract language may also determine the remedies available to the affected employee. Of special note, Civil Service Law does not provide for back pay as a remedy; rather, only a cease and desist order is available. The remedy of back pay must be negotiated.

Of special note, reclassification and promotion are never appropriate remedies for out-of-title work. Where a member requests reclassification, she must file reclassification forms with the Civil Service Department. Please be advised that an employee may file an out-of-title grievance or lawsuit at the same time she files a reclassification

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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. In addition, both GOER and the courts may rely upon the member's reclassification submissions in formulating their decisions about the out-of-title claim.

## STANDARDS OF LAW

If a lawsuit is filed where no contractual provisions exist, then the court will be asked to find that the employee is performing out-of-title work in violation of Civil Service Law Section 61(2). The remedy is a cease-and-desist order, which removes the out-of-title assignments.

If a lawsuit is filed in the case where Article 24 of the State contract is implicated, then the court will determine whether the decision to deny the grievance was irrational. If the court determines that the decision was irrational, then the court may grant all possible contractual remedies as well as a cease-and-desist order. A court will only review evidence that was before the agency at the time it made its decision. Thus, the court cannot review new evidence when it reviews a GOER decision. 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 a rational basis for the determination that the challenged duties are not out-of-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 performed are "substantially related" to the title and the description of the title held by the member.

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

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## **SUBMISSIONS AND SUPPORTING EVIDENCE**

For every specific argument listed in an out-of-title grievance, appeal, or court action, specific evidence must be presented to the deciding agency to support those arguments. Examples of appropriate evidence include, but are not limited to, the following:

1. State Labor-Management minutes, available from the CSEA State Operations 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; and
6. Copies of all reclassification requests submitted by the member.

## CONCLUSION

In order to best protect employees' interests, the CSEA officers, field staff, Legal Department and State Operations work together to ensure that out-of-title submissions follow the guidelines of the statute, court decisions, and the applicable collective bargaining agreement. Any questions regarding out-of-title issues should be submitted to the appropriate Labor Relations Specialist, who will contact the Legal Department with questions before taking any formal action with the employer.

## CHECKLIST FOR LABOR RELATIONS SPECIALISTS

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,” which is available from the CSEA Research Department.
3. If the remedy requested is a cease and desist order, continue this checklist. \* NOTE: back pay must be negotiated before it can be available as a remedy.
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 (see page 12);
  - b. Other evidence (for suggestions, see “Submissions and Supporting Evidence”, page 7)
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.***

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. The out-of-title duties listed above are more complex than the duties contained in Grievant's title specification and require increased supervisory functions;
6. In support of this argument, attached please find \_\_\_\_\_ (supervisor's letters of support, witness statements, etc.);
7. Grievant supervises \_\_\_\_ staff, namely \_\_\_\_\_ (list staff being supervised);
8. The member regularly and consistently performs the following supervisory functions with the following amount of time and frequency of performance for each function;
9. In support of this argument, attached please find \_\_\_\_\_; and lastly,
10. 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); and
  - e. Any other argument you may be able to raise with the agency.

Are You Working Out-of-Title?

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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.

\_\_\_\_\_  
CSEA Labor Relations Specialist

## **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 that 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 Knowledge, Skills and Abilities”, as well as any other portions of the specifications;
  - b. List specific work activities of the higher or lower title, specification that 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. 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;
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.



Mary E. Sullivan, President

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