Arbitration Decisions

Labor Arbitration Decision, Oakland Unified Sch. Dist., 2021 BL 506782, 2021 BNA LA 421

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Paul D. Roose
Arbitrator / Mediator
Golden Gate Dispute Resolution
510-466-6323
paul.roose@ggdr.net
www.ggdr.net
April 23, 2021

OPINION AND AWARD

IN ARBITRATION PROCEEDINGS

PURSUANT TO A

COLLECTIVE BARGAINING AGREEMENT

In the Matter of a Controversy Between

Oakland Unified School District, Employer

and

Service Employees International Union Local 1021, Union

Terrie Odabi Grievances

CSMCS ARB-20-0013

April 23, 2021

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BNA Headnotes

LABOR ARBITRATION

SUMMARY

[1] Job classifications - Work assignment - Layoffs - Authority of arbitrator ►100.72 ►100.08 ►100.68 ►100.0764 ►100.0733 [Show Topic Path]
Arbitrator Paul D. Roose ruled that Oakland Unified School District violated its CBA by misclassifying the grievant as a job coach instead of a higher-paid case manager, since, among other things, there was little evidence differentiating the positions, and the business cards of both positions identified them as “employment specialists.” He found that had the district performed a desk audit as promised, the grievant likely would have been reclassified as a case manager, as over half of her job coach duties were “at another level,” if that had occurred she wouldn’t have been laid off in 2019, and the district violated the contract by laying her off without performing a desk audit. Roose issued an advisory remedy that the district: reclassify the grievant to case manager with a seniority date in December 2018 when her misclassification grievance was filed; provide back pay from then until July 2019 when a subsequent layoff grievance was filed; and afford the grievant reemployment rights of a laid off case manager, including bumping rights. He issued an alternative remedy ordering a desk audit if the district rejects the advisory remedy.

APPEARANCES:

For the Employer: Seth Eckstein, Attorney

Fagen Friedman & Fulfrost

70 Washington St. Suite 205

Oakland, CA 94607

For the Union: Alan Crowley, Attorney

Weinberg, Roger & Rosenfeld

1375 55th St.

Emeryville, CA 94608

PROCEDURAL BACKGROUND

The above-referenced matters were processed through the grievance procedure contained in the collective bargaining agreement (CBA) between the parties. Remaining unresolved, they were submitted to final and binding arbitration. The undersigned was selected as the arbitrator by mutual agreement of the parties from a list of arbitrators provided by the California State Mediation and Conciliation Service. The matter was heard on February 8 - 9, 2021 via video hearing on the Zoom platform. The parties stipulated that the arbitrator retains jurisdiction over the remedy if the arbitrator grants a remedy.

The parties agreed to consolidate two grievances into a single arbitration hearing. The two grievances will be referred to, for purposes of identification, as the "classification" grievance and the "layoff" grievance.

The Employer raised a threshold issue of arbitrability, asserting that the grievances were not filed and / or processed by the Union in a timely manner. Notwithstanding this assertion, the parties agreed to proceed with a hearing on the arbitrability issue as well as on the merits of the grievance. The parties granted the arbitrator the authority to render a decision on the arbitrability issue. If the arbitrator determined that the matters were indeed arbitrable, then the parties gave the arbitrator the authority to render a decision on the merits of the grievances as well.

Both parties were afforded full opportunity to present documentary evidence and to examine and cross-examine witnesses. Both parties were ably represented by their respective representatives. At the conclusion of the hearing, the parties chose to conclude their presentations by written briefs. The briefs were received on March 31, 2021 and the matter was submitted for decision.

ISSUE

The parties did not reach a stipulated statement of the issues in this matter. The parties granted the arbitrator the authority to frame the issue.

The Union stated the issues as follows:

1. Whether the District violated Article 13.B of the MOU by requiring Ms. Odabi to perform duties on a regular basis which were not fixed or prescribed as part of her original classification? If so, what is the appropriate remedy?
2. Whether the District violated Article 19 of the MOU by laying off Terrie Odabi in April 2019, to be effective June 2019, when there was not a lack of work or lack of funds, and less senior workers were given the work she normally performed?

The District stated the issues as follows:

1. Whether SEIU timely filed the two grievances in this matter?
2. Whether Ms. Odabi was assigned and performed work duties within her job classification in compliance with Article 13.B and/or Article 3.G of the CBA?
3. Whether the District laid off Ms. Odabi in retaliation[*2] for[*2] her prior grievance and/or discriminated against her due to Ms. Odabi's age in violation of Article 9?[1]

4. Whether the District met its obligations to meet and confer with SEIU regarding Ms. Odabi's layoff pursuant to Article 41?

The issues are formulated by the undersigned arbitrator as follows:

Classification Grievance

1. Was the grievance timely filed, and is the grievance subject to the arbitration clause in the collective bargaining agreement?

2. Did the Employer violate the CBA by assigning certain duties to the Grievant, Terrie Odabi? If so, what is the proper remedy?

Layoff Grievance

1. Was the grievance timely filed, and is the grievance subject to the arbitration clause in the collective bargaining agreement?

2. Did the employer violate the CBA when it laid off the Grievant, Terrie Odabi, on June 30, 2019? If so, what is the proper remedy?

RELEVANT CONTRACT AND POLICY PROVISIONS

Agreement Between Oakland Unified School District and Oakland School Employees Association/Service Employees International Union (OSEA/SEIU, Local 1021) — July 1, 2018 through June 30, 2021

Article 13 — CLASSIFICATIONS

A. All unit members covered by this Agreement work in particular classifications. Their duties and responsibilities are set forth in job descriptions maintained by the District, which are available to unit members upon request.
B. Unit members shall not be required to perform duties on a regular basis which are not fixed and prescribed for their classifications.
C. The OSEA/SEIU shall have the right to meet and confer with the District upon request with regard to changes in job descriptions that impact upon wages, hours and working conditions.
D. Individual Reclassification
1. A unit member may submit a request to the District Reclassification Committee for the purpose of reclassifying one classification (position) to another classification (position) within the bargaining unit.
2. Consideration for reclassification will be based on significant, ongoing, permanent changes in the scope, complexity and/or level of responsibility of the unit member's current classification.
3. Reclassification requests must be submitted between October 1st and November 30th in accordance with the Reclassification Committee's procedures...Any reclassification that is ultimately granted shall be contingent upon, and effective from the date funding for reclassification is secured by the site administrator.
4. Decisions of the Reclassification Committee are final and not subject to the provisions of the Grievance and Arbitration Procedure listed herein.

ARTICLE 19 - LAYOFF

A. Definitions

1. Layoff is defined as the termination or reduction of a unit member's regular work assignment, or re-assignment to a lower classification or lower rate of pay, due to lack of work or lack of funds.
3. Displacement ("Bumping") Rights are rights of a unit member facing layoff to displace another unit member with less seniority in any classification[*3] in which the affected[*3] unit member holds seniority.

B. Procedure

1. Layoffs occur in reverse order of seniority by classification. Any unit member subject to layoff has the right to replace the least senior person in any classification in which the union member has seniority, who is working the same number of months, days and hours...Any unit member subject to layoff has the right to not less than forty-five days prior notice.
2. The District agrees that under law the District is obligated, upon written request, to negotiate the effects of layoff.

C. Re-employment Rights

1. Unit members who have been laid off shall have the right to re-employment in any classification in which they have seniority for a period of 39 months.

D. Reclassification

2. Nothing contained herein shall prevent the upward reclassification of a position occupied by a unit member, which results in the unit member remaining in that position.

ARTICLE 27 — GRIEVANCE PROCEDURE

A. The purpose of this article is to provide a prompt and orderly method for the processing and disposition of grievance which may arise during the life of this Agreement.
B. The parties endorse the concept that complaints and dissatisfactions which might develop into grievances should be informally resolved at the lowest administrative level possible.
E. All grievances, as defined above, must be filed within twenty calendar days after the act, occurrence, event or circumstance alleged to constitute the grievance, or within twenty calendar days after the unit member learned, or should have learned, of the act, occurrence, event or circumstance alleged to constitute the grievance.
J. ...The grievance may not be amended...and no new issues may be raised after the Step Two meeting is held or Step Two answer received, if no meeting is held.
O. Formal Procedure

1 ...
3. ...
4. Arbitration
If the OSEA/SEIU is dissatisfied with the final decision rendered at Step Two of the grievance procedure, it shall provide written notice to the Superintendent of its decision to invoke arbitration. Such notice shall be by certified mail and mailed within twenty days of the OSEA/SEIU's receipt of the Step Two decision...

ARTICLE 44 — MANAGEMENT RIGHTS

Except as limited by the express terms of this Agreement, the District retains the exclusive right to manage the District. Such retained rights include the District's right to determine the methods, mean and personnel by which District operations are to be conducted...to classify, establish or delete positions...and to relieve unit members from duty because of lack of work or funds...

ARTICLE 45 — LABOR MANAGEMENT RELATIONS COMMITTEE

...The parties shall establish a Labor Management Relations Committee...for the purpose of discussing all matters of interest or concern in the area of personnel policies and practices and matters affecting working conditions.

Job Descriptions

Job Coach / Workability — Revised June 27, 2007

Basic Function: Perform a variety of highly complex specialized duties[*4] requiring good communication[*4] skills, including assisting others in the workplace; assist with the coordination, promotion and development of private and public employment opportunities for participants of the Transitional Partnership Program (TPP); serve as a liaison with public and private employers to develop employment opportunities for exceptional students; assist students with skills needed for successful employment.

Minimum Qualifications: Training, Education and Experience: Any combination of education, training and/or experience equivalent to: graduation from high school, an AA Degree plus related courses and two years of relevant experience.

Case Manager — Revised June 27, 2007

Basic Function: Perform a variety of highly difficult, technical duties requiring excellent communication skills; utilize specialized knowledge and independent judgment involving frequent and responsible public contact; plan, organize and coordinate a program for providing case management services to students in various career vocational or other education programs.

Minimum Qualifications: Training, Education and Experience: Any combination of education, training and/or experience equivalent to: a Bachelors Degree plus related courses, and three years of relevant experience.

FACTS

The District's Special Education Department Uses Grant Money to Fund Several Programs to Assist Older Students with Disabilities Transition to the Workforce: Transition services, as the programs are generally termed, are largely grant-funded. The District does, however, contribute some funding from general funds. At least one of the grants requires the District to make a funding contribution.

The WorkAbility grant is the District's longest-standing grant supporting transition services. The source is the California Department of Education. The grant is renewed each year. It funds assistance to middle school to young adults (up to age 22). The WorkAbility grant includes funds that go directly to local employers who hire the District's students. The grant has supported over 800 students per year.

In prior years, the District also received a grant from the City of Oakland from Job Training Partnership Act (JTPA) funds. That grant ceased in 2002.

Around 2013, under the leadership of Career Transition Services (CTS) coordinator Petrina Alexander[2], the District sought another source of funding. The CA Department of Rehabilitation (DOR) made funds available to assist school districts to help a subset of their special needs students get employment. Many of the District's special education students were receiving payments from the federal government through the Supplemental Security Income (SSI) program that supports individuals with disabilities. The goal of the grant was to assist school districts in aiding these students to obtain jobs to reduce their dependency on this federal program.

The District's[*5] grant application was approved[*5] to support the Transition Partnership Program (TPP), also called CaPromise. The District used the grant money to hire a new teacher on special assignment (TSA) and to create and staff case manager positions. The District was required to reapply for the grant every three years.

Ms. Alexander testified that all the CTS staff knew that "it was a limited-time grant" and would be ending in a couple of years.

The CaPromise / TPP grant funding ended in 2018. What remained to fund the District's services was the WorkAbility grant and District general funds.

The Grievant, after Eight Years as an Instructional Aide, Was Promoted to a Job Coach Position in 1997: She was hired by the District in 1991 as a paraprofessional, an "aide to the handicapped," as she put it.[3] She worked one-on-one with a student who had cerebral palsy. In 1999, she applied for a promotion to a newly created position titled "job coach." She was the first employee in the new WorkAbility program. It was a twelve-month per year position in the classified service.

Her assignment was to work with twelve young adult students with special needs to help them transition to the workforce. The program was based at the College of Alameda, a nearby community college.

When she entered the WorkAbility program, the Grievant was enrolled in college working toward a bachelor's degree. Sometime after 2007, she was awarded her bachelor's degree in liberal studies from Cal State Hayward.

The Grievant worked continuously as a job coach until that job classification was eliminated and the Grievant was laid off by the District in June 2019. Only one other job coach ever worked for the District. That was Lillian Johnson, hired into the position in 2004. Ms. Johnson retired from the District during the 2018-2019 school year.

In 2007, the nature of the job coach work changed significantly. Petrina Alexander was a certificated employee of the District from 1994 until she left the District in 2018. She coordinated Career Transitional Services (CTS) for the Special Education Department as a TSA. She was called by the Union as a witness in this matter and gave extensive testimony.

Ms. Alexander first began her work as a transition services teacher at one of the District's high schools in 1997. At that time, the District employed certificated teachers dedicated to transition services at the high schools. Beginning in 2002, the District began to cut back the number of teachers assigned to CTS at the school sites. Regular classroom teachers were expected to pick up the work previously done by specialists.

Ms. Alexander became the CTS coordinator in 2006. She testified as follows:

> ...when I came on board...we were informed that the teachers were responsible for transition services now. And so, essentially, you are thinking, okay, as then we move into the school year, Terrie and Lillian could specifically focus on if teachers are doing[*6] preemployment skills...we did an opening of the school year training[*6] to explain, you know, what that would look like, help teachers to understand the WorkAbility grant, and how Terrie and Lillian could support them.

> However, there [was] a lot of pushback from teachers in assuming that work, some outright said they were not going to do it. And at some school sites, you know, it was difficult to connect with students...to serve 826 students.

Ms. Alexander did not supervise the Grievant prior to the change in the Grievant's duties. But she learned that, prior to Ms. Alexander's arrival, the Grievant "would be assigned students specifically and a specific young adult caseload to support every year."

In 2013, the District applied for and began receiving the CaPromise funding through the CA Department of Rehabilitation. Using that funding stream, the District brought in another TSA, Leslyn Henry.[4] A new classification in the classified service, case manager, was created to staff the new program.

Ms. Alexander testified that she brought in the case managers at a higher salary level than the job coaches "because that grant had the funding to be able to do so." She stated that, when hired, none of the case managers had bachelor's degrees.[5]

Ms. Alexander recalled that she told the Grievant and other CTS employees about the new grant and the case manager positions. She testified as follows:

> ...all of the team knew it was a...time-limited grant...So any of them coming into that program, they had the opportunity, if they wanted to, to apply, but...everyone knew this grant would be ending in a couple years...So...people made the decision...potentially to stay where they were.

Ms. Alexander testified as follows about the relationship between the WorkAbility program and the new Transition Partnership Program:

> We were all in the same office. We all worked back and forth together with each other...it wasn't a different office, but it was a different source of funds to pay people who also touched the same students that we were.

Ms. Alexander described the interrelatedness of the case manager and job coach work, as follows:

> So as they [the case managers] came on...my team would also have meetings together. So Terrie, Lillian, Stacy [case manager], Minyon [case manager]...we had collective meetings to talk about the pool of students; who was going where, how we were serving them...if someone needed a connection...doing workshops collaboratively, job developing...Because we were meeting together and sharing and putting out information about students during those staff meetings...we knew the students intimately. And so if there were students that Stacy and Minyon had that needed a job but Terrie didn't have maybe a student in WorkAbility who might fit the bill...she would...share the contact and work with them to get your student prepared. So it was very intertwined.

Program coordinator Alexander described the following difference between the work[*7] of the job coaches and the case managers:

> They [the case managers] were less at the school[*7] site than Terrie and Lillian. Terrie and Lillian were more in the classrooms, whereas the TPP staff was more working in the community, I felt, and supporting the students senior year to find job opportunities for them and really were the go-between as well between Department of Rehabilitation.

Ms. Alexander testified that the Grievant, at one point, expressed concern to Ms. Alexander about her job duties, as follows:

> She expressed to me that the job had changed significantly than what she was hired for...that was in the year in which I looked at it, then the job description that I had seemed to line up with what the duties were...I don't know what her original job description was.

The following exchange took place on cross-examination:

> Q: So if I understand you correctly, you are saying that you understood her job description, as it was written in 2007, to capture the work she was doing.
> A: To some degree. So let me maybe clarify. I think the type of work that she would do would be the same...but it was for a smaller — I think when she was trying to say it changed significantly, it was because she was delivering to a much smaller pool of students...so it did change.
> And the complexities of the job changed in terms of the magnitude and then now having to manage working with teachers, that was a critical component, and doing some...aspects

of instructional work...because that was done by those teachers on special assignment as transition teachers.
Q: But you still felt that those are still captured — even though it was maybe work she wasn't doing before or as much of, it was still captured by her job description?
A: I would say a portion. So excluding having the caseload changing, having to do the reporting. So she would never have to report on each individual student...for WorkAbility. So that was a definite change...in terms of having to document services and keep track of services being provided to over 200 students, then following up with their teachers and families...for that number of students. So there's a portion captured in it, but then a big portion that was not.

Ms. Alexander further testified that both job coaches and case managers were identified on their District business cards as "employment specialists."

David Cammarata, at the time of the arbitration hearing, was a coordinator with the Special Education Department, supervising the Career Transition Services program. He assumed that role at the end of the 2018-2019 school year. He replaced Ms. Alexander when she left the District. He supervised the Grievant.

Mr. Cammarata described the job coach position as follows:

> Job coaches were to provide services to students in middle and high schools across the city, transition-based services, supporting students with the ideas of how you find a job, how do you get a job, how do you keep a job, those kind of basic pieces.

He testified that case managers, who he also supervised, "provided support in[*8] much the same frame of transition services[*8] to students across the district," focusing primarily on students aged fifteen and older. He distinguished the case managers from the job coaches as follows, stating that the case managers had:

> ...a large component of communication and collaboration with the Department of Rehabilitation, as well as an intensive expectation of report writing on services that were...provided to the students....There was a level of reporting asked of the job coaches, but it was at a different level and a different specificity than the job coaches [sic][6]. Job coaches [sic]...their reports were much more in depth, whereas the reports or information by job coaches really relayed...an array of services, check boxes, basic personal information, things of that nature.

No samples of the written reports submitted by job coaches or case managers were introduced into evidence at the arbitration hearing.

The Grievant and Her Co-Worker Raised Concerns About Her Job Classification Over the Years: The Grievant testified that "it was kind of an ongoing conversation." She stated:

> I'm a grumbler, and I grumbled about the workload...I was well aware of the expansion of my job duties...I grumbled about it, but I didn't really do anything about it.

Lillian Johnson was a job coach from 2004 - 2019. She stated that she performed the same duties as the Grievant and was her co-worker. She testified as follows:

> I had given so much time and so much extra energy and went beyond what the description of our job called for. We [Ms. Johnson and the Grievant] had asked...to reclassify our positions and twice was denied.

Ms. Johnson stated that the first time, they asked Ms. Alexander about reclassification. The second time, they asked Mr. Cammarata. Both times, nothing came of these requests.

In Late 2018, the Grievant Obtained the Assistance of Union Representatives to Raise Concerns About Her Job Coach Classification and Pay: The Grievant went to the District's human resources department in 2018 to inquire about her classification. She stated that she spoke with "Travis." She testified as follows:

> [Travis] showed me a job description, and I think that one was dated 2017 or something.[7] And he said, Well, you are doing everything on this job. And my jaw dropped because I had never seen that before...I mean, how...do these job descriptions just kind of get added to...without us being knowledgeable of it? I get emotional when I think about this because I feel kind of hoodwinked.

She testified that "it's not the job description...that I signed up for when I was hired." She stated she was never notified of the change in the job description.

The Grievant stated that what prompted her to go to the Union was observing case managers, who are paid more than job coaches, doing WorkAbility work. "[T]hat's where I drew

the line," she stated.

Letizia Zamudio is a field representative for the Union. She was responsible for servicing the Union's members[*9] at the District. She testified that in December 2018, the[*9] Grievant contacted her and she began an investigation into the Grievant's classification. She compared the Grievant's job description and the job description for the case manager. She obtained information from the Grievant about what duties she did and did not perform.

Ms. Zamudio placed the issue of the Grievant's classification on the agenda of the Labor Management Relations Committee (LMRC) for the December 6, 2018 meeting. She and the Grievant both attended that meeting. Ms. Zamudio presented her findings to the District representatives, including labor relations executive director Jenine Lindsey and labor analyst Gia White.

Ms. Zamudio testified that the management members of the committee "had no information or...willingness to pursue [the Grievant's classification] otherwise."

A second discussion of the Grievant's case at the LMRC was scheduled for March 20, 2019. On that agenda, the Grievant's issue was listed as follows:

> **Terrie Odabi** — Reclassification — Next Steps in Desk Audit

The LMRC meeting was rescheduled for April 3, 2019. Ms. Zamudio testified as follows:

> ...that's when the District said to us...that it was okay to pursue the desk audit...They did not put it in writing.

The person who said this, Ms. Zamudio stated, was "likely" Jenine Lindsey.

Martin Mitchell is director of human resources operations for the District. He has been with the District's human resources department since 2011 and has conducted desk audits as part of his duties.

Mr. Mitchell testified that desk audits take from two to four months to complete. They include review of job descriptions and interviews with the employee and the employee's supervisor. He testified that, typically, desk audit applications are submitted "between October and probably April."

He stated that normally any salary change resulting from a desk audit is not retroactive, but "many times we'll go on the date that they submitted the desk audit."

He stated that last year, his office received no desk audit applications, and this year (2020-2021) they received one. "[W]e might get maybe two or three a year," he testified. He was asked about how his office handles it when an employee files for a desk audit when that employee's classification is being laid off. He responded as follows:

> If an employee is being laid off...it all depends because...layoff letters come in at the end of April. If...we get a desk audit, let's say, during April or early May, we will follow through with it. However, we will let the employee know it does not prevent them from being laid off because we're looking at the position, and the position is still being eliminated.

The following exchange took place on direct examination:

> Q: Have you ever denied an application because the classification has been laid off?
> A: Only this one because we received it two weeks before the end of the school year, and there wouldn't have[*10] been enough time to do an evaluation within a two-week period.

In December 2018, the Union[*10] Filed a Grievance Claiming that the Grievant Was Misclassified: Ms. Zamudio believed that the window period in the CBA for filing for a request for reclassification was not open. But, nonetheless, she filed a step one grievance on behalf of the Grievant on December 20, 2018. The grievance alleged a violation of Article 13 of the CBA and other provisions. The grievance asked for the Grievant to be reclassified and her pay be adjusted retroactively to the year 2008.

The District responded in a letter from Special Education director Neena Bhatal (also known as Neena Bawa). The response indicated that the Grievant was not performing any duties outside her job description.

On January 23, 2019, the Union moved the grievance to step two. On February 6, 2019, Ms. Lindsey responded on behalf of the district. The letter sustained the step one findings that "you are not performing any duties outside of this classification." The letter, however, goes on as follows:

> ...please note that your contract does allot [sic] for you to have a desk audit within your current role. Please contact me if any other further clarification is needed or if you have any questions.

Ms. Lindsey's testimony at the hearing clarified the meaning of this decision. The following exchange took place on cross-examination:

> Q: Do you recall drafting a response on February 6, 2019, to Ms. Zamudio about this grievance?
> A: ...I do recall that we did respond to the grievance that was filed on this matter.
> Q: And did you subsequently have a conversation with Ms. Zamudio about whether...the district would do a desk audit of Ms. Odabi, even if it was outside of the October to November window?
> A: I believe that may even have been in the response. That was the remedy to the grievance, was that we would make an exception that although the information had been provided to Ms. Odabi, so that a desk audit could be filed during the window stated in the CBA...the remedy was to allow her to submit that paperwork after the deadline in the contract.

In April 2019, the Grievant Was Notified She Was to Be Laid Off, and the Union Filed a Second Grievance: Ms. Bhatal was the District's special education executive director from 2016 - 2020. One of the areas she oversaw was career transition services.

She testified that the District was losing the CaPromise grant, and the District decided to cut the job coach position from the budget as a cost-saving measure. She, along with individuals higher in the district management structure, made that decision. Ms. Bhatal testified as follows:

> We made a decision of what job classification was going to be cut, given that a grant was going to be discontinued and no additional funding to continue that job classification.

The following exchange took place on cross-examination:

> Q: ...you said that the decision to cut the job coaches was because it would, in part, have the least impact on the number of students served. Is that what you said?
> A: It would have the least impact in terms of direct instruction with students.
> Q: How do the[*11] case managers provide more direct instruction that the job coach work that Ms. Odabi did?
> A: Based on what I know and what I saw, case managers worked with teachers in the high school setting, or young adult program, providing them support, training, PD [professional development], attending IEPs [individualized educational plans] as needed, so teachers can be trained to implement transition goals and job training as necessary.

Ms. Bhatal stated that case managers performed a "broader scope of work" than job coaches.

Ms. Bhatal stated that between eight and ten individuals within the special education department, from multiple bargaining units, were laid off in 2019.

On April 25, 2019, the Grievant received a notice of layoff, effective June 30, 2019.

On June 5, 2019, the Grievant contacted Laty Johnson, Human Resources Compliance Manager for the District.[8] The Grievant sought a meeting with her to "submit the desk audit to you in person." Ms. Johnson initially responded favorably, but on June 20, wrote the following email, in relevant part:

> ...I see that you will not be in this position in the next school year. As a result, I will not be able to conduct a position review for this role. Please also note that desk audits are not retroactive nor can I review work performed in the past school years. If a physical desk audit observation is necessary it would be conducted based on the current work performed in the role.

Ms. Johnson attached desk audit / position review guidelines to her email to the Grievant. One attached document is titled "Appropriate Considerations for Position Review." Relevant factors related to the dispute in this case are:

> • The substance of the position requirements must have ***significantly*** changed, and not just the volume or amount of work.
> • The position duties and requirements are evaluated, not the knowledge or skills of the employee in the position.
> • More than 50% of the position's responsibilities are at another level (i.e., higher or lower).

The Union Filed a Grievance Over the Layoff, and the District Wrote a Consolidated Response on August 26, 2019: The Union filed a grievance at step two on July 1, 2019. The grievance alleged that:

> ...Ms. Odabi was still being laid off despite the attempts in a previous grievance to re-classify Ms. Odabi into the appropriate classification.

The grievance asked for the Grievant to be reclassified as case manager and paid case manager pay and benefits retroactive to 2008.

The Union refiled the grievance on July 30, 2019. Ms. Zamudio testified that the Union refiled the job classification grievance and the layoff grievance because it was concerned that the previously filed grievances might not be arbitrable because they were filed when the parties were without a signed CBA.

The District, by Jenine Lindsey, responded on August 26, 2019. Her letter begins with the following paragraph:

> This letter is the Oakland Unified School District response[*12] to the Service Employee Union International [sic] filed at Step[*12] II on July 30, 2019. For the purposes of efficiency we are consolidating the grievance responses for the grievance also filed on July 30, 2019 [sic].[9]

Ms. Lindsey's letter alleged that the grievance was not timely filed because "Ms. Odabi's concern for all of the alleged violations dated back to 2008" and was thereby filed outside the 20-day time limit. Substantively, Ms. Lindsey responded as follows:

> During the LMC meeting on December 6, 2018, Ms. Odabi was advised to submit a desk audit request. Ms. Odabi did not officially submit a desk audit until June 18, 2019. During the preliminary review, it was noted that Ms. Odabi's [sic] was not going to be in the position in the next school year. As a result, the Manager of Human Resources Compliance was unable to conduct a position review for this role. Desk audits are not retroactive and work cannot be reviewed for past school years.

The Union appealed the consolidated matters to arbitration. It is that consolidated grievance that is before the arbitrator.

UNION'S POSITION

The Union argues that the preponderance of evidence supports a finding that the District violated Article 13.B for many years by requiring the Grievant to perform duties "not fixed and prescribed" as part of her position description. The violation extends back to 2007.

The Union considers this an ongoing violation and therefore "the Union is not time barred from filing this grievance in December 2018."

The Union argues that the arbitrator "should ignore the 2007 job description" because it was never shared with the Union or the Grievant. Even if the 2007 description is accepted as proper, the Grievant still performed duties outside of it. The District did not present testimony that contradicts the Grievant's description of her job duties.

For its violation of 13.B, the District should be ordered to pay the difference in pay between the case manager salary and job coach salary beginning in 2007.

The Union contends, with respect to the second grievance, that the District violated Article 19 of the MOU by laying off the Grievant "when there was not a lack of funds nor a lack of work."

"The District simply chose to divert the existing funds from the WorkAbility grant, which had always been devoted to the Job Coach / WorkAbility employees, and to shift that funding and work to the Case Managers," the Union writes in its brief. Moreover, the Union argues that the District violated its obligation under the EERA about changed working conditions when it assigned WorkAbility duties to the case managers.

"Inherent in any contract, including MOUs in the public sector," the Union writes, "is a covenant of good faith and fair dealing...the Arbitrator should find that the District also violated that covenant."

As for arbitrability, the Union writes that the "District alleges in its Step 2 response that the initial grievance was untimely because the Union seeks[*13] a remedy back to 2008, but the District does not claim the grievance was processed untimely."

The Union concludes[*13] that the arbitrator should sustain both grievances. "The Arbitrator should admonish the District for its callous and underhanded treatment of a 28-year employee who routinely over performed and yet was underpaid," the Union asks.

EMPLOYER'S POSITION

The Employer asserts that the classification grievance is untimely. "The grievance concerns allegations of changes to Ms. Odabi's job duties dating back to 2007 — more than a decade before this grievance was filed," the District writes in its brief.

Additionally, the Employer argues that the grievance is not arbitrable because "the union failed to timely escalate the grievance following the District's responses."

On the merits of the classification grievance, the Employer contends that "while Ms. Odabi's duties have evolved over time, they are nonetheless captured in her job description."

"Shifting an employee's job duties — provided they are articulated or reasonably comprehended by the employee's job description — are not a contract violation or otherwise unlawful," the District contends. The "controlling question is not whether the tasks Ms. Odabi performed were the same or similar to those of her colleagues in other classifications, but, rather, whether the tasks she performed are articulated in or reasonably comprehended by the Workability Job Coach job description," the District asserts.

On the merits of the layoff grievance, "the layoff of the Workability Coach classification was based on legitimate, undisputed budgetary reductions — namely the loss of the CalPromise grant funds and additional District-wide cuts," the District writes in its brief.

The Employer claims that the Union has shifted its argument from retaliation, made in the grievance, to challenging "the technical validity of the layoff itself." The Union may not amend the grievance after the Step Two answer, the District argues, as per Article 27J. The layoff was proper and falls "squarely within the District's managerial rights as affirmed in Article 44 of the CBA and established by PERB case law," the District's brief argues.

In conclusion, the District contends in its brief the following: "The Classification grievance should be withdrawn as untimely since SEIU failed to appeal the grievance within the timelines specified in the CBA. Moreover, SEIU has not shown — irrespective of any overlap with other classifications — that the duties performed by Ms. Odabi were beyond the scope of her existing job description. With regards to the Layoff grievance, SEIU has not carried its burden to show the District's decision to eliminate the Workability Job Coach classification was in retaliation for her previous grievance or due to her age. Finally, the District met and conferred with SEIU in compliance with its contractual obligations."

DISCUSSION

Both Grievances Were Timely Filed and Processed and are Properly [*14] ***Before the Arbitrator:*** The only issue of timeliness raised by the District prior to the [*14] arbitration hearing was the original filing dates of the grievances. The District, in its grievance response, characterized the grievances as years too late, since the Grievant first raised concerns about her job classification in 2008.

Being concerned about an ongoing situation and not filing a grievance does not bar the Grievant or the Union from filing the grievance months or years later. An allegation of performing duties out of classification or being misclassified is a continuing violation, provided that the questioned duties continue. The Union alleges that the improper duties continued.

The filing dates of December 20, 2018 and July 1, 2019, while timely, do impact the potential remedy available to the Union. The CBA is clear that the grievance must be filed within twenty calendar days of the alleged violation. It can be inferred that the event or circumstance is the Grievant's job duties as of December 1, 2018 and thereafter. The filing of the grievance put the District on notice that the Union considered the Grievant's job duties to be in violation of the CBA as of that date. If a finding of a violation is reached by the undersigned on the merits, the remedy can only be applied retroactively to December 1, 2018.

The District did not pursue its argument that the second grievance, concerning the layoff, was untimely at the first step. This issue will not be further addressed in this discussion.

The Union Has Not Met Its Burden of Persuasion that the Grievant Was Performing Duties Not Fixed and Prescribed for Her Classification: A bargaining unit member can file a grievance under Article 13.B for regularly being required to perform duties outside his / her job description. The contract language puts it clearly and succinctly: "Unit members shall not be required to perform duties on a regular basis which are not fixed and prescribed for their classifications."

It is the written job descriptions that "fix and prescribe" the employee's classification-specific duties. For the Grievant, that document was the 2007 job coach job description, cited in the opening of this decision.

The Union argued that the Grievant was never informed about the change in her job description in 2007. That may have been the case. But the CBA does not require the District to notify the employee of a change in his / her job description. The new description is to be made

"available to unit members upon request," Article 13A states. Nothing in the record indicated that the Grievant had ever requested that job description until 2018. No basis exists for a remedy retroactive to 2008.

The record is clear that the Grievant, after 2007, performed an expanded set of duties compared to the duties she performed when she was initially promoted in 1999. The Grievant's former supervisor Alexander — the Union's primary witness for relating the historical background — summed up the Grievant's[*15] work as follows: "the job description that I had seemed to line up with what the duties were."

Ms. Alexander[*15] then qualified this response by adding that the work with teachers and the reporting requirements were more extensive than the job description stated. The undersigned did not find this portion of Ms. Alexander's testimony persuasive. Those described duties, that the Grievant also testified about, are adequately covered by portions of the job description summary:

- highly complex specialized duties
- assist with the coordination, promotion and development of...

What is striking about the job coach job description is how similar it is to the case manager job description. The Grievant was, indeed, performing the duties prescribed in her 2007 job description. Article 13.B was not violated. The core issue to be addressed in this arbitration decision is whether those two job descriptions (job coach and case manager) were, in fact, a single job classification with two names.

The Union Made a Compelling Case that the Grievant Was Misclassified: The preponderance of the evidence in this matter is that the job coach and case manager classifications were, for all practical purposes, the same. TSA Alexander's testimony was vivid and direct on this point. She described how the office was set up, how the two programs (WorkAbility and TPP) worked in seamless interdependence. "We all worked back and forth together with each other," she succinctly summed up.

Where Ms. Alexander did identify differences, the complexities of the two positions appear equivalent. She stated that the job coaches spent more time in the classrooms with the teachers, and the case managers more time out in the community. Her testimony that the case manager pay level was initially set because of higher funding available under the DOR grant reinforces the impression that the distinction between the two classifications, and their respective compensation, was arbitrary.

The District brought on as a witness coordinator Cammarata, who had taken over the position held by Ms. Alexander when she left the District. When asked to differentiate between the job coach and case manager positions, he identified only one area of difference — report writing. He characterized the case manager reports to the DOR as more technical and complex than the reports written by the job coaches.

The District could have bolstered this line of argument by introducing sample reports from the differently classified employees. It did not. The general descriptions by supervisor Cammarata are not sufficient to convince the undersigned neutral that a meaningful difference existed.

Supervisor Cammarata was generally a nervous witness. Some nerves can be expected when one is called to testify in a formal arbitration hearing, even more so in a videoconference format. Nonetheless, it is telling that, in his testimony, Mr. Cammarata several times inadvertently conflated[*16] "job coach" and "case manager." Perhaps, subconsciously, he too saw the two job classes as interchangeable.

One[*16] other detail emerged in the evidentiary record that reinforces the interchangeability of the two job classes. Employees in both job classifications, job coach and case manager, carried District business cards that identified them as "employment specialists."

The District, In Its Written and Oral Responses to the Classification Grievance, Agreed to Perform a Desk Audit on the Grievant's Position: When the District responded at step two to the Union's classification grievance, it committed to performing a desk audit on the Grievant's position. The term "desk audit" does not appear in the CBA. However, from witness testimony is it clear that the phrase refers to a request for individual reclassification from one position to another within the bargaining unit.

Labor relations director Lindsey's reply to the classification grievance in February 2019 denied the 13.B allegation but opened the door for a desk audit. "[P]lease note that your contract does allot [sic] for you to have a desk audit within your current role." In context, the word "allot" was mistakenly used in lieu of "allow." To the extent that ambiguity existed in this step two decision, Union representative Zamudio cleared it up in conversations with labor relations staff at a labor-management committee meeting on April 3.

Ms. Lindsey, in her testimony, acknowledged that this commitment to the Grievant had indeed been made. She stated that the District committed to performing the desk audit, even if the request was submitted outside the time frame identified in the CBA.

Had the District Followed Through on the Desk Audit, Strong Evidence Exists That the Grievant Would Have Been Reclassified as a Case Manager: The CBA provides general criteria for a reclassification resulting from an individual request. It states that reclassification from one classification to another in the bargaining unit must be based on "significant, ongoing, permanent changes in the scope, complexity and/or level of responsibility of the unit member's current classification."

The CBA states that requests are to be submitted to the District Classification Committee. Unrebutted witness testimony in this matter indicated that this committee does not currently exist and that the function has been taken over by the District's human resources department. The undersigned arbitrator infers that this committee, when it functioned, was a joint labor-management committee including members designated by the Union and members designated by the District.

When the Grievant did formally apply for reclassification in June 2019, the District sent her materials about the desk audit process. Guidelines for the requesting employee stress that it is the complexity of duties, not the volume of work, that are examined. They emphasize that it is the position, not the[*17] individual, that is assessed. And, most germane to this case, the guidelines favor reclassification if the following holds:

More than 50% of[*17] the position's responsibilities are at another level

Even if one credits the unsupported testimony of supervisor Cammarata that report-writing distinguishes the case manager from the job coach, it is highly unlikely that this reporting constitutes more than half of the job duties of either classification.

Had the desk audit taken place as pledged, it would have been based on the same documents and testimony as were in evidence at this arbitration hearing. An objective analysis would have concluded that the Grievant was performing duties at the case manager level and should thereby be reclassified.

Had the District Reclassified the Grievant to Case Manager, She Might Not Have Been Laid Off: The evidentiary record in this proceeding did not include a full set of information about the individuals in the case manager classification. What was in evidence is that none of the case managers was laid off in June 2019. No seniority list with dates of entry into the case manager class was in evidence.

The record was also clear that the entire job coach job classification, at the time consisting of only the Grievant, was laid off and the classification permanently deleted.

The District, under the management rights clause, has broad discretion to retain or delete positions and / classifications. Article 19 does not curtail this right. Management is given wide latitude to determine whether a "lack of work or lack of funds" exists and whether a layoff is to take place. Whether those funds derive from a grant or general fund, and how they are to be applied, is a management decision.

The Union argued forcefully and at some length that the District violated the agreement by shifting funds from one program to another, thereby providing continued funding for case managers rather than the Grievant's position. This argument was made to support the case that a senior employee, the Grievant, was mistreated in the layoff.

The CBA does not support the Union's analysis in this regard. Moreover, the Union's fundingbased argument could easily work against seniority in a slightly different scenario. If a senior employee in a grant-funded program with discontinued funding was laid off and junior employees in the same classification in a better-funded program were not laid off, it stands to reason that the Union would file a grievance on behalf of the laid-off senior employee.

In the instant case, it is not the source of the funds that is determinative. It is the probable misclassification of the Grievant that led to the improper layoff. It is possible that, with a classification seniority date of December 2018, the Grievant would not have been laid off. Alternatively, even if she had been the junior person in the case manager class, she might have had reemployment or bumping rights after the layoff occurred.

The Arbitrator Lacks the Authority to Reclassify[*18] the Grievant but Can Order a Desk Audit Be Conducted Under the District's Guidelines: The remedy in this matter is complicated by the fact that decisions[*18] on individual reclassification, by CBA, are "not subject to the provisions of the Grievance and Arbitration Procedure." The most that the undersigned arbitrator can do under the contract is to order a desk audit. It is the reclassification decision, not the desk audit process, that is outside the scope of the arbitrator.

This decision includes an order that a desk audit be conducted. The District's reason for not following through on the desk audit — that the Grievant was being laid off — has no basis in contract or procedure.

The arbitrator, as noted above, infers that the CBA calls for a joint reclassification committee. No such committee exists today. But in that spirit, this decision will order a process to

be conducted by an individual mutually selected by the District and the Union. Mutual selection also will help assure everyone on all sides of this dispute that a fair process will ensue.

This decision does not dictate the exact process that an auditor would use. The District's guidelines were in evidence in this hearing, and the District is advised not to stray from the use of those guidelines.

The undersigned suggests, but will not order, that the auditor read this entire arbitration decision, the transcript of the hearing and relevant exhibits before ruling on the reclassification request. In the view of the undersigned, the work of the audit has largely been completed therein.

The desk auditor will have the authority to reclassify the Grievant to case manager, or not. The auditor, by CBA, will also have the authority to determine the start date of the Grievant's case manager status. Whoever that auditor is should keep in mind the testimony of Martin Mitchell, the District's director of human resources operations. He stated that "many times" the District goes back to the date of the reclassification request for the start date in the new classification.

The award in this matter includes an advisory remedy section. Section 4 below is advisory only because of the CBA language about the decisions on reclassification request audits being outside the scope of the grievance / arbitration procedure.

The fact that it is advisory does not change the fact that the preponderance of the evidence is that the Grievant should be reclassified as a case manager. This is the strong recommendation of the undersigned. It is up to the District whether to implement that recommendation.

The advantage of implementing the section 4 recommendation is that it will bring this matter to a speedier conclusion and allow the parties to move on to other issues. The alternative, ordered in section 5, will prolong the dispute and continue to entangle the Union and the District.

AWARD

1. The grievances were timely filed and are subject to the arbitration clause in the CBA.
2. The District did not violate the CBA when it assigned certain duties**[*19]** to the Grievant, Terrie Odabi.
3. The District violated the CBA when it laid off the Grievant, Terrie Odabi, on June 30, **[*19]** 2019 without conducting a desk audit of the Grievant's position.
4. The following remedy (4a, 4b, and 4c) is advisory only since it exceeds the arbitrator's authority under the parties' CBA:
    a. The District shall reclassify the Grievant to case manager with a classification seniority date of December 6, 2018.
    b. The Grievant shall be paid the difference between her job coach pay and the case manager pay for the period December 6, 2018 through June 30, 2019.
    c. The Grievant shall be afforded the reemployment rights of a laid off case manager with her newly established classification seniority date. These reemployment rights include "bumping" rights consistent with Article 19 of the CBA.

5. The following remedy is to be implemented only if the District declines to implement the advisory remedy in 4.a, 4.b and 4.c above:
    a. The District is ordered to conduct a desk audit of the Grievant's position within thirty days of receipt of this decision. The audit will examine 1) what should the Grievant's classification have been at the time she raised her concerns in December 2018, and 2) if her classification should have been case manager, when should she have been so classified. The scope of the audit shall be to determine the proper classification of the Grievant and the start date of any reclassification.
    b. The individual conducting the audit shall be mutually chosen by the District's Director of Labor Relations (or designee) and the President of SEIU Local 1021 (or designee).
    c. If the audit finds that the Grievant should have been classified as a case manager, she shall be paid the difference between her job coach pay and the case manager pay for the period December 6, 2018 through June 30, 2019. She shall be also afforded the reemployment rights of a laid off case manager with classification seniority beginning on the date the audit determines she should have been reclassified. These reemployment rights may include "bumping" rights consistent with Article 19 of the CBA.

6. If an audit conducted under 5.a, 5.b and 5.c finds that the Grievant should not have been classified as a case manager, no further remedy is required.
7. The arbitrator retains jurisdiction over the implementation of the remedy.

Paul D. Roose, Arbitrator

Date: April 23, 2021

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fn 1 The Union did not pursue this contention during the proceedings, so this decision does not address the issues of retaliation or age discrimination.

fn 2 Ms. Alexander was also known as Petrina Alexander-Perteet.

fn 3 The term "instructional aide" was eliminated from the District's list of positions in 2015-2016. A new class called "paraeducators" was created. All instructional aides were considered qualified to be paraeducators and were offered paraeducator positions.

fn 4 Ms. Henry did not testify at the hearing.

fn 5 No evidence was in the record about whether any of the original case managers went on to obtain their bachelor's[*20] degrees, or whether any of the case managers hired later had bachelor's degrees.

fn 6 Several times during his testimony,[*20] coordinator Cammarata mistakenly referred to job coaches as "case managers."

fn 7 In context, it is apparent that the Grievant inadvertently stated the year incorrectly here, because she later testified to seeing the "2007" job description.

fn 8 Ms. Laty Johnson did not testify at the hearing.

fn 9 In context, Ms. Lindsey was apparently referring to consolidating the job classification grievance January 23, 2019 grievance (refiled on July 30) and the July 1, 2019 layoff grievance (refiled on July 30)