VOLUNTARY LABOR ARBITRATION TRIBUNAL

BEFORE

IMPARTIAL ARBITRATOR KENNETH A. PEREA

In the Matters of Arbitration **Between** **STATE OF CALIFORNIA, DEPARTMENT OF STATE HOSPITALS, ATASCADERO STATE HOSPITAL** **And** **CALIFORNIA STATEWIDE LAW ENFORCEMENT ASSOCIATION, FOP LODGE NO. 77** **Re: Grievances of HPOs Durfee, Mafnas and Puebla**	**IMPARTIAL ARBITRATOR'S FINDINGS AND AWARD** **Case Nos. CalHR 16-07-0002 CSLEA LR 2617-15S**

The above-entitled consolidated matters are conducted pursuant to the provisions of an Agreement ("Agreement") effective July 2, 2013 through July 1, 2016, between State of California ("State") and California Statewide Law Enforcement Association, FOP Lodge No. 77 ("CSLEA"). The parties agree the matters at issue are properly submitted for final and binding adjudication before Impartial Arbitrator Kenneth A. Perea.

I. THE HEARING

This dispute was heard at Atascadero State Hospital ("ASH") in Atascadero, California, on January 11, 12, and February 3, 2017. Throughout the course of the hearing, both parties were afforded full opportunity to present sworn testimony, cross-examine witnesses and introduce documentary evidence. A verbatim transcript of the proceedings was prepared by Julieann Hamill, CSR, RPR, Phillips Legal Services – Sacramento Deposition Reporters. The matter was thereafter submitted upon post-hearing briefs. The Grievants, Hospital Police

Officers Bryant Durfee ("HPO Durfee"), Romerio Mafnas ("HPO Mafnas") and Abram Puebla ("HPO Puebla"), who attended the entire proceedings and testified upon their own behalves, were fully and fairly represented at the hearing by CSLEA.

II. THE APPEARANCES

The Grievants, HPOs Durfee, Mafnas and Puebla, were represented at the hearing by David De La Riva, Supervising Legal Counsel and James Vitko, Senior Legal Counsel, CSLEA. The appearances on behalf of the State were made by Camille K. Binon, Labor Relations Counsel and Leslie E. Overton, Labor Relations Specialist.

III. THE MATTERS AT ISSUE

The issues presented for adjudication in the instant proceedings may be stated in the following terms:

1. Were the grievances of HPOs Durfee, Mafnas and Puebla timely initiated pursuant to Article 6, Section 6.8 of the Agreement?

2. If the answer to Issue No. 1 above is in the affirmative, did HPOs Durfee, Mafnas and Puebla work out-of-class ("OOC") as Investigators, Class Code 8610, for Department of State Hospitals ("DSH") pursuant to Article 15, Section 15.2 of the Agreement?

3. If the answer to Issue No. 2 above is in the affirmative, what shall be the appropriate remedy?

IV. FINDINGS OF FACT

A. Background

HPOs Durfee, Mafnas and Puebla (collectively "the Grievants"), serve as HPOs, Class Code 1937, at ASH, a DSH maximum security forensic facility housing mentally ill patients. The Grievants are members of Bargaining Unit 7, recognized by California Department of Human Resources ("CalHR") and exclusively represented by CSLEA.

1. The Line HPO Position

ASH's uniformed "Line" HPOs are responsible for maintaining law and order within the facility 24 hours per day/seven days per week, including inside of its secured patient compound consisting of dining and recreational areas as well as adjoining corridors. ASH's secured compound houses male patients who have been adjudicated to be either (1) incompetent to stand trial pursuant to Penal Code section 1370, (2) mentally disabled offenders under Penal Code section 2962, (3) not guilty by reason of insanity, (4) welfare and institution commitments or (5) California Department of Corrections and Rehabilitation inmates referred to DSH for enhanced psychiatric treatment.

Line HPOs are assigned daily duty "posts" throughout ASH and are responsible for patrol, hospital security and responding to emergency alarms activated by staff members.

While on duty, DSH requires Line HPOs to wear duty belts consisting of handcuffs, pepper spray, a baton, a flashlight and a personal key set. Line HPOs are also required to wear stab-proof/ballistic vests at all times while in uniform. DSH, however, prohibits Line HPOs from carrying firearms while on duty.

While Line HPOs are working their assigned duty posts, they serve as first responders whenever crimes are committed or general incidents occur within their designated duty posts. Whenever such crimes or incidents occur, Line HPOs conduct preliminary investigations, which involve assessing the scene and gathering information such as "who, what, when, where and why" of the matter investigated. Line HPOs thereafter prepare preliminary reports using the information gathered at the scene. Line HPOs concurrently remain responsible for maintaining law and order within their assigned duty posts. Line HPOs do not carry investigatory caseloads.

2. ***The Detective HPO Position***

When preliminary reports prepared by Line HPOs indicate possible criminal misconduct has occurred, they are then referred to ASH's Detective Unit for follow-up investigation by "Detective" HPOs, such as the Grievants in this instance, whom ASH has administratively appointed for duty within its Detective Unit.

If a preliminary report requires both criminal and administrative follow-up investigations be performed, in order to preserve *Constitutional* guarantees articulated in *Miranda* v. *Arizona*, 384 U.S. 436 (1966) of persons subject to criminal investigation, the matter is bifurcated and will first be criminally investigated by Detective HPOs followed by an administrative investigation by Investigators from ASH's Office of Special Investigations ("OSI") to determine whether any internal misconduct warranting discipline has occurred.

While HPO, Class Code 1937, and Investigator, Class Code 8610, are officially recognized State Personnel Board ("SPB") job classifications, "Line" HPO and "Detective" HPO positions are not.

Follow-up criminal investigations conducted by Detective HPOs include (1) additional interviews, (2) collection of additional evidence, (3) forwarding evidence for forensic testing, (4) preparing reports following interviews of victims, suspects and witnesses, (4) presenting cases to the District Attorney, County of San Luis Obispo ("District Attorney") for criminal prosecution and follow-up on case status with the District Attorney.

3. ***The Detective HPO Work Assignments of the Grievants***

HPO Durfee occupied the Detective HPO position in ASH's Detective Unit from August 2010 through December 2016 whereupon he voluntarily returned to his former Line HPO assignment.

HPOs Mafnas and Puebla were each appointed to the Detective HPO position in May 2014, and continue to work as Detective HPOs to the present time.

From August 2010 through approximately January 2012, HPO Durfee received OOC pay for his performance of work duties as a Detective HPO. HPOs Mafnas and Puebla, however, have never received OOC pay during their tenures as Detective HPOs.

The Grievants work in the New Treatment Area at ASH sharing office space with OSI's Investigators. OSI Investigators Alex Alvarez ("Investigator Alvarez") and Jami Lovejoy ("Investigator Lovejoy") formerly served as Detective HPOs performing OOC work as Investigators. Pursuant to a grievance settlement agreement executed on June 26 and 29, 2009, Investigators Alvarez and Lovejoy received OOC pay while working as Detective HPOs before each was promoted to OSI Investigator in 2012.

The Grievants work under Post Orders and Instruction Detective Unit Order No. 204 ("POI Detective Unit Order No. 204"). POI Detective Unit Order No. 204 describes the routine duties for Detective HPOs which includes conducting follow-up on leads from crime reports and criminal investigations including suspect, victim and witness interviews in addition to handling and collecting evidence, conducting investigations relating to patient deaths, conducting administrative investigations at the direction of Chief of Police Services and preparing, obtaining and executing search warrants.

B. ***The Events Preceding the Grievances of HPOs Durfee, Mafnas and Puebla***

In February 2012, following direction from DSH headquarters, OOC pay was terminated for all staff members upon expiration thereof, regardless of whatever work duties were being performed, including that of HPO Durfee. While HPO Durfee continued to thereafter work as a Detective HPO in ASH's Detective Unit without OOC pay, his duties did not change from the time he began receiving OOC pay while serving as a Detective HPO in August 2010.

In August 2015, HPO Durfee approached his Division Commander, Police Lieutenant Jannette Zuniga ("Lieutenant Zuniga") inquiring whether Detective HPOs would ever again receive OOC pay. HPO Durfee was thereupon advised by Lieutenant Zuniga that Detective

HPOs would never again receive OOC pay and if he disapproved, he should exercise his contractually guaranteed right to initiate a grievance contesting same.

C. Initiation and Processing of the Grievances

The Grievants thereafter initiated their respective grievances at issue herein on August 5, 2015. On August 18, 2015, the grievances were denied as untimely by ASH's administration at the first step of the Agreement's grievance process. The Grievants timely elevated their grievances to the second step of the grievance procedure on August 28, 2015.

On September 21, 2015, the Grievants were emailed State Form 651 by ASH Labor Relations Analyst Amber Ehinger ("Labor Relations Analyst Ehinger") for completion. State Form 651 asked the Grievants to describe the major purpose of their duties, provide a description of their work and apply percentage estimates of the amount of time spent on each identified work function. None of the Grievants had ever before completed State Form 651 prior to doing so on September 25, 2015. The Grievants completed State Forms 651 and signed same on September 25, 2015. Each completed State Form 651 was thereafter signed by the Grievants' immediate supervisor, Marcella Hazuka, who concurred with their descriptions and corresponding percentages of time worked in their job duties.

DSH administration formally denied the third step consolidated grievances of the Grievants on December 14, 2015. On Grievants' behalves, CSLEA submitted their grievances to CalHR which, in turn, denied the grievances on February 8, 2016. CSLEA thereafter requested *de novo* arbitration proceedings be commenced regarding the grievances in accordance with the Agreement's Grievance and Arbitration Procedure. The matters thereafter proceeded to be heard by mutually selected Impartial Arbitrator Kenneth A. Perea.

V. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 6 – GRIEVANCE AND ARBITRATION PROCEDURE

6.8 Formal Grievance – Step 1

A. If an informal grievance is not resolved to the satisfaction of the grievant, a formal grievance may be filed no later than:

1. Fourteen (14) calendar days after the event or circumstances occasioning the grievance; or after the employee should reasonably have been aware of the event or circumstances occasioning the grievance; or

2. Within seven (7) calendar days after receipt of the decision rendered in the informal grievance procedure.

B. However, if the informal grievance procedure is not initiated within the period specified in Item (1) above, the period in which to bring the grievance shall not be extended by Item (2) above.

C. A formal grievance shall be initiated in writing on a form provided by the State and shall be filed with a designated supervisor or manager identified by each department head as the first (1st) level of appeal.

D. Within fourteen (14) calendar days after receipt of the formal grievance, the person designated by the department head as the first (1st) level of appeal shall respond in writing to the grievance.

E. No contract interpretation or grievance settlement made at this stage of the grievance procedure shall be considered precedential.

ARTICLE 15 – CLASSIFICATIONS

15.2 Out-of-Class Work

A. Notwithstanding Government Code section 905.2, 19818.8, 19823, an employee may be required to perform work in a higher classification other than that described in the specification for his/her classification for up to one hundred twenty (120) consecutive calendar days during a fiscal year.

B. Out-of-Class When Required in Writing a department head or designee may direct an employee in writing to perform work in a higher class for fifteen (15) consecutive calendar days

without any increase in compensation. If a department head or designee requires an employee in writing to work in a higher classification for more than fifteen (15) consecutive calendar days, the employee shall receive a pay differential of five percent (5%) over his/her normal daily rate of the class to which he/she is appointed for that period in excess of fifteen (15) calendar days. If a department head or designee requires in writing, an employee to work in a higher classification for thirty (30) consecutive calendar days or more, the employee shall receive a pay differential of five percent (5%) over his/her normal daily rate of the class to which he/she is appointed from the first day of the assignment. If the assignment to a higher classification is not terminated before it exceeds one hundred twenty (120) consecutive calendar days, the employee shall be entitled to receive the difference between his/her salary and the salary of the higher class at the same step the employee would receive if the employee were to be promoted to that class, for that period in excess of one hundred twenty (120) consecutive calendar days. If the employee is promoted, the five percent (5%) differential shall not be considered as part of the base pay in computing the promotional step in the higher class. In accordance with the provisions of this subsection, no employee may be compensated for more than one (1) year of out-of-class work for any one (1) assignment.

C. Employees are not performing work in a higher classification when:

1. They are on training and development assignments, in apprenticeship or training classifications or performing duties different from the employee's regular duties because of an injury, illness or return to work program.

2. CalHR approves a change in allocation standards and an employee claims that he/she was working in a higher classification prior to the effective date of the change in the standards.

3. The SPB establishes a new class which describes duties that were previously properly allocated to another class and an employee claims that he/she was working in a higher class prior to the effective date of the class establishment.

4. The current class specification permits the performance of such duties.

5. An employee requests accelerated movement in a deep class series (e.g., Staff Services Analyst Ranges A, B, C).

D. Should any employee file suit against CSLEA seeking to declare this provision illegal, the State shall indemnify CSLEA for any costs incurred in defending itself.

E. The State shall not rotate employee's in and out of acting assignments for the purposes of avoiding payment of an out-of-class differential.

F. It is not the State's intent to select employees for out-of-class assignments based on favoritism.

G. Out-of-Class Grievances

1. Should a dispute arise, this section shall be subject to the grievance and arbitration procedure and shall be the exclusive means by which alleged out-of-class assignments shall be remedied, including requests for review by the CalHR referenced in Government Code section 19818.8 or the California Victim Compensation and Government Claims Board.

2. The only remedy that shall be available (whether claiming out-of-class work or position misallocation) is retroactive pay for out-of-class work. Said pay shall be limited to out-of-class work performed (a) during the one (1) year calendar period before the employee's grievance was filed; and (b) the time between when the grievance was filed and finally decided by an arbitrator.

3. Arbitrators shall not have the authority to order reclassification (reallocation) of a grievant's position or discontinuance of out-of-class work assignments.

VI. THE PARTIES' CONTENTIONS

A. CSLEA's Contentions

Grievants have provided evidence meeting their burdens of proof beyond a preponderance of the evidence that the duties they perform in their capacities as Detective HPOs are pervasive to the extent they substantially perform work in the Investigator classification and such duties do not overlap with those of the Line HPO classification. DSH has admitted in writing that HPO Durfee was performing work at the Investigator level upon preparing the Out- of-Class Justification Form signed by Human Resources Director Elizabeth

Andres ("HR Director Andres") in May 2011. Also, HPO Durfee's duties did not change and his responsibilities actually increased over time, according to both Detective Sergeant Jeannie Martin's and HPO Durfee's testimony. ASH has skirted its obligations under the Agreement since February 2012 when DSH sent a message to its supervising staff indicating it was terminating OOC pay due to fiscal constraints. That fiscal need, however, cannot legitimately override either the 2009 Settlement Agreement or the language in the Agreement itself.

Instead, the Grievants have been forced to fight for their rightful compensation by facing DSH's illogical and self-defeating arguments. DSH claims Detective HPOs are not working OOC because the HPO and Investigator classifications both provide each is responsible for conducting "administrative and criminal investigations" which are therefore overlapping duties. If so, the same must be said of the Investigators' duties. It is evident, however, that work performed by Investigators comes primarily from preliminary reports prepared by Line HPOs. Detective HPOs, however, also receive and investigate cases based on the same type of preliminary reports prepared by Line HPOs. Line HPOs are, therefore, providing the same level and type of information to Investigators for exclusively administrative incidents that they are providing to Detective HPOs for exclusively criminal incidents. Following this line of reasoning to its logical conclusion would negate the need for the Investigator classification entirely. Any thought or concept that the preliminary investigations and responsibilities related to those investigations match those of the Detective HPOs or Investigators was refuted by the testimony of Investigator Alvarez and others who verified that Line HPOs are only getting the very basic information (who, what, when, where, and why) regarding investigated incidents.

As stated in the Arbitration Award of Arbitrator Catherine Harris, "the parties did not intend to compensate each and every assignment of a single non-overlapping duty. . . ." As Detective HPOs, the Grievants therefore seek OOC compensation because performance of their duties does not overlap those of Line HPOs and are consistent with investigations performed by

Investigators as verified in duty statements, the job specifications and State Forms 651 submitted by the Grievants. The remedy for OOC work includes pay (1) during the one calendar year period before the grievances were filed, and (2) the time between when the grievances were filed and the Impartial Arbitrator's Findings and Award. On behalf of the Grievants CSLEA accordingly requests an award in their favor, consistent with the terms of Article 15, Section 15.2 of the Agreement.

B. DSH's Contentions

CSLEA has the burden of proof in this case. The grievances were filed untimely, months and even years after the Grievants had knowledge that OOC compensation would not be continued. On this procedural arbitrability basis alone, the grievances must be summarily denied.

Additionally, the evidence presented at arbitration fails to prove the Grievants perform duties and responsibilities listed in the Investigator classification that are not also duties and responsibilities listed in the HPO classification. The Grievants' duties and responsibilities are appropriate for the HPO classification. Grievants perform criminal investigations (and allegedly limited administrative investigations) which are clearly within the HPO class specification. Even if some of Grievants' responsibilities are Investigator responsibilities, the duties and responsibilities are at best overlapping between the HPO and Investigator classifications and would therefore not give rise to a valid OOC compensation claim. Accordingly, the Grievants' grievances must be denied.

VII. DISCUSSION AND CONCLUSIONS

A. The Procedural Arbitrability Issue

The initial issue presented for adjudication in the above-entitled matter is whether the Grievants' grievances alleging they worked OOC while performing Detective HPO duties for ASH's Detective Unit, including conducting follow-up criminal investigations, preparing

investigatory reports and related ancillary responsibilities not specified in the HPO class specification, were timely initiated.

According to DSH, HPO Durfee was advised years before his belated August 5, 2015 grievance was initiated that OOC pay for his Detective HPO position was being discontinued by DSH. Also, HPOs Mafnas and Puebla were administratively assigned to serve as Detective HPOs in ASH's Detective Unit in May 2015. Their grievances seeking OOC pay for performing Detective HPO duties, however, were not initiated until August 5, 2015, and thus far in excess of the "Fourteen (14) calendar days after the event or circumstances occasioning the grievance; or after the employee should reasonably have been aware of the event or circumstances occasioning the grievance" time limitation for initiating grievances pursuant to Agreement Article 6, Section 6.8 A.1.

In response, CSLEA contends because the Grievants worked OOC but were not compensated for performing the duties of Investigators, DSH committed a continuing violation whenever failing to compensate them for working OOC at the Investigator rate of pay.

Addressing the issue of procedural arbitrability as presented, the Impartial Arbitrator notes *Fairweather's Practice and Procedure in Labor Arbitration*, Ray J. Schoonhoven, editor, Third Edition, BNA Books, 1991, generally observes the following:

> When a grievance has not been filed within the time limits set forth in the collective bargaining agreement, the arbitrator generally will dismiss the claim as nonarbitrable unless the opposing party has waived this procedural defect. Because the parties have limited the cases which they agree to arbitrate according to the terms of their agreement, the arbitrator lacks authority to hear an untimely grievance. Arbitrators have dismissed grievances as untimely not only on the ground that the arbitrator lacks authority to hear the grievance under the agreement, but also on the ground that the establishment of a time limit reflects the parties' recognition that grievances should be heard promptly before evidence is lost and recollections have dimmed. (Fns. omitted.)

Practice and Procedure in Labor Arbitration, supra, furthermore adds the following exception to the foregoing general rule in cases involving "continuing violations:"

> If the grievant continues to suffer from the alleged contract violation, the arbitrator may find that the violation is a continuing one. In such a case, the limitations period recommences each day; hence, the time for filing the grievance is extended.[1] For example, a company's failure to discharge an employee who does not join a union within 31 days is never barred because the failure constitutes a "continuing violation."[2] *The "continuing violation" doctrine is used most frequently by grievants seeking damages because an employer failed to pay the established wage rate for the employee's classification or failed to grant a merit increase.*[3] (Emphasis added.)

The subject of the continuing violation doctrine is likewise addressed in Elkouri & Elkouri, *How Arbitration Works*, 7th Edition at Chapter 5.7.A. ii. as follows:

> Many arbitrators have held that "continuing" violations of the agreement (as opposed to a single isolated and completed transaction) give rise to "continuing" grievances in the sense that the act complained of may be said to be repeated from day to day with each date treated as a new "occurrence."[4] These arbitrators permit the filing of such grievances at any time, although any back

---

[1] Damages (including back pay) in such a case, however, will be awarded only from the date the grievance was filed. See *Hillel Day School*, 89 LA 905 (Lipson, 1987).

[2] *Kerr-McGee Oil Indus.*, 44 LA 701 (Hayes, 1965); *Sargent Eng'g Corp.*, 43 LA 1165 (McNaughton, 1964); *Standard Oil Co. of Cal.*, AAA Case No. 70-4 (Burns, 1964); *American Meter Co.*, AAA Case No. 61-17 (Teple, 1963) (unreported).

[3] See, e.g., *Cleveland Pneumatic Co.*, 91 LA 428 (Oberdank, 1988) As Arbitrator Oberdank explained: "The arbitrator would not hesitate to enforce the time limits contained in Article VI, Section B. Paragraph 13 of the collective bargaining agreement if the dispute before him arose out of any isolated set of circumstances such as the imposition of discipline or denial of certain rights based upon seniority. But it does not. It involves the claim that management breached the contract by failing to pay employees properly. If true, the company violated the labor agreement each time it issued a pay check that did not include the proper cost of living allowance and the union is absolutely correct in its contention that the grievance is, therefore, of a continuing nature. As such, it is arbitrable and the arbitrator must so hold. The failure to file earlier would certainly limit the period for which compensation could legitimately be claimed but it does not preclude a resolution on the merits in this arbitrator's view.) ; *Allegheny Cigarette Serv. Co.*, 58 LA 1259 (Kates, 1972); *Dayton Tire & Rubber Co.*, 48 LA 83 (Dworkin, 1967); *Steel Warehouse Co.*, 45 LA 357 (Dolnick, 1965); *Taylor-Winfield Corp.*, 45 LA 153 (Kates, 1965); *Avco Corp., Lycoming Div.*, 43 LA 765 (Kornblum, 1964). See also *Mississippi Structural Steel Co.*, 55 LA 23 (Boothe, 1970). As observed by Arbitrator Boothe, "The Contract provision under the grievance procedure requiring service of notice within five (5) working days from the occurrence of the issue does not apply. It is a well-established practice in arbitration that a grievance of a continuing nature cannot be limited by a fixed filing date, inasmuch, as the issue at hand is not the occurrence of a single event but the daily re-occurrence of the cause of dispute. In the instant case, meetings were held for the purpose of resolving this issue without any conclusion. Presumably, the causation of the grievance is re-occurring on a daily basis until a specific determination is made."

[4] *Consolidation Coal*, 112 LA 407, 408 (West, 1999); *Tendercare Inc.*, 111 LA 1192 (Borland, 1998); *Municipality of Anchorage, Alaska*, 108 LA 97, 99 (Landau, 1997).

> pay would ordinarily accrue only from the date of filing.[5] For example, where the agreement provided for filing "within ten working days of the occurrence," it was held that where employees were erroneously denied work, each day lost was to be considered an "occurrence" and that a grievance presented within 10 working days of any such day lost would be timely.[6] Similarly, a grievance challenging a change in health plans was timely as a continuing violation, because the change was held to occur on a recurring basis throughout the duration of the period that the health care plan was in effect.[7]

Elkouri & Elkouri, *supra*, then provides the following specific observations concerning application of the continuing violation doctrine to cases involving alleged improper compensation:

> . . . [t]he "continuing violation" doctrine is especially viable for cases involving compensation, because it can be argued that each improper paycheck is a new violation. For example, corrections officers were allowed to challenge alleged Fair Labor Standards Act violations three years after they started because some of the violations took place in the 40-day filing period.[8]

Although the continuing violation doctrine ("the doctrine") is not unanimously embraced by all arbitrators of labor-management disputes, the Impartial Arbitrator's careful review of the applicable literature and reported cases on this subject indicates a strong majority of arbitrators have applied the doctrine at minimum in cases such as the present one involving an issue of the proper rate of pay for regularly recurring duties.

---

[5] E.g., *City of Buffalo, N.Y.*, 93 LA 5, 8-9 (Pohl, 1989); *Cleveland Pneumatic*, supra, 430-31 (Oberdank, 1988); *Plain Dealer Publ'g. Co.*, 90 LA 1042, 1044-45 (Kates, 1988); *Hillel Day Sch.*, supra, 907-08 (Lipson, 1987); *Cincinnati Post*, 89 LA 901, 903-04 (McIntosh, 1987).

[6] *Pacific Mills*, 14 LA 387, 388 (Hepburn, 1950). See also *Sevako* v. *Anchor Motor Freight*, 792 F.2d 570, 122 LRRM 3316 (6th Cir. 1986); *Dep't of Air Force, Warner Robins Air Logistics Ctr.*, 91 LA 1265, 1268 (Holley, Jr., 1988). But see *Chemung Contracting Corp.*, 291 NLRB 773, 129 LRRM 1305, (1988); *Southeastern Pa. Transp. Auth.*, 91 LA 1382, 1384 (Lang, 1988).

[7] *Schnuck Markets*, 190LA 20 (Bailey, 2011).

[8] *Federal Bureau of Prisons*, 127 LA 415 (Daly, 2010); see also *Safeway*, 127 LA 1686 (Bordone, 2009) (each time employer gave employee wages under allegedly improper wage rate was grievable event). Arbitrator Bordone thus explained: "I find that the August 20, 2007 grievance was timely filed and, thus, the grievance is arbitrable. Contrary to the Employer's contentions, the Union was not required to file its challenging grievance at the time of the December 7, 2006 announcement meeting or at the time the contract wage rates were supplemented on December 31, 2006, in order to forestall being forever precluded from challenging the Employer's approach as violative of the Agreements. Rather, an alleged violation, and thus a new grievable event, occurred each time the Employer failed to give an employee a wage increase which it would have given the employee were it following the Union's version of the contractually required method of making the wage adjustments to comply with the new Arizona minimum wage".

For example, in a case similarly involving an alleged incorrect rate of pay that existed for many years, Arbitrator Sidney L. Cahn responded to a timeliness argument as follows:

> A distinction must be drawn between a grievance based upon a continuing course of conduct allegedly in violation of agreement as in the instant case and a grievance based upon a single, isolated and completed transaction . . . The fact that [the Company] may have misapplied these definitions for several years would not constitute a bar to this grievance, for each heat poured, if not paid for as required, would constitute a separate violation forming the basis for a grievance.[9]

Similarly, in *Bethlehem Steel Co.*[10], Arbitrator Ralph Seward addressed the same issue in a case involving an incorrect seniority rank that apparently had gone unchallenged by the union for a substantial period of time. Arbitrator Seward thus reasoned as follows:

> This grievance, however, has nothing to do with such past occurrences. Its concern is with the present standing of [employees] on the seniority list. . . The "fact or event" upon which the grievance is based is not the original error in computing [the employee's] service which is alleged to have been made in the past but the continuation of that error in the present.[11]

While a "continuing course of conduct" may not always be easily distinguishable from a "single, isolated and completed transaction," an improper rate of pay received by Detective HPOs while allegedly performing the duties of the Investigator classification within State service clearly appears to be an example of the former category and not the latter. An employee, for example, who is denied monetary reimbursement for expenses incurred as a result of satisfactory completion of training is clearly a party to a completed transaction. A failure to properly compensate an employee who continuously performs assigned duties of a higher paid classification which do not overlap with those of his own classification, however, constitutes a separate and distinguishable act upon each incorrect payroll computation occurrence.

---

[9] *Jones & Laughlin Steel Corp.*, 26 LA 649, 650-51 (Cahn, 1956).
[10] 23 LA 538 (Seward, 1954).
[11] *Id.* at 540.

Based upon the foregoing analysis, it is concluded the subject grievances are procedurally arbitrable.

B. The Merits of the Grievances

Addressing the merits of the consolidated grievances of the Grievants, DSH argues the duties performed by ASH's Detective HPOs when performing criminal investigations as members of its Detective Unit are clearly delineated in the class specification for HPO. Thus, argues DSH, the Duty Statement for HPO, under "Major Tasks, Duties and Responsibilities," provides that the HPO position "conducts criminal investigations." The foregoing Duty Statement furthermore elaborates that HPOs,

> Investigate deaths and various crimes through such activities as interviewing witnesses, collection of physical evidence, surveillance, and the interviewing and interrogation of suspects, victims, complainants and witnesses. Determine elements of crimes and/or decide when and if arrest is indicated; prepares complete, accurate, and legible (sic), grammatically correct reports in a timely manner.

Thus, argues DSH, when conducting criminal investigations while administratively assigned as a Detective HPO within ASH's Detective Unit, Grievants were performing tasks as described in the foregoing job classification.

Furthermore, according to DSH, although Investigators perform investigations regarding potential misconduct as members of ASH's OSI, Detective HPOs' performance of criminal investigations are at most "overlapping duties" contained in both the HPO and Investigator class specifications and are thus ineligible for OOC compensation.

In addressing the foregoing arguments, it must initially be observed HPO Durfee received OOC pay for performance of duties as a Detective HPO while administratively assigned to ASH's Detective Unit for an extended period of years and as recently as January 2012. Importantly in this respect, on February 4, April 27, and December 8, 2011, ASH's then Chief of Police Services, D.W. Landrum, signed OOC Assignment Requests certifying therein that OOC

compensation for HPO Durfee was necessary because he had been performing duties of Classification Code 8610, Investigator.

Furthermore, on May 4, 2011, ASH's HR Director Andres signed documentation entitled "OOC Justification Form" stating Durfee's assignment was changed from HPO to Investigator, Class Code 8610, from December 21, 2010 through April 19, 2011. Pursuant to the foregoing OOC Justification Form, HR Director Andres requested an additional period HPO Durfee be considered working OOC from April 20, 2011 through August 17, 2011. HR Director Andres furthermore admitted in the foregoing business records that Investigator duties being performed by HPO Durfee cannot be performed through a temporary or limited term appointment, temporary assignment, reorganization, other administrative alternative or change in the classification. HR Director Andres thus wrote:

> The duties being performed by this employee [HPO Durfee] is specialized and requires extensive training, it is very disruptive operationally, to place an employee in a temporary assignment for 4 months then assign them. The need for Investigator classification is real and the duties performed have been determined to be at the Investigator level.

HR Director Andres furthermore stated on the OOC Justification Form that ASH had been directed by CalHR's predecessor agency, California Department of Personnel Administration, that ASH was working its Detective HPOs, such as HPO Durfee, OOC when requiring them to perform the duties provided in the Investigator duty statement. HPO Durfee accordingly continued to receive OOC pay while performing Investigator duties as a Detective HPO through early 2012 when he was advised DSH would cease providing OOC pay.

Also, while DSH's "overlapping duties'" argument may appear to have surface plausibility, a more detailed examination of the investigatory duties described in the Investigator class specifications reveals otherwise.

First, SPB's Specification for Investigator, Class Code 8610, specifies:

> The Investigator is a *deep class* with three alternative ranges. Responsibilities include, but are not limited to, conducting *independent criminal*, civil, and/or administrative *investigations* to detect or *verify* suspected violations of provisions of Federal, State, and/or local laws, rules, or regulations; obtaining and *verifying* evidence *to support* administrative action and/or *prosecution;* determining type of case and *developing investigation plan;* conducting and completing investigations; *maintaining accurate master investigation case files*; *developing field operation plans and safely executing them*; . . . (Emphasis added.)

SPB's Specification for Investigator, Range B then continues:

> Investigation responsibilities at Range B are expected to be *more complex and require broader knowledge and application of investigative techniques and procedures.* Incumbents conduct the *complex criminal*, civil, and/or administrative *investigations* to detect or *verify* suspected violations of laws, rules, or regulations; locate and interview witnesses and persons suspected of violations; *obtain and present facts and evidence to support administrative action or prosecution*; serve subpoenas, inspection warrants, search warrants, . . . (Emphasis added.)

SPB's Specification for Investigator, Range C then adds:

> At Range C, incumbents . . . (2) *have independent responsibility to oversee an entire investigative operation or project*; (3) *independently conduct the most difficult and complex investigations and participate in multi-agency investigations or assignments*; . . . (Emphasis added.)

Careful review of SPB's Investigator Specification thus reveals this "deep class" includes varying degrees of investigation complexities at different ranges. It would accordingly be less than accurate to compare the general description of investigation duties described in ASH's HPO Duty Statement which states,

> Investigate deaths and various crimes through such activities as interviewing witnesses, collection of physical evidence, surveillance, and the interviewing and interrogation of suspects, victims, complainants and witnesses. . . .

to the more specific and detailed investigation duties described in the SPB's Specification for Investigator including,

> . . . conduct the complex criminal, civil, and/or administrative investigations to detect or verify suspected violations of laws, rules, or regulations; locate and interview witnesses and persons suspected of violations; obtain and present facts and evidence to support administrative action or prosecution; serve subpoenas, inspection warrants, search warrants, . . .

and conclude they are simply "overlapping duties."

Investigations performed by Detective HPOs assigned to the Detective Unit and Investigators assigned to OSI may both be preceded by preliminary investigations performed by Line HPOs who serve as first responders to alleged crimes and other incidents occurring at ASH. While not all criminal investigations conducted are of equal complexity, the follow-up investigations performed by both Detective HPOs and Investigators may at times be more complex and detailed than the preliminary investigations which preceded them in order to verify suspected violations of laws, rules, or regulations performed in support of administrative actions or criminal prosecutions by the District Attorney. No one other than Detective HPOs assigned to ASH's Detective Unit support the prosecution of crimes allegedly committed at ASH by the District Attorney. Such investigations must necessarily include those which are more complex. Furthermore, if the investigation duties of Detective HPOs and Line HPOs are simply "overlapping duties," as argued by DSH, why would it then even be necessary for Detective HPOs assigned to ASH's Detective Unit to perform follow-up investigations at all?

Based both upon the business records supporting HPO Durfee's OOC compensation received while serving as a Detective HPO assigned to ASH's Detective Unit, as well as a detailed and careful examination of the more complex follow-up investigations performed by Detective HPOs in support of criminal prosecutions by the District Attorney, the Impartial Arbitrator concludes Grievants were performing OOC duties in the Investigator job classification and should accordingly be awarded compensation for such OOC work performed.

AWARD

1. The grievances of HPOs Durfee, Mafnas and Puebla were timely initiated pursuant to Agreement Article 6, Section 6.8.

2. HPOs Durfee, Mafnas and Puebla did work out-of-class ("OOC") as Investigators, Class Code 8610, for Department of State Hospitals ("DSH") pursuant to Agreement Article 15, Section 15.2.

3. The appropriate remedy for the violations found in Paragraph No. 2 above shall be as follows:

   a. HPO Durfee shall be compensated OOC pay in accordance with Agreement Article 15, Section 15.2 for the difference between HPO salary received and the salary of the Investigator classification at the same step he would have received if promoted to the Investigator classification for all hours worked during the period August 5, 2014 through December 31, 2016; and

   b. HPOs Mafnas and Puebla shall be compensated OOC pay in accordance with Agreement Article 15, Section 15.2 for all hours worked during the period August 5, 2014 through July 11, 2017, as follows:

      (1.) A five percent differential for the period August 5, 2014 to December 3, 2014; and

      (2.) The difference between HPO salaries received and the salary of the Investigator classification at the same step they would have received if promoted to the Investigator classification for the period December 4, 2014 through July 11, 2017.

4. The Impartial Arbitrator hereby retains jurisdiction for purposes of resolving any dispute regarding the implementation of the remedy specified in Paragraph Nos. 3.a. and 3.b. above.

Dated: July 11, 2017
Del Mar, California

KENNETH A. PEREA
IMPARTIAL ARBITRATOR