



VIA ELECTRONIC EMAIL  
*kristine.rodrigues@calhr.ca.gov*  
*grievances@calhr.ca.gov*

November 3, 2023

Kristine Rodrigues  
Assistant Deputy Director  
CA Department of Human Resources  
1515 S Street, North Building, Suite 500  
Sacramento, California 95811

**RE: 4.5% Special Salary Adjustment - Section 3.1(B) MOU Grievance**

Dear Ms. Rodrigues:

California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (CASE) is filing the attached grievance with the Department of Human Resources (CalHR) at Step 3 of the grievance process per Article 7 of the Unit 2 Memorandum of Understanding (MOU).

CalHR previously agreed to indefinitely toll the grievance filing deadline as CASE and CalHR attempted to work toward an informal resolution of this MOU violation. Unfortunately, no resolution has been reached at this time and CASE must file this grievance in order to correct this violation of the MOU.

If you have any questions or concerns, please contact me directly at (916) 669-5862 or [kregan@calattorneys.org](mailto:kregan@calattorneys.org). Your prompt attention to this matter is appreciated.

Sincerely,

***Katherine E. Regan***

Katherine E. Regan, CASE  
Director of Labor Relations

Enclosures

**EMPLOYEE CONTRACT GRIEVANCE / COMPLAINT**

STD. 630 (Rev. 10/2019)

BARGAINING UNIT NAME CASE	BARGAINING UNIT NUMBER (Circle one) 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21
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**Please refer to your bargaining unit's contract for specific information regarding employee grievance procedures and time frame requirements.**

GRIEVANT'S NAME All Affected Members of BU2	HOME TELEPHONE NUMBER (include area code)	
HOME ADDRESS (Number and Street)	(City)	(State) (Zip Code)
DEPARTMENT All Affected Departments of BU2	DIVISION OR FACILITY	SECTION, BRANCH, UNIT, ETC.
POSITION CLASSIFICATION All Affected Classifications of BU2	NORMAL WORKING HOURS	WORK TELEPHONE NUMBER (include area code)

**REPRESENTATION INFORMATION (Complete if applicable)**

REPRESENTATIVE'S NAME Katherine E. Regan	ORGANIZATION AFFILIATION CASE	TELEPHONE NUMBER (include area code) (916) 669-5862
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**GRIEVANCE INFORMATION**

DATE OF ACTION CAUSING GRIEVANCE July 1, 2023	DATE OF INFORMAL DISCUSSION WITH IMMEDIATE SUPERVISOR NA	DATE OF INFORMAL RESPONSE NA
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GRIEVANCE DESCRIPTION (Clear, concise statement. Attach additional sheets if necessary.)

See attached Grievance Statement.

SPECIFIC ARTICLE(S) AND SECTION(S) OF CONTRACT ALLEGEDLY VIOLATED  
Section 3.1(B) of the Bargaining Unit 2 Memorandum of Understanding

SPECIFIC REMEDY SOUGHT

The affected members of Bargaining Unit 2 receive the 4.5% Special Salary Adjustment per section 5.1(B) of the 2022-2025 BU2 MOU retroactive to July 1, 2023.


GRIEVANT'S SIGNATURE  K. Regan on behalf of Grievants	DATE FILED November 3, 2023
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(For grievance level reviews I through IV, continue on reverse.)

**EMPLOYEE CONTRACT GRIEVANCE / COMPLAINT**

STD. 630 (Rev. 10/2019) (REVERSE)

**GRIEVANCE REVIEW--LEVEL I**


DATE RECEIVED	LEVEL I REVIEWER (Signature) 	RESPONSE DATE
REVIEWER'S PRINTED NAME AND TITLE	TELEPHONE NUMBER (include area code)	

**LEVEL I DECISION**

<input type="checkbox"/> I concur and do not appeal to the second review level	<input type="checkbox"/> I do not concur and appeal to the second review level (State reason below)	GRIEVANT'S SIGNATURE	DATE SIGNED
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REASON FOR APPEAL


**GRIEVANCE REVIEW--LEVEL II**

DATE RECEIVED	LEVEL II REVIEWER (Signature) 	RESPONSE DATE
<input type="checkbox"/> Decision attached	REVIEWER'S PRINTED NAME AND TITLE	

<input type="checkbox"/> I concur and do not appeal to the third review level	<input type="checkbox"/> I do not concur and appeal to the third review level (State reason below)	GRIEVANT'S SIGNATURE	DATE SIGNED
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REASON FOR APPEAL

**GRIEVANCE REVIEW--LEVEL III--DEPARTMENT DIRECTOR OR DESIGNEE**

DATE RECEIVED	DIRECTOR OR DESIGNEE (Signature) 	RESPONSE DATE
<input type="checkbox"/> Decision attached	REVIEWER'S PRINTED NAME AND TITLE	

<input type="checkbox"/> I concur and do not appeal to the third review level	<input type="checkbox"/> I do not concur and appeal to the third review level (State reason below)	GRIEVANT'S SIGNATURE	DATE SIGNED
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REASON FOR APPEAL

**GRIEVANCE REVIEW--LEVEL IV--DEPARTMENT OF HUMAN RESOURCES**

DATE RECEIVED	DIRECTOR OR DESIGNEE (Signature) 	RESPONSE DATE
<input type="checkbox"/> Decision attached	REVIEWER'S PRINTED NAME AND TITLE	

## **4.5% Special Salary Adjustment Statement of Grievance**

Approximately 125 BU2 members were deprived of a timely 4.5% Special Salary Adjustment (“SSA”) they were mandated to receive on July 1, 2023. The affected members include ALJs who were previously WCJs or Cal-OSHAB Hearing Officers at the maximum salary rate prior to the ALJ Consolidation plan implemented by the State in 2022 (hereafter referred to as the impacted ALJs). The impacted ALJs were deprived of their SSA due to the interplay of several arcane provisions including CalHR’s salary rules, some unilateral salary-setting decisions by CalHR, and arbitrary decisions regarding basic arithmetic.

In the 2021-2022 MOU, the State agreed to present a proposal to SPB to consolidate the ALJ I/II classifications into one deep class within six months of ratification. (2021-22 MOU, Sec. 15.9.A.) That same MOU called for the State to submit to SPB a proposal to create a WCJ II classification no later than June 18, 2021. (2021-22 MOU, Sec. 15.10.) The creation of the WCJ II classification had previously been delayed by the State for many years.<sup>1</sup> The 2021-22 MOU called for DIR to develop an exam and create a WCJ II certification list no later than the end of 2021. DIR actually advertised the WCJ II position on December 9, 2021, with a closing date of December 23, 2021, however the position was never filled. A subsequent ALJ Classification Consolidation proposal was approved by SPB on January 13, 2022. Because the ALJ consolidation had the effect of eliminating the WCJ II classifications, none of the WCJs in BU2 were able to be promoted into the newly-created-and-then-abolished WCJ II classification. The BU2 WCJs had been trapped in the WCJ I class for many years, at a salary level equal to the prior, yet now abolished, ALJ I class, but with no opportunity for promotion.

In implementing the ALJ consolidation, the State created a new, statewide ALJ class with ranges A and B. Range A was intended to be roughly equivalent to the prior ALJ I department-specific classes, and Range B was intended to be roughly equivalent to the prior ALJ II department-specific classes, with both prior classifications having been abolished. However, CalHR unilaterally altered the salary range for both Range A and B.

Prior to consolidation, the salary range for ALJ I (and WCJ I) was \$9,732-\$12,241. The vast majority of WCJs in BU2 were at the top of that salary range.<sup>2</sup> The new salary range established for the new ALJ Range A was slightly higher: \$9,738-\$12,250. No explanation was provided as to why CalHR set the top salary for ALJ Range A at nine dollars higher than the old ALJ I salary range.

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<sup>1</sup> That same provision had appeared in prior MOUs, but CalHR repeatedly failed to create the WCJ II classification. (See 2019-20 MOU, Sec. 15.10; 2016-19 MOU, Sec. 15.10.)

<sup>2</sup> The same is true for a number of hearing officers at Cal-OSHAB. Their classification was similarly abolished, and their prior salary range was identical to the WCJs.

Similarly, the salary range for ALJ II was \$10,203-\$12,842 prior to consolidation. The new salary range established for the new ALJ Range B was slightly higher: \$10,213-\$12,853. Again, no explanation was provided as to why CalHR set the top salary for ALJ Range B at eleven dollars higher than the old ALJ I salary range.

The State's unilateral decision to set the salary ranges at these levels resulted in a severe, unintended, and unforeseen detriment to the impacted ALJs.

As part of the ALJ consolidation process, all of the impacted ALJs were first moved into the newly established ALJ Range A. For that movement, any impacted ALJ who had been at the old maximum salary range (\$12,241) was moved to the new maximum of ALJ Range A (\$12,250). Then for all the newly minted ALJ Range As who had enough years of experience (which again included the vast majority of the long-topped-out impacted ALJs), they were moved into ALJ Range B. In calculating the change to the salaries for these employees, CalHR utilized the salary rule at 2 CCR § 599.674. MOU Section 5.4 provides as follows:

If there are no specific salary regulations provided in the Alternate Range Criteria, the employee shall receive the salary and MSA as provided in CalHR Rule 599.681.

This provision has been in the MOU for years, and thus the default salary rule for range changes has always been 2 CCR § 599.681. However, buried in the ALJ consolidation packet submitted to SPB by CalHR was a provision in the Alternate Range Criteria that required range changes for ALJs to be calculated using at 2 CCR § 599.674. As will be shown, the State's decision to utilize a special salary rule rather than the default rule provided in the MOU severely disadvantaged the affected ALJs.

When calculating the new salaries for ALJs moving from ALJ Range A to ALJ Range B, DIR and/or CalHR used a rounding methodology that is **not only illegal but is not even supported by CalHR's own salary manual**. Section 6 of the Salary Manual begins with several mathematical rules that the State is supposed to follow in calculating salary changes. As relevant here, the manual provides:

When calculating range differentials, round percentages to the first decimal place by rounding up if the second decimal place is 5 or greater.

This rule of calculation clearly provides instruction for *rounding up*, but it provides no authority for *rounding down*. Thus, when the State opted to round down the calculations used for determining the new salaries of the impacted ALJs, the State was acting contrary to its own Salary Manual. Even worse, the rules set forth in the Salary Manual itself have never been enacted as laws or even regulations, and thus they do not carry the force of law. They are merely policies, and as applied to the impacted ALJs, the use of these policies to the detriment of the ALJs constitutes an underground regulation.

In calculating the salaries of the ALJs, the State relied upon the steps specified in the Salary Manual for salary rule 599.674. That rule calls for a three-step process:

- Subtract the maximum salary rate of the “From” class from the maximum salary rate of the “To” class.
- Divide the result by the maximum salary rate of the lower class in order to determine the range differential.
- Apply that range differential percentage to the old salary to determine the new salary.

For the impacted ALJs, that three-step calculation was performed twice, once for the move from WCJ to ALJ (reallocation), and then again for the move from ALJ Range A to ALJ Range B (range change) as follows:

Reallocation from abolished class to ALJ

New ALJ Range A Maximum \$12,250 - Old WCJ Maximum \$12,241= \$9<sup>3</sup>

$9/12241 = .000735$  which was rounded to .0007 or .07%

$1.0007 \times 12241 = 12249.56$  which rounded up to \$12,250

Using these calculations, those BU2 employees who were previously at the old maximum in their abolished class were moved to the ALJ Range A maximum. Then the process was performed again for the range change from A to B, as follows:

Change from Range A to Range B

Many of the impacted ALJs were now at the ALJ Range A maximum of \$12,250. Most were eligible to move immediately to Range B pursuant to the ARC.

ALJ Range B Maximum \$12,853 - ALJ Range A Maximum \$12,250 = \$603

$603/12250=.0492$ , or 4.92% The State rounded this down to 4.9%

$1.049 \times \$12,250 = \$12,850.25$ , which rounds down to \$12,850

Thus, all of the impacted ALJs who were previously at the maximum of the old WCJ/CalOSHAB Hearing Officer salary, were now left three dollars short of the maximum of ALJ Range B.

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<sup>3</sup> The math is the same for the CalOSHAB Hearing Officers.

For most of the impacted ALJs, the above calculations were performed in February or March of 2022, shortly after CalHR implemented the pay letter as part of the ALJ consolidation process, and most of the changes were retroactive to the February pay period. A range change resets the employee's anniversary date, so all the impacted ALJs had a new anniversary date of February.

In 2023, 12 months after their range change, the WCJs were eligible for a Merit Salary Adjustment because they were not yet at the top of the Range B pay scale – they were \$3 short of it. Because of the small difference in net pay, the vast majority of our members did not even notice the three dollar “raise.” Rather, most believed they had previously been moved to the top of Range B back in 2022.

On July 1, 2023, when implementing the 4.5% SSA specified in Section 5.1.B, the State determined that the impacted employees were not eligible for the 4.5% SSA, because of the requirement in the MOU that eligibility depended on being at the current maximum for 12 qualifying pay periods. Because the impacted members had only been at the maximum for approximately 4 pay periods (from the date they received their three-dollar “raise”), they were deemed ineligible for the SSA.

As a result, the impacted members will have to wait until early 2024 to receive the SSA that they should have received on July 1, 2023.

The State made a series of errors and unfair discretionary decisions throughout the process which led to the impacted members having their SSAs be unjustifiably delayed. Each error is discussed in detail below.

### **Error #1 – Using the Wrong Salary Rule**

First, the State prejudiced the impacted ALJs when it unilaterally elected to insert salary rule 599.674 into the Alternate Range Criteria, rather than simply relying on the default rule 599.681 as provided in the MOU. The salary manual calculations for range changes under 599.681 are performed differently than they are under 599.674. Under 599.681, there is only a two-step calculation process:

- Subtract the maximum salary rate of the “From” range from the maximum salary rate of the “To” range.
- The employee shall receive an increase equivalent to the dollar difference between the maximum salary rates of the alternate ranges.

Had the method specified under 599.681 been applied to the impacted members, they would have been moved to the top of the new Range B back in 2022. Below is how those calculations would have been performed.

Reallocation from WCJ to ALJ

New ALJ Range A Maximum \$12,250 - Old WCJ Maximum \$12,241= \$9

Employees receive an increase equivalent to \$9

$$\$12241 + \$9 = \$12250$$

Using these calculations, those BU2 employees who were previously at the WCJ maximum would have been moved to the ALJ Range A maximum.

Change from Range A to Range B

ALJ Range B Maximum \$12,853 - ALJ Range A Maximum \$12,250 = \$603

Employees shall receive an increase equivalent to \$603

$$\$12,250 + \$603 = \$12,253$$

Using these calculations from rule 599.681, all impacted ALJs would have been immediately moved to the top of Range B when the adjustments were first made in February of 2022. There then would have been no three-dollar MSA in February of 2023, and all impacted ALJs would have been eligible for the SSA on July 1, 2023, having been at the maximum of their range for more than 12 months.

The State never provided CASE any explanation as to why it treated the impacted members differently from other similarly situated members by inserting an unfavorable salary rule in the Alternate Range Criteria, but this choice by the State operated to deprive members of the timely SSA to which they were entitled. This disparate treatment is a violation of Section 3.1.B of the MOU.

**Error #2 – Rounding Down**

When applying 599.674 in calculating the movement from ALJ Range A to ALJ Range B, the State opted to round 4.92% down to 4.9% in step two of the three-step process. However, there is nothing in the Salary Manual that authorizes rounding *down*. The Salary Manual only authorizes the State to round *up*. Specifically, the Salary Manual provides: “When calculating range differentials, round percentages to the first decimal place by rounding up if the second decimal place is 5 or greater.” Thus, this specifies that a percentage should be rounded up to the first decimal place “if the second decimal place is 5 or greater.” But the Salary Manual guidance does not allow for rounding down if the second decimal place is less than 5.

Improperly rounding down had a direct and immediate impact on all impacted ALJs when the State performed the calculations for the Range Change. Had it used the actual percentage,



rather than the improperly rounded-down percentage, the impacted ALJs would have been immediately placed at the maximum of ALJ Range B. That calculation should have been as follows:

ALJ Range B Maximum \$12,853 - ALJ Range A Maximum \$12,250 = \$603

$\$603/\$12250 = .0492$ , or 4.92%

$1.0492 \times \$12,250 = \$12,852.7$ , which rounds to \$12,853

Thus, the rounding down of only two-hundredths of a percent robbed the impacted ALJs of eligibility for their SSA on July 1, 2023. The State's decision to round down when the Salary Manual does not authorize such rounding down not only runs against the general rule that salary calculations are to be performed in favor of employees whenever possible, but it also violates section 3.1.B of the MOU because it has enforced upon the impacted members a rounding-down rule that is not authorized by the Salary Manual. No similarly situated employees have been subjected to this nonexistent rule.

### **Error #3 – Relying on the Salary Manual**

A more fundamental problem exists with the entirety of the Salary Manual, as it constitutes an underground regulation in the manner it has been applied to the impacted ALJs. State law defines an underground regulation as follows:

“Underground regulation” means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

(Tit. 1 CCR § 250(a)(1).)

Moreover, Government Code section 11342.600, referenced in the foregoing regulation, provides:

“Regulation” means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

The rules in the Salary Manual which were employed against the impacted ALJs constitute “a rule governing a state agency procedure,” specifically, the calculation of

salaries by CalHR, but those rules have never been adopted as a regulation pursuant to the APA. Courts routinely vacate such underground regulations and declare them unlawful. (*Malaga Cnty. Water Dist. v. Cent. Valley Reg'l Water Quality Control Bd.* (2020) 58 Cal. App. 5th 418, 444.)

Neither Government Code section 11342.600, nor 1 CCR § 250(a)(1) are subject to supersession under the MOU. (See Section 4.4.) Thus, the laws governing underground regulations apply to the parties to the MOU.<sup>4</sup>

Accordingly, all of the directives for performing the math, rounding, and other instructions in the salary manual were unlawfully applied. IN the absence of the arcana in the Salary Manual, the only rule or regulation that the State could lawfully apply to the impacted ALJs appears in Salary Rule 599.674. Specifically, that rule provides:

When moving to a class with the same salary range or a range not to exceed one step higher at the maximum, the employee may, as recommended by the appointing power, receive any rate in the salary range not to exceed the total of the range differential between the maximum salary rates.

Under this rule, the total of the range differential between the maximum salary rates was \$603, and the impacted ALJs were eligible to receive \$603 when the range change from ALJ Range A to ALJ Range B was calculated.

The enforcement of an underground regulation to the detriment of the impacted ALJs is a violation of section 3.1.B of the MOU, as the State does not generally try to enforce underground regulations on other similarly situated employees.

#### **Error #4 – Arbitrarily Setting the New Salary Ranges**

When CalHR unilaterally determined the salary ranges for the new ALJ Range A and Range B classifications, it chose dollar amounts that, when applying the salary rules discussed above, just happened to result in a percentage that was *three-hundredths of a percent* too low to allow the impacted ALJs to move to the maximum of Range B immediately in 2022. Specifically, performing the calculations using CalHR's chosen numbers resulted in a percentage of 4.92% (which was unlawfully rounded down to 4.9% as previously discussed), whereas a percentage of 4.95% would have been rounded

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<sup>4</sup> Even if the State could identify a provision of the MOU that allowed enforcement of underground regulations, such a provision would be void and unenforceable, because a contract that conflicts with an express provision of the law is illegal and the rights thereto cannot be judicially enforced. (See *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 583, 110 Cal.Rptr.2d 552; *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 287–288, 52 Cal.Rptr.2d 115, 914 P.2d 193 [provisions of collective bargaining agreement in conflict with Education Code are preempted and unenforceable].)

up to 5.0%, which would have allowed all impacted ALJs to move to the maximum of the new Range B salary. The three hundredths of a percentage difference between 4.92% and 4.95% make all the difference in the calculations used by the State.

As previously demonstrated, the old maximum salary for the WCJ and ALJ I classes was \$12,241. For no apparent reason, CalHR set the new maximum salary for the newly created ALJ Range A at \$12,250, arbitrarily increasing it by nine dollars. Similarly, the old maximum salary for ALJ II was \$12,842, but in setting the salary for the new ALJ Range B, CalHR arbitrarily chose \$12,853.

There are literally dozens of other options that CalHR could have chosen that would have avoided the unjustified harm to the impacted ALJs. For example, if the maximum of the new Range A salary had remained the same as the pre-consolidation ALJ I salary (\$12,241), then the math would have been as follows:

- $\$12,853 - \$12,241 = \$612$
- $\$612 / \$12,241 = 0.4999$ , which rounds to 5.0%

Alternatively, if CalHR was desirous of increasing the new Range A maximum salary to \$12,250 (nine dollars above the old ALJ I maximum) as it did, it could have chosen to set the maximum for the new Range B at \$12,857 rather than the arbitrary \$12,853. Had it done so, the math would have been as follows:

- $\$12,857 - \$12,250 = \$607$
- $\$607 / \$12,250 = 0.4955$ , which rounds to 5.0%

Moreover, there are dozens of other combinations that are just as arbitrary as the ones actually chosen by CalHR. For example, had CalHR set the ALJ Range A maximum at \$12,244 rather than \$12,250, and set the maximum for ALJ Range B at \$12,851 rather than \$12,853, the math would have been as follows:

- $\$12,851 - \$12,244 = \$607$
- $\$607 / \$12,244 = .04957$ , which rounds to 5.0%.

While there are many alternative examples, all within a few dollars of the numbers chosen by CalHR, that would have allowed impacted members to move to the maximum of ALJ Range B immediately in 2022, CalHR has, without explanation, exercised its salary setting authority arbitrarily in a manner that seems calculated to have been at precisely the amount to narrowly deprive impacted ALJs of their timely SSA.

The actual numbers that were arbitrarily and unilaterally chosen by CalHR, without consultation with CASE, operated to deprive all impacted ALJs of the July 1, 2023 SSA that the parties negotiated. While the MOU specifically incorporates Government Code section 19829 which allows CalHR to exercise its salary-setting authority, exercising that

authority arbitrarily to disadvantage CASE members is a violation of one of the most basic aspects of contract law. “The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made.” (Guz v. Bechtel National Inc. (2000) 24 Cal.4th 317, 349–350.) Thus, CalHR willfully breached the implied covenant of good faith and fair dealing when it selected maximum salary rates that would, using CalHR’s own improper mathematical calculations, deprive all impacted ALJs of the benefit of the 4.5% SSA on July 1, 2023.