

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

MARK COHEN,
Appellant

v.

C-09-268

MASSACHUSETTS HIGHWAY
DEPARTMENT,
Respondent

Appellant's Attorney:

Michelle Gates, Esq.
M.O.S.E.S.
90 North Washington Street
Boston, MA 02114

Respondent's Attorney:

John L. Casey, Esq.
Executive Office of Transportation
10 Park Plaza
Boston, MA 02116

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 30, s. 49, the Appellant, Mark Cohen (hereinafter "Appellant" or "Cohen"), is appealing the May 8, 2009 decision of the Human Resources Division (hereinafter "HRD") denying his request for reclassification from the position of General Construction Inspector I (GCI I) to General Construction Inspector II (GCI II).

The appeal was timely filed and a hearing was held on July 7, 2009 at the offices of the Civil Service Commission and was digitally recorded. At the conclusion of the hearing, the parties were encouraged to enter into a settlement agreement but were unable to do so.

FINDINGS OF FACT:

Seventeen (17) exhibits were entered into evidence at the hearing. Based on the documents submitted into evidence and the testimony of the Appellant, I make the following findings of fact:

1. The Appellant is employed and classified as a General Construction Inspector I and is assigned to District 5 within the Massachusetts Highway Department (hereinafter “MassHighway”).¹ (Testimony of Appellant)
2. The Appellant has been employed with MassHighway since November 2000 (Testimony of Appellant)
3. At all times during his employment with MassHighway, the Appellant has been assigned to the District 5, whose main administrative office is located in Taunton. (Testimony of Appellant)
4. In March 2008, the Appellant appealed his classification as General Construction Inspector I (“GCI I”) (Job Grade 18) to a General Construction Inspector II (“GCI II”) (Job Grade 21). (Exhibit 1)

¹ Effective November 1, 2009, the Massachusetts Highway Department became part of the newly created Highway Division of the Massachusetts Department of Transportation. This was the result of Chapter 25 of the Acts of 2009, commonly referred to as the Transportation Reform Act. For the purposes of this proposed decision, the name “MassHighway” will be used to identify Mr. Cohen’s Employer.

5. The Appellant appealed the preliminary denial of the appeal back to the Executive office of Transportation ² on March 12, 2008 and was again denied on January 12, 2009. (Exhibit 3)
6. On January 22, 2009 the Appellant appealed the denial of the reclassification to HRD and was subsequently denied on May 8, 2009. (Stipulated Fact)
7. On May 14, 2009 the Appellant appealed HRD's denial to the Commission.
8. The Classification Specifications for General Construction Inspector I indicate that an individual in that position "receive direct supervision from General Construction Inspectors or other employees of a higher grade who provide instruction...." (Exhibit 8)
9. The Classification Specifications for General Construction Inspector II indicate that an individual in that position "receive general supervision from employees of a higher grade who provide procedural and policy guidance..." (Exhibit 8)
10. The Classification Specifications for General Construction Inspector I describe field work and generally include inspecting materials and construction operations for conformance to rules and regulations and contract plans and specifications, conducting tests on construction materials, performing minor survey work, maintaining records of construction operations, and inspect contractor safety procedures for conformance with current regulations. (Exhibit 8)
11. The Classification Specifications for General Construction Inspector II contain a more general statement of duties which carry a greater degree of responsibility and independent decision-making. While many of the duties would be performed in the

² The former Executive office of Transportation and Construction, the Secretariat under which MassHighway came under.

field, a significant portion of the duties would be performed in the office. They include inspecting construction operations, but also include recommending changes to specifications or construction plans, recommending the acceptance of completed construction projects, responding to inquiries from abutters, contractors, other agencies and the general public, reporting and recording investigative and inspection activities by writing letters, reports and memoranda, recommendations for corrective action and justifications for contract proposals. (Exhibit 8)

12. Until recently, the Structures Maintenance Unit was comprised of three office personnel: The District Structures Maintenance Engineer (Mr. Ellis), a Civil Engineer IV, and two assistants George Pappas, a Civil Engineer III, and Mr. Cohen, a General Construction Inspector I. (Exhibit 7, Testimony of Appellant)

13. In addition, there were several field personnel: two Resident Engineers, (CE III) one or two Assistant Resident Engineers, and two or three bridge crews (laborers). (Exhibit 7, Testimony of Appellant)

14. Mr. Ellis reported to Don Pettey, the District Maintenance Engineer (CE VI) (Testimony of Appellant)

15. The Structures Maintenance unit was responsible for repairs of any and all bridges within the District. (Exhibit 5)

16. Prior to 2005, the Appellant reported primarily to Resident Engineer Greg Wood, a CE III. (Testimony of Appellant)

17. As assistant to Mr. Wood, the Appellant worked in the field and was responsible for inspecting construction bridge repairs and maintenance operations including taking

field notes, recording attendance, and calculating quantities for estimates. (Exhibit 7, Testimony of Appellant)

18. After approximately 2005, the Appellant worked primarily in the district office as Assistant to Alton Ellis, the District Structures Maintenance Engineer. (CE IV). In that role, the Appellant was responsible for answering calls regarding necessary bridge repairs from the Maintenance Engineer, TOC, the state police, or the travelling public regarding events impacting bridges in the District. He then would determine (either by a personal site visit or by calling another employee to make a site visit) what needed to be done to remedy the problem, and either notify the bridge gang supervisor, Arthur Pike, to get one of the bridge gangs to undertake the repair, or, if it was a more complicated problem, determine that a special contract would need to be developed so that the job could be put out to bid. He would then put the contract documents together so that the job could be bid upon. (Exhibit 7 and Testimony of Appellant)
19. In that capacity, the Appellant functionally supervises (assigns work to) the two bridge gangs which are comprised of approximately five employees each. (Exhibit 7)
20. Recently, the Structures Maintenance Unit has expanded significantly with three new personnel and a new reporting structure. Instead of falling within the maintenance section, it has been merged with the bridge inspection unit as the “Bridge Engineering Group”. (Exhibit 17)
21. The Appellant is responsible for “showing the ropes” to the new hires, two of whom hold higher titles than him. (Testimony of Appellant)

22. The Appellant now has increased responsibility for writing contracts for bridge repair work. While this duty was always a significant portion of his work, it has occupied an ever-increasing percentage of his time and at present is a primary duty. (Exhibits 11, 12, 14 and Testimony of Cohen)

CONCLUSION

G.L. c. 30, § 49 states:

“Any manager of employee of the commonwealth objection to any provision of the classification affecting his office or position may appeal in writing to the personnel administrator and shall be entitled to a hearing upon such appeal. Any manager of employee or group of employees further aggrieved after appeal to the personnel administrator may appeal to the Civil Service Commission. Said Commission shall hear all appeals as if said appeals were originally entered before it.”

After careful review of the testimony and documentation presented in this appeal, the Appellant has shown by a preponderance of the evidence that he performs a majority of the duties of a General Construction Inspector II more than 50% of the time.

While the Appellant performs one or two of the duties common to both levels within that job series, he clearly is performing the level-distinguishing duties of a GCI II for a substantial majority of his time working as Assistant to the Structures Maintenance Engineer. For example, the Appellant coordinated the emergency bridge repair program for the District Structures Maintenance Engineer by troubleshooting problems and either assigning work to two bridge gangs or writing proposals for contractors to perform the necessary repair work.

The primary function of the Appellant’s position is to identify and evaluate bridge maintenance problems in the field and recommend corrective action including writing contracts for bridge repairs. Such contracts would include drafting the plans, designs,

specifications and cost estimates for these jobs. This duty is wholly encompassed within the position of the GCI II as stated in duty #5 of the list of functions that would be performed exclusively by one in that title. According to his Audit Interview Guide, the Appellant performs these duties approximately 65% of the time (duties # 1 & 2). He is also responsible for the financial tracking of contracts and recommending the acceptance of completed construction projects as noted by the Reviewer, Don Petty in his FY 2008 EPRS. There he states that the Appellant “was instrumental in clearing a back-log of maintenance contracts needing final submissions.” This appears as duty #3 in the list of functions which would only be performed by a GCI II.

While both the GCI I and GCI II perform inspections of construction operations, only a GCI II inspects “structural steel placement, excavation and drainage, traffic lines, signs, controls, pavement and lighting...” This is exactly the type of work involved in the Structures Maintenance section. As such, the Appellant appears to perform few, if any, or the duties of the General Construction Inspector I. Rather, the evidence overwhelmingly shows that almost all of his duties as Assistant to the Structures Maintenance Engineer fall exclusively under the title of General Construction Inspector II.

While the Appellant does not have numerous direct reports to supervise, he has substantial indirect, functional and program supervisory responsibilities. He provided many examples of his duties involving scheduling work and issuing program directives. Although he is not in a direct supervisory role, he does appear to have the functional and program supervision duties expected by a first-level supervisory position in the title.

For all of the above reasons, the appeal under Docket No. C-07-268 is hereby *allowed*.

The Appellant is to be reclassified to the position of General Construction Inspector II.

retroactive to the date of the filing of his appeal to the Appointing Authority.

Christopher C. Bowman, Chairman

By a vote of the Civil Service Commission (Bowman, Chairman, Henderson, Stein and Taylor, Commissioners [Marquis – Absent]) on February 11, 2010.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:

Michelle Gates, Esq. (for Appellant)

John L. Casey, Esq. (for Appointing Authority)

John Marra, Esq. (HRD)