

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

DANIEL DRISCOLL,
Appellant
v.

Case No.: C-21-169

**DEPARTMENT OF
CONSERVATION &
RECREATION,**
Respondent

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA) was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission and the parties had thirty days to provide written objections to the Commission. The Appellant submitted objections and the Respondent submitted a response to the Appellant's objections.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

To ensure clarity, the Commission observes that its function in relation to reclassification appeals is relatively narrow. Although entitled to a *de novo* hearing before an adjudicator designated by the Commission, here Daniel Driscoll, as the Appellant, bore the burden of proof to demonstrate by a preponderance of admissible evidence that he has been misclassified. To do so successfully, he needed to show that he performs the duties of the sought-after position (here, Civil Engineer VI) more than fifty percent (50%) of the time that he is working. *Bhandari v. Exec. Office of Admin. and Finance*, 28 MCSR 9, 9 (2015) (finding that "in order to justify a reclassification, an employee must establish that he is performing the duties encompassed within the higher-level position a majority of the time ..."); *Roscoe v. Dep't of Environmental Protection*, 15 MCSR 47 (2002) ("The determining factor of a reclassification is the distribution of time that an individual spends performing the functions of a job classification"). Moreover, the Appellant must specifically demonstrate that he is predominantly performing the "level-distinguishing duties" of a Civil Engineer VI; proffering evidence of duties that do not exclusively fall within the sought-after, higher-graded position is not useful as such evidence will not be factored into a calculation that could lead to reclassification. *See Lannigan v. Dep't. of*

Developmental Services, 30 MCSR 494, 494 (2017). For reasons amply spelled out in the Respondent's submissions, here the Appellant has not met his burden of proof. In short, the record shows that the Appellant simply does not exercise the breadth of responsibility or the scope of authority (especially supervisory) required of the highest level in the Civil Engineer job series.

The decision of the Department of Conservation & Recreation to deny the Appellant's request to be reclassified to Civil Engineer VI is affirmed and the Appellant's appeal under Docket No. C-21-169 is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners) on October 20, 2022.

Civil Service Commission

/s/ Christopher C. Bowman

Christopher C. Bowman

Chair

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Daniel Driscoll (Appellant)

Eric Klein, Esq. (for Respondent)

Edward B. McGrath, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

**DIVISION OF ADMINISTRATIVE
LAW APPEALS**

14 Summer Street – 4th Floor
Malden, MA 02148
781-397-4700
www.mass.gov/dala

DANIEL DRISCOLL,
Appellant

v.

C-21-169
CS-22-0019

DEPARTMENT OF CONSERVATION
AND RECREATION,
Respondent

Appearance for Appellant:

Daniel Driscoll

Appearance for Respondent:

Eric P. Klein, Esq.
Executive Office of Energy and
Environmental Affairs
100 Cambridge Street, 9th Floor
Boston, MA 02114

Administrative Magistrate:

Kenneth Bresler

SUMMARY

The Administrative Magistrate of the Division of Administrative Law Appeals (DALA) recommends that the Civil Service Commission deny the Appellant's appeal.

RECOMMENDED DECISION OF DALA MAGISTRATE

On September 10, 2021, Mr. Driscoll timely appealed to the Civil Service Commission (Commission) the Department of Conservation and Recreation's denial of his request to be reclassified from a Regional Planner V to Civil Engineer VI, and the Human Resources

Division's affirmance of the denial. (App. Ex., p. 48) I held a full hearing in person at the Commission, One Ashburton Place, Room 503, Boston on April 7, 2022, with two witnesses testifying remotely.¹ The hearing was digitally recorded.² The parties submitted post-hearing briefs.

FINDINGS OF FACT:

I admitted 13 exhibits: Appellant Exhibits 1-9 (A1 – A9) and Respondent Exhibits 1-4 (R1 – R4). Based on the exhibits and the testimony of the following witnesses:

Called by the Appellant:

- Daniel Driscoll, Appellant;
- Ruth Helfeld, Director of Landscape Architecture, Department of Conservation and Recreation (DCR)³
- Mike Galvin, union representative of the Massachusetts Organization of State Engineers and Scientists (MOSES)
- Stella Lansing, DCR
- Paul Jahnige, DCR

Called by the Respondent:

- Jeff Parenti, Deputy Chief Engineer, DCR; and
- Jason Santos, Director of Transportation, DCR

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

³ Her title, as with many witnesses, is not in evidence.

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. On October 1, 2019, Mr. Driscoll worked at the Department of Conservation and Recreation (DCR) in its Division of Planning and Engineering, Bureau of Design and Project Management. He was Director of Recreation Facilities Planning and Design. (App. Ex. 2, p. 18)

2. Mr. Driscoll supervised six employees directly and an additional three employees indirectly. (App. Ex. 2, pp. 35-36)

3. On October 1, 2019, Mr. Driscoll asked DCR to be reallocated from Regional Planner V to Civil Engineer VI. (App. Ex. 2, p. 18)

4. When asked to describe the general basis of his appeal, Mr. Driscoll wrote:

During my tenure at DCR my supervisory roles and responsibilities (e.g., now have 9 people under my supervision/management in my office), the extent and complexity of project management I provide, my external responsibilities, and my contact with senior management, business leaders, consultants and elected officials have all increased in volume and complexity.

(App. Ex. 2, p. 18)

5. When asked whether his job had changed significantly, Mr. Driscoll wrote:

At DCR in 2004 I was put into my current RP V [Regional Planner V] position with no supervisory responsibilities outside of the consultant teams I managed as part of my project management responsibility. In 2006 I was asked by Joe Orfant to become Director of Recreation Facilities Planning & Design and accept supervisory responsibility for 7 DCR employees with oversight responsibility for all seven staff members projects. I was told that the “DCR would figure out a way to compensate me for this new level of responsibility”, and to date (13 years later) this has not happened.⁴ Currently I am supervising 9 DCR employees with an array of extensive and complex projects. Included under my supervision are all

⁴ Mr. Driscoll did not pursue this issue in the hearing or his post-hearing brief. Thus, I do not discuss it further.

the DCR playgrounds, all DCR soft surface and hard surface trails, all DCR funded master plans, many complex design projects with extensive engineering components, and the entire DCR Landscape Architecture section. Please see the enclosed spreadsheet of current active projects in DCR's Recreation Facilities Planning and Design Office that I am responsible for.⁵

In addition to this intensive supervisory role change, I also began managing directly numerous projects with far more complex engineering components. Such projects include the Cape Cod Rail Trail with several multi-million-dollar bridges; the Blackstone Greenway with nine bridges, a tunnel, and a major seven span viaduct; the Charles River and Neponset River Greenways with major bridge and walkway components; and the Mystic River Reservation with a proposed 780-foot span pedestrian and bike bridge. Most of these projects are still on-going.

My job also had a significant expansion into parkway engineering, as I was acknowledged as the agency expert on providing scopes and design consultation for parkway cross-section analysis and marking plans to provide safe pedestrian and bike facilities. I regularly meet with DCR Chief Engineer to discuss parkway projects and provide technical guidance and assistance. I have written several complicated civil engineering scopes and manage the resulting projects including: design for full reconstruction of Hammond Pond Parkway; the Charles River Basin Connectivity Study; design for Memorial Drive Phase 3 (with Rick Corsi); design for the Mass Central Rail Trail Corridor; design for the Blackstone River Greenway (featuring reconstruction of 7 bridges and a tunnel); and the scope for the DCR Parkway Study (most extensive data collection and study on DCR parkways ever undertaken). The consultant teams I presently manage almost always include engineers on the team or are led by engineers due to the technical nature of the work I am managing for the DCR.

Please see attached Scope of Work examples that I have prepared for the DCR, and if complete the resulting documents/reports.⁶

Finally, I have an expanded role in acting as DCR liaison on many DOT projects across the Commonwealth. I meet twice a month with DOT planners and engineers to strategize and plan an array of very complex projects, most of which have civil engineering elements.

(App. Ex. 2, p. 30) (some bolding has been unbolded)

6. In March 2020, the Division of Planning and Engineering was reorganized and became the Division of Design and Engineering. (Driscoll and Parenti testimony)

⁵ Mr. Driscoll identified App. Ex. 5, pp. 88-93 as this spreadsheet.

⁶ Mr. Driscoll identified App. Ex. 8, pp. 138-89 as these scope of work examples.

7. In March 2020, while his application for classification to Civil Engineering VI was pending, Mr. Driscoll was transferred to the Bureau of Transportation Infrastructure and Construction. His new title became Director of Green Transportation. (Driscoll testimony)

8. Driscoll no longer had employees reporting to him. (Driscoll testimony)

9. After Mr. Driscoll was transferred, his former colleagues continued to confer with him to get the benefit of his expertise and institutional knowledge of ongoing projects. (Driscoll, Helfeld, and Jahnige testimony)

10. MOSES, the union that Mr. Driscoll belonged to, was concerned that this transfer was punitive. (Galvin testimony)⁷

11. DCR's Director of Human Resources told Mr. Driscoll that the reorganization and transfer would not affect his pending request for reclassification. (Driscoll testimony)

12. On June 8, 2021, the Human Resources office of the Executive Office of Energy and Environmental Affairs (EEA) denied Mr. Driscoll's request to be reallocated from a Regional Planner V to Civil Engineer VI. (App. Ex. 3, p. 44)

13. The June 8, 2021 Non-Management Appeal Audit Report Form indicated that one reason for the denial was that Mr. Driscoll had not provided enough evidence for his request. The form stated:

Dan has taken on many high visibility projects for DCR, but as Director of DCR's Office of Recreational Planning and Design,⁸ his appeal and desk audit *lacks the evidence* to support his appeal to the Civil Engineer VI level. This level is reserved for "Section Head" with years of experience supervising many professionals and administrative and finance responsibilities. The org

⁷ The possibility that DCR intended the transfer to punish Mr. Driscoll went further unexplored in testimony. Mr. Driscoll did not establish that the transfer was punitive or, if it were punitive, the implications. Thus, I do not discuss it further as an issue.

⁸ That is, Mr. Driscoll's request in October 2019 to be classified as a Civil Engineer VI was denied in June 2021 based on his work as Director of the Office of Recreational Planning and Design, which he left in March 2020 to become Director of Green Transportation.

[organizational] chart indicates that his peers were of the V level[,] and documentation[,] such as recent EPRSs [Employee Performance Review System forms], and Supervisor comments *were not submitted*. As he is currently functioning as the only Regional Planner among Civil Engineer Vs, we are open to re-classifying him as a CE V to allow career growth and advancement opportunities.

(App. Ex. 3, p. 44) (emphasis added)

14. In an email of the same date, apparently accompanying the Non-Management Appeal Audit Report Form, the Human Resources office added that Mr. Driscoll's duties did "not warrant a reallocation of your position and that your position is properly classified as a level V." It advised him that he could appeal the decision to the Human Resources Division (HRD). (App. Ex. 3, p. 45)

15. HRD received Mr. Driscoll's classification appeal on June 9, 2021 and denied it on August 20, 2021, stating, "We concur with the agency's recommendation that [your] duties...are more appropriately classified as a Civil Engineer V."⁹ HRD advised Mr. Driscoll that he could appeal its decision to the Commission. (App. Ex. 3, p. 47)

16. On September 10, 2021, Mr. Driscoll timely appealed to the Commission. (App. Ex., p. 48)

17. On October 26, 2021, Commission Chairman Christopher Bowman held a remote pre-hearing conference in this appeal. (App. Ex. 3, p. 51)

18. On October 28, 2021, Chairman Bowman ordered DCR to complete an updated review of Mr. Driscoll's reclassification based on his role of Director of Green Transportation. (App. Ex. 3, p. 51-52).

⁹ The parties did not raise, at the hearing or in their briefs, why Mr. Driscoll did not follow through on the suggestions of both the Human Resources office of EEA and HRD that he become a Civil Engineer V. If the reason is in the record, I did not see it.

19. On January 18, 2022, the Human Resources office of EEA again denied Mr. Driscoll's request to be reallocated from a Regional Planner V to Civil Engineer VI. (App. Ex. 3, p.53)

20. The January 18, 2022 Non-Management Appeal Audit Report Form again indicated that one reason for the denial was that Mr. Driscoll had not provided enough evidence for his request. The form stated:

Our interview with Mr. Driscoll regarding his current work as Director of Green Transportation and the job specifications for a Civil Engineer VI confirmed that he is not being asked to perform work duties that constitute a Civil Engineer VI level. Additionally, he does not meet the MERs [minimum entry requirements] of the classification and he reports to a Civil Engineer VI. Mr. Driscoll *did not submit an updated Form 30 [job description] or EPRS* to support his responsibilities and performance expectations. His supervisor provided comments specifying that Mr. Driscoll is not expected to perform duties of a CE VI.

(App. Ex. 3, p. 53) (emphasis added) for his response about no EPRS or Form 30, see pp. 55 56

21. The classification specification for the regional planner series, Regional Planner I through V, includes this summary:

Incumbents of positions in this series gather and analyze data and develop plans for the utilization of land and physical facilities; confer with local, state and federal government authorities, civic leaders and others; prepare reports; respond to inquiries; and perform related work as required.

The basic purpose of this work is to prepare plans for the use of land and physical facilities, water and other natural resources, and plans for the implementation and coordination of environmental protection programs.

(Resp. Ex. 1)

22. The job specification for regional planner includes as "examples of duties common to all levels in [the] series" the following:

1. Gathers data to be used in preparing plans, programs and guidelines for the use of land, water resources, buildings or other physical facilities.

2. Gathers data and performs research to be used in the preparation of plans, programs and guidelines for the prevention and remediation of environmental hazards to the air, land and water.

3. Confers with local, state and federal government agencies and others to gather data and exchange information.

4. Provides information for the preparation of reports concerning planning studies and recommendations.

5. Responds to inquiries from agency staff and others to provide information concerning assigned agency programs.

6. Performs related duties such as attending conferences, seminars and meetings; preparing memoranda and maintaining records.

(Resp. Ex. 1)

23. Regional Planner I is the entry-level job in the regional planning series. The description for a Regional Planner II lists the duties that “[i]ncumbents...at this level or higher” perform. The description for Regional Planner III lists the duties for incumbents at that level or higher, and so on. Thus, a Regional Planner V performs all the duties listed for Regional Planner II, III, IV, and V. The classification specification also states the supervision that Regional Planners I through V receive and exercise, as well as their necessary and additional qualifications. (Resp. Ex. 1)

24. The classification specification for the civil engineer series, Civil Engineer I through VI, includes this summary:

Incumbents of positions in this series prepare or review plans, designs, specifications and cost estimates for engineering projects; prepare and/or review reports, studies and analytical data; perform calculations relating to engineering problems; perform engineering surveys; inspect construction and/or maintenance work; and perform related work as required.

The basic purpose of this work is to perform professional engineering duties in such areas as highways, bridges, buildings and facilities all in accordance with sound engineering principles, applicable laws, regulations and standards.

(Resp. Ex. 2)

25. The job specification for civil engineer includes as “examples of duties common to all levels in [the] series” the following:

1. Prepares and/or reviews plans, designs, specifications, and cost estimates for elements of engineering projects such as the construction or maintenance of highways, bridges or facilities.
2. Provides engineering data for the preparation and review of engineering or environmental reports and studies.
3. Performs calculations such as those related to survey traverses, traffic forecasting, soil capacity, groundwater flow, and quantity of materials by using calculators, computers and other instruments.
4. Writes memoranda, letters and technical or general reports to supervisors concerning the status of engineering projects or problems.
5. Analyzes changes in scope of work during design and/or construction of projects to recommend corrective action.
6. Conducts field investigations such as those needed to gather information needed to resolve construction, maintenance, environmental or traffic problems.
7. Recommends modifications to plans, specifications, and engineering agreements for elements of engineering projects.
8. Reviews applications for licenses or permits for the transportation of materials and for the construction of projects...to make recommendations to supervisors for approval.
9. Approves construction and service contract payment estimates and/or invoices for materials, equipment and supplies.
10. Inspects construction operations, such as drainage, steel placement, paving or concrete to ensure that work is being performed according to specifications.
11. Inspects maintenance work, such as highway landscaping, repaving operations, and snow and ice removal.

12. Acts as resident engineer on projects, such as intersection reconstruction and traffic signal installation.

13. Performs engineering surveys, including the operation of transits, levels and other surveying instruments.

14. Acts as Chief of Party in performing surveys for taking detail or laying out construction projects.

15. Performs related duties, such as collecting, compiling and correlating engineering and environmental data; reading manufacturers' publications and meeting with manufacturers' representatives to keep abreast of latest technical advances, new products, product prices, safety hazards and specifications; maintaining records; providing information on such matters as department procedures and applicable standards; operating technical equipment and devices and attending meetings and conferences.

(Resp. Ex. 2)

26. Civil Engineer I is the entry-level job in the civil engineering series. The description for a Civil Engineer II lists the duties that “[i]ncumbents...at this level or higher” perform. The description for Civil Engineer III lists the duties for incumbents at that level or higher, and so on. Thus, a Civil Engineer VI performs all the duties listed for Civil Engineer II, III, IV, V, and VI. The classification specification also states the supervision that Civil Engineers I through VI receive and exercise, as well as various qualifications. (Resp. Ex. 2)

27. A Civil Engineer VI must

[s]upervise the operations of a major unit of a department, such as construction, highway or bridge design, maintenance, environmental, traffic, state aid, or specifications.

(Resp. Ex. 2, p. 5)

28. A Civil Engineer VI must

exercise direct supervision (i.e. not through an intermediate supervisor) over, assign work to, and review the performance of 6-15 professional personnel; and exercise indirect supervision (i.e. through an intermediate level supervisor) over 6-15 professional and/or technical personnel.

(Resp. Ex. 2, p. 7)

29. Mr. Driscoll supervises no employees, although DCR has budgeted a Regional Planner IV for his section and DCR anticipates hiring a second person for Mr. Driscoll to supervise. (Parenti testimony)

Legal Standard

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on “[b]asic merit principles.” Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259, citing Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. 300, 304 (1997). “Basic merit principles” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration” and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, section 1.

Analysis

During the hearing, I found that much of the testimony that both sides presented was meandering. I found it meandering enough that I issued an email order to the parties that included these instructions:

8. In your briefs, please discuss the significance of Mr. Driscoll’s change in title to Director of Green Transportation....

....

10. In your briefs, please cite to witness testimony by witness name, and hour and minute on the recording. If you do not, I cannot guarantee that I will search the four-hour recording for the relevant testimony.

11. In your briefs, for all factual assertions, please cite to witness testimony or an exhibit and page number. If you do not, I cannot guarantee that I will credit the assertion.

I have not issued such an order, or felt the need to, in any previous Civil Service Commission case. Unfortunately, neither party fully complied with these instructions.

Regarding instruction #8, DCR did not discuss this issue in its brief. In his brief, Mr. Driscoll mentioned it in three paragraphs (Pet. Br. 3, 8, 18) and alluded to it in a fourth. (Pet. Br. 15) He did not, however, discuss the *significance*.

Regarding instruction #11, DCR did not fully comply with it. (*E.g.*, Resp. Br. 1-2, 6-7, 8). Nor did Mr. Driscoll. (*E.g.*, App. Br. 2-4, 16-18).

These lapses made it hard to assess both parties' arguments in their post-hearing briefs, arguments that I read and reread, parsed and reparsed. Not being able to locate the sources of factual allegations that were the basis of some legal arguments, I do not address them.

Mr. Driscoll also hindered his case by not using the evidentiary hearing to present facts to support his reclassification from Regional Planner V to Civil Engineer VI as much as to present accolades and superlatives (“major,” “most extensive”) about his achievements. The Non-Management Appeal Audit Report Forms of both June 8, 2021 and January 18, 2022 indicated that one reason for denying reclassification was that Mr. Driscoll had not provided enough evidence for his request. (App. Ex. 3, pp. 44, 53) Mr. Driscoll did not rectify that shortcoming in his appeal to the Commission.

Mr. Driscoll succeeded in proving that he is an experienced, knowledgeable, accomplished, dedicated, and passionate public servant, who inspires loyalty and respect in others. (App. Ex. 6, Driscoll testimony, Helfeld testimony) However, that was not the issue in this appeal or the standard to decide whether Mr. Driscoll is entitled to classification as a Civil Engineer VI. Mr. Driscoll did not succeed in proving by a preponderance of the evidence, *James*

P. Massenburg, Jr. v. MassDOT, C-20-099 (CSC 2022), that he is entitled to be reclassified as Civil Engineer VI.

One prerequisite for Mr. Driscoll to be reclassified as a Civil Engineer VI is that he directly supervise 6 to 15 professional employees and indirectly supervise an additional 6 to 15 professional and/or technical personnel. (Resp. Ex. 2, p. 7) However, Mr. Driscoll does not meet this prerequisite; he supervises no employees. (Even in his previous role as Director of Recreation Facilities Planning and Design, his role when he first applied for reclassification, he did not meet this prerequisite. Although he supervised six employees directly, he supervised only three employees indirectly. (App. Ex. 2, pp. 35-36))

Another prerequisite for Mr. Driscoll to be reclassified as a Civil Engineer VI is that he

[s]upervise the operations of a major unit of a department, such as construction, highway or bridge design, maintenance, environmental, traffic, state aid, or specifications.

(Resp. Ex. 2, p. 5) Mr. Driscoll did not prove that he supervised the operations of a major unit of a department. *Id.*

Mr. Driscoll does not meet the prerequisites of a Civil Engineer VI. Thus, he is not entitled to reclassification as a Civil Engineer VI.

Recommendation of DALA Magistrate

The Civil Service Commission should **deny** the Appellant's appeal.

Kenneth Bresler
Administrative Magistrate

Date:

Notice:
Daniel Driscoll (for Appellant)
Eric P. Klein, Esq. (for Respondent)