

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

Decision mailed: 7/26/13
Civil Service Commission

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

PAUL FERREIRA,
Appellant

v.

**DEPARTMENT OF
CONSERVATION AND
RECREATION,**
Respondent

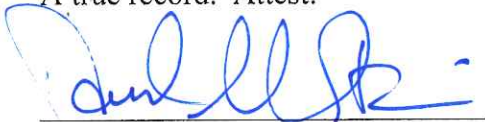
Case No.: C-12-218

DECISION

The Civil Service Commission (Commission) voted at an executive session on July 25, 2013 to acknowledge receipt of the Recommended Decision of the Administrative Law Magistrate dated June 4, 2013. After careful review and consideration, the Commission voted to adopt the findings of fact and the Recommended Decision of the Magistrate therein. A copy of the Magistrate's Recommended Decision is enclosed herewith. The Appellant's appeal is hereby *denied*.

By vote of the Civil Service Commission (Ittleman, Marquis, McDowell and Stein, Commissioners [Bowman, Chairman – Absent]) on July 25, 2013.

A true record. Attest.



Paul M. Stein
Commissioner

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)(l), 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.

Notice to:

Paul A. Ferreira (Appellant)
Frank Hartig, Esq. (for Respondent)
John Marra, Esq. (HRD)
Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

ONE CONGRESS STREET, 11TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

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June 4, 2013

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

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CIVIL SERVICE COMMISSION

Re: Paul Ferreira v. Department of Conservation and Recreation
DALA Docket No. CS-12-511
CSC Docket No. C-12-218

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,

Richard C. Heidlage
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Paul A. Ferreira
Frank Hartig, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Paul A. Ferreira,
Petitioner

v.

Docket No. C-12-218
DALA No. CS-12-511

Department of Conservation and Recreation,
Respondent

Appearance for Petitioner:

Paul A. Ferreira, *pro se*
194 Cranberry Road
Carver, MA 02366

Appearance for Respondent:

Frank Hartig, Esq.
Assistant General Counsel
Department of Conservation and Recreation
251 Causeway Street
Suite 900
Boston, MA 02114

Administrative Magistrate:

James Rooney, Esq.

Summary

The decision of the Department of Conservation and Recreation denying an employee's request for reclassification to a new position in a division of the agency should be affirmed. The employee is seeking a permanent position through the classification appeal process rather than through the standard hiring process.

RECOMMENDED DECISION

Paul A. Ferreira appealed timely, under M.G.L. c. 30, § 49, the May 24, 2012 decision of the Human Resources Division sustaining the Department of Conservation and Recreation's denial of his request for reclassification from the position of Construction and Maintenance Foreman to Institution Maintenance Foreman. I held a

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hearing on September 14, 2012 at the office of the Division of Administrative Law Appeals, One Congress Street, Boston, Massachusetts.

I admitted seventeen documents into evidence, thirteen offered by the Department of Conservation and Recreation (1 through 13) and four offered by Mr. Ferreira (14-17) Mr. Ferreira testified on his own behalf. DCR called one witness, Harry Pierre-Mike, director of workforce management. I made a digital recording of the hearing.

Findings of Fact

Based on the testimony and evidence presented and reasonable inferences drawn from them, I make the following findings of fact:

1. The Department of Conservation and Recreation (DCR) was formed through the merger of two state agencies. (Pierre-Mike testimony.)¹
2. DCR's two predecessor agencies operated in different geographic regions, had different internal organizations, and used different job descriptions. (Pierre-Mike testimony.)
3. On May 11, 2001, Paul Ferreira, who was a Construction and Maintenance Foreman in DCR's Division of State Parks, applied for reclassification as an Institution Maintenance Foreman. (Ex. 5.)
4. At that time, an Institution Maintenance Foreman position existed in DCR's Division of Urban Parks, but not in its Division of State Parks, where Mr. Ferreira worked. The Institution Maintenance Foreman in the Division of Urban Parks

¹ In 2003, the Massachusetts Department of Environmental Management merged with the Metropolitan District Commission. The former MDC became the Division of Urban Parks within DCR, while the former Department of Environmental Management became the Division of State Parks. This background information was mentioned by DCR's counsel in his opening. Although it appears nowhere else in the record, it is uncontroverted and is a matter of public record.

supervised a Construction and Maintenance Foreman. The four regions of the Division of State Parks each had a Construction and Maintenance Foreman with no Institution Maintenance Foreman or equivalent superior above them. (Ex. 5; Pierre-Mike testimony.)

5. The responsibilities of a Construction and Maintenance Foreman are to:

supervise and participate in the design, construction, fabrication, installation, repair and maintenance of sites, projects and structures such as power and telephone lines, radio and microwave transmission towers, forest fire observation towers, etc. and the installation and maintenance of weather recording and monitoring instruments and antennae.

The basic purpose of this work is to supervise unique construction and maintenance projects.

(Ex. 8.) This classification specification was last revised in September 1987. (Ex. 8.)

6. The responsibilities of an Institution Maintenance Foreman are to:

oversee and coordinate...the maintenance and repair [of] buildings and related structures; determine the need for repair or maintenance of buildings, related structures and/or building utility systems; inspect work of contractors; prepare work progress, cost reports, etc.; [and] arrange for the acquisition of supplies....

The basic purpose of this work is to monitor the maintenance and repair of buildings and related structures at state institutions.

(Ex. 7.) This classification specification was last revised in June 1987. (Ex. 8.) DCR's job specifications for Construction and Maintenance Foreman and for Institution Maintenance Foreman do not reflect all the current duties of either position. (Pierre-Mike testimony.)

7. In his reclassification request, Mr. Ferreira stated that he supervised and scheduled a Mobile Repair Crew, a Regional Mechanic, and nine permanent staff members plus seasonal staff, as assigned. (Ex. 1.)

8. On September 29, 2011, DCR denied Mr. Ferreira's request because, based on its appeal audit of his position, his duties "do not warrant the reallocation" of his position, and that he was "properly classified" in his current position. (Ex. 3.)

9. In the appeal audit, DCR stated that Mr. Ferreira, as a Construction and Maintenance Foreman, "supervises, coordinates and participates in facility maintenance, associated recreational park services, and construction activities" in the region, "inspects and determines repair needs, maintains various logs and weekly time sheets for staff and enters service requests" in the Facility Administration Management Information System (FAMIS), "and coordinates small projects requiring contracted services." (Ex. 5.)

The audit determined that "Mr. Ferreira does not perform the duties and responsibilities associated with the level of Institution Maintenance Foreman classification." A person with that classification "has Division wide responsibility within Urban Parks." Furthermore, a person with that classification "reports to the Director of the Mobile Unit . . . oversees a numerous wide range of staff, assists in developing policies and procedures," and more specifically, assists "to a great extent in long-range budgetary and procurement planning and forecasting and making recommendations for maintenance staffing, etc." (Ex. 5.)

DCR concluded in the audit that Mr. Ferreira's current classification as a Construction and Maintenance Foreman "is appropriate . . . for those employees who supervise a Regional Mobile Maintenance Unit." Furthermore, it is consistent with his assigned duties and responsibilities, comparable with other employees with the same title, and "a proper fit within the current organizational structure." (Ex. 5.)

10. On October 5, 2011, Mr. Ferreira appealed DCR's decision to the state Human Resources Division (HRD). (Ex. 4.)

11. On May 24, 2012, HRD denied the appeal and sustained DCR's decision. (Ex. 2.)

12. On June 18, 2012, after an agency reorganization, DCR temporarily promoted Mr. Ferreira to an "out of title position" status as an Institution Maintenance Foreman. (Ex. 10.) DCR redrew its regional boundaries so that every region would have an Institution Maintenance Foreman. The Southeast Region, where Mr. Ferreira worked, became the South Region and included more urban swimming pools. (Pierre-Mike testimony.)

12. As of the September 14, 2012 DALA hearing, Mr. Ferreira remained in the position of Institution Maintenance Foreman. DCR was still weighing applications before filling the job permanently. (Pierre-Mike testimony.) Mr. Ferreira has applied for the position. (Ferreira testimony.)

Discussion

The nature of this reclassification appeal has changed since Mr. Ferreira filed a reclassification request on May 11, 2011. When Mr. Ferreira first sought to be reclassified, the position of Institution Maintenance Foreman did not exist within the Division of State Parks.

If a state employee asks to be reclassified to a position that does not exist in his agency, but it exists in other agencies or in a different branch of the same agency, it would not be within DALA's jurisdiction to recommend that the employee be so reclassified. That would entail not merely shifting an employee within established

positions, but creating new a new title and adding it to the agency's organization chart – and thereby potentially disrupting the agency's structure.

Mr. Ferreira's division had no position as Institution Maintenance Foreman at the time he asked to be reclassified as one, and thus no available position into which he might theoretically be reclassified. Hence, were I to consider only the situation as it existed then, I could not grant his reclassification request.

But thereafter, Mr. Ferreira's division established a permanent Institution Maintenance Foreman position. He is filling the position temporarily until the hiring process for a permanent appointment is completed.

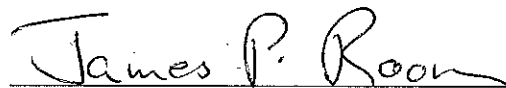
This makes the analysis slightly more complicated. The standard analysis in a reclassification case focuses on whether an employee performs the majority of the duties of a requested position more than 50% of the time. *See Bowen v. Dept. Of Conservation and Recreation*, Docket No. C11-177 and DALA No. CS-11-391, 24 MCSR 603, 604 (Mass. Div. of Admin. Law App., Oct. 20, 2011; adopted by Civil. Serv. Comm., Dec. 16, 2011). Whether Mr. Ferreira was performing more than 50% of the duties of an Institution Maintenance Foreman when that position did not exist within his division would be difficult to determine, particularly when one of the duties of an Institution Maintenance Foreman was to supervise a Construction and Maintenance Foreman. But now that DCR has established an Institution Maintenance Foreman position in Mr. Ferreira's division and he is filling that position temporarily, it is certain that he now spends more than 50% of his time in that role.

As it stands then, Mr. Ferreira is no longer asking to be reclassified to a position that does not exist in his division; it now exists, albeit as a temporary position

for him. Rather, he is, in effect, asking to be appointed to a new permanent position through this classification appeal process, rather than through the standard hiring process. This requested reclassification is also not within my power to recommend. I cannot compel his division to simultaneously create this position on a permanent basis and assign it to him. In another case involving a change by DCR in its job classification scheme, when a DCR employee asked to be reclassified to a position the agency was phasing out, the Civil Service Commission denied reclassification, in part, because it would disrupt the staffing structure of the agency. *Simmons v. Dept. of Conservation and Recreation*, Docket No. C-11-177, 24 MCSR 584, 587 (Nov. 18, 2011). It would be equally disruptive for an employee to claim a right to be hired to a newly added position without going through the hiring process. Mr. Ferreira must apply for it and go through the hiring process for this new position.

I recommend, therefore, that the decision of the Human Resources Division sustaining DCR's denial of Paul A. Ferreira's request to be reclassified as an Institution Maintenance Foreman be affirmed.

DIVISION OF ADMINISTRATIVE LAW APPEALS



James P. Rooney
First Administrative Magistrate

Dated: June 4, 2013