

Decision mailed: 8/22/08
Civil Service Commission
OB

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

JOSEPH KOWALSKI,
Appellant

v.

**DEPARTMENT OF CONSERVATION
AND RECREATION,**
Respondent

Case No. C-07-206

Appellant's Attorney:

Paul K. Donohue, Atty.
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Boston, MA 02114

Respondent's Attorney

Francis Hartig, Atty.
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Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 30, § 49, the Appellant, Joseph Kowalski, (hereinafter "Appellant" or "Kowalski"), is appealing the November 15, 2006 decision of the Human Resources Division ("HRD") denying his request for reclassification from the position of Natural Resource Specialist to the position of Environmental Analyst III within the Massachusetts Department of Conservation and Recreation (hereinafter "DCR" or

“Department”). The appeal was timely filed and a hearing was held on November 6, 2007 at the offices of the Civil Service Commission (hereinafter “Commission”). Two (2) tapes were made of the hearing and are held at the Commission office.

FINDINGS OF FACT:

Twenty-four (24) exhibits and a stipulation of facts were entered into evidence at the hearing. Based on the documents submitted into evidence and the testimony of:

For the Appointing Authority:

- Karen Valeri, Personnel Analyst, Department of Conservation and Recreation
- Gail Wilson, Senior Personnel Analyst, Executive Office of Environmental Affairs

For the Appellant:

- Joseph Kowalski, Appellant
- Dominic Pezzuto, Massachusetts Organization of State Engineers and Scientists

I make the following findings of fact:

1. The Appellant has been employed by DCR for approximately twenty-five (25) years.
(Stipulated Fact)
2. Since about October, 2000, the Appellant has been employed and classified as a Natural Resource Specialist, at a pay grade of 21, with the DCR Division of Water Supply Protection.
(Exhibit 10B)
3. The Classification Specification for a Natural Resource Specialist summarizes the position, stating: “incumbents of positions in this series develop and implement natural resources management plans and programs for reservations, forests, wetlands and seashores; formulate recommendations for maintenance and long-range planning; prepare detailed plans and

reports; develop training programs to enhance management of natural resources; and perform related work as required.” (Exhibit 18A, Page 1)

4. On January 26, 2005, the Appellant appealed his classification as a Natural Resource Specialist to the Human Resources Department at DCR, requesting that he be classified as an Environmental Analyst III. (Stipulated Fact)
5. The Classification Specification for an Environmental Analyst III states “incumbents of positions in this series prepare and/or review scientific reports, studies and analytical data of environmental impacts and environmental processes; perform calculations relating to environmental science problems; determine possible impacts on water, soil, air and public health; measure levels of pollution; identify sources of pollution; and perform related work as required.” (Exhibit 19A, Page 1)
6. In his Reclassification request, the Appellant presented certain duties he had performed which he believed were not required of a Natural Resource Specialist. Such duties include:
 - a. Baseline and annual review of over one half of the Department’s Conservation Restriction Easements
 - b. Contract formulation and administration for vegetative enhancements on watersheds, hazardous tree identification and removal, and remedial planting
 - c. Tree arborist duties as the only ‘certified’ arborist in the Department
(Testimony of Appellant)
7. In carrying out the above duties, the Appellant argued he had performed tasks which were assigned to the position of Environmental Analyst III as per its Classification Specification.
(Testimony of Appellant); Specifically:

- a. Determine enforcement actions and corrective measures to be taken when violation of laws, rules, and regulations are discovered (Exhibit 19c, duty 2 of Environmental Analyst III)
 - b. Conduct meetings on environmental issues and their effects and to resolve problems regarding conservation restriction easements (Exhibit 19c, duty 8 of Environmental Analyst III)
 - c. Maintain computer programs to track environmental data as it relates to Conservation Restriction Easement Enforcement (Exhibit 19c, duty 7 of Environmental Analyst III)
 - d. Advise legal staff on environmental matters; particularly as a tree biologist and certified arborist (Exhibit 19c, duty 5 of Environmental Analyst III)
8. Gail Wilson is assigned to review requests for reclassification submitted by employees at DCR. Ms. Wilson met with the Appellant to audit his position on April 3, 2006. (Testimony of Appellant; Testimony of Ms. Wilson)
9. The Classification Specification for an Environmental Analyst III states "Incumbents of positions at this level exercise direct supervision over, assign work to and review the performance of 1-5 technical or professional personnel." (Exhibit 19F)
10. As a result of his interview, Ms. Wilson found that the Appellant "does not supervise anyone" and does not perform the specifications for an Environmental Analyst III at least fifty percent of the time. (Testimony of Ms. Wilson)
11. The position of Environmental Analyst I is the first level supervisory position in the series. The position of Environmental Analyst III is a high level technical position, with broad geographical and administrative responsibilities. The requirement that an Environmental

Analyst III supervise 1-5 Technical Staff may be substituted with very high level technical duties. (Testimony of Valerie)

12. On August 30, 2006, the Human Resources Director of DCR denied the Appellant's request for reclassification, stating that the Appellant was properly classified as a Natural Resource Specialist. (Exhibit 5)

13. On September 6, 2006, the Appellant appealed DCR's decision to HRD. (Stipulated Fact)

14. On November 15, 2006, HRD denied the Appellant's appeal, finding that the title of Natural Resource Specialist covers the duties performed by the Appellant. (Exhibit 3)

15. The Appellant's "Position Description – Form 30" dated May 16, 2007, prepared after his Audit Interview, lists his duties and responsibilities states:

a.) Responsible for the on site/ground inspections of assigned Conservation Restriction Easement Agreements . . . Maintain all administrative records and computer databases to effectively track the environmental data analyzed and evaluated.

b.) Perform environmental analysis as assigned relating to arboriculture/tree biology issues within the Division.

c.) Perform assignments as they relate to tree advocacy and education . . .

d.) Investigate the development of an invasive plant monitoring program across Division lands. . .

e.) Routinely monitor known locations of rare and endangered plant species and perform systematic surveys to document new populations of rare and endangered plants. . .

f.) Other Natural Resource duties as assigned, including assisting with the completion of the 2007-2017 Quabbin Land Management Plan. (Exhibit 22)

16. I find that the duties and activities claimed by the Appellant on his Form 30 dated May 16, 2007, relate to a time period that is subsequent to the time period relevant to his request for reclassification. His supervisor, Dan Clark, who signed the Form 30 on May 16, 2007, had only been the Appellant's supervisor for a month or so. Dan Clark did not testify at this hearing and did not submit any corroborating documentation to support the contents of the Form 30. The Appellant testified here that his duties and activities were substantially different from the duties and activities described in this Form 30. The description, contained in this Form 30, is embellished, exaggerated and tailored to the incumbents of the sought position of Environmental Analyst III. The Appellant admitted that some of the activities were not assigned to him but voluntarily undertaken. The Appellant offered no independent corroboration of these claimed activities. This Form 30 is given little or no weight or probative value. (Exhibits and testimony, Exhibit 22)

17. Classification Specification for Environmental Analyst III provides as part of the job duties:

1. Write the technical specifications and utilize item service cost estimates to develop the budget portion of agreements and grant applications for the assessment and remediation of hazardous waste.
2. Determine enforcement actions and corrective measures to be taken when violation of laws, rules and regulations are discovered.
3. Review and recommend data collection methods for soil, air waste and water sampling.
4. Conduct scientific studies and prepare reports in such areas as meteorology, air pollutant dispersion, contaminant migration, hydrology, hydrogeology and marine ecology.
5. Advise legal staff on environmental matters; prepare scientific data for courtroom testimony.

6. Analyze environmental impact and public health risk assessments associated with the licensing of hazardous waste treatment, storage or transport projects.
7. Develop and maintain computer programs to track environmental data.
8. Conduct meetings and/or conferences with agency staff, contractors and interested parties on environmental issues such as air, water, soil and wetland impacts, public health effects and investigating and resolving problems.
9. Monitor the activities of consultants in identifying and treating environmental pollutants.
10. Recommend operational strategies for dealing with compliance and enforcement in the area of public health and environmental protection.
11. Review and approve health and safety plans for environmental assessment and during remedial construction programs. (Exhibit 19)

18. Personnel Analyst Karen Valeri testified before the Commission that the Appellant's position of Natural Resource Specialist "has a little bit of overlap" with the position of Environmental Analyst III. (Testimony of Valeri)
19. The job titles of Natural Resources Specialist and Environmental Analyst are not in the same HRD job series by specifications. The organizational chart for this Division of DCR shows that positions at the Appellant's level are specialized. The Appellant is the only Natural Resource Specialist at DCR. The Environmental Analyst Series, specifically Environmental Analyst III is a higher level technical position than Natural Resources Specialist. (Testimony of Valeri, Appellant and Exhibit 9)
20. The Appellant testified that approximately two-thirds (66%) of his time was spent in charge of more than half of DCR's Conservation Restriction Easements. (Testimony of Appellant)

21. Approximately one-quarter (25%) of the Appellant's job time is spent on tree biology. He is the only certified Tree Arborist employed by the DCR. The Appellant has testified a few times in court as a "Tree Biologist" for private clients. The Appellant omitted this information regarding court testimony from his resume. The Appellant's duties and activities on the DCR's Conservation Restriction Easements, (66%) and tree biology, (25%) consume (91%) ninety-one per cent of his time, by his own admission. (Testimony of Appellant)
22. The Appellant also testified that his duties on DCR's Conservation Restriction Easements require the determination of environmental enforcement actions, corrective measures, and the conduct of meetings to resolve environmental issues. (Testimony of Appellant)
23. The Appellant's enforcement activities involve the preparation of form letters and recommended enforcement action, which he sends along to his supervisor. The Appellant does not have any direct contact with DCR's Legal Department. (Testimony of Appellant)
24. The Appellant contested the DCR's Form 30, dated August 30, 2006, which was admitted as Exhibit 7. The Appellant testified that Exhibit 7 was not accurate for the period covered by this appeal and that he did not participate in the preparation of that document. The Appellant submitted a Form 30, dated May 16, 2007, signed by the Appellant and Dan Clark, the Appellant's supervisor. Dan Clark held the Position of Environmental Analyst III and had been the Appellant's supervisor since April, 2007. This Form 30 was objected to by DCR on the ground that it was not relevant to the time period of this appeal. This Form 30 was marked as Exhibit 22 with the limitation that its weight and relevancy would be later determined. (Testimony of Appellant, Exhibits 7 & 22)

25. At the time that the Appellant filed his request for reclassification to the title of Environmental Analyst III, there were no open positions in that title, in the DCR's Division of Water Supply Protection/Office of Watershed Mgt. (Testimony of Valerie, Exhibit 9)
26. At the time of this Commission hearing there was a position open in the title of Environmental Analyst III, in that Division. The Appellant's prior supervisor Dan Clark had recently vacated his position as an Environmental Analyst III and the DCR was in the process of filling that position. The hiring process was in its later stages at the time of this hearing. The Appellant did not apply for this vacant position. (Testimony of Valerie, Exhibit 9)

CONCLUSION

Pursuant to G.L. c. 30, §49, the Appellant first filed his appeal with HRD after his request for reclassification to the position of Environmental Analyst III was denied by DCR. §49 reads: "Any...employee of the commonwealth objecting to any provision of the classification affecting his office or position may appeal in writing to the personnel administrator [HRD] and shall be entitled to a hearing upon such appeal. If the administrator finds that the office or position of the person appealing shall warrant a different position allocation...he shall report such recommendation to the budget director and the house and senate committees on ways and means...Any...employee...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 evidence presented in this appeal, the Commission concludes that HRD's denial of the reclassification should be upheld, and the

Appellant should remain at the position classified as a Natural Resource Specialist. The Appellant has not met his burden of proof to demonstrate that he was improperly classified as a Natural Resource Specialist, in that he has not shown he has performed the duties of an Environmental Analyst III more than fifty percent of the time.

The Appellant testified that he spent approximately two-thirds of his time in charge of Conservation Restriction Easements for DCR. He also testified that he is the only certified arborist in the Department and performs special tasks in relation to this role. The Appellant argued these duties are not among those assigned to a Natural Resource Specialist, but are comparable to those of an Environmental Analyst III. Although the Appellant may have performed duties similar to those required of an Environmental Analyst III, he has not taken on the higher technical and administrative responsibilities of an Environmental Analyst III.

The Classification Specification states that an Environmental Analyst III “is the first-level supervisory job” in the Environmental Analyst series. The “supervision exercised” section states in part: “incumbents of positions at this level exercise *direct supervision* (i.e., not through an intermediate level supervisor) over, assign work to, and review the performance of 1-5 technical or professional personnel.” On the other hand, the Classification Specification for the position of Natural Resource Specialist states it “is a professional job” and does not describe any direct supervisory requirements for the position. Under the Natural Resource Specialist’s “supervision exercised” section, it states: “incumbents of positions at this level exercise *functional supervision* (i.e., over certain but not all work activities, or over some or all work activities on a temporary basis) over 1-5 professional and/or skilled trade personnel.”

While the Appellant has shown that he is likely capable of performing the duties of the position of Environmental Analyst III, he has not met the burden of performing the level

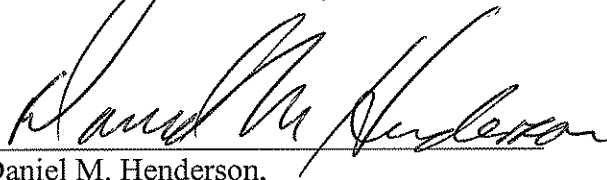
distinguishing requirements necessary to fulfill such position. As described by the Classification Specifications, for one to have the title of Environmental Analyst III, that person is required to supervise and assign work to other personnel. Although the Appellant has performed other duties which may generally fall under the description of duties for an Environmental Analyst III, such duties alone do not qualify him as an Environmental Analyst III. There are supervisory responsibilities required under the position of Environmental Analyst III as presented in its Classification Specification. Further, Ms. Valeri stated that the duties under the position of Natural Resource Specialist have some overlap to those under Environmental Analyst III but the duties performed by the Appellant are at a lower level of technical complexity and administrative responsibility. The Appellant did not supervise any technical staff. A mandated incumbent of the higher position he sought, requires the supervision of 1-5 technical staff.

The DCR's organizational chart shows that the positions at the Appellant's level in his Division, are highly specialized and limited in number. Considering the limitations of DCR's organizational scheme, it would take substantive reasons to implement changes that might destabilize it. In this case, there simply was not an Environmental Analyst III position available within his Division of the DCR, at the time that he filed his reclassification request. However, a position did subsequently become available when the Appellant's own supervisor, Dan Clark vacated his position. The Appellant did not apply for this open position and did not offer an explanation for not applying.

In order for a reclassification to occur, the Appellant must perform the duties listed under the higher position more than fifty (50) percent of the time. This is not the case in the instant matter.

For all of the above reasons, the appeal under Docket No. C-07-206 is hereby *dismissed*.

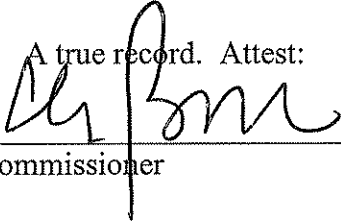
Civil Service Commission,



Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Bowman Chairman, Taylor, Henderson, Marquis, and Stein, Commissioners), on August 21, 2008.

A true record. Attest:



Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. C. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

Paul K. Donohue, Atty.

Francis Hartig, Atty.

John Marra, Atty.