

The Commonwealth of Massachusetts

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place – Room 503
Boston, MA 02108
(617) 727 – 2293

PETER KURT,
Appellant

v.

C-09-428

MASSACHUSETTS HIGHWAY
DEPARTMENT,
Respondent

Attorney for the Appellant:

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Hearing Officer:

Angela C. McConney, Esq.
General Counsel

DECISION

Pursuant to the provisions of G.L. c. 30 §49, the Appellant, Peter Kurt (hereinafter “Appellant”) is appealing the December 3, 2009 decision of the Human Resources Division (hereinafter “HRD”) denying his request for reclassification from the position of Civil Engineer

II (“CE II”) to the position of Civil Engineer III (“CE III”)¹ in the Massachusetts Department of Transportation (hereinafter “MassDOT”) Highway Division. A full hearing was held on Tuesday, March 2, 2010 at the offices of the Civil Service Commission (hereinafter “Commission”). The hearing was digitally recorded. Copies of the hearing were forwarded to the parties, and a copy is retained by the Commission.

The parties submitted post hearing briefs on April 5, 2010.

FINDINGS OF FACT:

Nineteen (19) exhibits were entered into evidence at the hearing. The record was left open in order for the parties to submit two additional exhibits at the request of the Hearing Officer. Those documents were received by the Commission on April 2, 2010, and were entered into the record as Exhibits 20 and 21.

Based on the documents submitted into evidence and the testimony of:

For the Respondent:

- Carol Hebb, Manager VII, MassDOT, Highway Division, State Construction Engineer

For the Appellant:

- Michael Hartnett, Civil Engineer VI, MassDOT, Highway Division, District III Construction Engineer
- Ron Savoy, Civil Engineer IV, MassDOT, Highway Division, District III Finals Engineer
- Peter Kurt, Civil Engineer III, MassDOT, Highway Division, District III Finals Engineer, the Appellant

I make the following findings of fact:

¹ In his original appeal, the Appellant appealed for a reclassification from a CE I to CE III. Exhibit 1. He was reclassified to a CE II. Exhibit 3.

1. The Appellant began his employment as a CE I in the Highway Division of the MassDOT² in December 2004. (Testimony of the Appellant, Exhibit 14)
2. He received a Bachelors Degree in Civil Engineering in his native Turkey, a Masters in International Affairs and Economics degree from the University of Central Oklahoma, and a Masters Degree in Structural Engineering from the University of Massachusetts. (Testimony of the Appellant, Exhibit 14)
3. He also serves as an engineer in the United States Air Force National Guard. (Exhibit 14)
4. Carol Hebb (hereinafter “Hebb”) has been the state’s Construction Engineer for the past five (5) years. She is classified as a Manager VII, and has thirty-three (33) years experience as an engineer. She oversees the state’s construction programs. (Testimony of Hebb)
5. The state is carved into five (5) districts within the Highway Division. The Boston office operates as the centralized headquarters, providing consistent guidance on policies and procedures to all five geographical Districts. (Testimony of Hebb)
6. The Appellant began his career in District II, the Western Massachusetts region, performing field inspections as a CE I. (Testimony of the Appellant, Exhibit 2)
7. The Boston Construction Office operates as a central office and oversees the entire road construction program for the Highway Division. It provides oversight and consistency in all aspects of the construction program, including construction contracts and the performance of contractors. None of the actual construction work is performed by Highway Division

² The Massachusetts Department of Transportation (“MassDOT”) was created on November 1, 2009 as a result of Chapter 25 of the Acts of 2009, commonly referred to as the Transportation Reform Act. MassDOT consists of 4 Divisions; Highway, Rail and Transit, Aeronautics Division, and a Registry of Motor Vehicles Division. The Highway Division is comprised of assets from the former Massachusetts Highway Department, the former Massachusetts Turnpike Authority, the Department of Conservation and Recreation, and the Massachusetts Port Authority. As such, former MassHighway employees became MassDOT – Highway Division employees via operation of law on November 1, 2009. For the purposes of this Decision, the Appellant’s Employer is the Highway Division of MassDOT.

employees, the work is performed by contractors under the state's supervision. (Testimony of Hebb)

8. On April 29, 2007, the Appellant was assigned to the "finals section" of District III, the Worcester region. (Testimony of Appellant, Exhibit 2)
9. The finals section performs the audit function within the Construction Office, reconciling records with work actually performed. (Testimony of Hebb)
10. Although they are physically present in the district offices, finals personnel report to the Boston Construction Office. A district Finals Engineer is responsible for overseeing the finals work in each district, and usually holds the title of CE IV. (Testimony of Hebb)
11. Ron Savoy, CE IV, (hereinafter "Savoy") is the District III Finals Engineer. He has been a district Finals Engineer for fifteen (15) years and is the Appellant's direct supervisor. (Testimony of Savoy)
12. Traditionally, district Finals Engineers do not have permanent full-time assistants, although it is common practice for construction personnel to assist the finals section during the winter months. These construction personnel typically hold titles of Engineering Aide or General Construction Inspector, lower-job grades than the position of CE III. (Testimony of Savoy)
13. The finals section audits the record keeping of field construction personnel: reviewing payments, quantity of materials, and the daily ledger of police personnel. Much of this work comes down to checking the arithmetic of those in the field, be they resident engineers or their assistants. This work is primarily office work, although periodic field visits are conducted. (Testimony of Hebb)

14. None of the districts has a full-time Assistant Finals Engineer, except for District IV - due to its large volume of construction work. That full-time Assistant Finals Engineer is usually a CE II. (Testimony of Hebb)
15. Proposed staffing plans for Assistant District Finals Engineers indicate that they shall be CE IIs. (Exhibit 21, Testimony of Hebb).
16. Active construction projects in District III are usually audited at quarterly levels of completion. (Testimony of Appellant)
17. As a civil engineer assigned to the finals section, the Appellant's duties include performing calculations; including checking the calculations of others, and preparing final cost estimates. (Exhibit 1, Page 2 and Exhibit 2)
18. The Appellant frequently went with his supervisor on field visits with Savoy, although he sometimes he went alone.(Testimony of Savoy)
19. No one directly reports to the Appellant. (Exhibit 10)
20. The Classification Specification for the Civil Engineer series as issued in 1989, states that a CE I is the entry-level professional job in the series; the CE II position is the second-level professional job in the series; and the CE III position is the first-level supervisory job in the series.

EXAMPLES OF DUTIES COMMON TO ALL LEVELS IN SERIES:

- a. Prepares and/or reviews plans, designs, specifications, and cost estimates for elements for elements of engineering projects such as the construction or maintenance of highways, bridges or facilities.
- b. Provides engineering data for the preparation and review of engineering or environmental reports and studies.
- c. 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.
- d. Writes memoranda, letters and technical or general reports to supervisors concerning the status of engineering projects or problems.
- e. Analyzes changes in scope of work during design and/or construction of projects to recommend corrective action.

- f. Conducts field investigations such as those needed to gather information needed to resolves construction, maintenance, environmental or traffic problems.
- g. Recommends modifications to plans, specifications, and engineering agreements for elements of engineering projects.
- h. Reviews applications for licenses or permits for the transportation of materials and for the construction of projects in order to make recommendations to supervisors for approval.
- i. Approves construction and service contract payments estimates and/or invoices for materials, equipment and supplies.
- j. Inspects construction operations, such as drainage, steel placement, paving or concrete to ensure that work is being performed according to specifications.
- k. Inspects maintenance work, such as highway landscaping, repaving operations, and snow and ice removal.
- l. Acts as resident engineer on projects, such as intersection reconstruction and traffic signal installation.
- m. Performs engineering surveys, including the operation of transits, levels and other surveying instruments.
- n. Acts as Chief of Party in performing surveys for taking detail or laying out construction projects.
- o. 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.

DIFFERENCES BETWEEN LEVELS IN SERIES:

Civil Engineer II: Incumbents of positions at this level or higher also:

1. Prepare and /or review plans, specifications and cost estimates for engineering projects, such as intersection upgradings, repaving projects, box culverts and single span bridges.
2. Prepare and/or review engineering or environmental reports and studies.
3. Recommend alternate methods of construction and/or substitution of materials specified to resolve problems as they occur.
4. Determine feasibility of proposed construction through on-site inspection, discussions and review of available data.
5. Conduct field investigations to determine the necessity of repair or reconstruction of roads or structures.
6. Act as resident engineer on projects such as multi-lane intersection reconstruction; traffic signal installation, including control loops and turn signals; two-lane highway construction or reconstruction in a rural setting.
7. Inspect construction operations such as simple span bridges.
8. Act as chief of a survey party in performing surveys of a high order.
9. Supervise maintenance work such as highway landscaping, repairing operations and snow and ice removal
10. Collect and analyze traffic flow data and make speed control studies.

Civil Engineer III: Incumbents of positions at this level or higher also:

1. Prepare and /or review plans, specifications and cost estimates for engineering projects, such as two-lane highway projects in a rural or suburban setting or multi-span bridges of standardized design.

2. Act as resident engineer on construction projects, such as interstate or multi-lane highway projects, including earthwork, drainage, bridge construction or reconstruction, waterworks, electrical or environmental operations.
3. Inspect construction operations such as indeterminate or curved-beam bridges.
4. Act as district or area materials engineer with local supervision of materials inspection.
5. Assist the district or area survey supervisor by assigning and checking the work of several survey parties.
6. Participate in the planning, design and technical review of capital budget building projects.
7. Review the work performed by contractors in the construction, maintenance or site development for small buildings or building-related projects.
8. Prepare state highway layoffs, including calculations and boundary descriptions; check land court petitions, orders of takings and easements and advise the Attorney General when a court appearance is required.
(Exhibit 9)

21. The Appellant indicated on his Interview Guide that he performs the following:

- a. "Review project quantities – 30% of the time;
- b. Check plans and specifications – 30% of the time;
- c. Weekly field visits to the construction project
 - Prepare Excel spreadsheet for resident engineers or assistants – 10%
 - Check records and procedures – 10%
 - Make recommendation for the Project Review Report -10%
- d. Training the field personnel with proper construction procedures – 10% of the time.”
(Exhibit 2)

22. The Appellant further described his duties in his appeal letter to the Appointing Authority

Human Resources Department:

1. "I visit each job site; and I check each item in the contract. Make sure the items are paid correctly according to the plans and specification. If I find any error, I informed the RE to make any necessary changes.
2. If the RE or his/her assistance (sic) does not know how to do it, I will show them how to do the calculation, or I will do it for them.
3. I check each project at the end of the completion before the final estimate. If I am not satisfied of the quantity which was paid by the RE, I will check the quantities from the beginning to the end. Sometimes, I have to contact the Contractor, or Subcontractor to verify the quantities.
4. Sometimes, I create new items which were omitted. Sometimes I delete the items which were over paid (sic) from the estimate in SAM.
5. I have been creating excel calculation sheets for the Resident Engineers to help them reduce their work, and eliminate their mathematical errors. The excel sheets that I have created are not only used by District III Resident Engineers but also other District Engineers as well.
6. I have been giving training to District III Engineers and their assistants to use our excel calculation sheets, and the beginners to show how to do the field measurement and what is expected of them.
7. I have made recommendations to the Final Engineer Director and the Construction Engineer to make changes for the price adjustment's units. This recommendation will be approved shortly.”
(Exhibit 4)

23. On January 13, 2009, the Appellant gave a demonstration on how to use the Excel spreadsheet to construction field personnel in District III. He later gave a demonstration to the field personnel from District V on February 23, 2009. Approximately 60% of the staff attended the trainings. (Testimony of Savoy, Testimony of Appellant, Exhibits 16 and 17)
24. In the spring of 2009, the Appellant was assigned as the resident engineer on a Route 146 project in District III. This was the only construction project he was assigned to. (Testimony of Hartnett)
25. Usually resident engineers assigned to districts oversee multiple ongoing construction projects, and hold the title of CE III. (Testimony of Michael Hartnett)
26. The Appellant's performance evaluations show that he performs excellent work. (Exhibits 11 and 12)
27. The Appellant testified that he has saved the Commonwealth money as a finals engineer, and named five (5) instances of saving the state a total of approximately \$400,000. (Testimony of Appellant)
28. The Appellant filed an Appeal Form with the Massachusetts Highway Department on November 5, 2008, seeking to be reclassified as a CE III. (Exhibit 1)
29. For the basis of his appeal in the Interview Guide, the Appellant stated:
"I am performing and I have the responsibility of a CE III position based (sic) my work duties and also due to the fact that my level of responsibilities has been increased since the time that I have been working in Finals/Construction Section.
I am now responsible for reviewing; making corrections and recommendations for work performed by resident engineers which is of a higher classification than my current classification."
(Exhibit 2)
30. In response to the Basic Purpose of Position in the Interview Guide, the Appellant responded:
"The Basic purpose of my job is to review of the payments to the contractor and to ensure that the

quantities are paid correctly in accordance with Mass Highway Specifications.”
(Exhibit 2)

31. In response to the Job Changes in the Interview Guide, the Appellant responded:

“Change from field inspection to District Finals Section (Since April 29, 2007).

Previously, I was monitoring one construction job according to the Mass Highway Specifications. Now I am reviewing all the construction jobs in District III up to point of the final estimate. This is a major change in my level of responsibility.”
(Exhibit 2)

32. On July 17, 2009, the Appellant received the preliminary recommendation of his appeal from the Respondent, which approved a reclassification to a CE II. (Exhibit 3)

33. The Appellant accepted the CE II offer via email on July 20, 2009. (Exhibit 19)

34. On July 27, 2009 the Appellant appealed the decision to the Appointing Authority. In his appeal letter, he wrote,

“I have been acting as an Assistant Finals Review Engineer for the last 3 years. This job does not really fit the description of either Civil Engineer II or Civil Engineer III positions.”
(Exhibit 4)

35. According to his performance evaluations, the Appellant was evaluated on finals work.
(Exhibits 11 and 12)

36. On August 31, 2009, the Appointing Authority affirmed its denial and affirmed the Appellant’s reclassification to CE II retroactively to November 2, 2008. (Exhibits 5 and 6)

37. The Appellant appealed to the state’s Human Resources Division on September 8, 2009.
(Exhibit 20)

38. HRD denied the Appellant’s appeal on December 3, 2009, finding that his duties were properly classified as a CE II. (Exhibit 7)

39. The Appellant appealed HRD’s denial to the Commission on December 9, 2009. (Exhibit 8)

CONCLUSION

After careful review of the testimony and evidence presented in this appeal, I affirm the decision of HRD denying the Appellant's request to be reclassified as a CE III. I base my conclusion on the documentary evidence and the testimony of the Appellant and other witnesses.

The Appellant has not shown by a preponderance of the evidence that he is performing a majority of the duties of a CE III more than fifty percent of the time. The duties of a CE III are the following: (1) Prepare and /or review plans, specifications and cost estimates for engineering projects, such as two-lane highway projects in a rural or suburban setting or multi-span bridges of standardized design; (2) Act as resident engineer on construction projects, such as interstate or multi-lane highway projects, including earthwork, drainage, bridge construction or reconstruction, waterworks, electrical or environmental operations; (3) Inspect construction operations such as indeterminate or curved-beam bridges; (4) Act as district or area materials engineer with local supervision of materials inspection; (5) Assist the district or area survey supervisor by assigning and checking the work of several survey parties; (6) Participate in the planning, design and technical review of capital budget building projects; (7) Review the work performed by contractors in the construction, maintenance or site development for small buildings or building-related projects; and (8) Prepare state highway layoffs, including calculations and boundary descriptions; check land court petitions, orders of takings and easements and advise the Attorney General when a court appearance is required.

As an Assistant Finals Engineer assigned to the Highway Division's District III office, the Appellant's primary job function is auditing the field records of the resident engineers for completeness and accuracy. It is his duty to check the quantity of materials recorded by a resident engineer and the related calculations that ultimately result in payment to a contractor. In

the event of an error, it is his duty to bring it to the attention of the resident engineer or correct it himself. The Appellant documents these final duties himself in Exhibit 4. It is the Appellant's duty to perform final work, which includes reviewing the work of resident engineers. He documented these duties in great detail in Exhibit 4: "(1) I visit each job site; and I check each item in the contract. Make sure the items are paid correctly according to the plans and specification. If I find any error, I informed the RE to make any necessary changes; (2) If the RE or his/her assistance (sic) does not know how to do it, I will show them how to do the calculation, or I will do it for them; (3) I check each project at the end of the completion before the final estimate. If I am not satisfied of the quantity which was paid by the RE, I will check the quantities from the beginning to the end. Sometimes, I have to contact the Contractor, or Subcontractor to verify the quantities; (4) Sometimes, I create new items which were omitted. Sometimes I delete the items which were over paid (sic) from the estimate in SAM; (5) I have been creating excel calculation sheets for the Resident Engineers to help them reduce their work, and eliminate their mathematical errors. The excel sheets that I have created are not only used by District III Resident Engineers but also other District Engineers as well; (6) I have been giving training to District III Engineers and their assistants to use our excel calculation sheets, and the beginners to show how to do the field measurement and what is expected of them; (7) I have made recommendations to the Final Engineer Director and the Construction Engineer to make changes for the price adjustment's units. This recommendation will be approved shortly." There is no comparison between the duties actually performed by the Appellant and the duties of a CE III as documented in the previous paragraph.

The Appellant confused his auditing duties with those of supervising duties. Because many of the resident engineers he reviews when performing final work are CE IIIs, the Appellant

believes that he too should be classified at their level. As evidenced in the job description, CE IIIs oversee multiple construction projects at any given time. They have final oversight and responsibility for all aspects of their projects and directly supervise employees. The Appellant reviews *only* one aspect of the resident engineer's responsibility: the material quantities and the related cost calculations. He does not supervise employees. The Appellant's work is performed in the field by *assistants* to the CE III, assistants with lower-grade titles. It is not accurate when the Appellant claims that he reviews the work of CE IIIs; he simply does not have the same level of responsibility.

The Appellant is highly educated, and holds at least two Masters degrees, including a Master's degree in Structural Engineering from the University of Massachusetts. Although he presented himself as a well-intentioned, professional, and earnest engineer in the Highway Department before the Commission, neither his testimony nor the exhibits show that he performed a majority of the duties of a CE III more than fifty percent of the time. *Compare Harand v. Soldiers' Home in Holyoke*, 21 MCSR 194 (2008).

Other testimony also did not show that the Appellant performs a majority of the duties of a CE II more than fifty per cent of the time. The one point the Appellant's witnesses did proffer was that the Appellant performs job duty #1 in the Civil Engineer III and Civil Engineer IV titles, i.e. prepare and /or review plans, specifications and cost estimates for engineering projects, such as two-lane highway projects in a rural or suburban setting or multi-span bridges of standardized design. (See Finding of Fact #20) That is one duty out of eight duties in the CE III job description, and does not equal more than fifty percent of the Appellant's work performance. The Appellant's witnesses, however, also testified that the Design/Projects sections rather than the finals section prepares the plans and specifications

for engineering projects. The Appellant does not review what a conceptual project might cost, but rather how much a contractor should be paid for the work actually performed.

These are two separate and distinct functions.

While his development of a spreadsheet and the subsequent training are commendable, it is simply another tool in the Appellant's arsenal for recording quantities and calculations in the field. The Appellant has used an application already developed for calculations to create a template for engineers and staff in the field.

The CE III position is the first supervisory level job in the Civil Engineer series, but the Appellant has not shown that he directly supervises any subordinate employees. CE IIIs supervise professional personnel, including Civil Engineer titles, while CE Is and IIs do not supervise professional titles. The Appellant argues that because some Civil Engineer IIIs attended his spreadsheet training, he should hold an equivalent title. This training was a one-time one-day event, and cannot be reasonably interpreted as the equivalent of supervising the employees. From testimony, it is not certain that this training would become an annual event. This one-time one-day training does not show that the Appellant performed a majority of the Civil Engineer III duties more than fifty percent of his time.

The Appellant has failed to show by a preponderance of the evidence that he is performing the duties of a CE III more than fifty percent of the time.

For these reasons, the appeal filed under Docket No. C-09-428 is hereby *dismissed*.

Angela C. McConney, Esq.
Hearing Officer

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein Commissioners) on May 6, 2010.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 to:

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