COMMONWEALTH OF MASSACHUSETTS

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

HERRIO LAMOTHE,
Appellant

v.

C-19-067

MassDOT,
Respondent

Appearance for Appellant:	*Pro Se* Herrio Lamothe
Appearance for Respondent:	James F. Norton, Esq. MassDOT 10 Park Plaza Boston, MA 02116
Commissioner:	Christopher C. Bowman

DECISION

On March 20, 2019, the Appellant, Herrio Lamothe (Appellant), pursuant to G.L. c. 30, § 49, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division (HRD) to deny his request for reclassification from Civil Engineer I (CE I) to Civil Engineer II (CE II) at MassDOT. On April 16, 2019, I held a pre-hearing conference at the offices of the Commission. I held a full hearing at the same location over two days on July 12th and 31st, 2019.[1] The hearing was digitally recorded and both parties

[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.

were provided with a usb drive containing a recording of the hearing.[2] The Appellant submitted a post-hearing brief on July 10, 2020. The Respondent opted not to submit a brief.

FINDINGS OF FACT:

Twenty-six (29) exhibits (Respondent Exhibits 1-21 (R1-R21) and Appellant Exhibits 1-8 (A1-A8)) were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

Called by MassDOT:

- Tom Maloy, District 4 Construction Engineer, CE VI

For the Appellant:

- Harry B. Thompson, CE III
- Herrio Lamothe, Appellant

and taking administrative notice of all matters filed in the case, and pertinent rules, statutes, regulations, case law, policies, and reasonable inferences from the credible evidence; a preponderance of credible evidence establishes the following facts:

Background

1. The Appellant was appointed as a CE I by MassDOT in 2012. (Stipulated Fact) He has a bachelor's degree in civil engineering and a master's degree in engineering management. According to the Appellant, he is also "EIT certified." (Testimony of Appellant) The website for the Massachusetts Society for Professional Engineers states: "If you're a graduate from an engineering program approved by the MA state licensure board, you can become classified as an "engineer intern" (EI) or "engineer-in-training" (EIT) by successfully completing the Fundamentals of Engineering (FE) exam. Achieving EI or EIT

[2]In the event of a judicial appeal, the appealing party would be responsible for using the recording to have a transcript prepared.

status signals that you have mastered the fundamental requirements and taken the first step toward earning your PE licensure." (Administrative notice: https://mspe.com/licensing-and-registration/path-to-licensure)

2. From December 2010 until May 2017, MassDOT and the Coalition of MassDOT Unions for bargaining Unit E were engaged in a classification study in accordance with the provisions of the Master Labor Integration Agreement (MLIA), an agreement that was negotiated between and among MassDOT and all of the unions that represented MassDOT employees. (R1)
3. Pursuant to the Classification Study, the Appellant submitted a Job Analysis Questionnaire (JAQ) to a consultant for review. The consultant reviewed the Appellant's classification of CE I and recommended that his position maintain its classification as a CE I. (R2 and R3)
4. On May 8, 2017, MassDOT and the CMU reached a Memorandum of Understanding (MOA) resolving the Classification Study. Under this MOA, the Appellant was recommended to remain classified as a CE I although he had the right to appeal this determination in accordance with the MOA and G.L. c. 30, s. 49. (R4)
5. The Appellant had already submitted a traditional Chapter 30, Section 49 classification appeal to MassDOT on June 16, 2016. (Stipulated Fact)
6. Pursuant to the MOA, MassDOT, on January 3, 2019, after conducting an audit interview, notified the Appellant that his request for reclassification to CE II was denied, concluding that he was properly classified as a CE I. (Stipulated Facts)
7. The Appellant appealed MassDOT's denial to HRD. HRD affirmed MassDOT's decision and denied the Appellant's appeal on February 27, 2019. This appeal to the Commission by the Appellant followed. (Stipulated Facts)

Job Specifications

8. The Classification Specifications for the Civil Engineer, approved in 1989, define the CE I position as the entry level professional job in the series, the CE II as the second level professional job in the series, and the CE III as the first level supervisory job in the series. (R14)
9. The examples of duties common to all levels in the series are:
   A. 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.
   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 resolve 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 payment 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 intersections 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 constructions 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 specification; maintaining records; providing information on such matters as department procedures and applicable standards; operating technical equipment and devices and attending meetings and conferences. (emphasis added) (R14)

10. The Classification Specifications indicate in the section called "Differences Between Levels in Series" that a CE II performs the following ten additional duties:

A. Prepare and/or review plans, specifications and cost estimates for engineering projects, such as intersection upgrading, repaving projects, box culverts and single span bridges.

B. Prepare and/or review engineering or environmental reports and studies.

C. Recommend alternate methods of construction and/or substitution of materials specified to resolve problems as they occur.

D. Determine feasibility of proposed construction through on site inspection, discussions and review of available data.

E. Conduct field investigations to determine the necessity of repair or reconstruction of roads or structures.

F. **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**.

G. **Inspect construction operations** such as single span bridges.

H. Act as chief of a survey party in performing surveys of a high order.

I. Supervise maintenance work such as highway landscaping, repairing operations and snow and ice removal.

J. Collect and analyze traffic flow data and make speed control studies. (emphasis added) (R14)

11. The duties most applicable to the Construction division at MassDOT are duties F & G. (Testimony of Maloy)

12. As referenced above, both CE Is and CE IIs can be assigned as Resident Engineers and both CE Is and CE IIs can be assigned to inspect construction operations. The distinction between the work of a CE I and CE II relates more to the *size and complexity* of the project assigned

to the employee, discussed in more detail below regarding "Guidelines for the Assignment of Resident Engineers." (Testimony of Maloy; R14, R19)

13. Tom Maloy has been the District 4 Construction Engineer since February 2010. He is responsible for administering all of the construction projects in District 4. He has been employed at MassDOT or its predecessor since 1991. (Testimony of Maloy)
14. In terms of the most direct oversight over construction projects, MassDOT utilizes employees in the functional role of Resident Engineers and Assistant Resident Engineers. Depending on the size and complexity of the project, those functional roles can often be performed by CE Is, CE IIs, CE IIIs; General Construction Inspectors (GCI) Is and GCI IIs. (Testimony of Maloy)
15. The Resident Engineer is the person assigned to oversee the day-to-day operations of the construction project. MassHighway, a predecessor agency to MassDOT, produced "Guidelines for the Assignment of Resident Engineers." (Guidelines) for the functional role of Resident Engineer I, II and III. The Guidelines: a) list what classification titles can serve as RE I, RE II and RE III; and b) identifies the types and complexity of each project that can be assigned to an RE I, RE II and RE III. (R19)
16. According to the Guidelines, the functional role of RE I can be performed by a CE I, a GC I or Environmental Analyst I. (R19)
17. Under the Category "Highway Construction", the Guidelines state that the work associated with an RE I "includes the construction or reconstruction of <u>two-lane</u> roadways on existing or new locations. Construction activities may include <u>minor geometric modifications, including widening, vertical profile and horizontal alignment, safety improvements, sidewalks,</u>

drainage improvements and pavement markings and signs. This work also includes the construction of bike paths." (emphasis added) (R19)

18. The Guidelines state that that the work associated with an RE II "includes the construction or reconstruction of multi-lane roadways on existing or new locations. Construction activities may include simple grade separated interchanges such as diamonds and cloverleafs, roadway widenings that increase capacity, safety improvements, drainage improvements and pavement markings and signs. (emphasis added) (R19)
19. Under the Category "Surfacing", the Guidelines state that the work associated with an RE I "includes the cold planing, resurfacing and repaving of two-lane roadways. The work may also include the resurfacing of sidewalks and parking lots. (emphasis added) (R19)
20. The Guidelines state that the work associated with an RE II "includes the cold planning, resurfacing and repaving of multi-lane roadways and highway ramps. The work can include divided and undivided roadways and more involved traffic management or specialized pavements. (emphasis added) (R19)
21. Under the Category "Traffic Signals", the Guidelines state that the work associated with an RE I "includes traffic signal betterment contracts, pedestrian signal locations, and single or multiple traffic signal locations for two lane roadways. The work also includes minor widening for turning lanes or geometric improvements, other safety improvements and pavement markings and signs. (R19)
22. The Guidelines state that work associated with an RE II "includes single or multiple traffic signal locations for multi-lane roadways. The work also includes roadway widening that increases capacity through the addition of travel lanes, the installation of strain poles and the interconnection / coordination between signal locations. (R19)

23. Area Engineers that report to Mr. Maloy make recommendations to Mr. Maloy regarding whether a construction project should be assigned an RE I, RE II or RE III. Mr. Maloy, after review, signs a "Notice of Assignment of Resident Engineer" for each project. (Testimony of Maloy; R20 & R21)
24. Regardless of whether someone is assigned as an RE I, RE II or RE III, they are referred to, on a day-to-day basis, as the "Resident Engineer" of that particular project. (Testimony of Maloy)
25. MassDOT, and Mr. Maloy in particular, try to ensure that RE I, II and III functional jobs are assigned to employees consistent with the guidelines (i.e. - an RE I job would be assigned to a CE I.) (Testimony of Maloy)
26. In those limited circumstances where MassDOT, because of resource issues, cannot strictly abide by the Guidelines (i.e. – a CE I is assigned to work a project where an RE II is needed), that employee can request to receive additional compensation for working temporarily out-of-grade. (Testimony of Maloy)
27. An Assistant Resident Engineer can also be assigned to a construction project. They are there to *support* the Resident Engineer, primarily focused on conducting inspections (i.e. – ensure that the proper concrete is being poured, etc.). (Testimony of Maloy)
28. Depending on the size and complexity of a project, a Resident Engineer could be assigned more than one Assistant Resident Engineer to conduct inspections. The Resident Engineer is typically onsite, but the Resident Engineer would be focusing more on administrative items, depending on the size and complexity of the project. (Testimony of Maloy)

29. Employees typically assigned to the functional title of Assistant Resident Engineer can be CE Is, CE IIs, GCI Is, and GCI IIs, with the size and complexity of the project being the most important factor. (Testimony of Maloy)
30. "Area Engineers", who work below Mr. Maloy, typically assemble a team to support the Resident Engineer, based upon the size and complexity of the project and the available resources available across the District. (Testimony of Maloy)
31. Sometimes employees can be pulled off one project (i.e. – a project is wrapping up) and assigned to a new project. (Testimony of Maloy)
32. During Mr. Maloy's tenure, the Appellant has never been assigned to serve as a Resident Engineer on any construction project. Rather, Mr. Maloy has been assigned to serve as an Assistant Resident Engineer on various construction projects. (Testimony of Maloy)
33. The Appellant filed his reclassification appeal with MassDOT on June 16, 2016. (Stipulated Fact)
34. The construction projects to which the Appellant was assigned as an Assistant Resident Engineer on around that time included: a) Somerville – East Broadway project; b) Melrose – Lebanon Street project; c) Lawrence – Union Street / Canal project. (R20)
35. Harry B. Thompson III was the Resident Engineer on the Melrose – Lebanon Street project between 2015 and 2016. (Testimony of Thompson and R20)
36. Mr. Thompson has worked for MassDOT for twenty-eight years. He has served as a CE I, CE II and CE III. He has been assigned as both an Assistant Resident Engineer and Resident Engineer. (Testimony of Thompson)
37. For the past ten years, Mr. Thompson was a CE III who would get assigned as a Resident Engineer. (Testimony of Thompson)

38. Mr. Thompson describes a larger, complex project as typically being more than $7M. (Testimony of Thompson) The cost of the Melrose project was between $3.8M to $4.5M. (R18 and R20)
39. In regard to the above-referenced Melrose project, Mr. Thompson primarily assigned the Appellant to "reconcile" various invoices with the work performed by the contractor since there was a significant backlog of invoices which had resulted in the contractor's payment being delayed. (Testimony of Thompson)
40. Mr. Thompson was typically on-site at the Melrose project. Thus, the Appellant was not required to fill-in as the Resident Engineer. (Testimony of Thompson)
41. The Somerville – Broadway project (2014-2015) was a $7.9M project. The person assigned to be the Resident Engineer was a CE II. The Appellant served as an Assistant Resident Engineer on that project. The project included roadway and sidewalk reconstruction, including the construction on new water, drain and sewer lines, maintenance or replacement of other utilities, street lighting, traffic signal system, new curbing, concrete paver crosswalks, street trees, signing, pavement markings and other streetscape items as shown on the contract drawings. (R20; R21)
42. The Lawrence – Union Street Project (2015 – 2016) was a $655,000 project. The person assigned to be the Resident Engineer was a GC I. The Appellant served as the Assistant Resident Engineer. (R20; R21)
43. The Lawrence – Union Street project was a streetscape enhancement and pedestrian safety improvement project that involved reconstruction of a sidewalk and improved traffic signals and crosswalks, including ADA-compliant features; and a new 20-space parking lot. (Testimony of Appellant and R20)

44. A fourth project, which began *after* the Appellant filed his reclassification request with MassDOT, was a "Safe Roads" project named the "Somerville – Mystic / Temple" project. The person assigned to be the Resident Engineer was a GC II. The Appellant was the Assistant Resident Engineer. (R21) The bid amount on that project was $944,000. (R18)
45. In his Interview Guide, the Appellant listed his duties and percentage of time spent on each as follows:
    A. Assist with administering construction contracts by monitoring/inspecting contractor's work for compliance with plans, specifications and schedules, monitoring and coordinating the collection of material for samples for testing, coordinating construction survey and traffic signal inspections, conducting and/or witnessing all testing upon contract materials, equipment, installation, etc., establishing and maintaining effective working relationships with all parties, providing and maintaining construction photos. (40%)
    B. Assist with construction management activities by participating in and conducting planning, preconstruction, coordination, progress, scheduling and field staff meetings, preparing project documentation including inspector's daily report, force account and construction records, reviewing plan specifications and updating logs in regard to RFIs, submittals, and shop drawings, and change orders, making field measurements and maintaining as-built and red-lined drawing records, reviewing and monitoring contractor's approved construction baseline schedule, preparing and initiating field change notices, and ensuring all required tests, operations, measurements, and inspections are scheduled, ordered and satisfactorily completed and documented. (30%)

C. Assist in the approval of contractor payments by verifying, reviewing and preparing quantity and progress estimates and payment forms for payments. (10%)

D. Assists in negotiating and preparing documentation for change order or claims by reviewing and evaluating change order requests or claims, preparing engineer's estimate for change order, and maintaining records on unit price quantities for material, labor and equipment. (10%)

E. Monitors and coordinates safety and quality control on projects by ensuring project is constructed in accordance with applicable safety regulations, reporting safety, traffic hazards and defective work to the contractor for correction, and preparing and issuing appropriate reports for compliance documentation. (10%) (Exhibit 6)

Legal Standard

"Any manager or employee of the commonwealth objecting to any provision of the classification of his office or position may appeal in writing to the personnel administrator and shall be entitled to a hearing upon such appeal . . . . Any manager or 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." G.L. c. 30, § 49.

The Appellant has the burden of proving that he is improperly classified. To do so, he must show that he performs the duties of the CE II title more than 50% of the time, on a regular basis. Gaffey v. Dep't of Revenue, 24 MCSR 380, 381 (2011); Bhandari v. Exec. Office of Admin. and Finance, 28 MCSR 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 . . . .").

Analysis

The level distinguishing duties (LDDs) associated with the *classification* titles of Civil Engineer I, II and III are inexorably tied to MassDOT guidelines related to the *functional* titles of Resident Engineer I, II and III. District Construction Engineers, after assessing the size and complexity of a construction project, determine whether a project should be overseen by a RE I, II or III. Once that has been determined, MassDOT then looks to fill those functional positions with employees with corresponding classification titles of CE I, II and III. There is actually a symmetry between the functional and classification titles, with the job specifications indicating that Civil Engineers at all three levels can serve as Resident Engineers and oversee operations and inspections. In short, both the functional and classification titles are tied to the size and complexity of the project.

First, the Appellant acknowledges that he has never been assigned and/or designated to serve as a Resident Engineer. Rather, he argues, in part, that on some projects to which he has been assigned as an Assistant Resident Engineer, he has, at times, filled in for and served as the de facto Resident Engineer. Since MassDOT acknowledges that CE IIs may, at times, serve as Assistant Resident Engineers, I have looked at the same guiding principles related to size and complexity of project, while keeping in mind that the Assistant Resident Engineer is designed to do exactly what the title says – *assist* the Resident Engineer.

The Appellant's own witness acknowledged that, in regard to the project (Melrose – Lebanon Street) in which he (the witness) served as Resident Engineer, the Appellant, at almost all times, served strictly as the *Assistant* Resident Engineer. Further, and just as importantly, the Appellant's witness acknowledged that a project typically needs to exceed $7M in costs in order to be considered larger in scope and responsibilities. The Melrose – Lebanon project fell a few

million short of that threshold. Finally, the Appellant's witness acknowledged that the Appellant was primarily focused on one discrete task on the project: fixing a backlog of invoices in which the contractor had gone unpaid for many months. While, based on a review of the record, it appears that the Appellant excelled at this task, it works against the Appellant's argument that he had been performing as the de facto Resident Engineer on large complex, projects.

While the Somerville – East Broadway project was just over $7M, the Appellant served as an Assistant Resident Engineer and reported to a CE II. Also, the time worked on that project was only about one year.

The two other projects cited by the Appellant were both less than $1M in cost, did not appear to meet the definition of complex, and, in once instance, was being coordinated by a Resident Engineer who held the classification title of CE I.

The Appellant is a highly-educated, competent, detail-oriented employee who is passionate about the work he does for MassDOT and the Commonwealth. He has not shown, however, that he performs the level distinguishing duties of a CE II a majority of the time, the issue the Commission is responsible for ruling on here.

Conclusion

For all of the above reasons, the Appellant's appeal under Docket No. C-19-067 is hereby ***denied.***

Civil Service Commission

/s/ Christopher C. Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan, and Stein, Commissioners) on July 30, 2020.

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 the 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:
Herrio Lamothe (Appellant)
James Norton, Esq. (for Respondent)