

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

CHRISTOPHER LEE,
Appellant

v.

C-20-116

MassDOT,
Respondent

Appearance for Appellant:

Pro Se
Christopher Lee

Appearance for Respondent:

Matthias P. Kriegel, Esq.
MassDOT
10 Park Plaza
Boston, MA 02116

Commissioner:

Christopher C. Bowman

DECISION

On August 22, 2019, the Appellant, Christopher Lee (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), in which HRD affirmed MassDOT’s denial of his request to be reclassified from Civil Engineer II (CE II) to Civil Engineer III (CE III). On August 8, 2020, I held a remote pre-hearing conference. I then held a remote full hearing, on December 5, 2020.¹ The hearing was recorded via Webex, and both parties were provided with a

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.

link to the recording of the hearing.² The Commission also retained a copy of the hearing recording. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT:

Fifteen (15) Appellant exhibits (Exhibits A-O) and twenty-eight (28) MassDOT exhibits (Exhibits 1-28) were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

For the Appellant:

- Christopher Lee, Appellant
- Jean-Pierre Telemaque, Resident Engineer, MassDOT Highway Division, District 3
- Jeffrey Gorczynski, Assistant Construction Engineer, MassDOT Highway Division, District 3

For MassDOT:

- James Marine, Acting District Administration Manager, MassDOT Highway Division District 3
- Amy Lynch, Manager, Classification and Compensation Unit, MassDOT

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

1. The Appellant is employed with MassDOT in its Highway Division, Construction Department, and is classified as a Civil Engineer II. (Testimony of Appellant; Exhibits 2, 7-11, C)

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 the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing.

2. The Appellant received a Bachelor of Science degree in Civil Engineering Technology from Wentworth Institute of Technology, Boston, MA, in 2009. He holds certifications from the American Concrete Institute (ACI) to qualify as a Concrete Field Testing Technician - Grade 1 and from the NorthEast Transportation Training and Certification Program (NETTCP) to qualify as a Quality Assurance Technologist, Concrete Inspector, Hot Mix Asphalt Paving Inspector, Driven Pile Inspector, Drilled Shaft Inspector, and Soils & Aggregate Inspector. (Testimony of Appellant; Exhibit 18)
3. The Appellant began work at MassDOT as a Civil Engineer I on November 8, 2009. He was assigned to the Highway Division, District 3, in Worcester, MA. (Testimony of Appellant; Exhibit 1)
4. On June 28, 2017, the Appellant was reclassified to Civil Engineer II, effective retroactively to June 10, 2016. He remained assigned to District 3. (Exhibit A; Testimony of Appellant)
5. Since 2013, the Appellant has worked on projects of varying size and complexity as an Assistant Resident Engineer and as a Resident Engineer. His duties include reviewing the work of the prime contractor and sub-contractors for conformity to the contract; reviewing documents and plans for non-conforming materials or methods and making suggestions for changes; preparing Contract Quantity Estimates (CQE's) for contractor payment in a timely manner; performing field inspections and concrete test sample cylinders; and updating monthly spending projections for review by the District and Headquarters. (Testimony of Appellant; Exhibit 6)
6. From May 2013 to January 2016, the Appellant worked as an Assistant Resident Engineer for the Burns Bridge Replacement Project in Worcester and Shrewsbury, MA. The Burns Bridge was a five-span design-build project valued at 100 million dollars. The Appellant

was the lead overnight inspector for the hot mix asphalt paving and also maintained pay and financial records. (Testimony of Appellant; Exhibits 6, 18, M)

7. Beginning in January 2016, the Appellant was assigned as an Assistant Resident Engineer on the project to install an All Electric Tolling System (AETS) on the Mass Pike, Route I-90. From August 2016 to August 2019, the Appellant was assigned as an Assistant Resident Engineer on the related project to demolish seven interchange toll plazas along a fifty-mile area running from Sturbridge through Worcester, Auburn, Millbury, Westborough, Framingham, and Natick, MA; a project valued at 40 million dollars. Removal of the toll booths, tunnels, and adjacent buildings required redesign and full depth construction of each of the seven areas, including new drainage, new light poles and electrical work, utility work, new water hydrants, new curbing, ramp widening, and new parking at one location. (Testimony of Appellant, Telemaque; Exhibits 6, 18, M).
8. On the toll plaza demolition project, the Appellant reported to Resident Engineer Jean-Pierre Telemaque, a CE III. Mr. Telemaque was working on a total of five projects, so at times he was not available at the Mass. Pike sites. For this reason, and because there were seven sites involved, as much as an hour's drive apart, Mr. Telemaque relied on the Appellant, his Assistant Resident Engineer, to help with supervision of the project. (Testimony of Appellant, Telemaque; Exhibits 18, 19)
9. The Appellant helped run the day-to-day operations of the demolition project. He supervised a staff of five to six full-time inspectors and additional part-time inspectors, assigning their work and reviewing their reports. Many of the inspectors were former toll collectors and needed extensive training. The inspections included tracking more than 300 contract pay items. With the multiple sites, many design changes were needed, and the Appellant

participated in discussions about redesign to accommodate site conditions and kept his inspectors informed about design changes. He also reviewed contract pay estimates and brought any pay issues to the attention of the Resident Engineer. (Testimony of Appellant; Exhibits 6, 18)

10. The contractor on the toll plaza demolition project worked multiple shifts, since time was of the essence in light of heavy use of the turnpike and the loss of toll revenue. Although the Appellant's regular shift was days, approximately half the time he worked nights so that an engineer would be available to the contractor. (Testimony of Appellant; Exhibits 6, 18)

11. For six months, from September 2019 to April 2020, the Appellant worked as one of two Resident Engineers on a resurfacing and bridge repair project on Route I-495 in Littleton and Westford, MA. The project was valued at 15 million dollars and covered five miles of roadway and bridges in both the northbound and southbound sections of the highway. The project included resurfacing, box widening, and work relating to ramps, drainage, electrical installation, and guardrails. The section of highway in question is a multi-lane interstate passing through rural and suburban areas. (Testimony of Appellant, Exhibits 6, 18)

12. The I-495 project had been ongoing since 2018, but had fallen behind in electronic record-keeping and documentation, including approval of contract pay. In order to free the other Resident Engineer, a CE III, to get the office work back on track, the District Construction Engineer asked the Appellant to take over the field portion of the project. The Appellant was also asked to assist the other Resident Engineer as needed with MassDOT's electronic Site Application Module (SAM). For this project, the Appellant reported to Area Engineer Steven Toloczko, a CE IV. (Testimony of Appellant, Gorczynski; Exhibit 18)

13. As a Resident Engineer on the I-495 project, the Appellant spoke with the contractor daily to coordinate the upcoming schedule, supervised the part-time inspectors, and coordinated with District 4 personnel to reduce traffic issues arising from a ramp closure. When the project was short-handed, the Appellant performed field inspections himself, since as a Resident Engineer he was responsible for getting the work done. (Testimony of Appellant; Exhibit 18)
14. Before accepting the temporary Resident Engineer position on the I-495 project, the Appellant asked supervisory staff whether he could be provided with documentation that he was performing CE III Resident Engineer duties for this project. He was told, incorrectly, that “Exceptions to Policy,” i.e., Acting out-of-grade titles, were no longer permitted. (Exhibit B; Testimony of Appellant, Lynch).
15. In fact, a provision in the Collective Bargaining Agreement applicable to the Appellant provides that an employee who works at a higher grade for more than thirty days may receive an acting appointment for that closed period with an accompanying temporary increase in pay:

Section 16.2 Work in a Higher Classification

Any employee who is assigned by his/her supervisor to a position in a higher grade for a period of more than thirty consecutive days shall receive the salary rate for the higher position from the first day of assignment, provided such assignment has the prior approval in writing of the department head. Written approval must be provided on the form which is attached as Appendix C. The approval of the department head or his/her designee shall take effect as of the first day of assignment. In the event authorization is granted or payment is awarded for out-of-title work, no payment shall be made for any period prior to fifty-one days from the date the grievance was filed unless the assignment was in writing.

This Article shall not apply to working in a higher grade when the holder of the higher grade is absent on vacation leave.

(Exhibit B; Testimony of Lynch, Appellant)

16. MassDOT policy requires supervisors to assign personnel to work within their existing classification. Out of grade assignments may be made only when no one is available for the assignment within the proper grade. (Testimony of Lynch)
17. Since 2019 the Appellant has also worked as a Resident Engineer on smaller projects. In June 2019 he was assigned as Resident Engineer for a Stormwater Improvement Project in District 3, valued at one million dollars. In April 2020, he was assigned as Resident Engineer for a roadway reconstruction project in Upton, MA, valued at 5.5 million dollars. (Testimony of Appellant; Exhibit 18)
18. Until July 2020, the Appellant did not serve as a direct supervisor for any other employees. In July 2020, the Appellant was assigned one direct report, Thomas Lally, a CE II. The Appellant acts as Mr. Lally's supervisor and prepares his performance review EPRS form. Mr. Lally also reports to the Appellant on the Upton road reconstruction project. (Testimony of Appellant)
19. The Appellant noted in his Interview Guide that he sought to carefully monitor contractors' work and materials supplied, sought to keep projects on time and on budget while limiting traffic disruption, and sought to address any issues immediately, so that they could be corrected with minimal impact on the project and its timeline. (Exhibit 6)
20. The Appellant's Employee Performance Review System (EPRS) report for 2020 shows that he was rated "exceeds expectations" as to every job duty. His supervisor, Mr. Gorczynski, wrote, "Continued excellent work as Resident Engineer." (Exhibit D)
21. On August 22, 2019, the Appellant filed a Classification Appeal with the MassDOT Human Resources Division, Classification and Compensation Unit, claiming that he was

misclassified as a Civil Engineer II and was performing the duties of a Civil Engineer III.
(Exhibit 2)

22. In support of his appeal, the Appellant filed his Employee Questionnaire on August 26, 2019 and his Interview Guide on November 6, 2019. (Exhibits 4, 6)
23. District 3 Highway Director Barry Lorion filed a Manager's Questionnaire on October 25, 2019. (Exhibit 5)
24. An audit was conducted by MassDOT Personnel Analyst Pamela Deal, including an interview and review of supporting documentation. (Testimony of Lynch; Exhibits 6, 21, 22, 26)
25. On April 22, 2020, Sheila Mulcahy, Acting Manager of Classification and Compensation for MassDOT Human Resources, wrote to the Appellant that a preliminary recommendation had been made to deny his appeal. The letter provided the Appellant with the right to submit a written rebuttal. (Exhibit 21)
26. On April 30, 2020, the Appellant provided Ms. Deal with a rebuttal letter. He requested that his denial be reconsidered in light of his work on multi-lane highways, multi-span bridges, and roadway and site development for building-related work. (Exhibit 22)
27. On June 4, 2020, Amy R. Lynch, Manager of Classification and Compensation for MassDOT Human Resources, wrote to the Appellant to notify him that MassDOT had denied his appeal to be reclassified from CE II to CE III. She informed the Appellant of his right to appeal to Commonwealth's Human Resources Division (HRD). (Exhibit 23)
28. On July 12, 2020, the Appellant filed his appeal with HRD. (Exhibit 24)
29. On July 17, 2020, Alexandra McInnis, Senior Personnel Analyst in HRD's Classification and Compensation Unit, wrote to the Appellant to notify him that his appeal had been denied by

HRD because his duties did not warrant reallocation of his position. Ms. McInnis provided the Appellant with appeal rights and instructions. (Exhibit 24)

30. On July 28, 2020, the Appellant appealed HRD's decision to the Civil Service Commission. (Exhibit 25)

31. The duties of a Civil Engineer II and Civil Engineer III are set out in the Classification Specification for the Civil Engineer series. The Classification Specification states that the CE II position is the "second-level professional job in this series"; and the CE III position is the "first-level supervisory job in this series." (Exhibit 16)

32. The series Summary describes the function of a Civil Engineer as follows:

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.

(Exhibit 16)

33. The CE Classification Specification lists the following under "Examples of duties common to all levels of the Civil Engineer series":

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 in order to make recommendations to supervisors for approval.
9. Approves construction and service contract payments 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.

(Exhibit 16)

16. Under "Differences Between Levels in Series" the CE Classification Specification states that those in levels CE II and CE III, and in higher levels, perform the following duties:

Civil Engineer II:

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:

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 layouts, 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 16)

17. Under “Supervision Exercised” the CE Classification Specification provides for those at the

CE II and CE III levels:

Civil Engineer II:

Based on assignment, incumbents of positions at this level **may exercise** direct supervision (i.e., not through an intermediate level supervisor) over, assign work to and review the performance of 1-5 technical or non-professional personnel; may exercise indirect supervision (i.e., through an intermediate level supervisor) over 6-15 technical or other personnel; and/or may 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 technical or non-professional personnel. (emphasis added)

Civil Engineer III

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; may exercise indirect supervision (i.e., through an intermediate level supervisor) over 6-15 technical and/or professional personnel; and/or may 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 technical or professional personnel. (emphasis added)

(Exhibit 16)

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 Civil Engineer III 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”)

What must be shown is that the Appellant performs the “distinguishing duties” of PC-II a majority of his/her time and, in making this calculation, duties which fall within both the higher

and lower title do not count as “distinguishing duties.” See Lannigan v Department of Developmental Services, 30 MCSR 494 (2017)

Oversight of non-employees does not generally qualify as the required supervisory duties as defined by the PC Series Job Classification. See, e.g., Haque v. Department of Environmental Protection, 27 MCSR 585 (2014); Farinha v. UMass at Dartmouth, 23 MCSR 22 (2010); Dziczek v. Department of Conservation & Recreation, 20 MCSR 200 (2007); Canata v. Holyoke Comm. College, 14 MCSR 91 (2001).

MassDOT's Argument

MassDOT acknowledges that the Appellant is a “valued and dedicated public employee with a strong and lengthy background in Civil Engineering, a great work ethic, and a desire to advance up the ranks.” Nevertheless, he has not shown that he is entitled to be reclassified as a CE III.

First, the Appellant admittedly does not perform most of the level-distinguishing duties listed in the Classification Specification for CE IIIs. For that reason alone, he has failed to show that he is entitled to reclassification as a CE III.

Next, the Appellant’s day-to-day duties show that he is correctly classified as a CE II. In particular, the Appellant supervises and oversees the daily project work schedule and work shift assignments of assigned personnel, including night-time and rotational personnel and inspectors; administers group training; creates, tracks and drafts daily reports, payslips, sketches and measurements; reviews the submissions and work of contractors and subcontractors; takes field measurements; reviews Contract Quantity Estimates (CQEs); and coordinates with state and local authorities. None of these activities are level distinguishing duties of a CE III.

That the Appellant has acted as a Resident Engineer on several projects does not show that he is performing the duties of a CE III, since CE II's also act as Resident Engineers. MassDOT does not agree that the Appellant was acting as a CE III when he was temporarily assigned as a second Resident Engineer alongside a CE III Resident. The Appellant did not have full autonomy where he shared duties with the other engineer and also received assistance from the District Construction Engineer.

Finally, MassDOT points out that having a direct report is not a level-distinguishing factor, since both CE IIs and CE IIIs may have direct reports.

Appellant's argument

The Appellant argues that the record shows he spends about 70 percent of his time performing level-distinguishing duties of a CE III. He spends about 50 percent of his time acting as a Resident Engineer, by coordinating with the contractor and supervising the work for conformity to the contract, which corresponds to CE III distinguishing duty 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." He also spends 20 percent of his time reviewing plans and documents for non-conforming issues and making recommendations to correct them, which corresponds to CE III distinguishing duty 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."

The Appellant argues that his lengthy work on the Mass. Pike I-90 toll plaza demolition project qualifies as work as a Resident Engineer on a multi-lane project, even though he was officially assigned as an Assistant Resident Engineer. Relying on his own testimony and that of

his supervisor, Mr. Telemaque, he argues that he was acting as a de facto Resident Engineer when he worked nights, which was about half the time, and when Mr. Telemaque was not on site. Additionally, the Appellant points out that not only was this project highly complex, with many design changes, but that his duties supervising multiple employees across different shifts and in seven different locations were also sufficiently complex to qualify as CE III work.

Next, the Appellant argues that his work as a Resident Engineer on the I-495 project qualified as a CE III duty, since he was acting as a Resident Engineer on an “interstate or multi-lane highway project[], including earthwork, drainage, bridge construction or reconstruction, waterworks, electrical or environmental operations.” Although another Resident Engineer was already on the project, the Appellant points out that he had greater duties than the other Resident and was given some supervisory responsibilities over the other Resident Engineer, a higher-grade CE III. Thus, he was performing CE III duties on this project.

Finally, the Appellant argues that his work as a functional supervisor of multiple professional personnel, as well as his direct supervision of another CE II, gives further support to his claim that he is working as a CE III. Although CE II’s also may exercise supervision, the Classification Specification describes the CE III as the “first level supervisory job” in the series, suggesting that supervision is an important element of a CE III position.

Analysis

Although it is evident that the Appellant is a hard-working, highly competent, and valued civil engineer, he has not shown that he spends more than half his time performing the level-distinguishing duties of a Civil Engineer III on a regular basis.

The Appellant argues that he has been performing CE III duties since he began working on the Mass. Pike I-90 toll plaza demolition project in 2016, which was an interstate or multi-lane

highway project that included such elements as earthwork, drainage, waterworks, and electrical or environmental operations. In order for that work to qualify as a level-distinguishing CE III duty, however, the Appellant would have had to be working as a Resident Engineer. Although I acknowledge the testimony of both the Appellant and Mr. Telemaque that, in their judgment, the Appellant was acting as a de facto Resident Engineer the Appellant was an Assistant Resident Engineer. Despite his many duties helping supervise and direct the project, the ultimate responsibility for decisions rested with Mr. Telemaque.

For instance, the Appellant testified as to a design change that had to be made after a three-foot deep area of asphalt was used to correct a grade issue. The change in depth of the asphalt required design changes to a highway sign that could not be placed in deep pavement. Mr. Telemaque called a meeting, which the Appellant attended, to discuss alternatives, and a design change was ultimately made by the consultant and submitted to the projects department, which then notified the engineers. The Appellant then passed on the information to the inspectors. Decision-making for the design change was ultimately made by Mr. Telemaque.

Shortly after completing his work on the toll plaza demolition project, the Appellant spent six months as one of two Resident Engineers on a highway resurfacing and bridge repair project on Route I-495. The Appellant's work during this six-month period work qualified as a level-distinguishing CE III duty, as it involved work as a Resident Engineer on a multi-lane, interstate highway, including "earthwork, drainage, bridge construction or reconstruction, waterworks, electrical or environmental operations." Although I gave weight to this, it is not dispositive because the Appellant's work on this project was temporary, lasting only six months. The circumstances of the Appellant's assignment to this project were also unusual and not likely to recur in light of MassDOT's policy limiting out-of-grade assignments.

Since that time, the Appellant has continued to be assigned to smaller projects as a Resident Engineer, including a Stormwater Improvement Project valued at 1 million dollars and a roadway reconstruction project in Upton, MA, valued at 5.5 million dollars. Neither of those projects involved the type of work that falls within level-distinguishing duties of a CE III.

The Appellant contends that, in effect, he became a “de facto” Resident Engineer temporarily filling in “as needed” to perform duties that would have been the responsibility of other staff during periods when there were vacancies in the positions directly responsible for those duties. The Commission has consistently held that a reclassification requires proof that an Appellant’s duties comprise the majority of his or her current, permanently assigned work. In this respect, a reclassification is different from a promotion, which implies a prospective change in duties, rather than proof that the duties are already being performed at the higher level a majority of the time. e.g., Shine v. Department of Correction, 34 MCSR xxx (2021); Brunelle v. Massachusetts Dep’t of Transp., 33 MCSR 370 (2020); Hartnett v. Department of Revenue, 30 MCSR 398 (2017); Baran v. Department of Conservation & Recreation, 18 MCSR 355 (2005). See generally, Boston Police Dep’t v. Jones, 98 Mass.App.Ct. 762 (2020) (in general, voluntary overtime and detail pay are not part of the regular compensation of a tenured civil servant).

Despite his six months working on CE III duties, the Appellant has not shown that he is working as a CE III on a regular basis. His work on the Mass. Pike toll plaza demolition project did not qualify as a CE III duty, nor does his current work.

I have not overlooked the fact that the Appellant inquired about an Acting out-of-grade appointment for the time that he spent working on the Route I-495 project, and was denied the chance to apply for the temporary increase in pay . When an employee agrees to work overtime or temporarily works “out-of-grade”, he or she may have some other claim (such as under a

collective bargaining agreement) to receive a pay-differential for the time spent working in that capacity, but temporary, voluntary or overtime assignments are not, as a general rule, meant to be transformed into permanent promotions through the reclassification statute. It behooves the Appellant to explore through his union what relief he may be entitled to receive to compensate him for what seems clearly shown to be “out of grade” work that he honorably and effectively performed for the Commonwealth and which he seems to have been denied through no fault of his own.

For all of the above reasons, the Appellant’s appeal for a reclassification under Docket No. C-20-116 is hereby *denied*.

Civil Service Commission

/s/ Christopher C. Bowman
Christopher C. Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Ittleman, Tivnan, and Stein, Commissioners [Camuso – Absent]) on July 15, 2021.

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 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:
Christopher Lee (Appellant)
Matthias Kriegel, Esq. (for Respondent)