

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

MOHAMMED NABULSI,
Appellant

v.

MassDOT,
Respondent

Case No.: C-21-121

DECISION

Following a pre-hearing conference that I conducted on August 3, 2021, I assigned the above-captioned reclassification appeal to the Civil Service Commission's General Counsel, attorney Robert L. Quinan, Jr., for adjudication purposes and he then proceeded to conduct a hearing on behalf of the Commission on October 21, 2021.

Pursuant to 801 CMR 1.01 (11) (c), the Commission's General Counsel issued the attached Tentative Summary Decision on January 20, 2022, recommending the dismissal of the Appellant's appeal in which he sought to be reclassified from Civil Engineer VI (CE VI) to District Maintenance Engineer (DME). The parties had thirty days thereafter to proffer written objections to the Commission. On February 18, 2022, the Appellant filed written objections to the Tentative Decision and the Respondent filed a Response thereto on March 1, 2022. On April 22, 2022, the Appellant also filed a Testimonial Proffer. On May 6, 2022, the Respondent notified the Commission and the Appellant that it intended to create specifications for a new Senior Supervising Engineer position at Job Grade 31 and that the Appellant would be assigned to this position, representing an upward reallocation for salary purposes vis-à-vis his prior position of Civil Engineer VI at Grade 29A.

On August 9, 2022, the Appellant advised the Commission that the classification specification for the new Senior Supervising Engineer indeed had been finalized as of June 30, 2022, and that the Appellant had been retroactively classified at Grade 31 on the Unit E salary chart effective as of June 5, 2022. The Appellant maintained, however, that he should have been offered compensation retroactive to at least the 2021 fiscal year (when he commenced his reclassification appeal) because he claimed that all along he had been performing work quite similar to his District's Maintenance Engineer, who earlier had been elevated to Pay Grade 31 in 2019; he had for years been performing relevant duties described in the June 2022 classification specification (all core duties common to all sections of District 3 plus the particular duties pertinent to the District 3 Bridge Section he heads); and the June 2022 reclassification subsumed

both his old Civil Engineer VI position and the District Maintenance Engineer position into one unified Senior Supervising Engineer position.

On August 23, 2022, the Commission's General Counsel convened a status conference to explore whether the parties could resolve their differences by agreeing that it would be appropriate to retroactively reclassify the Appellant as a Senior Supervising Engineer at Pay Grade 31 as of the first day of the prior fiscal year (i.e., July 1, 2021). General Counsel Quinan asked the parties to report back on the status of any settlement discussions in the fall. On December 9, 2022, General Counsel Quinan requested a status update and directed the Respondent, in the event that a private resolution had not been achieved, to show cause why the Commission should not recommend to the Legislature's Ways and Means committees that the Appellant's position be reclassified at Grade 31 retroactive to July 1, 2021. On January 7, 2023, the Respondent filed a five-page *Statement of Reasons Why Appellant's Position Should Not Be Retroactively Reallocated to Senior Supervising Engineer at Pay Grade 31*.

The Commission acknowledges that it cannot compel the Respondent to reallocate the Appellant's prior position of Civil Engineer VI (and functional title of District Bridge Engineer) to Pay Grade 31 as of July 1, 2021, simply because District 3's Maintenance Engineer had been classified at Grade 31 as of that date and the incumbent Maintenance Engineer was later reclassified as a Senior Supervising Engineer (at the same pay grade) in June of 2022. For the reasons stated in the attached Tentative Decision, the Appellant has never performed the duties that distinguish the District Maintenance Engineer function from those associated with other senior civil engineer functions (including the Appellant's own District Bridge Engineer functions) in MassDOT's Highway District 3. The final approved Classification Specification for MassDOT Senior Supervising Engineer (dated June 30, 2022) continues to specify the following key duties for the incumbent heading up the District Maintenance Section:

- Manages incident response on state highways to ensure the safety of the traveling public by overseeing traffic management, incident resolution and restoration of the operational characteristics of state transportation infrastructure.
- Responsible for maintaining the transportation infrastructure, including but not limited to pavement repairs, line painting, drainage maintenance, accident recovery, mowing and highway cleaning operations, litter removal, facility repairs and upgrades, installation of signage and other incidentals necessary to maintain a safe and efficient state highway transportation and infrastructure system.
- Oversees and conducts snow and ice operations to maintain and ensure safe and efficient operations.
- Directs the implementation of District programs such as Accident Recovery Program and Adopt/Sponsor a Highway Program.

There is simply no evidence in this record that the Appellant has performed any of the above functions outside the confines of matters affecting District 3's bridge-related infrastructure. The fact that the June 2022 Classification Specification lists a number of overlapping duties common to all sections of District 3, or even that the Appellant shares with the head of District 3's Maintenance Section some overlapping responsibilities for the overall

maintenance of the District's infrastructure assets, does not satisfy the key test for a successful reclassification appeal: that (in this case) the Appellant spends more than 50% of his time performing the *distinguishing* duties attributed to a position ranked higher in the pay classification schedule.

The Respondent argues that the agreement it negotiated with its unions to reallocate a dozen or more employees previously placed in Grade 29A Civil Engineer VI positions, including the Appellant, to a higher pay grade effective as of June 5, 2022, does not constitute any admission by MassDOT that these positions (generally, the heads of district sections other than the Maintenance Section) warranted greater compensation prior to June of 2022. The Commission accepts the Respondent's representation that the elevation to Pay Grade 31 of these other section heads was one of several *quid pro quo* terms exchanged between MassDOT as employer and its unions to accommodate the parties' respective goals in their collective bargaining efforts.

Even if the Commission were to conclude that similarities in the responsibilities associated with the other section heads vis-à-vis the Maintenance Section chief engineer would have warranted some form of pay equity earlier in time, the limited authority the Legislature has conferred upon the Commission under the governing reclassification statute precludes the Commission from ordering any retroactive relief under the circumstances of this case. Section 49 of G.L. c. 30 states that *if* this Commission "finds that the office or position of the person appealing *warrants* a different position reallocation . . . , it shall report such recommendation to the budget director and the house and senate committees on ways and means in accordance with paragraph (4) of section forty-five [of G.L. c. 30]." (Emphasis added to accentuate the present tense of the operative verb.) Subsection 45(4) of c. 30 provides that "[n]o permanent [re]allocation . . . shall be effected, unless *and until* . . . (d) it shall have been included in a schedule of permanent offices and positions approved by the house committee on ways and means[.]" This appears to rule out any retroactive compensation even if a position reallocation is approved by the Legislature. Section 57 of G.L. c. 30 provides for only one exception: "no [favorable Commission reclassification] decision shall require any payment to be made as of any date before the beginning of the fiscal year in which such decision shall be rendered, except to the extent such payment is permitted pursuant to the provisions of said section forty-nine and subject to appropriation for the purposes thereof." The express statutory preconditions for retroactive compensation benefiting the Appellant in this case, then, include: (a) a Commission decision finding that the Appellant's position *warrants* a different position allocation [a finding this Commission could not make after June of 2022]; (b) a Commission recommendation to the Legislature for reallocation [now unnecessary in this case]; (c) that the position reallocation has been approved by the Legislature [a step unlikely to have occurred here]; and (d) a special appropriation for any resulting obligation predating the current fiscal year. Only then could the Appellant's position reallocation to Senior Supervising Engineer at Pay Grade 31 be deemed retroactively effective as of the date of his reclassification appeal to the Personnel Administrator. G.L. c. 30, § 57.

The *coup de grâce* in terms of retroactive relief for the Appellant, however, is that the position he seeks to have reallocated retroactively (whether it be labeled Civil Engineer VI or Senior Supervising Engineer) is one shared by many others employed by MassDOT. Thus, he is

a member of a class (of district section heads), notwithstanding his attempt her to bring an individual position reallocation appeal. The final sentence of the statute granting the Commission jurisdiction to hear this appeal (G.L. c. 30, § 49) states: “The provisions of this section, as they relate to appeals on the reallocation of a class or group of classes to a higher job group or job groups, shall not apply to any employee whose position is included in a collective bargaining unit represented by an employee organization certified in accordance with the provisions of section four of chapter one hundred and fifty E.” There can be no dispute that the Appellant’s position (again, however labeled) is a position within a bargaining unit represented by a labor union certified under G.L. c. 150E, § 4. Any effort, then, to have his position elevated to Grade 31 prior to the date agreed upon by his union and the Respondent cannot be entertained by this Commission under G.L. c. 30, § 49.

After careful review and consideration, the Commission today voted to affirm and adopt the Tentative Decision issued by General Counsel Quinan, thus making the attached summary decision, together with this document, the Final Decision of the Commission.

Accordingly, the Appellant’s appeal under Docket No. C-21-121 is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein and Tivnan, Commissioners) on January 26, 2023.

Civil Service Commission

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

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. 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:

Muhammed Nabulsi (*pro se* Appellant)
James F. Norton, Esq. (for Respondent)

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

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MOHAMMED NABULSI,
Appellant

v.

C-21-121

MassDOT,
Respondent

Appearance for Appellant:

Mohammed Nabulsi, *pro se*

Appearance for Respondent:

Matthias Kriegel, Esq.¹
Massachusetts Department of Transportation
10 Park Plaza, Suite 3170
Boston, MA 02116

Adjudicator:

Robert L. Quinan, Jr.

TENTATIVE SUMMARY DECISION

The Appellant, Mohammed Nabulsi, appealed to the Civil Service Commission (Commission) pursuant to G.L. c. 30, § 49, from the denial of a request to reclassify his position of Civil Engineer VI (CE-VI) to a District Maintenance Engineer (DME) at the Massachusetts Department of Transportation (MassDOT). The Commission's Chair, Christopher Bowman, held a pre-hearing conference via the Webex videoconference platform on August 3, 2021, and I held a motion to dismiss / show cause hearing,² which turned into an informal evidentiary hearing, via

¹ Attorney Kriegel is no longer employed by MassDOT. Thus, this decision is being sent to MassDOT counsel James Norton, Esq.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with any conflicting provisions of G.L. c. 30, § 49, or Commission rules, taking precedence.

the Webex platform on October 21, 2021. The hearing was digitally recorded.³

Both parties filed substantive pre-hearing memoranda the week before the August 3, 2021 pre-hearing conference. Following this conference, Chair Bowman issued a Procedural Order requesting briefing on three issues.⁴ On September 8, 2021, the Respondent moved to dismiss on jurisdictional grounds the Appellant's appeal for reclassification. The Respondent supported this motion with a compendium of nine exhibits. In addition to his pre-hearing memorandum dated July 28, 2021, Appellant filed an Opposition to Respondent's Motion to Dismiss and a Rebuttal Response to Respondent's Denials of Appellant's Request for Reallocation of his Position, both dated October 8, 2021. Each of these filings were supported by five different exhibits submitted by the Appellant.⁵ At a summary hearing on October 21, 2021, the Appellant was invited to present testimonial or other evidence of some material disputed fact showing that, if a full-blown formal evidentiary hearing were to be conducted, he might succeed on his reclassification claim. The following individuals made statements and were examined by one or both of the parties at the October 21 hearing:

MassDOT District 3 Highway Director Barry Lorion
MassDOT District 3 Administrator James Marine

³ If there is a judicial appeal of this decision, the plaintiff becomes obligated to use the link to the Webex audio-recording provided to the parties to supply the court with a written transcript of the hearing to the extent that he or it wishes to challenge this decision as unsupported by the substantial evidence of record, arbitrary and capricious, or an abuse of discretion.

⁴ Contemplating a potential motion to dismiss on the Respondent's part, the Commission Chair requested briefing on the following questions:

- (a) Is the instant appeal actually a request for a change in pay grade which is a collective bargaining issue outside the scope of the Commission's jurisdiction?
- (b) If not, does the Commission have jurisdiction to adjudicate a matter related to reclassification for which there are no approved job specifications?
- (c) Assuming the Commission does have jurisdiction to hear this appeal, and that the Form 30 can be relied upon to render a decision, are there undisputed facts which establish that the Appellant is not entitled to a reclassification?

⁵ Actually, one of the exhibits in Appellant's second set of filings appears to be a duplicate of an exhibit associated with his first filing. So each party filed nine distinctly different exhibits prior to the October 21 hearing.

MassDOT Manager of Classification and Compensation Amy Lynch
MassDOT HR Business Partner for Highway Division Christine Mountain

The day after this motion to dismiss/show cause hearing, the Respondent filed two new supplemental exhibits and, two days later, the Appellant filed a four-page “Response to Respondent’s Supplemental Exhibits and Arguments – Amending its Motion to Dismiss.”

FINDINGS OF FACT

Based on the parties’ pleadings, the 20 exhibits received, the statements of the foregoing witnesses, taking administrative notice of all other matters filed in the case, pertinent law, and drawing reasonable inferences from the credible evidence, a preponderance of evidence establishes the following facts:

1. The Appellant, Mohammed Nabulsi, began employment with the Massachusetts Highway Department (MHD) in 1988, a year after earning a Master of Science degree in civil engineering. Nabulsi has been continuously employed by either MHD or MassDOT's Highway Division as a Civil Engineer since 1988 and he has held a CE VI job classification title since 1995. (See Appellant's résumé, included as Respondent's Exhibit 9.)
2. The 2009 Transportation Reform Act consolidated state roadway assets (including the Massachusetts Turnpike) under MassDOT’s Highway Division. The highway maintenance responsibilities that had been handled by a single CE VI (the District Maintenance Engineer) prior to 2009 were roughly equally divided between two CE VI’s: the District Bridge Engineer (DBE), who assumed all responsibilities associated with “maintenance of bridge and related infrastructure assets,” and the District Maintenance Engineer (DME), responsible for “maintenance of highway and related infrastructure assets.” (Appellant testimony)

3. Also in 2009, MassDOT promoted Nabulsi to DBE and transferred him from the agency's Boston headquarters to District 3's offices in Worcester (Resp. Exh. 9). Nabulsi has been the District Bridge Engineer for Highway District 3, covering central Massachusetts, ever since. (Appellant testimony)
4. As part of a multi-year job title reclassification process growing out of the merger of multiple entities into the new MassDOT agency, Nabulsi's employer created a new job classification for the DME position only. As the result of negotiations with the coalition of unions representing MassDOT employees, the agency decoupled the new DME job title from pay grade no. 29 and instead linked it to pay grade no. 31.⁶ No change was made to the DBE functional title, still officially classified as a Civil Engineer VI position, linked to pay grade no. 29A. (Resp. Exh. 2)
5. MassDOT posted the more highly compensated District 3 DME position under the new (uniquely DME rather than CE-VI) classification in April of 2019 and Nabulsi was one of several candidates who interviewed for the position. (App. Exh. 4.) He received a non-selection letter in June of 2019 stating that the successful candidate was another District 3 employee who had years of experience in District 3's Maintenance Section. (Resp. Exh. 2, ¶ 16; Resp. Exh. 6.)
6. Contending that both the DME and DBE positions continue to "share the same duties, operate at the same level of responsibility, have similar staffing levels, oversee and work

⁶ "[I]n or about 2019, MassDOT and the Appellant's collective bargaining unit—Unit E—entered into a Memorandum of Understanding ("MOU") concerning certain classifications as part of collective bargaining negotiations for the 2017-2020 agreement. The purpose of the MOU: (1) identified newly created positions and corresponding job grades for the agency's business and operational needs; and (2) upgraded the classifications of specific existing positions." Affidavit of Christine Mountain (who has "oversight of the organizational structure of all of the Highway Division's districts," including employee classifications), Resp. Exh. 2.

within the same annual maintenance operating budget, and report directly to the same District Highway Director,” Nabulsi commenced an internal classification appeal, no later than October of 2019, initially seeking to have his DBE position reclassified to pay grade no. 31. (App. Exh. 1.)

7. MassDOT issued a denial letter regarding Nabulsi’s “Grade 31 Classification Appeal” in July of 2020. In August of 2020, Nabulsi attempted to submit an appeal to the Commonwealth’s Human Resources Division (HRD) noting his “current position is Civil Engineer VI, Pay Grade 29A” and stating that he was “requesting a reclassification to Civil Engineer VI, Pay Grade 31.” (App. Exh. 1.)
8. The Director of MassDOT’s Classification and Compensation Unit, Amy Lynch, responded later in August to advise Nabulsi that “[a]lthough you can appeal your job classification, you cannot appeal your grade.” (App. Exh. 1.) Although no further written explanation is included in the record presently before the Commission, in making this quoted statement presumably Ms. Lynch was relying on the third paragraph of the Commonwealth’s “Appeal from Classification” statute, G.L. c. 30, § 49, which states: “The provisions of this [law], as they relate to appeals on the reallocation of a class or group of classes to a higher job group or job groups, shall not apply to any employee whose position is included in a collective bargaining unit[.]” All positions relevant to this appeal are bargaining unit positions.
9. Nabulsi promptly thanked Ms. Lynch “for clarifying” and attempted to commence a new classification appeal. He received guidance from District 3’s Highway Director, Barry Lorion, in September of 2020, stating: “You should be filing a classification appeal

suggesting that your title/classification is CE6-District Maintenance Engineer.” (App. Exh. 1.)

10. By the next month, it appears that MassDOT’s Classification and Compensation (“C&C”) Unit had accepted and started to examine Nabulsi’s new appeal. The C&C Unit reached out to Nabulsi’s superiors for information. Nabulsi was asked to fill out a six-page Classification Appeal Employee Interview Guide, which he completed in January of 2021. (Resp. Exh. 7.)
11. After conducting an “appeal audit,” the head of the C&C Unit, Amy Lynch, wrote Nabulsi that this audit concluded “that the duties being performed by you do not warrant the reallocation of your position” and, thus, “your appeal must be denied.” (App. Exh. 2.) The audit determination specified how five of Nabulsi’s current DBE duties “are consistent with your current function” and further listed five other core duties unique to the DME title that Nabulsi does not perform. (*Id.*)
12. In summary, as the C&C Unit audit review concluded, “the majority of [Appellant’s] duties are consistent with [his] current function [of Civil Engineer VI,] including the following: [overseeing] bridge maintenance and related bridge issues; supervis[ing] . . . subordinates . . . in the District Bridge Section . . . ; . . . maintaining the District’s bridge transportation infrastructure . . . ; oversee[ing] the administration of bridge maintenance and preservation contracts[; and] coordinat[ing] the bridge inspections response to incidents [leading to] bridge damage[.]” (App. Exh. 2.)
13. By contrast, Nabulsi does not perform certain duties associated with the District Maintenance Engineer function, including recommending “long-range equipment” purchases; dealing with “major incidents involving crashes or road defects” and related

citizen complaints; overseeing “district snow and ice[-clearing] operations” on state highways; managing routine incident response, resolution, and restoration of “safe transportation infrastructure” elements; overseeing traffic management; overseeing “the implementation of the District Asset Management Program & Performance Control Programs”; and overseeing implementation of other District programs “such as the Accident Recovery Program and Adopt/Sponsor a Highway Program.” (*Id.*)

14. MassDOT prepared draft DME specifications in November of 2019 (Resp. Exh. 19⁷) that contain a general statement (as well as a detailed statement) of certain unique duties and responsibilities, summarized as: traffic operations, snow and ice removal, permits, facility maintenance (e.g., salt sheds), maintenance contracts (for, e.g., drainage/catch basin upgrade/cleaning/repair; highway lighting; litter clean up; traffic signal/sign upgrade/repair; roadway emergency services; mowing and tree trimming), accident recovery, and garage mechanics.

15. Nabulsi’s own testimony, reflected in the Interview Guide and Appeal Questionnaire he completed in January of 2021, indicates that he spends the majority of his time overseeing or implementing core bridge engineering functions within District 3’s Bridge Section. (R. Exh. 4) Specifically, Nabulsi referred therein to his oversight responsibility for the District’s bridge inspection and maintenance programs, which cover 1,160 bridges subject to federal inspection, 348 other state-maintained bridges, and 429 culverts. He “provides engineering assistance to communities on bridge-related issues.” Nabulsi

⁷ Amy Lynch stated during the October 21, 2021 hearing that MassDOT’s C&C Unit expended considerable time and effort discussing with union representatives and internal stakeholders the draft specifications for all of the new job titles created as a result of the years-long major reclassification study and her unit expected to have HRD’s final approval of the specifications for the DME job title by the end of 2021. Neither party contends that the non-final nature (as of October 2021) of the DME job specifications somehow divests this Commission of jurisdiction to adjudicate this appeal.

states he is “also involved in various aspects of bridge design, project scoping, development and project management” and he supervises 34 employees. (*Id.* at page bates-stamped 22.)

16. In specifying the most important duties Appellant performs, and the approximate percentage of time he spends on each task on a weekly basis, Nabulsi himself reported that the largest chunk of his time (20% of his workweek) is devoted to “maintaining the District’s Bridge transportation infrastructure, including but not limited to structures maintenance and repairs including deck, joints, superstructure and substructure repairs.” (R. Exh. 4; bates 22). The second largest chunk of his time (15% each workweek) is devoted to overseeing contracts “related to the operational responsibilities assigned to the Bridge section such as, but not limited to: Drainage Structures Cleaning, Bridge Washing, Structural Steel Clean and Paint, Concrete Coating, Deck and Joint Repairs, Substructure and Structural Repairs, and other corridor and site-specific maintenance contracts.” (*Id.* at bates 23) Adding up the percentage of time Nabulsi states he devotes to bridge-specific tasks, it is evident that more than 50% of his workweek is spent on duties outside the purview of a DME and that are specific to maintenance of state-controlled bridge assets. (*Id.* at 22-23)

17. Appellant was never advised by anyone at MassDOT that he was performing as a DME. His Employee Performance Review (EPRS) form for Fiscal Year 2020 (R. Exh. 12) clearly identifies distinct DBE duties. His EPRS for FY20 shows him exceeding expectations re his overall job performance and with respect to four unique DBE duties (R. Exh. 12). For example, Duty #4 is described as furnishing engineering advice and opinions to municipalities, MassDOT personnel, other agencies and officials “regarding

District Bridge activities and implement[ing] strategies for evaluating and addressing bridge needs in order to improve overall condition of district bridges[.]”

18. Nabulsi’s duties, as delineated in both his 2021 Form 30 and his FY ’21 EPRS form (R. Exh. 12), correspond with those typically performed by CE VIs. Other CE VIs normally “[s]upervise the operations of a major unit of the department such as construction, highway or bridge design, maintenance, [etc.]” (R. Exh. 18). The EPRS forms of other DBEs (based in other highway districts) also show the exact same duties as stated on N.’s EPRS form (compare R. Exhs. 12, 13, and 14). These duties are distinctly different from the EPRS duties listed for DMEs in other highway districts. (See R. Exhs. 15 and 16 and compare them to Nabulsi’s EPRS at R. Exh. 12). Quite plainly, there is no majority overlap of duties.
19. More specifically, Nabulsi’s duties correspond with other MassDOT DBE’s, as demonstrated by their completed Forms 30 (see R. Exhs. 7 and 8), and yet are distinct from a DME’s unique responsibilities (specified in R. Exh. 19 and summarized above).
20. Only one person holds the title of DME in each of the MassDOT Highway Division’s six districts (each one being a Section Head in each district) and the incumbent DME for District 3 is James Robida, as demonstrated by a July 1, 2021 Form 30. (Resp. Exh. 11) While the Appellant discharges some duties within his Bridge Section that are similar or nearly identical in function to those completed by a DME, the functions undertaken by the Appellant are specific to the Bridge Section, much as the DME’s duties are specific to the Maintenance Section. Compare the Forms 30 of Nabulsi and Robida (Resp. Exhs. 6 and 11).

21. Overall, Nabulsi’s duties are not quite as extensive as those performed by DME Robida. Compare *id.* and Resp. Exhs. 12 and 17 (the EPRS forms for Nabulsi and Robida). For example, the DME has responsibility for upkeep of maintenance facilities and a fleet of some 300 maintenance vehicles. (C. Mountain testimony) Importantly, DME Robida supervises twice as many subordinates (about 60 field personnel plus a smaller group of mechanics) as DBE Nabulsi (who supervises about 35 Bridge Section employees). Resp. Exh. 2 and Mountain testimony.
22. After receiving the MassDOT C&C Unit’s classification appeal denial letter dated March 12, 2021, Nabulsi filed a further appeal with HRD one week later. On June 3, 2021, a senior personnel analyst in HRD’s C&C Unit wrote Nabulsi: “We concur with the agency’s decision that the duties being performed by you are appropriately classified and we therefore deny your appeal.” App. Exh. 2A (typographical errors corrected).
23. As the HRD letter invited him to do, Nabulsi commenced a further appeal to this Commission on June 21, 2021.

THE GOVERNING LEGAL STANDARD

Section 49 of G.L. c. 30 (¶ 1) provides that a manager employed by the Commonwealth “objecting to any provision of the classification affecting the manager[‘s] office or position may appeal” – first to the Chief Human Resources Officer (or his designee within HRD) and then, if “further aggrieved” after this appeal, he or she may appeal to the Civil Service Commission, which shall consider the matter *de novo*. Para. 3 of § 49 states, however: “The provisions of this section, as they relate to appeals on the reallocation of a class or group of classes to a higher job group or job groups, shall not apply to any employee whose position is included in a collective bargaining unit represented by an employee organization certified in accordance with the provisions of section four of chapter one hundred and fifty E.” There is no dispute that Nabulsi’s

DBE (CE VI) position is included in MassDOT's CBA with the Coalition of MassDOT Unions for Bargaining Unit E.

The Appellant bears the burden of proof to demonstrate by a preponderance of the evidence that he has been misclassified. To do so, he must show that he performs the duties of the DME more than fifty percent (50%) of the time that he is working. *Gaffey v. Dep't of Revenue*, 24 MCSR 380, 381 (2011); *Bhandari v. Exec. Office of Admin. and Finance*, 28 MCSR 9, 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 ..."). The Appellant must specifically demonstrate that he is performing the "distinguishing duties" of a DME; proffering evidence of duties that do not exclusively fall within the sought-after, higher-graded position is not useful as such evidence will not be factored into a calculation that could lead to reclassification. *See Lannigan v. Dep't. of Developmental Services*, 30 MCSR 494, 494 (2017).

ANALYSIS

While the Appellant is a much-valued employee who performs his duties well, there was never any intention on MassDOT's part (or evidence of any directive) that he perform the duties of a DME. Rather, the record evidence—including the Appellant's own appeal forms, the Appellant's Interview Guide, and the corresponding Forms 30 and EPRS forms for the District 3 Section Heads—uniformly indicate that the Appellant is performing in the position to which he was officially appointed by MassDOT over a decade ago—that of a DBE in the corresponding classification of a CE VI. (Resp. Exhs. 6 and 12).

I accept that Nabulsi is not presently pursuing a job title classification appeal. In other words, he is not contending that *all* MassDOT CE-VI's, or even all District 3 Section Heads, should be reclassified as DMEs at pay grade 31. Rather, as he states in his Opposition to

MassDOT's motion to dismiss his appeal, "pursuant to G.L. c. 30 § 49[, his appeal] is an individual appeal for a position reallocation." Nabulsi simply wants his own unique District 3 DBE position to be reclassified as a DME position, contending (albeit without adequate evidentiary foundation) that "more than 50% of [these two positions'] duties are the same." The relevant CBA preserves Appellant's right to seek position reallocation. Section 17.3 of the CBA states: "Individual employees . . . have the . . . right to appeal the propriety of the classification of his/her position[.]" (App. Exh. 3); *see also DeRosa v. Civil Serv. Comm'n*, Mass. Super. Ct. 10-4769-H at *9 (May 22, 2012) (Brassard, J.) ("[T]he CBA does not prevent [the individual employee] from appealing the class in which her position was placed").

The insurmountable problem for Appellant is that the record evidence overwhelmingly shows that the duties of the District 3 DME and the District 3 DBE are *not* the same. Nabulsi himself, in his pre-hearing memorandum, implicitly concedes as much, writing that "their primary duties are similar" and other duties are distinct "to their primary function." It simply is not true, as Appellant contends in his Opposition to Respondent's Motion to Dismiss, that he "spends 51% or more of his time performing duties assigned to the DME[.]" (*Id.* at page 9)

That the Appellant performs duties associated with *bridge*-infrastructure maintenance on a daily basis, or that he shares with the District 3 DME some overlapping responsibilities for the overall maintenance of District 3 infrastructure assets, does not mean that he is performing the *distinguishing* duties of a DME more than 51% of the hours he devotes to work in a given day, week, or month. The incumbent DME's distinguishing duties are the ones that set him apart from his subordinates as much as they are responsibilities that fall uniquely within the Maintenance Section, as opposed to the Bridge or any other Section within District 3. I also credit, however, District 3 Highway Director Barry Lorion's testimony that, were the District 3

DME incumbent forced to take an unexpected leave of absence, as head of District 3 Lorion would turn to the DME incumbent's first deputy to cover the responsibilities associated with the DME position rather than turning to DBE Nabulsi to fill in during the unexpected absence.

Nabulsi contends that “[t]he core function of a MassDOT [DME] is the maintenance of the districts’ infrastructure” and that he principally discharges that function in District 3 (at least with respect to the district’s bridge-related assets). (Appellant Rebuttal memorandum, p. 2) But the DME Form 30 (App. Rebuttal Exh. 4), reflected in the “Duties and Responsibilities” section of the Internal Job Posting for the Dist. 3 DME position (App. Exh. 4) tells a somewhat different story. The District 3 DME’s key duties/functions/responsibilities are: (1) to oversee District 3’s Maintenance Section [Nabulsi does not do this]; (2) oversee the contracts and operational responsibilities *assigned to that section* such as “litter clean up, catch basin cleaning, highway lighting, pavement markings, pot hole repair, traffic signal and sign mounting, tree trimming, street sweeping, salt shed repairs, and a variety of roadway emergency services.” [Nabulsi does not do this and would only oversee *a few* of the specified activities within the sphere of his own bridge section]; (3) oversee other activities not within the realm of the Bridge Section, such as roadside mowing operations, snow and ice removal operations; and (4) manage incident response on state highways and the District’s Accident Recovery program [no evidence shows that Nabulsi does this].

In short, the fact that the Appellant has some bridge-related infrastructure *maintenance* responsibilities is not enough to warrant reclassifying him as a DME.

Rather than being able to prove that he performs DME duties a majority of the time, the Appellant’s more persuasive argument would be that the duties he discharges are *equivalent* in terms of the scale of responsibility and in several major instances are *parallel* to those

undertaken by the District 3 DME—and thus he should be paid similarly and his job title should be in the same pay grade as the DME. But this precise ground for appeal is foreclosed by the statute (§ 3 of § 49), case law (e.g., *DeRosa, supra*), and the CBA (Articles 17 and 17A) (Resp. Supp. Exh. 3) or an MOU modifying the CBA (Resp. Supp. Exh. 1). On the other hand, the C&C Unit’s Amy Lynch stated at hearing that MassDOT is examining an equal pay act claim advanced by Nabulsi. The agency would do well to give this claim serious consideration given the significant parallels in the DME and DBE job responsibilities in District 3 (possibly tighter than in other districts).⁸ The Commission, however, has no jurisdiction to entertain individual appeals under G.L. c. 30, § 45(3).

Clearly the Appellant holds a very demanding position, supervising about 35 professional staff consisting largely of civil engineers and field inspectors and overseeing some 14 bridge maintenance contracts worth over \$35 million per year, and there is no dispute that he performs his duties admirably, but the Commission does not have the jurisdiction to address his true grievance, which is that his compensation lags that of an individual who not long ago (pre-July of 2019) was his peer as a District 3 CE VI section head and senior district engineer. Job title reallocation disputes are not actionable under G.L. c. 30, § 49 and, thus, are not within the Commission’s jurisdiction.

⁸ See Affidavit of Mark Devylder, App. Exh. 5, in which the District 1 DBE avers that he does not “oversee the construction aspect of bridge infrastructure repairs or supervise the field personnel involved in infrastructure bridge maintenance.” (But that does not mean that Nabulsi’s performance of those functions in District 3 makes him effectively a DME.) Additionally, the Devylder affidavit asserts that the District 3 DBE “supervises a Contracts Administration Unit with the responsibilities for overseeing and managing bridge maintenance and construction repair contracts. In District 1, this is handled by a different section.” *Id.* However, the mere fact that Nabulsi has additional contract administration duties, as compared to Devylder, does not make him a DME because Nabulsi does not typically spend that much time on overseeing maintenance contracts (15% of his total time according to the Classification Appeal Interview Guide Nabulsi himself completed – see Resp. Exh. 7 at bates 34). Nabulsi’s additional duties vis-à-vis Devylder might be an argument for paying him more than Devylder (a grievance matter perhaps), but do not serve as a ground for reclassifying Nabulsi’s DBE position to DME.

Accordingly, for the reasons stated above, I recommend that the appeal of the Appellant, Mohammed Nabulsi, under Docket No. C-21-121, be *dismissed*.

Civil Service Commission

/s/ Robert L. Quinan, Jr.
Robert L. Quinan, Jr.
General Counsel

Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(11)(c), both parties to this appeal shall have the opportunity to file written objections or proposed corrections to this tentative decision with the Commission, which may be accompanied by supporting briefs and exhibits. The parties shall have 30 days from the issuance of the tentative decision to file written objections. Parties may file responses to objections within 20 days of receipt of a copy of the opposing party's objections. In its discretion, the Commission may order or allow the parties to argue orally. A party requesting oral argument shall file the request with the party's written objections or response.

Notice to:
Mohammed Nabulsi (Appellant)
James Norton, Esq. (for Respondent)