

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293

JARED SAUNDERS,
Appellant

CASE NO: C-17-123

v.

**DEPARTMENT OF LABOR
STANDARDS,**

Respondent

Appearance for Appellant:

David J. Fried, Esq.
David J. Fried & Associates
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Woburn, MA 01801

Appearance for Respondent:

Patrick G. Butler, Esq.
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Commissioner:

Paul M. Stein

DECISION

The Appellant, Jared Saunders, appealed to the Civil Service Commission (Commission) pursuant to G.L.c.30,§49,¹ from the denial of the Massachusetts Human Resources Division (HRD) of a request to reclassify her position at the Department of Labor Standards (DLS) within the Executive Office of Labor and Workforce Development (EOLWD) from his current title of Industrial Safety and Health Inspector II (ISHI-II) to the title of Industrial Health and Safety Inspector III (ISHI-III). The Commission held a pre-hearing conference at the Commission's Boston office on June 27, 2017 and held a full hearing at that location on October 2, 2017 and November 20, 2017, which was digitally recorded.² Eighteen (18) exhibits

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with and conflicting provisions of G.L. c.30,§49, or Commission rules, taking precedence.

² Copies of a CD of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CDs to supply the court with the written transcript of the 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.

(Exhs. 1 through 6, 8 through 10, 12 through 20) were taken into evidence.³ The Commission received a Proposed Decision from the Respondent on January 6, 2018 and a Proposed Decision from the Appellant on January 24, 2018. For the reasons explained below, Mr. Saunders appeal is denied.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by DLS:

- Michael Flanagan, DLS Chief of Safety and Health Programs
- Karen McGonagle, EOLWD Staffing & Payroll Manager

Called by the Appellant:

- Jared Saunders, DLS ISHI-II, Appellant
- Brian T. Wong, former DLS Program Manager/Chief of Investigations

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Jared Saunders, was employed in 2012 with the DLS Investigations and Enforcement Unit (IEU), initially as an ISHI-I in the Springfield office. His prior experience included military service in the United States Air Force and 14 years of experience with lead and asbestos abatement in the private sector. In 2014, he was promoted to ISHI-II and relocated to the Haverhill office about that same time. He completed the Commonwealth Supervisory Certificate Program in 2014. (*Exhs.2,5-6,8,19-20; Testimony of Appellant & Wong*)

2. The DLS is the agency within EOLWD tasked with protecting workers' safety and health, wages and working conditions, headed by a Department Director. (*Exh. 6; Testimony of Flanagan*)

3. Until his retirement in April 2016, the IEU was managed by a Program Manager, Brian Wong, reporting to Michael Flanagan, DLS Chief of Safety & Health Programs, who, in turn,

³ Two (2) exhibits were marked for identification (*Exhs. 7ID & 11ID*)

reported directly to the DLS Director. In 2017, Michael Weakley was appointed to the position of an ISHI-IV as the direct supervisor of the IEU. In the interim, Mr. Flanagan directly supervised the IEU staff.⁴ (*Exhs. 2, 5-6 & 19-20; Testimony of Flanagan & Wong*)

4. The IEU is staffed with approximately eight inspectors, primarily ISHI-IIs except for new hires who are ISHI-Is, working out of one of the DLS's five offices. The core mission of the IEU is to perform on-site workplace inspections, conduct state and federal safety standard compliance investigations and ensure that workers and contractors are properly licensed and trained to provide lead paint and asbestos abatement services. (*Exhs. 1, 5-6, 15, & 19-20: Testimony of Appellant, Flanagan & Wong*)

5. Prior to January 2016, the Industrial Safety and Health Inspector Series Class Specification (dated 4/89) promulgated by the Massachusetts Human Resources Division (HRD) contained three job titles: ISHI-I was the "entry-level technical job" in the series; ISHI-II was the "second-level technical job" in the series; and ISHI-III was the "first level [and only] supervisory job in the series. (*Exhs. 2 & 15*)

6. Effective January 24, 2016, pursuant to a Memorandum of Agreement (MOA) between the Commonwealth and MOSES Unit 9 (the bargaining unit which includes IEU inspectors), HRD promulgated new ISHI Classification Specifications consisting of four job titles and pay grades: ISHI-I (Grade 21); ISHI-II (Grade 23); ISHI-III (Grade 25); and ISHI-IV (Grade 27).⁵ (*Exh. 1; Administrative Notice [MOA cited in Sutliff v. Executive Office of Labor & Workforce Dev., 32 MCSR 26 (2019)]*)

⁴ As noted below, the job classification of ISHI-IV was created as part of a 2016 Classification Specification revision. Mr. Weakley was the first IEU supervisor to be appointed to that title. (*See Finding of Fact No. 6; Exhs. 1 & 15; Testimony of Flanagan*)

⁵ Prior to the group reclassification, the position of ISHI-II had been allocated to Grade 21. (*See Exh.5*)

7. According to the 2016 ISHI Class Specifications, the job of employees within the ISHI series is to “protect the health and safety of working people and the public by investigating and evaluating workplaces for health and safety hazards, hazardous exposures, violations of safety procedures, compliance with established health and safety standards . . .” The four levels in the series are further defined as follows:

- ISHI-I – the entry-level technical classification. Incumbents focus on gaining knowledge and seek guidance from more experienced colleagues
- ISHI-II – the fully competent professional classification. Incumbents have mastered the technical job content, perform work of greater complexity, exercise greater independence in making decisions, handle most cases independently and provide leadership through guidance and advice to others. Examples of specific functions performed at the ISHI-II level include: (1) functional direction, assignment of work, and acting as mentor to employees of lower grade; (2) represent agency at meetings with outside governmental and private sector organizations; (3) provide on-the-job training; (3) draft rules, regulations, procedures, forms, manuals, directives and descriptive and/or educational bulletins; (4) assist in preparation of grant applications and progress reports; (5) assist with laboratory operations as assigned; and (6) interpret data, apply policies, rules and regulations, and render decisions on complex cases.
- ISHI-III – the first-level supervisory classification. Incumbents perform complex work in a specialty area requiring judgment in determining approaches, interpreting and applying agency policies, standards and procedures. Incumbents are expected to be able to perform the duties of ISHI-Is and ISHI-IIs but, at this level, the primary

focus is to provide formal and informal supervision and act as the liaison with agency management. Examples of specific duties of an ISHI-III include: (1) supervise program operations; (2) exercise overall management of training programs; (3) grant hearings to aggrieved individuals; and (4) coordinate major activities of the department on a statewide level.

- ISHI-IV – the second-level supervisory classification. Incumbents perform advanced work in a specialty field, handle more complex projects, and exercise significant independence in making program decisions and assisting in policy development. Examples of specific duties of an ISHI-IV include: (1) supervision over, assign work to and review the performance of other employees of lower grade; (2) represent the agency in high-level policy discussions; (3) assist management in strategic planning; (4) oversee design and development of training programs and other forms of outreach; (5) oversee the drafting of regulations and policies; and (6) develop, implement changes to, and review program design for best practices and evidence based data to support program goals.

8. By his own estimate, corroborated by his former supervisor, Mr. Wong, Mr. Saunders devotes approximately 60% of his time on his core functions of “conducting compliance inspections on contractors to ensure they are properly trained and licensed and are conducting their work in compliance with Massachusetts Asbestos, Lead and Lead Safe Renovation regulations.” He also estimated that an additional 20% of his time was devoted to “licensing of various lead and asbestos disciplines [sic] on Wednesday of each week” and “deposit[ing] checks from licensing into state bank account.” (*Exh. 2; Testimony of Appellant & Wong*)

9. Mr. Saunders contends, however, that he performs additional duties that fall outside the scope of an ISHI-II and, instead, fit the job responsibilities of an ISHI-III. These additional duties include:

- Beginning in or about 2013, he began to assist Mr. Wong in the preparation of periodic reports submitted by the DLS to the federal Environmental Protection Agency (EPA) as required to support three grants awarded to the DLS by the EPA. His work primarily involved collecting statistics and preparing spreadsheets on the activities of the IEU used to measure the objectives prescribed by the grants to be accomplished during the two-year grant cycle and, beginning with the grant request for the two-year grant cycle 10/1/2014 through 9/30/2016, also assisted in preparing the grant request for Mr. Wong's approval. These data were provided to Mr. Wong who is identified in the grants as the Commonwealth's designated Project Manager on the grants.⁶ He also prepared similar spreadsheets and summaries of the IEU's lead and asbestos program activities for submission to his supervisor to be included in the DLS's departmental monthly and annual reports.
- In 2014, he spoke at a meeting of approximately 80 realtors from the Springfield area "to teach them about Lead Safety Renovation Requirements."
- In 2014, he was assigned to convert Mr. Wong's "outline" form Mr. Wong used for in-house inspector training into a "more presentable" Power Point format which he presented to the IEU staff and for which he received favorable feedback.
- In 2014, while working out of the Springfield office, he took primary (but not exclusive) responsibility for training two new hires (ISHIs) who were assigned to

⁶ According to Mr. Wong, when EPA had substantive program-related issues to discuss it would contact him; only when EPA sought statistical information, it would often contact Mr. Saunders directly. (*Exh.16; Testimony of Wong*)

that office. He mentored them in the field and in preparation of paperwork. He did not have formal supervisory responsibility, however, and did not perform any formal reviews or performance evaluations (EPRSs).

- In 2014, he was assigned by Mr. Wong to obtain quotes for Mr. Wong's review from two health care clinics to replace the current vendor who performed the annual examinations of inspectors with whom Mr. Wong was not satisfied.
- In 2015, he proposed, and upon Mr. Wong's approval, implemented a new "Winter Project Protocol" that involved identifying hardware and paint stores in each ISHI's territory and providing guidelines for the ISHI's to visit these businesses during down-time in the winter. In addition to coming up with the idea, he requested reports from each ISHI to monitor their progress.
- In November 2016, he revised the form of compliance citation called the "Written Warning and Order to Correct" for approval by his superiors.
- From time to time, he would fill in for Mr. Wong at "outreach" meetings with the public when Mr. Wong was not available. Mr. Wong estimated that Mr. Saunders filled in about 3 or 4 of the ten (10) times this occurred, with other ISHIs filling in for the others.
- He also performed outreach to city and town building departments at the direction of Mr. Wong to provide information (sometimes in the form of a meeting with town personnel and sometimes leaving informational literature) on developments in the applicable Renovation Repair and Painting Rule (RRP) promulgated by EPA.

(Exhs. 2, 7, 9-14, 16-18; Testimony of Appellant & Wong)

10. On March 30, 2016, Mr. Saunders filed a reclassification appeal with EOLWD, which denied his request on April 26, 2017. (*Exhs 2 & 3; Testimony of McGonogle*)

11. Mr. Saunders duly appealed the EOLWD decision to HRD which, on May 23, 2017, informed Mr. Saunders that HRD concluded that EOLWD had properly determined that he was correctly classified as an ISHI-II and denied his appeal. (*Exh. 4*)

12. Mr. Saunders appeal to the Commission ensued. (*Claim of Appeal*)

APPLICABLE CIVIL SERVICE LAW

G.L.c.30, §49 provides:

Any manager or employee of the commonwealth objecting to any provision of the classification affecting his office or position may appeal in writing to the personnel administrator. . . 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. If said commission finds that the office or position of the person appealing warrants a different position reallocation . . . it shall be effective as of the date of appeal . . .

“The determining factor of a reclassification is the distribution of time that an individual spends performing the function of a job classification.” Roscoe v. Department of Environmental Protection, 15 MCSR 47 (2002). In order to justify a reclassification, an employee must establish that she is performing distinguishing duties encompassed within the higher level position the majority (i.e., at least 50% or more) of the time. See, e.g., Pellegrino v. Department of State Police, 18 MCSR 261 (2005) (at least 51%); Morawski v. Department of Revenue, 14 MCSR 188 (2001) (more than 50%); Madison v. Department of Public Health, 12 MCSR 49 (1999) (at least 50%); Kennedy v. Holyoke Community College, 11 MCSR 302 (1998) (at least 50%). What must be shown is that Mr. Saunders performs the “distinguishing duties” of the RN-III position at least 50% of the 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)

ANALYSIS

Mr. Saunders is clearly a master of his field of expertise in lead and asbestos abatement regulatory work. He is regarded by his superiors and colleagues as a dedicated public servant who works hard at his job. However, reclassification of a position by the Commission requires proof that specified distinguishing duties at a higher title are actually being performed as the major part of his current work (i.e. more than 50 percent of his time is spent on the distinguishing duties). Accordingly, the issue before the Commission is limited to that narrow question.

The evidence establishes that substantially all of Mr. Saunders's job duties fit squarely within his current level of an ISHI-II. While he does occasionally perform at a higher level, the preponderance of the evidence falls well short of establishing that he performs above the ISHI-II level more than 50% of the time, which is the Commission's core requirement to allow a reclassification appeal.

First, even Mr. Saunders acknowledges that approximately 60% of his time is devoted to performing on-site inspections and that an additional 20% (one day a week) involves contractor license processing. These functions represent the core duties of an ISHI-I and IHSI-II. While an ISHI-III is also expected to devote some time to performing these tasks, they are not level distinguishing duties of the higher title. Rather, the "primary focus" that distinguishes the "first-level supervisory" title of ISHI-III from the second-level "fully competent professional" level of ISHI-II is that the higher title is expected to spend more than 50% of the time in "formal and informal supervision" of subordinates and "liaison with agency management".

Second, while some of the interaction Mr. Saunders has with subordinates in performing inspections and licensing activities might broadly be considered what the ISHI-III Classification

Specification calls “informal supervision”, those interactions, in the aggregate, are clearly not the “primary focus” of his job. Furthermore, virtually all of that “informal” supervision of subordinates is equally consistent with the duties of an ISHI-II, who is expected to provide “functional direction”, assign work and mentor employees of lower grade, as well as provide “on the job training”. None of Mr. Saunders’ duties fall within the category of “formal” supervision. Where duties are equally applicable to both the lower and higher titles, although they may be described slightly differently for each title, those types of overlapping duties are not “distinguishing” duties of the higher title.

Third, the non-supervisory work Mr. Saunders performs beyond his core duties of inspections and processing licenses, similarly, represents work that largely falls well within the duties he has long performed, and are generally expected of, an ISHI-II. For example, his research and compilation of data needed for his supervisor, Mr. Wong, to submit monthly, quarterly and annual reports to DLS management and to the EPA is precisely the type of work expressly delineated by the Classification Specification as ISHI-II duties. They do not rise to the level of serving as a “liaison” to management, supervision of “program operations” or other higher level duties of an ISHI-III. Similarly, from time to time, Mr. Saunders has drafted forms and technical and training materials, but always subject to review and approval of his superiors. He (and other ISHIs) occasionally met with others as the “eyes and ears” of Mr. Wong, but not as a policy or decision maker. His role in these ancillary functions fits squarely within the functions of the “fully competent” professional ISHI-II. Moreover, even if some part of this work could be considered more complex than the work he typically does, the record simply does not show that such work, even in the aggregate, comprises any significant and regular part of his job, let alone, show that it occupies more time than his core ISHI-II level duties.

Fourth, I do credit Mr. Saunders's testimony that he has been responsible for several initiatives that could fairly be regarded as more "complex" work than what an ISHI-II is typically assigned. For example, his proposing and implementing the "Winter Project Protocol" to identify and connect with local businesses who supplied contractors who required lead and asbestos licenses, could fairly be considered the type of "statewide" program management that the ISHI-III might be expected to perform. Similarly, although less certain, the administrative duties that Mr. Wong occasionally delegated to him, arguably, might fit within the duties of the higher title of ISHI-III. Nevertheless, these additional functions have been sporadic and, from the evidence presented, I cannot fairly conclude that he has continued to perform such work for any significant, quantifiable part of his time on and after the date (March 30, 2016) that he seeks to be reclassified to an ISHI-III.

In sum, Mr. Saunders did not meet his burden to establish that he performs the duties of an ISHI-III more than half of his time. Therefore, the Commission is not authorized to find that his position should be reclassified to an ISHI-III

Accordingly, for the reasons stated above, the appeal of the Appellant, Jared Saunders, under Docket No. C-17-123, is *denied*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan & Stein, Commissioners) on December 19, 2019.

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

David J. Fried, Esq. (for Appellant)

Patrick G. Butler, Esq. (for Respondent)