

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

BRIAN BRUNELLE,
Appellant

CASE NO: C-19-166

v.

**MASSACHUSETTS DEPARTMENT
OF TRANSPORTATION,**
Respondent

Appearance for Appellant:

Brian Brunelle, Pro Se

Appearance for Respondent:

Matthias P. Kriegel, Esq.
Jose J. Lopez, Esq.,
Massachusetts Department of Transportation

Commissioner:

Paul M. Stein

DECISION

The Appellant, Brian Brunelle, appealed to the Civil Service Commission (Commission) pursuant to G.L.c.30,§49,¹ from the decision of the Massachusetts Human Resources Division (HRD) to affirm a denial by the Massachusetts Department of Transportation (MassDOT) of his request to be reclassified from his current title of General Construction Inspector I (GCI-I) to General Construction Inspector II (GCI-II). A pre-hearing conference was held at the Commission's Boston office on September 10, 2019 and I held a full hearing at that location on October 29, 2019, which was digitally recorded.² Twenty (27) exhibits (*Exhs.1 through 27*) were introduced in evidence. Each party submitted a post-hearing Proposed Decision. For the reasons stated, the appeal is denied.

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.

FINDINGS OF FACT

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

Called by MassDOT:

- James Marine, Acting Dist. Admin. Manager, MassDOT Dist. 3
- Brian Brunelle, GCI-I, MassDOT Dist. 3

Called by the Appellant:

- Roger Wykes, Civil Engineer III, MassDOT Dist.3
- Michael Hartnett, Dist. Construction Engineer, MassDOT Dist. 3

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, Brian Brunelle, began employment with MassDOT in 2002, initially serving in the position of Laborer II., He was promoted in 2009 to the position of Highway Traffic Inspector II. In March 2017, he was promoted to Engineering Aide II (EA-II) and assigned to the Construction Section of MassDOT's District 3, headquartered in Worcester, MA. (*Exhs.1 & 8*)

2. On or about March 21, 2017, Mr. Brunelle submitted a request to MassDOT for reclassification of his title from EA-II to GCI-II. (*Exh.5*)

3. At the time of his request, MassDOT was in the process of a classification study of MassDOT job titles, and deferred consideration of his request until after July 2018, when the study was completed. (*Exhs.5 through 8*)

4. By letter dated March 19, 2019, MassDOT informed Mr. Brunelle that his position was reclassified from EA-II to GCI-I, effective March 19, 2017, with retro pay as a GCI-I awarded from that date forward. (*Exhs.9 & 10*)

5. Mr. Brunelle appealed the reclassification decision through the MassDOT's Human Resources Division, continuing to press his request for reclassification to the title of GCI-II, which was denied. (*Exhs.11 & 12*)

6. Mr. Brunelle further appealed to the Massachusetts Human Resources Division (HRD). By letter dated July 30, 2019, Mr. Brunelle was informed that HRD concurred with MassDOT's decision that the duties being performed by him do not warrant the reclassification request and denied his appeal. (*Exh.13*)

7. This appeal to the Commission duly ensued. (*Exh.17*)

Job Specifications for GCI-I and GCI-II

8. The Classification Specification for the General Construction Inspector (GCI) Series, issued May 1, 1989, defines the basic purpose of the work of a GCI is to oversee construction projects and enforce compliance with plans and specifications and all applicable laws, rules, regulation, policies and procedures. Incumbents in the GCI series inspect the construction of highways, buildings, bridges, dams, water or sewage systems, tunnels and waterways; conduct test on construction materials; survey construction sites; maintain records of construction operations; and perform related work as required. (*Exh.15*)

9. The GCI Series contains two levels: (a) GCI-I is the entry-level technical job in the series; and (b) GCI-II is the first-level supervisory job in the series. A GCI-I exercises "functional supervision" over 1-5 technical or other personnel with respect to "certain, but not all work activities" or "over some or all work activities on a temporary basis". The GCI-II exercises such "functional supervision", but also exercises "direct supervision" over, and "assign[s] work to and review[s] the performance of 1-5 technical personnel." (*Exh.15*)

10. The specific duties common to both the GCI-I and GCI-II level include: inspection of materials and construction operations for conformance to plans and specifications and rules and regulations; conducting field and/or laboratory test on materials used, minor survey work (e.g., placing grade stakes and operating survey instruments to determine line and grade and boundary

lines; preparing field notes and sketches and other documentation to chronicle work progress; inspecting contractor safety procedures for compliance with state and federal regulations; calculating quantities for pay estimates and payments; attending safety meeting and construction seminars to maintain proficiency; writing routine letters and memoranda. Both levels of work also involve “work contacts” with federal, state and municipal officers, engineers, technicians, workmen, abutters, contractors and the general public. (*Exh.15*)

11. In addition to the duties described above, a GCI-II is responsible for inspection of more complex construction operations, such as concrete and steel placement, excavation and drainage, traffic lines, signs, controls, pavement and lighting; monitoring contractor compliance for necessary permits and EEO guidelines; recommending changes to specifications and construction plans; recommending acceptance of completed projects, responding to issues from abutters, contractors and others regarding boundary lines and building codes; documenting investigative and inspection activities and recommending corrective action; and reviewing and editing reports prepared by subordinates; attend pre-bid conferences. (*Exh.15*)

The Appellant’s Work

12. Since March 2017, Mr. Brunelle has worked on highway construction projects assigned to him by his immediate supervisor, Roger Wykes, Civil Engineer III (CE-III). Mr. Wykes serves as the Resident Engineer with overall responsibility for project oversight. (*Exh.27; Testimony of Appellant & Wykes*)

13. Due to staff attrition and high workloads, Mr. Wykes’s responsibilities encompass simultaneous oversight of multiple projects as well as duties as a MassDOT scuba diver. Mr. Wykes had previous experience with Mr. Brunelle prior to 2017, and requested that Mr.

Brunelle be assigned to serve as his assistant to cover some of the projects in his absence.
(*Testimony of Wykes & Hartnett*)

14. Mr. Brunelle has been assigned to as many as four on-going multi-lane divided highway projects at a time, with an aggregate contract price of \$26 million, working a regular workday schedule as well two or three overtime night shifts. These projects include:

- Contract 97774 - \$7 million project consisting of full depth construction, pavement milling and paving, removal of existing and installation of new vertical curb, sidewalk installation, drainage repairs and installation, and the installation of traffic signal equipment.
- Contract 100200 - \$2 million project consisting of full depth roadway construction, roadway widening, removal and installation of curbing, installation of trench and subdrain, wetlands replication, pavement and the construction of a geosynthetic reinforced slope.
- Contract 97595 - \$13.5 million project consisting of resurfacing 6.2 miles of highway and related work, including drainage improvements, replacing guardrail and sections of barriers, slope stabilization and pavement.
- Contract 102206 - \$3.9 million project consisting of full depth construction, micro-milling, paving, removing and resetting existing granite curb and edging, drainage and installation of traffic signals.

(*Exhs.18 through 20, 23 & 28; Testimony of Appellant & Wykes*)

15. Mr. Brunelle regularly performs the duties that would be performed by Mr. Wykes when he was on site. During day shifts and on all overtime night shifts, Mr. Brunelle has overall responsibility for project oversight, which requires that he exercise “functional” supervision

over contractor personnel as well other MassDOT personnel assigned (usually on an overtime, temporary basis for a few days at time) to one of the projects. On the night overtime shifts, he prepares the overtime pay records as the Shift Supervisor. The scope of the work on these projects includes excavation, setting and pouring of structural concrete, drainage systems, and traffic and lighting assemblies. Mr. Brunelle also monitors and documents compliance with environmental rules and best practices. He prepares and signs off on the daily Field Inspection Reports covering all work performed during his shift. (*Exhs.8,11,23, 24 & 28; Testimony of Appellant & Wykes*)

16. Mr. Brunelle engages in routine "work contact" with local officials, especially law enforcement and municipal engineers, as well as private property abutters. In the absence of Mr. Wykes, he has addressed and resolved issues that arise with abutters or require changes to contract plans and specifications (for example, reconfiguring a drainage system to prevent runoff). He reviews for accuracy the daily operations reports of other MassDOT personnel on site and has the authority, and has exercised the authority, to require corrections in the reports prepared by others. (*Exhs.11; Testimony of Appellant & Wykes*)

17. The MassDOT personnel Mr. Brunelle "functionally" supervises on site include GCIs and other technical personnel assigned to the job by Mr. Wykes or by a supervisor in another unit. Mr. Brunelle does not assign personnel to a job. He has no "direct reports" and does not prepare EPRS reports for any MassDOT employees. (*Exhs.24; Testimony of Appellant, Wykes & Hartnett*)³.

18. The only Form 30s prepared for Mr. Brunelle's position relate to his job as an EA-II, prior to his reclassification to GCI-I. No Form 30 for his job since that reclassification was

³ There are approximately a dozen GCI-IIs in the District 3 Construction Section, none of whom have any direct reports. (*Exh.27;Testimony of Hartnett*)

provided. Mr. Wykes did prepare one EPRS for Mr. Brunelle as a GCI-I for FY 2019, for which he copied the job duties from prior EPRS forms for an EA-II, finding that Mr. Brunelle, “exceeds/excels” in all categories. None of the duties in Mr. Brunelle’s EA-II or GCI-I EPRS Forms encompass any of the level distinguishing duties of a GCI-II. (*Exhs.2 through 4 & 14*)⁴

19. Mr. Brunelle’s reclassification interview guide broke down the time he devoted to his duties as 70% spent in communication with “contractors and subcontractors regarding accomplishing their work” and resolution of “conflicts between the plans and the contract and/or between contractors and sub-contractors” and 30% of the time in related duties which includes checking in with local law enforcement regarding road safety, performing materials sampling, report preparation and updating his supervisor. (*Exh 6*)

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 of the time. See, e.g., Pellegrino v. Department of State Police, 18 MCSR

⁴ MassDOT called District 3 Acting District Administrative Manager, James Marine, whose sole knowledge about Mr. Brunelle work was based on EA-II Form 30s and EPRS Forms. The basic function of an EA-II is defined as: providing “technical duties in support of engineering activities: such as interpreting maps and charts, surveying, collection of traffic data, and clearing vegetation. (*Exh.16;Testimony of Marine*)

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. Brunelle performs the “distinguishing duties” of the GCI-II position a majority 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. Brunelle was initially misclassified as an EA-II in the Engineering Aide Series when he was assigned to Mr. Wykes as an inspector for District 3 construction projects. This issue has now been resolved with his reclassification, retroactively, to a GCI-I in the General Construction Inspector Series. The sole question for the Commission is whether the job Mr. Brunelle performs is appropriately classified at the “entry level” of GCI-I or at the supervisory level of GCI-II.

The Commission has plowed this ground before. In Cohen v. Massachusetts Highway Dep’t, 23 MCSR 120 (2010), the Commission allowed a reclassification from GCI-I to CGI-II of an eight-year tenured employee assigned to the Structures Maintenance Unit responsible for repairs of all bridges within District 5. Prior to 2005, Mr. Cohen worked in the field, reporting to a Resident Engineer (CE-III), and was responsible for inspecting bridge repairs and maintenance operations, taking field notes, recording attendance and calculating quantities for estimates. In approximately 2007, Mr. Cohen was reassigned to the district office, reporting to the District Structural Maintenance Engineer (CE-IV), and he became responsible for responding to reports from his superiors, the state police and the public concerning the state of

bridges that needed repairs. He would then determine whether to make a site visit (either in person or by directing another employee to do so) and determine what needed to be done to remedy the problem. If the repair was simple, he would inform the bridge gang supervisor who would send a gang (laborers) to make the repair. If the repair was more complex, he would prepare the necessary documents so that the job could be put out to bid. Over time, preparing and monitoring bridge contracts became Mr. Cohen's primary full-time duty. Although he did not have any direct reports assigned to him, he did supervise the bridge gangs (approximately 5 employees each), scheduling their work and issuing program directives, all work of the type "expected of a first-level supervisory position." He became responsible for "showing the ropes" to new hires, some of whom held titles higher than his. He also assumed responsibility for financial tracking of contracts, recommending the acceptance of completed construction projects and was "instrumental in clearing a back-log of maintenance contracts needing final submission". While some of Mr. Cohen's duties were common to both GCI levels, the Commission found that the preponderance of the evidence established that he devoted more than 60% of his time to his duties in preparing contracts for structural bridge repairs, supervising the construction operations on those contracts, and closing out completed work, all work involving "structural steel placement, excavation and drainage, traffic lines, signs, controls and pavement" that fell within the purview of a GCI-II.

More recently, in Pavone v. Massachusetts Dep't of Transportation, CSC No. C-20-085, 33 MCSR xxx (2020), the Commission denied a reclassification appeal brought by a MassDOT District 3 GCI-1 who sought reclassification to GCI-II. Mr. Pavone had been employed as a GCI-I for one year when he sought reclassification. He had no prior experience in general construction inspection and did not meet the minimum entrance requirements for the position of

GCI-II which requires at least “four years of full-time or equivalent part-time, technical experience in the construction, inspection, and/or alterations of construction projects such as highways, buildings, bridges, tunnels, sewers, waterway, dams and parks” or equivalent educational substitutes. Moreover, after six months of on-the-job training, Mr. Pavone stated that he was “now able to provide Line and grade to the contractor and calculate pay quantities” and that his other job duties “now include concrete sampling, asphalt inspections when grinding/paving is being done. I keep a daily log of the contractor's completed work and ensure that the work which has been logged has been completed to the contract specifications. I then enter my daily log into the field report recording all measurement, pay codes and pictures which is then reported back to [my supervisor] for his review and input. Together, [my supervisor] and I ensure that the set ups and road closures are done properly to ensure the well-being and safety of the workers and the public.” There was no evidence that Mr. Pavone directly or functionally supervised any MassDOT personnel on the project to which he was assigned. Id. Thus, the experience and duties presented by Mr. Pavone described are a classic example of the work of an “entry-level” GCI-I.

In Mr. Brunelle’s case, he had performed highway inspection work for almost a decade before assuming his current position in March 2017. He became a “de facto” assistant to his supervisor, Resident Engineer Wykes, who assigned him primary responsibility to oversee multiple projects in his periodic absence, and on overtime night shifts, with contract values from 42 million dollars to \$13.5 million dollars. These projects included concrete and steel placement, excavation and drainage improvements, wetlands replication, installation of traffic signal equipment and full depth roadway construction, which are the specific types of construction projects assigned to a GCI-II. As part of his duties, on occasion, he responded to

and resolved an issue involving an abutter, he directed a change to plans and specifications when a work-around was needed to rectify a design problem that arose in the field, and he served as part of the team of personnel who attend pre-bid conferences, all examples of duties performed at the GCC-II level.

On the other hand, according to Mr. Brunelle's reclassification interview guide, he estimated that 70% of his time was devoted to communication with "contractors and subcontractors regarding accomplishing their work" and resolution of "conflicts between the plans and the contract and/or between contractors and sub-contractors." Thus, neither his interview guide, nor any of his EA II or GCI-I EPRSs identify any duties that fit the GCI-II level. No Form 30 was prepared for his position as a GCI-I.

Mr. Brunelle's duties do not include the responsibility for any direct reports, for whom he assigns work and reviews their performance (through the EPRS process) of any MassDOT personnel which is part of the distinguishing duties of a GCI-II, although no GCI-II in District 3 actually have any such direct reports. He does, as part of his work in the field, "functionally" supervise and assign work to both contract employees and MassDOT technical personal who are assigned to his shifts (by others), but this work is a duty expressly described as common to both the GCI-I and GCI-II levels and is not properly included in determining whether he performs at the GCI-II level. E.g., Lannigan v Department of Developmental Services, 30 MCSR 494 (2017)

Finally, Mr. Brunelle contends that one or more other MassDOT employees have been reclassified to GCI-II who are doing allegedly equivalent work. The Commission has repeatedly noted, when reviewing reclassification appeals, the Commission must look "only at the duties of the Appellant" and the classification of other employees who held those positions prior to being

transferred to their current job, or promoted by the Appointing Authority to the position, have no bearing on the issue before the Commission as to whether the Appellant meets the preponderance of the evidence test that the Appellant is performing a majority of the time at the higher level. See Dell'Anno v. Massachusetts Dep't of Revenue, CSC No. C-18-083, 33 MCSR xxx (2020); McBride v. Dep't of Industrial Accidents, 28 MCSR 242 (2015); Palmieri v. Department of Revenue, 26 MCSR 180 (2013).

After carefully reviewing the evidence, I conclude that, Mr. Brunelle has shown that he has been given considerable discretion to exercise independent authority over contractors and MassDOT personnel and that, on occasion, his decision-making authority rose to the level expected of a GCI-II, such as in identifying and implementing field changes to plans and specifications, inspecting and reporting on the more complex types of construction (concrete and steel, drainage, traffic signals, etc.), and being delegated the authority to act as a “de-facto” assistant Resident Engineer. The evidence, however, does not support the conclusion that, at the time of the request for reclassification in March 2017, or at of any time thereafter, Mr. Brunelle was performing these level distinguishing duties more than 50% of the time. Although his superiors supported his request for reclassification, the Form 30s and the EPRSs, prepared by those same supervisors, as well as Mr. Brunelle’s own interview guide descriptions, are devoid of evidence that supports that conclusion. Although Mr. Brunelle provided credible, anecdotal evidence that, in some respects, he does sometimes perform at the level of a GCI-II, the Commission has consistently held that the evidence required to allow a reclassification requires proof that, at the time of the reclassification request, those duties comprise the majority of his 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. Similarly, 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. See, e.g., 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, xx Mass.App.Ct. xxx, xxx (2020) (in general, voluntary overtime and detail pay are not part of the regular compensation of a tenured civil servant)

In sum, Mr. Brunelle is, without doubt a well-regarded, high performer in his position as a GCI-I. He does not qualify for reclassification to GCI-II at this time. If, at a later date, he is able to marshal more specific, convincing evidence that demonstrates that his job obligates him to perform, on a permanent basis, the level distinguishing duties of a GCI-II for more than a majority of his time, he may be able to show, in the future, that he deserves appropriate relief.

Accordingly, for the reasons state above, the appeal of the Appellant, Brian Brunelle, under Docket No. C-19-116, is *denied*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman [absent]; Camuso, Ittleman, Tivnan & Stein, Commissioners) on December 3, 2020.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in 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:

Brian Brunelle (Appellant)

Matthias P. Kriegel, Esq. (for Respondent)