

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

J. OTAVIO S. DePAULA-SANTOS,
Appellant

v.

C-19-211

DEPARTMENT OF ENVIRONMENTAL
PROTECTION,
Respondent

Appearance for Appellant:

Pro Se
J. Otavio S. DePaula-Santos

Appearance for Respondent:

Julia O’Leary, Esq.
EOEEA
100 Cambridge Street, Suite 900
Boston, MA 02114

Commissioner:

Christopher C. Bowman

DECISION

On October 7, 2019, the Appellant, J. Otavio S. DePaula-Santos (Appellant), pursuant to the provisions of G.L. c. 30, s. 49, filed an appeal with the Civil Service Commission (Commission), appealing the September 18, 2019 decision of the state’s Human Resources Division (HRD) in which HRD affirmed the decision of the Department of Environmental Protection (DEP) to deny his request to be reclassified from Environmental Analyst III (EA III) to Environmental Analyst IV (EA IV).

On October 29, 2019, I held a pre-hearing at the offices of the Commission and a full hearing was held at the same location on December 3, 2019¹. The hearing was digitally recorded and one CD was made of the hearing.²

FINDINGS OF FACT:

Thirty-five (35) exhibits were entered into evidence (Respondent Exhibits 1-6 (R1 – R6) and Appellant Exhibits 1-29 (A1 – A29). Based on the documents submitted into evidence, the testimony of:

Called by Mr. DePaula-Santos:

- J. Otavio S. DePaula-Santos, Appellant;
- Ted Saad, EA V / Information Manager, DEP;

Called by DEP:

- Ana Maria Yvette DePeiza, Director, Drinking Water Program, DEP;
- Damon Guterman, EA VI, Drinking Water Program, DEP;
- Andrew Durham, EA V, Drinking Water Program, DEP;

and taking administrative notice of all matters filed in the case, and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. The Appellant has a Bachelor’s degree in Biology and Mathematics and a Master’s degree in Environmental Studies. (Testimony of Appellant)

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.

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 substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

2. Prior to working for DEP, the Appellant worked for an environmental consulting company.
(Testimony of Appellant)
3. The Appellant has worked for DEP for twenty-eight (28) years. (Stipulated Fact; Testimony of Appellant)
4. For the past ten (10) years, the Appellant has served in the title of EA III. (Testimony of Appellant)
5. The Appellant works at 1 Winter Street in Downtown Boston from 5:30 A.M. to 3:00 P.M.
(Testimony of Appellant)
6. The Appellant reports to Andrew Durham, an EA V. (Testimony of Appellant)
7. The Appellant does not supervise any employees. (Testimony of Appellant)
8. Not all EA IVs at DEP supervise employees. (Testimony of Appellant, DePeiza, Guterman)
9. The Appellant spends more than 50% of his time administering the Cross Connection Control Program (CCCP) within DEP's Drinking Water Program. (Testimony of Appellant, Saad, DePeiza, Guterman and Durham)
10. Pursuant to state regulations, every public water system in Massachusetts must have a CCCP to prevent "cross-connections". (Testimony of Appellant)
11. A "cross-connection" is "any actual or potential connection between the public water supply and a source of contamination or pollution." (<https://www.mass.gov/service-details/cross-connection-control-a-best-practices-guide-for-small-systems>)
12. The Appellant did not establish the guidelines for the CCCP Program at DEP. Rather, the guidelines were established many years ago by the current Director of the Drinking Water Program. (Testimony of Appellant and DePeiza)

13. Using those pre-existing guidelines, the Appellant reviews new applications and renewal applications for individuals seeking to be certified as “Back-Flow Testers” and “Cross-Connection Surveyors.” Approximately 891 individuals hold such certifications in Massachusetts, which must be renewed every three (3) years. (Testimony of Appellant)
14. Once certified, these individuals may approve local permits on behalf of a public water system (i.e. – a local water department) that has a CCCP. (Testimony of Appellant)
15. As part of his job duties and responsibilities, the Appellant provides information to applicants seeking one of the above-referenced certifications. (Testimony of Appellant)
16. Once the application is received, the Appellant is responsible for data-entering the application information into a tracking system. (Testimony of Appellant)
17. The Appellant then verifies that the applicant has submitted the appropriate fee. (Testimony of Appellant)
18. The Appellant then reviews the application to ensure that the applicant has provided the appropriate supporting documentation. (Testimony of Appellant)
19. New applicants must provide supporting documentation showing that he/she has successfully passed an examination from an approved provider. (Testimony of Appellant)
20. Applicants seeking a renewal must show that they have completed a minimum number of tests and three (3) hours of approved training. (Testimony of Appellant)
21. If the applicants provide the above-referenced documentation, and the appropriate fee, the Appellant approves the initial certification or renewal and mails the approved certification to the applicant. (Testimony of Appellant)
22. The Appellant spends a minority of his time attending meetings of water supply system organizations and reviewing water vending machine applications. Although he has not done

so in approximately two (2) years, the Appellant also occasionally “audits” a public water system to ensure that appropriate certifications have been issued. (Testimony of Appellant)

23. The Job Specifications for the EA series were developed and approved in 1989, approximately thirty (30) years ago. (Exhibit R1)
24. Each title in the series (EA I – EA VI) has level distinguishing duties (LDDs). (Exhibit R1)
25. Partly because of the passage of time (30 years) since they were developed, the LDDs for the EA series do not always accurately reflect the actual job duties of employees serving in those titles. (Testimony of DePeiza)
26. In addition to reviewing the language in the LDDs, DEP, when determining the correct job title to assign in the EA series, also looks at the work typically performed by incumbents in the various titles. (Testimony of DePeiza)
27. When reviewing the Appellant’s request for reclassification to EA IV, DEP looked both at the LDDs in the EA series as well as the type of work being performed by incumbent EA IVs. (Testimony of DePeiza)
28. The LDD most relevant to this appeal is EA IV LDD #5 which states: “Recommend approval/disapproval of applications for permits for hazardous waste or other projects.” (Exhibit R1)
29. Upon review, Ms. DePeiza determined that employees classified as EA IVs at DEP administered programs that required more qualitative review, including the need to consult publications and other material to determine whether a certification and/or approval was appropriate. Further, EA IVs at DEP typically work independently to develop guidelines and standard operating procedures. (Testimony of DePeiza)

30. Ms. DePeiza found that the Appellant’s job duties and responsibilities were distinguishable from EA IVs because the majority of his duties involved a more straightforward, administrative review (i.e. – either the applicant did or did not have a passing grade from an approved training provider.) Further, the Appellant does not work independently to develop program guidelines or standard operating procedures. (Testimony of DePeiza)

Legal Standard

“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 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 must show that he performs the distinguishing duties of the [title sought] more than 50% of the time. See Gaffey v. Dept. of Revenue, C-11-126 (July 18, 2011); see also 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 duties encompassed within the higher level position the majority of the time....”).

Analysis

The Appellant has not shown that he spends a majority of his time performing the level distinguishing duties of an EA IV. Here, DEP has appropriately applied LDDs developed thirty (30) years ago to the current work environment, including LDD #5. The Appellant, based on a rigid, literal application of LDD #5, argues that this LDD describes the work that he performs a majority of the time.

However, based on the credible testimony of Ms. DePeiza, the long-time DEP employee who currently serves as Director of the Drinking Water Program, and who created the CCCP, a literal interpretation of that LDD is not appropriate thirty years later. Today, EA IVs meet LDD #5 by working independently to develop program guidelines and review and approve applications that require a more qualitative review. She found that the Appellant's job duties and responsibilities were distinguishable from EA IVs because his review is effectively an administrative review.

Importantly, I do not think that Ms. DePeiza's conclusion here was based on a result-driven attempt to deny the Appellant's request for reclassification. Rather, Ms. DePeiza, who hired the Appellant many years ago, spoke favorably of the Appellant and the important role that he plays administering the CCCP.

Although this appeal must be denied, it should not be viewed as a negative reflection on the Appellant or his work. His commitment, organization skills and dedication were evident in the documents submitted as well as his professional presentation to the Commission. DEP is fortunate to have someone with his skill set in this mission-critical position.

Conclusion

The Appellant's re-classification appeal under Docket No. C-19-211 is hereby ***denied***.

Civil Service Commission

/s/ Christopher C. Bowman

Christopher C. Bowman

Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, 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)(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:

J. Otavio S. DePaula-Santos (Appellant)

Julia O'Leary, Esq. (for Respondent)