

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

MARVIN LEWITON,
Appellant

v.

C-16-211

DEPARTMENT OF LABOR
STANDARDS / EOLWD,
Respondent

Appearance for Appellant:

Pro Se
Marvin Lewiton

Appearance for Respondent:

Suzanne Quersher, Esq.
Executive Office of Labor
and Workforce Development
19 Staniford Street, 5th Fl
Boston, MA 02114

Commissioner:

Christopher C. Bowman

DECISION

On December 15, 2016, the Appellant, Marvin Lewiton (Mr. Lewiton), pursuant to the provisions of G.L. c. 30, s. 49, filed an appeal with the Civil Service Commission (Commission), appealing the September 21, 2016¹ decision of the state's Human Resources Division (HRD) to affirm the decision of the Department of Labor Standards (DLS) to deny his request for reclassification from the position of Industrial Safety and Health Inspector (ISHI) III to the position of ISHI IV. On January 17, 2017, I held a pre-hearing at the offices of the

¹ Appellant asserts, and it is undisputed, that he did not receive this correspondence until November 18, 2016.

Commission and a full hearing was held at the same location on March 1, 2017². The hearing was digitally recorded and one CD was made of the hearing.³

FINDINGS OF FACT:

DLS submitted eleven (11) exhibits (Respondent Exhibits 1-11) and Mr. Lewiton submitted nine (9) exhibits (Appellant Exhibits 1-9). Based on the documents submitted into evidence and the testimony of:

For DLS:

- Michael Flanagan, Chief of Safety and Health Programs, Department of Labor Standards;
- Caryn Makros, Personnel Analyst II, Executive Office of Labor and Workforce Development;

For Mr. Lewiton:

- Kathy Flannery, Supervisor, Department of Labor Standards;
- Richard Reibstein, former employee, Executive Office of Energy & Environmental Affairs;
- Marvin Lewiton, Appellant;

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. Mr. Lewiton has been employed by DLS, which currently falls under the jurisdiction of the Executive Office of Labor and Workforce Development (EOLWD), since 1999. (Stipulated Fact)

² 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.

³ 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. Mr. Lewiton is currently classified as an ISHI III, assigned to the On-Site Consultation Program. (Testimony of Mr. Lewiton; Respondent Exhibit 9)
3. The Classification Specification for the ISHI series was reviewed and revised effective January 24, 2016. (Testimony of Ms. Makros; Respondent Exhibit 1)
4. Specifically, in January 2016, Mr. Lewiton and others were moved from the Environmental Engineer series to the ISHI series in an effort to bring pay equity and update the ISHI classification specifications. This conversion was negotiated with the Massachusetts Organization of Scientists and Engineers (“MOSES”) labor union over several years, and resulted in Mr. Lewiton’s lateral reclassification from an Environmental Engineer IV to an ISHI III. The lateral reclassification did not result from a change in job duties, nor did a change in job duties follow. (Testimony of Mr. Flanagan; Respondent Exhibit 1)
5. The ISHI III is the first level supervisor in the series and, based on assignment, may be a seasoned technical leader. An ISHI III performs complex work, often requiring the development of unique solutions, based on extensive professional knowledge of and experience in a specialty area. An ISHI III performs work that requires considerable independence in the exercise of judgment, in determining approaches, and in the interpretation and application of agency policies, standards and procedures. The primary focus of an ISHI III is to provide formal and informal supervision and act as the liaison with agency management. (Respondent Exhibit 6)
6. The ISHI III also manages training programs, assists management or personnel of a higher grade in grant applications or administering grant programs, and coordinates major DLS activities on a statewide level. (Respondent Exhibit 6)

7. The ISHI IV is a second level supervisor performing advanced work requiring expert knowledge of a specialty area. The IV performs the duties of a I – III and also exercises significant independence in decision-making and policy development. The IV represents DLS at high-level policy discussions with other government officials, assists management with strategic planning, oversees the design and development of training programs and other outreach, and participates in or oversees the drafting of regulations and policies.
(Respondent Exhibit 6)
8. An ISHI IV has the decision-making authority to: develop and implement changes to programs to ensure quality advice and services; and continually review program design for best practices and evidence based data to support program goals. (Respondent Exhibit 6)
9. Mr. Lewiton is not a second-level supervisor. He reports directly to an ISHI IV (Kathy Flannery) and supervises four (4) ISHI IIs. (Respondent Exhibit 9)
10. Mr. Lewiton is an expert in “process safety management” inspections. These inspections occur approximately once a year. (Testimony of Ms. Flannery and Mr. Flanagan)
11. There are other infrequent complex inspections assigned to Mr. Lewiton that are not routine, such as ammonia refrigeration. (Testimony of Ms. Flannery)
12. Ms. Flannery, who is Mr. Lewiton’s supervisor, seeks and receives input on budget decisions and grant applications from both supervisors that work for her, including Mr. Lewiton and the other ISHI III. (Testimony of Ms. Flannery)
13. Ms. Flannery is in charge of developing, overseeing and ensuring compliance with the On-Site Consultation grant. (Testimony of Mr. Flanagan and Ms. Flannery)
14. Mr. Lewiton’s second level supervisor, Mr. Flanagan, receives budget, programmatic, and grant material directly from Ms. Flannery, an ISHI IV. Mr. Lewiton has never been in

attendance in meetings over such matters that Mr. Flanagan himself attends. (Testimony of Mr. Flanagan)

15. Mr. Lewiton does not exercise significant independence or assist management with strategic planning. (Testimony of Mr. Flanagan)

16. Mr. Lewiton does not participate in or oversee the drafting of regulations and policies. (Testimony of Mr. Flanagan and Mr. Lewiton)

17. Mr. Lewiton's EPRS states that he is an exemplary employee responsible for: conducting inspections and interventions, maintaining knowledge on industrial hygiene practices as well as OSHA regulations, providing on-the-job training and training on use of equipment, interfacing with employers, employees, other agencies, and other safety and health professionals as assigned, providing technical advice orally and in writing, preparing and conducting training as assigned, supervising industrial hygienists and overseeing the day-to-day operations of industrial hygiene, and assisting the consultation program supervisor in managing activities related to the OSHA On-Site Consultation Program. (Respondent Exhibit 5)

18. Ms. Flannery is responsible for managing all activities of the OSHA On-Site Consultation Program including ensuring performance goals are met, financial and budgetary matters, developing and implementing an annual Consultation Annual Program Plan ("CAPP"), overseeing all personnel including the industrial hygiene team, the safety inspection team, and any technical or supporting staff within the program, maintaining and overseeing the Safety and Health Achievement Recognition Program and Alliance Programs, and working with and receiving assignments directly from the program manager. (Testimony of Ms. Flannery; and Respondent Exhibit 11)

19. Ms. Flannery is responsible for assigning all work to the industrial hygienists. (Testimony of Mr. Flanagan and Ms. Flannery)
20. Requests for training generally come to Ms. Flannery from outside sources such as federal OSHA, or are self-initiated by Ms. Flannery to meet a need in the Commonwealth, such as the development of OSHA record-keeping training and fall prevention training. Ms. Flannery generally will then assign trainings to an appropriate ISHI III or ISHI II depending on specialized expertise, although she may stay involved to help market the training or coordinate logistics. (Testimony of Ms. Flannery)
21. Mr. Lewiton performs approximately 20% supervision, 10% direct training, 30% inspections, a quarter of which are uniquely complex, 15% working with his supervisor on budget and program matters, and 25% on outreach and working with other organizations, with one-third of that involving the design and development of trainings. (Testimony of Mr. Lewiton)
22. Approximately 25% of Mr. Lewiton's work responsibilities consist of outreach and participating on statewide committees. As examples, Mr. Lewiton lists his work with cosmetology safety, Nantucket lead and safety, and speaking at conferences. (Testimony of Mr. Lewiton)
23. ISHI IIs and IIIs sit on committees and represent DLS by providing technical expertise. (Testimony of Flanagan; AA Exhibit 6) Mr. Lewiton does not have the independence to commit agency resources to committees, but rather brings back such inquiries or recommendations to his supervisor. (Testimony of Mr. Flanagan and Ms. Flannery)

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.” M.G.L. c. 30, § 49.

Mr. Lewiton must show that he is improperly classified and to do so, he must show that he performs the distinguishing duties of the TE IV title 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

Mr. Lewiton has not shown that he performs the level-distinguishing duties of an ISHI IV a majority of the time for the following reasons.

First, Mr. Lewiton is not a second-level supervisor. Rather, he supervises four ISHI IIs and reports to an ISHI IV, who is the second level-supervisor.

Second, Mr. Lewiton does not represent the agency in “high-level policy discussions” with other government officials. I considered Mr. Lewiton’s testimony that his work on statewide committees constitutes policy-making. I listened carefully to all of the relevant testimony, including that of Mr. Lewiton, Ms. Flannery, Mr. Flanagan and a former employee at the Executive Office of Energy and Environmental Affairs. Ultimately, I concluded that Mr. Lewiton is a sought-after expert who provides invaluable *technical expertise* regarding health-related issues in Massachusetts. This is distinguishable from representing the agency in high-

level policy discussions, something that is performed by Mr. Flanagan, with input from Ms. Flannery, an ISHI IV.

Third, Mr. Lewiton does not assist management in strategic planning. Rather, a review of the testimony shows, similar to the above, that this function is performed by Mr. Flanagan, with the input and assistance of Ms. Flannery.

Fourth, while Mr. Lewiton does conduct training sessions, including curriculum development, this is also a level-distinguishing duty of an ISHI III, the title that Mr. Lewiton currently holds.

Fifth, Mr. Lewiton does not, as a regular part of his job, participate in and oversee the drafting of regulations and policies. I considered Mr. Lewiton's testimony that he has worked on policies related to telecommuting and rental car use. However, this involvement occurred years ago and is not part of Mr. Lewiton's current or ongoing duties.

Sixth, Mr. Lewiton has not shown that he "develops and implements changes" to programs. Again, while his advice and technical expertise may be relied on in making such decisions, these programmatic decisions are ultimately made by Mr. Flanagan and Ms. Flannery.

Finally, the evidence does show that Mr. Lewiton reviews program design for best practices and evidence based data to support program goals. However, Mr. Lewiton has not shown that this duty, even if combined with his training duties, constitutes more than 50% of his time.

Overall, the preponderance of the evidence shows that Mr. Lewiton's job duties fall squarely within the title of an ISHI III, which describes a first-level supervisor who supervises program operations, exercises overall management of training programs, develops new protocols on technical matters, assists management with budgets and grants and coordinates major activities of the department (i.e. – process management, ammonia inspections, etc.). Further, his current classification is consistent with the current organization chart which shows that he supervises

ISHI IIs, who spend most of their time doing inspections, and reports to an ISHI IV, who is a second-level supervisor who does not perform inspections, but spends more of her time on policy, budget, training and planning issues.

Conclusion

For all of the above reasons, Mr. Lewiton's appeal under Docket No. C-16-211 is hereby ***denied.***

Civil Service Commission

/s/ Christopher C. Bowman
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein and Tivnan, Commissioners [Camuso – Absent]) on January 3, 2018.

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:
Marvin Lewiton (Appellant)
Suzanne Quersher, Esq. (for Respondent)