

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

PATRICIA E. SUTLIFF,
Appellant

CASE NO: C-17-077

v.

**EXECUTIVE OFFICE OF LABOR
AND WORKFORCE DEVELOPMENT,**
Respondent

Appearance for Appellant:

Joseph G. Donnellan, Esq.
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Appearance for EOLWD:

Patrick G. Butler, Esq.
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Commissioner:

Paul M. Stein

DECISION

The Appellant, Patricia E. Sutliff, 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 her current title of Industrial Safety and Health Inspector II (ISHI-II) to the title of Industrial Health and Safety Inspector IV (ISHI-IV). The Commission held a pre-hearing conference on May 2, 2017 and a full hearing, which was digitally recorded,² on July 12, 2017, both at the Commission's Boston office. Eleven exhibits were taken into evidence. Each party submitted a Proposed Decision.

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 EOLWD:

- Michael Flanagan, DLS Chief of Safety and Health Programs
- Cheryl Stanton, EOLWD Payroll and Staffing Manager

Called by the Appellant:

- Patricia Sutliff, Appellant

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, Patricia Sutliff, has been employed with the DLS since 1996, initially, as an Environmental Engineer II and promoted to Environmental Engineer III in 1998. Her prior employment includes five years with the Massachusetts Department of Fisheries and Wildlife, handling permitting and regulations, and approximately ten years for the Town of Brookline, first in the Building Department and then as a Health Inspector, where she began to handle lead and asbestos abatement issues. (*Exh. 2; Testimony of Appellant*)

2. The DLS is the agency tasked with protecting workers' safety and health, wages and working conditions, headed by a Department Director. (*Exh. 6; Testimony of Flanagan: <https://www.mass.gov/orgs/department-of-labor-standards>*)

3. Effective January 24, 2016, pursuant to a Memorandum of Agreement (MOA) between the Commonwealth and the bargaining agent for EOLWD employees (MOSES Unit 9), the Environmental Engineer Series was replaced by a new job series entitled Industrial Safety Health Inspector (ISHI) Series. Pursuant to the MOA, the new ISHI series created four new job titles – ISHI-I (Grade 21); ISHI-II (Grade 23); ISHI-III (Grade 25); and ISHI-IV (Grade 27).

The MOA further stated:

“As a result of this new grade structure, the parties agree that Inspectors at the Department of Labor Standards shall be reallocated from their current grade levels in accordance with levels described above. In addition, Environmental Engineers (EE)

II, III, IV and V at the Department of Labor Standards shall be placed in the new ISHI series as follows: EE II/ISHI I; EE III/ISHI II; EE IV/ISHI III/EE V/ISHI IV.”

(Exh.1; Testimony of Flanagan)

4. In accordance with the terms of the MOA, Ms. Sutliff’s job title was reclassified from Environmental Engineer III to her current job title of ISHI-II. *(Stipulated Facts; Testimony of Appellant & Stanton)*

5. The job of employees with 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 . . .” There are four levels in the series:

- 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.

6. Ms. Sutliff is one of eight staff members (all now IHSI-IIs) assigned to the DLS Investigations and Enforcement Unit. Her unit supervisor holds the title of IHSI-IV (currently Michael Weakly and, at the time of the reclassification request, Brian Wong) and reports to the

Chief of Safety and Health Programs, Michael Flanagan. Mr. Flanagan reports directly to the DLS Director. (*Exhs.2, 6 & 7: Testimony of Appellant & Flanagan*)³

7. Ms. Sutliff's core duties focus on providing technical services for the Asbestos and Lead Program, including lead and asbestos licensing of abatement contractors, analytical labs, consultants and training providers; performing and documenting routine and specialty field inspections; and, to a lesser degree, assisting her superiors and others in the development of regulations and technical guidance materials. She mentors new hires and exercises discretionary technical leadership and oversight at field inspections and training audits but she acknowledges that she has "no direct reports" for whom she evaluates performance. (*Exhs. 2, 7 through 11; Testimony of Appellant & Flanagan*)

8. On October 18, 2016, Ms. Sutliff filed a reclassification appeal with EOLWD, which denied her request on February 7, 2017. (*Stipulated Facts; Exhs 2 & 4; Testimony of Stanton*)

9. Ms. Stanton duly appealed the EOLWD decision to the Massachusetts Human Resources Division (HRD). On March 30, 2017, HRD informed Ms. Sutliff that HRD concluded that EOLWD had properly determined that she was correctly classified as an ISHI-II and denied her appeal. (*Stipulated Facts; Exh. 5*)

10. Ms. Sutliff's 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

³ At the time of Ms. Sutliff's 2016 EPRS, the position of Investigations and Enforcement Unit manager was vacant, so Mr. Flanagan performed that EPRS, although he had "not had time to fully assess performance" of the unit staff. (Exh. 7; Testimony of Flanagan)

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 Ms. Zeller 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

Ms. Sutliff has a long and distinguished career with the DLS and is clearly a master of her field of expertise in lead and asbestos abatement regulatory work. She is uniformly regarded by her colleagues as a dedicated public servant who works hard at her job. However, reclassification of a position by the Commission requires proof that specified distinguishing duties at a higher title are, in fact, actually being performed as the major part of her current work (i.e. more than 50 percent of her time is spent on these distinguishing duties). Accordingly, the issue before the Commission is limited to that narrow question.

The evidence establishes that substantially all of Ms. Sutliff’s job duties fit squarely within her current level of an ISHI-II. While she does occasionally perform at a higher level, the

preponderance of the evidence falls well short of establishing that she performs above the ISHI-II level more than 50% of the time, which is the Commission's core requirement to allow a reclassification.

First, the preponderance of the evidence established that EOLWD and HRD correctly determined that substantially all of the duties regularly performed by Ms. Sutliff are not distinguishing duties of an ISHI-IV. Indeed, they largely fall well within the duties expected of an ISHI-II. These duties include the core functions associated with licensing, training audits, and field inspections. Although she also does assist in drafting regulations and technical materials, she does that work subject to review and approval of her superiors. Similarly, she participates in meetings with other agencies and institutions as the "eyes and ears" of DLS but not as a policy or decision maker. Her 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 she typically does, the record simply does not show that such work comprises any quantifiable regular part of her job, let alone, show that it occupies more of her time than her other core ISHI-II level duties.⁴

Second, as defined in the Classification Specification, the "primary focus" above the ISHI level is supervision. While, an ISHI-III "may" exercise either functional or formal supervision, at the ISHI-IV level, an employee in that title MUST have formal supervisory responsibility over lower level employees. Ms. Sutliff admits that, while she exercises some "functional" supervision and mentors lower level staff (which is expressly provided as a duty of an ISHI-II), she has no formal supervisory role as defined by the ISHI classification specification for an ISHI-IV.

⁴ A fair argument might be made that some of Ms. Sutliff's "functional supervision" of others and performance at a more "complex" level fit the specification for an ISHI-III, but the extent to which she might be performing at the ISHI-III level a majority of the time was not before the Commission and is not addressed in this Decision.

Third, reclassification of Ms. Sutliff would be fraught with practical complications, including, the elevation of an employee whose position has been reallocated pursuant to a collective bargaining agreement, which, in the area of job reallocations, the Commission has no authority to tread. See G.L.c.30, §46 & §49, ¶3. Moreover, the reclassification of Ms. Sutliff to the same level as her supervisor presents an organizational anomaly that, as a general rule, ought to be avoided.

In sum, Ms. Sutliff did not meet her burden to establish that she performs the duties of an ISHI-IV more than half of her time. Therefore, the Commission is not authorized to order that her position be reclassified to an ISHI-IV.

Accordingly, for the reasons stated above, the appeal of the Appellant, Patricia E. Sutliff, under Docket No. C-17-077, is *dismissed*.

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 January 17, 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 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:

Joseph Donnellan, Esq. (Appellant)

Patrick G. Butler, Esq. (for Respondent)