COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Division of Administrative Law Appeals

 1 Congress Street, 11th Floor

 Boston, MA 02114

 (617) 626-7200

 Fax: (617) 626-7220

Marie Clement,

 Petitioner Docket No: CR-15-299

v.

State Board of Retirement, Date Issued: December 8, 2017

 Respondent

**Appearance for Petitioner**

Stephen I. Hansen, Esq.

Eckert Seamans Cherin & Mellott, L.L.C.

Two International Place

16th Floor

Boston, MA 02110

**Appearance for Respondent**

Candace L. Hodge, Esq.

State Board of Retirement

One Winter Street

Boston, MA 02108-4747

 **Administrative Magistrate**:

Edward B. McGrath, Esq.

Chief Administrative Magistrate

**SUMMARY OF DECISION**

 I reverse the Respondent’s decision to classify the Petitioner’s position as Group 2 thereby making her ineligible for ERIP, because the Petitioner meet her burden of proof and established that her position should have been classified in Group 1.

**DECISION**

 The Petitioner, Marie Clement, timely appealed under G.L. c. 32, § 16(4) the decision of the Respondent, State Board of Retirement, classifying her position in Group 2 and refusing to process her application for the Employee Retirement Incentive Program (“ERIP”).

 The Petitioner submitted a pre-hearing memorandum that I marked “A” for identification. The Respondent submitted a pre-hearing memorandum that I marked “B” for identification. On December 15, 2016, I held the evidentiary hearing, which was digitally recorded. The Petitioner testified on her own behalf. The Respondent did not call any witnesses.

 I admitted seven documents into evidence. The Petitioner offered a letter dated July 30, 2016 signed by June Roy. It is not the type of evidence that reasonable people rely on when conducting their serious affairs and, therefore, I excluded it and marked it “C” for identification.  *See* G.L. c. 30A, § 11(2). The Respondent and Petitioner filed Post-hearing briefs and I marked them “D” and “E” respectively for identification. On February 21, 2017, when I received the Respondent’s Post-hearing brief, I closed the administrative record.

**FINDINGS OF FACT**

 Based upon the testimony and documents submitted in the above-entitled matter, I hereby render the following findings of fact:

1. The Petitioner, Marie Clement, is 69 years old. (Ex. 1)
2. The Petitioner worked as a Mental Health Assistant at the Fernald School from 1974 to 1977. She has worked for the Department of Developmental Services (“DDS”) since January14, 2002. (Stip.)
3. While employed at DDS, the Petitioner worked as a Human Service Coordinator A/B. (Stip.)
4. The Form 30 for a Human Services Coordinator A/B, which was prepared in August 2002 for DDS/Metro Region, states that the general duties and responsibilities of the position are:

Coordinates and facilitates the development of an Individual Support Plan, that incorporates a broad spectrum of individual needs, skills and desires; reviews and monitors the planning process; Provides direct advocacy in human, civil and legal rights; Arranges or organizes DDS-funded and generic support services in response to needs of individuals; Provides information and referral; Facilitates linkage, between the Individual Support Planning process and the supports and services to be provided, purchased or arranged and QUEST processes; Monitors the safety and wellbeing of individuals; Maintains outreach to community, performs related duties as required.

1. (Ex. 7) The Detailed Statement of Duties and Responsibilities Section of the Form 30 states:
2. Arrange or .provide crisis intervention for individuals, as needed; Assess the situation; Coordinate with other appropriate agencies; Provide the least restrictive alternative in a timely manner; Define andadvocate for the most appropriate alternative; Promote individual rights.
3. Coordinate and facilitate development of an Individual Support Plan that incorporates a broad spectrum of individual needs, skills and desires; Support individuals with mental retardation in achieving lives of their own choosing; Assists individuals in being connected to and sustained by their communities by utilizing the planning process to identify the needed supports, including innovative support activities, that can meet the individual's needs and serve as a vehicle for pursuing meaningful community inclusion for the individual. Subject to assignment, coordinate Intake and Eligibility process; Types of services to be provided would include; residential supports, family and individual supports, training/employment, clinical supports, transportation, routine medical, etc.
4. Coordinate, conduct, and document reviews of each Individual's Support Plan, including modifications and documentation of services not needed or desired by the individual, Review plan on an annual basis, and more frequently as needed to ensure that the person is satisfied with the supports/services s/he is receiving.
5. Organize individual services and supports to build and enhance the capabilities in individuals with mental retardation; Support individuals in identifying and developing their vision of a desirable future; Incorporate this vision into a coherent and integrated plan.
6. Provide advocacy in the areas of human, civil, and legal rights. Provide such education and support as needed to family members/guardians by explaining and clarifying DDS and generic service options (including risks, benefits and safeguards); Assist individuals in identifying their service and support choices and networking with their community; Provide information and referral.
7. Maintain consumer records database which documents individual's choices and needs; Maintain priority needs list for individual day/residential support needs; Keep the Area Director and Service Coordinator Supervisor informed of these needs on an ongoing basis in order for them to identify and provide adequate supports within fiscal resource constraints; Facilitate linkage between Individual Support Planning process by participating in the state contracting process; maintain data base for individuals, to maximize all public benefits.
8. Coordinate referrals to all state and federal entitlement benefits such as: SSI, SSA, food stamps, SSDI, Medicaid, Medicare, etc.
9. Attend training or conferences, as approved by supervisor and subject to resource constraints; Seek and receive clinical consultation from clinical specialists; Seek and receive consultation from individuals receiving services and their family members/advocates/guardians; Upon availability, read relevant journals, and share information with colleagues, in order to maintain current knowledge of best practices and skills as related to the work of Service Coordinator.

Monitor the safety and wellbeing of individuals by being cognizant of and responsive to quality of life and life safety issues as directly observed by the service coordinator, by making regular visits to residential and day programs through a coordinated schedule, and/or, as reported through QUEST or other means.

(Ex. 7)

1. The Petitioner did not supervise any DDS employees. (Ex. 7)
2. The Petitioner’s work required her to oversee DDS vendors to ensure individuals receiving services were safe and healthy and obtain further services for individuals when necessary. (Pet. Test.)
3. The Petitioner did not see these individuals on a daily basis. (Pet. Test.)
4. The Petitioner did not assist with the individuals’ daily activities like dressing, bathing or medication. The DDS vendors were responsible for providing those services. (Pet. Test.)
5. The Petitioner’s job required her to coordinate services. (Pet. Test.)
6. She visited individuals’ residences, met with guardians and held team meetings as necessary. (Pet. Test.)
7. The Petitioner used her personal vehicle for those visits and spent ten per cent (10%) to twenty per cent (20%) of her time traveling, but never transported individuals as part of her job. (Pet. Test.)
8. Thirty per cent (30%) of her time during an average week was spent dealing with individuals 1:1. Sometimes other people attended these meetings and sometimes these meetings were conducted on the phone. (Pet. Test.)
9. The number of visits to each individual and vendor would depend on what the individual was dealing with at any particular time. (Pet. Test.)
10. The Petitioner would oversee and coordinate the care of individuals. (Pet. Test.)
11. The nature of individual’s problems would determine the length and type of meeting. (Pet. Test.)
12. The Petitioner advocated for individuals when necessary. (Pet. Test.)
13. The Petitioner went to her office every day and worked on the computer three to four hours every day. The Petitioner was responsible for preparing monthly reports, ISPs and developing field packets. (Pet. Test.)
14. ISPs are reports requiring input from people receiving services and DDS funded agencies. (Pet. Test.)
15. In addition, the Petitioner had to attend meetings in the office. (Pet. Test.)
16. The Petitioner’s job required her to spend forty per cent (40%) to fifty per cent (50%) of her time in the office each week. (Pet. Test.)
17. In a crisis, the Petitioner would do what was necessary to help, including helping individuals dress, but she did not typically provide hands-on crisis intervention. (Pet. Test.)
18. The Petitioner filed her ERIP Application dated May 18, 2015. (Ex 1)
19. On June 3, 2015, the Respondent informed the Petitioner that it had classified her position in Group 2 and, therefore, she did not qualify for ERIP and it would not process her application. (Ex. 3)
20. On June 12, 2012, the Petitioner filed her timely appeal of that decision with DALA. (Post-mark on envelope with incorrect zip code received on June 24, 2015)

**DISCUSSION**

After careful consideration of the evidence presented in this case, the Board’s decision to classify the Petitioner’s position in Group 2 and refuse to process her ERIP application is reversed.  To be eligible for ERIP, an employee must be employed by an executive department, be a member of the State Employee Retirement System, and be classified in Group 1 pursuant to G.L. c. 32, § 3(2)(g). St 2015, c. 19, § 3(b). G.L. c. 32, § 3(2)(g) provides a system of classification of employees for retirement purposes. Group 1 includes “officials and general employees including clerical, administrative and technical workers, laborers, mechanics and all others not otherwise classified;" while Group 2 includes,

employees of the commonwealth…whose regular and major duties require them to have the care, custody, instruction of …persons who are mentally ill or mentally defective…

G.L. c. 32 § 3(2)(g). An employee's "regular and major duties" are those that an employee must spend more than half of her time doing.  *E.g. Roberts v. State Bd. of Ret.*, CR-15-297 at 6 (DALA 9/1/2017). “Care” as used in the statute means direct care*. See Barry v. State Bd. of Ret.*, CR-07-1125 (DALA 8/6/2009). Not all direct contact is direct care. For example, an employee who worked as a launderer in a facility for the developmentally disabled spent a few hours each day with two developmentally disabled residents. She gave them laundry to fold and then collected it, but this interaction did not amount to care of the residents. *See Albano v. State Bd. of Ret*., CR-15-327 at 10-11 (DALA 7/29/2016) *citing* *Nichols v. State Bd. of Ret.*, CR-06-919 (DALA 3/12/2009).

In this case, the Petitioner testified credibly that she spent the majority of her time coordinating and supervising vendors, doing paper work, traveling, and conducting team meetings. The Petitioner testified credibly that it was the vendors who provided the individuals with direct care. In addition, the Form 30 in evidence does not demonstrate that the Petitioner’s job required her to provide direct care to individuals. Rather, the Form 30 confirms that the Petitioner’s job duties involved coordinating, monitoring, and supervising care. *See Cross v. State Bd. of Ret.*, CR-04-774, at 6 (DALA 12/12/2005) *citing* *Gaw v. Contributory Ret. App. Bd.*, [4 Mass. App. Ct. 250](http://sll.gvpi.net/document.php?id=sjcapp:4_mass_app_ct_250) (important to consider job description and actual duties performed).

The Respondent cites decisions in which individuals with the same job title as the Petitioner in this case were classified in Group 2. But in each of those cases the magistrate found that the employee performed duties which, unlike the facts of the instant case, constituted direct care of individuals. For example, in *Burciaga,* the magistrate found: “Ms. Burciaga helped her clients learn daily living skills including personal hygiene skills, social skills, shopping, help with obtaining a job including how to interview for work and how to apply for jobs.” *Burciaga v. State Bd. of Ret.*, CR-03 940 (DALA 8/1/2005).  The magistrate in *Burciaga* also found:

Ms. Burciaga spent about seventy to eighty percent of her time working with clients, and of that, about ten percent was involving telephoning.  She spent about twenty percent of her time on administrative matters such as completing required documentation on each client and meeting with DMH staff and supervisor.

*Id.* In *Evans v State Board of Retirement,* CR-03-647 (DALA 9/17/2004), the Magistrate found that: the Petitioner spent “more than 50% of her time in the company of her clients.” These are critical facts which distinguish those cases from the one before me.

**CONCLUSION AND ORDER**

Accordingly, the decision of the Respondent classifying the Petitioner’s position as Group 2 is **REVERSED** and the Respondent is directed to reclassify the Petitioner’s position as Group 1 and process her application for ERIP.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

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Edward B. McGrath

Chief Administrative Magistrate

Dated: December 8, 2017