

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

CHRISTOPHER COOK,
Appellant

v.

C-17-243

DEPARTMENT OF CHILDREN AND
FAMILIES,
Respondent

Appearance for Appellant:

Pro se
Christopher Cook, Esq.

Appearance for Respondents:

Melinda Willis, Esq.¹
Deputy General Counsel
Human Resources Division
100 Cambridge St., #600
Boston, MA 02114

Commissioner:

Cynthia A. Ittleman

DECISION

The Appellant, Christopher Cook (Mr. Cook or Appellant), appealed to the Civil Service Commission (Commission) pursuant to G.L. c. 30, §49, from the denial of his request for reclassification of his position from Counsel II to Counsel III with the Department of Children and Families (DCF) within the Executive Office of Health & Human Services (EOHHS). The Commission received the appeal on November 22, 2017. A pre-hearing conference was held at the Commission's offices in Boston on January 23, 2018 and a full evidentiary hearing was held

¹ Attorney Michael Downey, from the HRD Legal Office at the time, represented the Respondent at the hearing and submitted a post-hearing brief. Attorney Downey no longer works at HRD.

at the same location on March 21, 2018.² The hearing was digitally recorded and the Commission provided each party with a copy of the recording.³ The Appellant submitted ten (10) exhibits (Jt.Exs.1 through 10) and the Respondent submitted nine (9) exhibits (R.Exs. 1 – 9). After the hearing, each party duly submitted a Proposed Decision on May 18, 2018.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses: *Called by the Appellant:*

- Andrew Rome, General Counsel, DCF
- Michael Broderick, Assistant Regional Counsel, DCF
- Sharon Coose, Deputy Regional Counsel, DCF
- Christopher Cook, Assistant Regional Counsel, DCF
- Thomas Malone, Regional Counsel, DCF
- Leslie Martin, Assistant Regional Counsel, DCF

Called by the Respondent:

- Cindie Smey, Planning and Staffing Analysis Coordinator, EOHHS Human Resources.

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:

DCF Counsel Organization

1. DCF is the Commonwealth's child protection agency. (Testimony of Rome and Cook) As such, child protection is a core function of DCF. (Testimony of Malone, Cook) Specifically,

² 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.

³ If there is a judicial appeal of this decision, the plaintiff becomes obligated to use the copy of the CD provided to the parties 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.

DCF's mission is to protect children from abuse and neglect and ensure that they are able to grow and thrive in a safe and nurturing environment. (Testimony of Rome)

2. "Care and Protection" cases are between eighty-five to ninety percent of the cases at DCF. (Testimony of Malone)
3. There are approximately one hundred and ten (110) attorneys (Counsel I and II) at DCF statewide, of whom approximately one hundred four (104) attorneys handle care and protection cases, including managers, the Appellant, and trial attorneys. Currently, there are no Counsel IIIs at DCF. (Testimony of Rome)
4. DCF has five (5) regional offices for Boston, Southeastern, Northeast, Central and Western. (Testimony of Rome)
5. For each region, there is one legal office that operates under the supervision and oversight of the DCF General Counsel, Andrew Rome. (Testimony of Rome)
6. The legal offices are responsible for covering a number of courthouses located in their geographical region. (Id.)
7. The attorneys in each DCF legal office are individually assigned to one of the courthouses in the geographical region and they handle all DCF cases in the courthouse to which they are assigned. (Id.)
8. Care and protection cases are generally assigned among Assistant Regional Counsels (Counsel Is and IIs) on a rotating basis. (Testimony of Smey)
9. A Regional Counsel manages each legal office operations, providing direct supervision over the Deputy Regional Counsel/s. The Deputy Regional Counsel directly supervises the office Assistant Regional Counsel (Counsel I and/or II). Counsel IIs do not supervise Counsel Is.

General Counsel Rome meet with Regional Counsels and Deputy Regional Counsels monthly. (Testimony of Rome)

10. In the Northeast region legal office, Thomas Malone is the Regional Counsel, and Lisa Loveland and Share Coose, the two (2) Deputy Regional Counsels, have a number of Assistant Regional Counsels (Counsels I and/or II) as direct reports. (Testimony of Malone and Coose) Northeast Regional Counsel Malone supervises Counsels who represent DCF in the greater Boston area. (Testimony of Malone). Loveland and Coose supervise the Counsels operating in the Merrimack Valley and the seacoast, respectively. (Id.) All but two (2) of the attorneys in the Northeast region's organization chart are assigned to care and protection cases. Those two (2) attorneys are assigned to Probate and Family Court matters. (R.Ex. 3) Deputy Regional Counsel Coose approves the Appellant's time and signed his EPRS; she has been in court and seen the Appellant. (Testimony of Coose; Jt.Ex. 9)
11. The Appellant and fellow Assistant Regional Counsel Martin, under the supervision of Northeast Regional Counsel Malone, were assigned to represent DCR care and protection cases in Cambridge Juvenile Court. (Testimony of Martin) Regional Counsel Malone delegates assignment of the Cambridge cases to the Appellant and Martin. (Testimony of Martin; R.Ex. 2b) The Appellant no longer works in Lowell Juvenile Court. (R.Ex. 5)

Appellant's Background

12. The Appellant is a Counsel II, employed by DCF in the Northern Region as an Assistant Regional Counsel. (Testimonies of Malone and Cook) He was hired as a Counsel I in 1999. (Jt.Ex. 1)⁴

⁴ After the Appellant requested reclassification to Counsel III, he was elected President of SEIU/NAGE Unit 6, Local 282 and he is on leave from his position at DCF. (Testimony of Appellant) According to a union webpage, it appears that the Appellant is still the presiding President. (<http://www.nage.org/state/state-units-unit6-local-282>)

13. The Appellant is a *cum laude* graduate of Suffolk University Law School and was admitted to the Massachusetts Bar in December 1996 and began working as a litigation associate at the Boston firm of Lawson and Weitzen, LLP where he had been previously employed as a law clerk. (Jt.Ex. 1) He applied to work at DCF because he believed that it was an opportunity to earn a living while being socially useful. DCF hired him in 1999 as an Assistant Regional Counsel, Counsel I. (Testimony of Cook)
14. The Appellant became a Counsel II in 2005. (Testimony of Cook; R.Ex. 2b)
15. The Appellant has been teaching classes including Writing and Legal Research and Writing and Legal Advocacy for more than ten (10) years. (Jt.Ex. 5; Testimony of Cook)
16. The First Justice of the Middlesex Juvenile Court and two other Judges of the same Court have observed the Appellant in Court for fourteen years and wrote a letter stating that he is “the best we have seen” and refers to him as the “The Gold Standard.” (Jt.Ex. 2)(emphasis added) The letter adds, “Attorney Cook has demonstrated the highest level of expertise in all matters involving Care and Protection cases.” (Id.)
17. A number of DCF attorneys with whom the Appellant works consult the Appellant when addressing difficult cases or parts of cases. (Testimony of Cook and Broderick)
18. The Appellant is the go-to person in his regional for questions involving trial strategy. (Jt.Ex. 6, 7 and 8; Testimony of Broderick and Martin) Even though the Appellant is currently on an approved leave of absence, he continues to field these questions from other DCF attorneys. (Testimony of Cook)
19. The Appellant’s fellow Assistant Regional Counsel in the Northeast region, Mr. Broderick, believes that the Appellant is “universally respected, including by people who have been here longer”. (Testimony of Broderick)

20. Asked if there is anyone in his region with knowledge superior to the Appellant, Regional Counsel Malone stated, “[t]here could be but I can’t say that for certain.” (Testimony of Malone)
21. In August of 2015, with the approval of Regional Counsel Malone, Assistant Regional Counsel Michael Broderick’s caseload was temporarily assigned to Mr. Cook until a replacement could be hired.⁵ (Testimony of Broderick)
22. Mr. Broderick has consulted the Appellant on the “really obscure, strange things.” (Testimony of Broderick)
23. Mr. Broderick no longer works with the Appellant but if he has an issue regarding trial strategy he determines if anyone has dealt with it before and, if not, he goes to the Appellant for advice. (Testimony of Broderick)
24. Fellow Assistant Regional Counsel Leslie Martin, also in the Northeast region, volunteered for a case in 2015 involving Children’s Hospital regarding a child nearing death and asked Mr. Malone for permission for the Appellant to assist her in the case because of the Appellant’s expertise in trial work. (Testimony of Martin). The Appellant volunteered to handle this work. (Testimony of Cook)

Appellant’s Request for Reclassification

25. On April 25, 2017, the Appellant submitted his request to be reclassification to the position of Counsel III. (R.Ex. 1).
26. Cindie Smey, Staffing and Analysis Coordinator for the EOHHS Human Resources office, was assigned to conduct a review of the Appellant’s request. (R.Ex. 1)

⁵ The parties dispute the number of cases the Appellant had at a point in time. Since there is no allegation that the Appellant’s caseload was deficient and since the size of his caseload is not dispositive vis a vis his request for reclassification, I make no finding regarding the number of cases in the Appellant’s caseload.

27. Ms. Smey's work at EOHHS began in 2003, as a Human Resources Planner, supporting the Secretary, the Undersecretary, the Chief Information Officer and the General Counsel. In the two and one-half years prior to this case, Ms. Smey reviewed approximately thirty (30) to forty (40) reclassification requests from various EOHHS agencies. Five (5) of the total reclassification requests that Ms. Smey had handled involved requests for reclassification from Counsel II to Counsel III. Ms. Smey approved two (2) of the five (5) Counsel II to Counsel III reclassification requests - one for applicant S and one for applicant E. Neither applicant E nor applicant S was an employee of DCF. (Testimony of Smey)
28. Ms. Smey found that applicant S had demonstrated that she (applicant S) was the "go-to person for the agency" because S was the only attorney at the EOHHS MassHealth office assigned to pursue reimbursement from Medicaid enrollees. Further, Ms. Smey determined that if applicant S left her job, there would be no one in state government readily capable of assuming the tasks that S performed. (Testimony of Smey)
29. Ms. Smey found that applicant E is responsible for the procurement of health insurance plans for the Commonwealth in order to cover Medicaid subscribers and supervised more than four (4) attorneys in her office, indicating that in addition to managing the work of others, she was approving vacation leave, she signed off on performance evaluations and she approved time sheets. (Testimony of Smey)
30. On the date that Ms. Smey received the Appellant's reclassification request, she emailed Regional Counsel Malone to notify him of the request, advised him of the reclassification request process and attached documented needed to process the reclassification request.

(Testimony of Smey; R.Ex. 2)⁶ The letter informed the Appellant that he needed to complete the attached Interview Guide and return it with an organization chart, work samples and any other supplementary materials in support of his request. (R.Ex. 2c)

31. The Appellant submitted his completed Interview Guide on May 9, 2017 with the letter of reference from three Judges in the Lowell Juvenile Court. (R.Ex. 2b)

32. Ms. Smey reviewed the Appellant's Interview Guide, the letter from the Lowell Juvenile Court Judges, the organization chart and the Counsel Classification Specification.

(Testimony of Smey)

33. In his completed Interview Guide, the Appellant wrote that he is involved in litigation 85% of the time, he spends 10% of his time providing advice to DCF social workers and 5% of the time on data entry and other clerical functions. (R.Ex. 2)

34. In his Interview Guide, the Appellant wrote:

- he has "extensive" knowledge of the laws "specific to the assignment", stating that he has appeared in Court on behalf of DCF in all Juvenile and Probate Courts in Essex County and nearly all Juvenile Courts in Middlesex County in thousands of cases over his seventeen (17)-year DCF career;
- he has "extensive" knowledge of federal and state laws;
- he has "extensive knowledge" of advocacy techniques and strategies, stating that three (3) judges before whom he has appeared in the Lowell Juvenile Court have indicated that he has "excellent" trial skills;
- as a law school adjunct professor, he has "extensive" knowledge of the methods and ability to conduct complex legal research for more than ten (10) years;
- he has the ability to address complicated legal issues, stating that he "volunteered" for a complex case involving a child needing medical treatment who was brought to Massachusetts and he handled the cases of another attorney in his regional office "for several months", in addition to his own caseload; and
- he has the ability to analyze and determine the applicability of legal data, draw conclusions and make appropriate recommendations because he reviews and assists in drafting social worker affidavits as required.

(R.Ex. 2)(emphasis added)

⁶ The acknowledgement letter that was sent to the Appellant is dated May 25, 2017 but the Respondent asserts that that is a typographical error and that it should have been dated April 25, 2017. The error does not affect the outcome of this case.

The Appellant provided no other example of complex legal research that he has performed beside the case involving a child with medical needs. (Administrative Notice)

35. With respect to relationships with others, the Appellant wrote in his Interview Guide that he comes in contact with social workers and their management, area office management, and regional management to gather information and dispense advice as well as domestic violence specialists, medical professionals, educational professionals, housing experts, substance abuse counselors, police, probation, assistant district attorneys, court staff and children. (R.Ex. 2)
36. Regarding “significant job changes” since his appointment, the Appellant wrote in his Interview Guide that the opioid crisis, the increase in the volume of cases going to trial and the difficulty of some cases have changed his job. (R.Ex. 2)
37. Asked who assigns, reviews and approves his work, the Appellant wrote in his Interview Guide that he receives new cases on a rotating basis, that his work is reviewed by Deputy Regional Counsel Coose and Regional Counsel Malone and that he is “given feedback to assist him as needed.” (R.Ex. 2)
38. Asked whom he supervises, the Appellant wrote in his Interview Guide that he does not supervise other employees although he has overseen the work of two (2) interns who drafted documents. (R.Ex. 2)
39. Asked about any unusual working conditions, the Appellant wrote in his Interview Guide that the cases can be long-lasting and stressful since they involve on-going conflicting parent-child relationships and because of the incredible abuse some of the children in DCF cases have endured. (R.Ex. 2)

40. Near the line for the “Signature of Interviewer” on the last page of the Interview Guide, Regional Counsel Malone signed the Appellant’s Interview Guide although there is no indication that Malone interviewed the Appellant in connection with the Interview Guide and General Counsel Rome indicated that DCF does not agree with the Appellant’s request for reclassification. (R.Ex. 2b; Jt.Ex. 10) Ms. Smey did not interview the Appellant about his completed Interview Guide. Although Ms. Smey discussed with General Counsel Rome whether the Appellant is an expert, she did not discuss that topic or the Appellant’s reclassification request generally with Regional Counsel Malone, who supervises the Appellant. (Testimony of Smey)

41. After an initial review of the Appellant’s submission and the Counsel Classification Specification, Ms. Smey was leaning toward denying the reclassification request because of the following:

the Appellant was not a subject matter expert, nor is he a statewide- or agency-wide expert,

cases are assigned on a rotation basis (rather than having complex cases assigned to the Appellant, for example),

other DCF attorneys perform the same work as the Appellant,

the Appellant only gave one (1) example of a complex case he was involved in and that he volunteered for the case,

the Appellant is not involved in policy-making,

the Appellant does not supervise anyone (other than 2 interns), and

she considered the letter from the three (3) Lowell Juvenile Court Judges but gave the letter little consideration because the Appellant does not report to the three Judges.

Ms. Smey withheld her ultimate reclassification decision until she received the written comments of the employee’s managing supervisor, as she did with the reclassification

requests of applicants E and S. She does not meet with employees requesting reclassification. Ms. Smey discussed the Appellant's reclassification request with Amy Lynch, who is the Director of Planning at EOHHS Human Resources, prior to making an initial decision. Ms. Smey and Ms. Lynch agreed that the Appellant was not performing the functions of a Counsel III more than 50% of the time. (Testimony of Smey)

42. Ms. Smey sent Regional Counsel Malone a Classification Audit Decisions form, with the Appellant's completed Interview Guide, asking whether Malone agrees or disagrees with the content of the Appellant's Interview Guide. (R.Ex. 2a) Ms. Smey subsequently sent the request to DCF General Counsel Rome. (Jt.Ex. 10)

43. General Counsel Rome discussed the Appellant's reclassification request with Northeast Regional Counsel Malone and Deputy Regional Counsels Loveland and Coose. Rome does not believe that the Appellant is a subject matter expert or that the Appellant is the "gold standard" for the entire DCF. Rome has not observed the Appellant in Court but he believes that each of the DCF trial attorneys has full knowledge of child welfare law as well as the effects of trauma, domestic violence, substance abuse and poverty has on children, and pertinent medical laws, such as HIPAA. (Testimony of Rome)

44. On August 3, 2017, General Counsel Rome submitted the completed Classification Audit Decisions form regarding the Appellant's reclassification appeal. Rome wrote, in full,

"While most of the duties that Attorney Cook has stated are correct, I do not agree that he had a caseload of 225 [as the Appellant alleged]. Also, the duties that Attorney Cook states in the Interview Guide are the same job responsibilities and requirements for all DCF attorneys While he states that this child welfare (sic) is a specialized field, his fellow attorneys within DCF have the same skill set that he sets forth in this interview guide. While he may be a very skilled attorney, this is a performance issue (i.e. EPRS) and not one that requires a reclassification."
(R.Ex. 2a)

45. On August 8, 2017, Ms. Smey sent a memo to the Appellant stating that the preliminary decision was to deny his reclassification request and that he had until August 24, 2017 to submit a rebuttal. (R.Ex. 4)
46. On September 9, 2017⁷, the Appellant submitted his rebuttal to Ms. Smey in which he repeated information in his Interview Guide, stating that the information on which Ms. Smey relied does not indicate the actual work he performs and added, in pertinent part, he works independently; he has “extensive knowledge” of G.L. c. 119 and c. 210 pertaining to care and protection as well as federal law, such as HIPAA, the Indian Child Welfare Act and federal law relating to admissibility of patient drug and alcohol records; he trains social workers and, although he is no longer assigned to the Lowell Juvenile Court, he receives requests from the area social workers for training; he negotiates settlements on behalf of clinical staff and advises the agency whether to accept settlement or to litigate. (R.Ex. 5)
47. Attached to the Appellant’s rebuttal were a letter from law school Professor and Assistant Dean Kaldis, who oversees the Appellant as an adjunct professor, and from three (3) affidavits from fellow Assistant Regional Counsels (Goldberg, Broderick and Martin) in the Northeast legal office. (Jt.Exs. 5 – 8)
48. Asst. Dean Kaldis has known the Appellant for more than a decade while he has been teaching writing and legal research and advocacy courses. She wrote, in part, that the Appellant’s “knowledge of advanced legal research, analysis, and encouraging attitude has been evidenced by his professional evaluations conducted by students[]” and she offered “high recommendations” for the Appellant “without reservation”. (Jt.Ex. 5)

⁷ The Appellant was unable to submit his rebuttal to Ms. Smey earlier because he was out of the office on vacation. (Jt.Ex. 3)

49. Assistant Regional Counsel Goldberg's affidavit states, in pertinent part, that she began working at DCF in 1999 (the same year as the Appellant), the Appellant "has been one of the most professional, knowledgeable and prepared attorneys I have known", that he has "displayed extensive knowledge of state and federal laws", "there have been times where I have relied on him for advice in relation to performing our roles" and that he is "often one of the first people I reach out to for advice on matters before the Juvenile Court." (Jt.Ex. 6)
50. Assistant Regional Counsel Broderick has eight (8) years less experience than the Appellant. (Testimony of Broderick; Jt.Ex. 7) His affidavit states, in pertinent part, that the Appellant has "comprehensive knowledge of the state and federal laws" pertaining to care and protection cases; that the Appellant's knowledge "exceeds that of a typical DCF attorney who has been practicing for several years in care and protection law"; and that the Appellant informed him of a New Hampshire case dealing with another state's interpretation of the Interstate Compact on the Placement of Children, the "consular notification" under the Hague Convention, and whether the Juvenile Court would require a parent to post bond to ensure the parent would not flee the state with the child in connection with Mr. Broderick's cases. (Jt.Ex. 7) Mr. Broderick's testimony was consistent with his affidavit. (Jt.Ex. 7; Testimony of Broderick)
51. Assistant Regional Counsel Martin's Testified that that she has worked with the Appellant in the Northeast legal office for more than twelve (12) years, which is seven (7) years less than the Appellant's experience at DCF. Her affidavit states that the Appellant has "extensive knowledge" of pertinent state and federal law, the Appellant is "the most skilled attorney with whom I have worked in the past twelve years", and the Appellant volunteered for "several difficult cases because of his expertise", one of which involved a child with medical

problems who was brought to Massachusetts. (Jt.Ex. 8) Martin also testified that she relies on the Appellant before trials but she goes to Regional Counsel Malone for specifics about the workings of a particular court. Martin disclosed that she socializes with the Appellant after work and that she is very good friends with the Appellant's wife. (Testimony of Martin)

52. By letter dated October 5, 2017, the Respondent denied the Appellant's reclassification request. (R.Ex. 6)

53. The Appellant appealed the Respondent's decision to the state's Human Resources Division (HRD). By letter dated November 10, 2017, HRD denied the Appellant's request to reverse the Respondent's decision.

54. The Appellant filed his appeal with the Commission on November 22, 2017.

Appellant's Form 30 Job Description

55. Neither party produced a copy of the Appellant's Form 30 Job Description. (Administrative Notice). An email exchange between Ms. Smey and General Counsel Rome between May 17, 2017 and August 1, 2017 indicated that the Respondent apparently attempted to locate the Form 30 for the Appellant but there is no indication that the Respondent located it. (Jt.Ex. 10)⁸

Appellant's FY 2017 EPRS

56. The Appellant received "exceeds" ratings on all four (4) of his EPRS duties:

- 1) **COMPETENT LITIGATION SKILLS ARE DEMONSTRATED.** Develops and maintains good working relationship and open lines of communication with those District, Juvenile or Probate Court Judges (and their staffs) before whom attorney appears. Prepares appropriate, well written and thoroughly researched legal memoranda, affidavits, motions, proposed findings, etc. for filing with court.

⁸ The Respondent should make every reasonable effort to maintain an accurate Form 30 for each employee and promptly provide a copy of it to anyone seeking a reclassification.

Prepares and effectively tries or otherwise appropriately [handles]⁹ cases in District, Juvenile, Probate Court or other courts as directed. Is well prepared and advocates effectively at all court appearances and any other matters subpoenas, motions, etc.) related to the work of the Department.

- 2) **KNOWLEDGE OF LAW/REGS/POLICIES IS COMPLETE.** Utilizes and maintains accurate attorney caseload Family/Net data and other data as required. Complies with all legal policies and procedures, as well as requirements related to implementation of ASFA, including IV-E and 29B procedures and documentation. Maintains complete familiarity with Massachusetts and Federal laws and case decisions applicable to the work of the Department.
- 3) **APPEARANCES/ADVICE ARE TIMELY, CLEAR AND, CONSTRUCTIVE.** Makes timely appearances for all work-related matters. Performs all job responsibilities in a professional manner (including but not limited to timeliness, appearances, courtesy, etc.) Provides constructive advice to (and is available to advise) Department social work staff, and promotes understanding by social work staff, regarding laws and court decisions concerning the work of the Department; advises Department employees of legal procedures involved in their work; responds in a timely and appropriate manner to telephone and other inquiries. Keeps regional legal office informed at all times of schedule and changes.
- 4) **OPTIONAL ADDITIONAL WORK IS CAPABLY UNDERTAKEN.** May act as a resource for less senior or less experienced member of the Department's legal staff. May be asked to assume acting management role in absence of Deputy Regional Counsel. Under existing arrangement with Attorney General's Office, may write and argue one or more briefs in Appeals Court and SJC involving DSS cases on appeal. May conduct training in legal matters for social work staff, foster parents, area boards, contracted providers, etc. (Jt.Ex. 9)(EMPHASIS in original)

Counsel III Classification Specification (Class Spec) vs. Counsel II Class Spec

57. The position of Counsel III in the Counsel series was established effective August 11, 2013.

(Jt.Ex. 4)

58. The Counsel series provides, in part,

There are three levels of work in the counsel series. Incumbents of classifications in this series represent the interests of assigned agencies in dispute resolution and legal proceedings; collect facts and evidence; perform legal research and analysis; prepare and manage cases for review by a tribunal; provide guidance, advice and recommendations to agency staff and others on legal matters; draft administrative and legal documents; and

⁹ The word "handles" is inserted because the actual word is illegible in Jt.Ex. 9.

provide customer service and information to the public on agency functions, rules and regulations.
(Jt.Ex. 4)¹⁰

59. The Counsel III “Distinguishing Characteristics” are:

This generally is the most expert and experienced attorney in this series, and in some work environments can also be the second-level supervisory classification. Incumbents typically possess greater experience and have specialized expertise in a specific area of the law (e.g., administrative, family, finance, labor and employment, litigation) and general knowledge of other areas or broad knowledge of multiple areas. Incumbents at this level serve as subject matter experts and have advanced knowledge of laws, legal principles and practices. **The distinguishing characteristic of the Level III is incumbents at this level are statewide or agency expert with more legal experience and have greater expertise in a specialized area of the law.**

(Jt.Ex. 4)(emphasis added)

60. Counsel II Distinguishing Characteristics are:

This is the experienced professional level classification in this series, and in some work environments can also be the first level of supervision. Incumbents typically possess greater experience and may have specialized expertise in a specific area of law (e.g. administrative, family, finance, labor and employment, litigation) or general knowledge of other areas or broad knowledge of multiple areas. While incumbents may seek guidance and advice from more senior colleagues on complex issues and situations, they have thorough knowledge of laws, legal principles and practices and have the ability to handle most cases independently. At this level, incumbents are expected to perform the duties described for Level I, but generally will have more experience and expertise, handle more complex cases and collaborate and interact with others outside of the agency more often. At this level, incumbents may receive less supervision than incumbents at Level I and may also exercise greater independence in decision making.

(Jt.Ex. 4)(emphasis added)

61. The Counsel III Supervision Received is:

Incumbents receive general supervision from employees of a higher grade who provide policy direction, assign work, and review performance through reports, case reviews, and conferences for accuracy and conformance to applicable laws, regulations, policies and agency procedures.

Incumbents may also receive functional direction from the legal executive and executive personnel in other agencies who provide final approval, assignments, guidance and review.

(Jt.Ex. 4)(emphasis added)

¹⁰ There are no examples of the Appellant’s legal writing in the record. (Administrative Notice)

62. The Counsel II Supervision Received is:

Incumbents receive general supervision from employees of a higher grade who provide guidance, work assignments, and review of performance through both formal and informal verbal and written reports for effectiveness and conformance to laws, regulations and agency policy.

(Jt.Ex. 4)(emphasis added)

63. The Counsel III Supervision Exercised is:

Incumbents may provide direct supervision over and assign work to interns, professionals, support staff and/or other personnel.

Incumbents may provide functional direction to interns, professional or other personnel through guidance, instruction and delegation of tasks and participate in the training and mentoring of new employees.

Incumbents may also participate in the interviewing process or may make recommendations for new hires.

(Jt.Ex. 4)(emphasis added)¹¹

64. The Counsel II Supervision Exercised is:

Incumbents may provide functional direction to interns, support staff, or other personnel through guidance, instruction and delegation of tasks and participate in the training and mentoring of new employees.

Incumbents may exercise direct supervision over, assign work to, and review the performance of interns, support staff or other personnel. Incumbents may also participate in the interviewing process or may make recommendations for new hires.

(Jt.Ex. 4)(emphasis added)

65. The Counsel Class Sec provides that Counsels II and III may have “Additional Functions

Performed” and “Additional Key Accountabilities”. (Jt.Ex. 4)

66. The Counsel III Spec for Relationships with Others provides, in part,

In addition to the key contacts listed for the Counsel Level I and II, key contacts and relationships for Counsel III incumbents include court personnel and public officials; federal and state agencies; community-based organizations; and local municipalities. ...

(Jt.Ex. 4)

¹¹ Although the Supervision exercised for a Counsel III provides that incumbents “may” supervise certain others, the “Knowledge, Education and Experiences” section of the Counsel III Class Spec states that applicants “must have ... at least three years ... in a supervisory capacity.” (Jt.Ex. 4)(emphasis added)

67. The Counsel II Spec for Relationships with Others provides,

In addition to the contacts listed for the Counsel Level I, key contacts and relationships for Counsel Level II incumbents include additional external contacts, including stakeholders.

(Jt.Ex. 4)

68. The Counsel III Spec for Knowledge, Education and Experience provides, in part,

Applicants must have a Juris Doctor (JD) degree, admission to the Massachusetts Bar Association (sic), and at least (A) six years of full-time, or equivalent part time, professional experience in the practice of law in a specialized area that is relevant to the assigned agency, of which (A) at least three years must have been in a supervisory capacity. ... Based on assignment and supervisory responsibilities, three years in a supervisory capacity may be required. ...

(Jt.Ex. 4)(emphasis added)

69. The Counsel II Spec for Knowledge, Education and Experience provides, in part,

Applicants must have a Juris Doctor (JD) degree, admission to the Massachusetts Bar and (A) at least three years of full-time, or equivalent part-time, professional experience in the practice of law. ...

(Jt.Ex. 4)(emphasis added)

70. The Counsel III Spec for Requirements at the Time of Hire provides,

In addition to the requirements listed for the Counsel Levels I and II, incumbents must have:

1. Extensive knowledge of the laws specific to assignment (e.g., administrative, finance, family, litigation).
2. Extensive knowledge of federal and state laws.
3. Knowledge of advocacy techniques and strategies.
4. Knowledge of the methods and ability to conduct complex legal research and technical report writing.
5. Ability to address complicated legal issues.
6. Ability to analyze and determine the applicability of legal data, draw conclusions and make appropriate recommendations.

(Jt.Ex. 4)(emphasis added)

71. The Counsel II Spec for Requirements at the Time of Hire provides,

In addition to the requirements listed for the Counsel Levels I and II, incumbents must have the:

1. Ability to lead or work with cross-functional project teams.
2. Ability to manage multiple projects and project teams.
3. Ability to exercise discretion in safeguarding information through compliance with rules of disclosure.
4. Ability to supervise, including planning and assigning work according to the nature of the job to be accomplished, the capabilities of subordinates, and available resources; controlling work through periodic reviews and/or evaluations; determining the need for and recommending disciplinary action.
(Jt.Ex. 4)(emphasis added)

Applicable 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). As a general rule, an employee must establish that she is performing 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%).

Because of its unique structure as compared with other civil service class specifications, however, the Commission has used a somewhat different approach to requests for reclassification of attorneys under the 2013 revision of the Counsel Series Class Specifications. In Thomson v. Division of Insurance, 29 MCSR 585 (2016), the first appeal to come before the Commission under the 2013 Class Specifications, the Commission approved reclassification of that Appellant, a Counsel II, to the newly created position of Counsel III. The Commission's Decision summarized the rationale for applying a different approach to Counsel Series appeals:

Clearly, a considerable amount of time, effort and thought was devoted to the development of the new Counsel Series Specifications. The Commission acknowledges that the process was especially complicated because it presented challenges to craft a specification that would be effective to distinguish, by level of expertise, the work performed by skilled legal counsel employed in a wide variety of diverse jobs across state government. By definition, all legal counsel employed by the Commonwealth hold a post-graduate doctorate-level degree and have attained some level of accomplishment in the law. Many come into state government with prior, often extensive experience in a particular field within the practice of law. In addition, unlike many other job specifications that provide a clear civil service "career ladder" from entry level into management roles, the new Counsel Specifications were not intended to be used to provide such a path; indeed, the original drafts were expressly rejected because they overlapped with management positions in the legal area.

Given these factors, the new Counsel Specifications, understandably, depart from the typical job and class specifications that have been the focus of prior Commission reclassification appeals. In addition, the degree of overlap from one Counsel job title to another . . . is much more pronounced than found in most other class specifications.

Accordingly, the Commission reviewed this reclassification appeal under a slightly modified paradigm tailored to resolve the ambiguities in the unique terminology used and to fit that terminology into a workable means to differentiate the work performed by each of the three Counsel job titles. In brief, the Commission has applied a three-prong test to distinguish the job performed by a Counsel III: (a) the Counsel III must have the "Knowledge Education and Experience" as well as the additional requirements described for a Counsel III in the section of the specification entitled "Incumbents are required to have the following at the time of hire"; (b) a Counsel III must have the "distinguishing characteristic" as THE most expert and experienced attorney in the agency in a specific area of expertise essential to a core mission of the agency; and (c) the Counsel III must perform, in the aggregate, at least a majority of the time, duties listed in the Counsel III class specifications under "Supervision Exercised", "Additional Functions Performed",

“Additional Key Accountabilities” and “Relationships with Others”, with the “Supervision Received” by a Counsel III.

In applying the “distinguishing characteristic” criterion, the Commission will consider the significance of the area of expertise to the core mission of the agency and the degree of specialization involved. Generalized expertise, such as knowledge of administrative law or trial practice, would be less likely to meet the “distinguishing characteristic” criterion than, say, a subject-specific expertise, such as the automobile insurance market expertise held by the Appellant in this case. In addition, the Commission would consider the frequency with which the agency (or a person outside the agency) relies on that expertise, i.e., is it sporadic or regular and sustained and is it current. Although some regular level of work above de minimus would be expected in the area of expertise, the Commission does not construe the Counsel III specification to require that the employee must be working in the area of expertise more than 50% of the time; that threshold can be met so long as the aggregate duties performed a majority of the time involve any combination of the duties covered by the Counsel III job description as noted herein. Finally, in view of the unusual level of overlap between Counsel II and Counsel III, and the ambiguity in the language used in the specification that purports to “distinguish” those duties, the fact that some of the duties may describe work that can be done by either a Counsel II or Counsel III, the Commission will not exclude from the calculation of the over 50% paradigm work solely because it fits both categories, but will consider all of the facts presented on a case-by-case basis.

Since the Thompson Decision, the Commission has decided other Counsel Series reclassification appeals, such as:

- In Rubin v. HRD, 30 MCSR 8 (2017) the Commission allowed the Appellant’s appeal for reclassification to a Counsel III, finding that she was the Division of Insurance “go to” expert in several substantive core areas of insurance law and performed those duties, along with others, at the Counsel III level a majority of her time.
- In Phelan v. Division of Insurance, 30 MCSR 45 (2017), the Commission upheld the denial of that Appellant’s appeal for reclassification of his positions from Counsel II to Counsel III, finding that he did not meet the Commission’s modified test for reclassification to the newly created Counsel III position.
- In Tannenbaum v. Department of Revenue, 30 MCSR 167 (2017), the Commission upheld the denial of a request for reclassification from Counsel I to Counsel II. Although the Appellant had over ten years of experience as a Counsel I, her duties had not expanded to include any Counsel II-specific tasks, she was not handling cases of particularly more complexity than others, she had one of the largest backlogs on the staff, and did not possess any specialized expertise in any core area of practice.
- In Duvall-Paprocki v. Department of Revenue, 30 MCSR 188 (2017), the Commission denied an appeal for reclassification from Counsel I to Counsel II. Although the

Appellant had seven years' experience as a Counsel I and performed with greater efficiency, and productivity her duties had not changed or become particularly more specialized or complex and still required supervision over non-routine matters. In addition, she lacked supervisory responsibility which, for the particular unit to which she was assigned, DOR had consistently specified was a required duty for all Counsel IIs.

- In Walleigh v. Department of Housing & Community Development, 30 MCSR 505 (2017), the Commission allowed the appeal for reclassification from Counsel I to Counsel II who, after five years with the DHCD's Office of General Counsel (OGC), had assumed formal responsibility as the primary, lead attorney for the management and program staff of the largest agency within the DHCD umbrella, essentially, inheriting the duties formerly performed by two Counsel IIs and "stepping into the shoes" of the Counsel II who trained and mentored him when he started with the OGC.
- In Kallianidis v Department of Children Youth and Families, xx MCSR xxx (2018), the Commission denied the appeal for reclassification from Counsel II to Counsel III of the appellant who was one of 24 Hearing Officers at the Board of Hearings at the division of the MassHealth Office of Medicaid, Department of Children, Youth and Families within EOHHS. The quality and quantity of his work product did not make his work unique. That the appellant was the longest serving Hearing Officer at the agency does not mean that he was the most expert. *See Kallianidis v EOHHS and Civil Service Commission*, Barnstable Superior Court, C.A. No. 1872CV00192 (January 30, 2019)(Commission decision affirmed).

Analysis

The Appellant has not established by a preponderance of the evidence that he performs the work of a Counsel III a majority of the time. The Appellant is a seasoned and dedicated public servant who decided to work at the DCF to be "socially useful". As a DCF attorney, the Appellant is involved in the daily battle to secure the care and protection of children who have been abused or neglected. Over the many years he has worked at DCF, he has developed significant legal skills. However, reclassification of a position requires proof that the specified duties of the higher title are, in fact, actually being performed as the major part of his current position.

As noted above, the Commission has established a three-prong test to distinguish the job performed by a Counsel III: (a) the Counsel III must have the "Knowledge Education and

Experience” as well as the additional requirements described for a Counsel III in the section of the specification entitled “Incumbents are required to have the following at the time of hire”; (b) a Counsel III must have the “distinguishing characteristic” as THE most expert and experienced attorney in the agency in a specific area of expertise essential to a core mission of the agency; and (c) the Counsel III must perform, in the aggregate, at least a majority of the time, duties listed in the Counsel III Specifications under “Supervision Exercised”, “Additional Functions Performed”, “Additional Key Accountabilities” and “Relationships with Others”, with the “Supervision Received” by a Counsel III. In applying the “distinguishing characteristic” criterion, the Commission will consider the significance of the area of expertise to the core mission of the agency and the degree of specialization involved. The Appellant has failed to pass the three-prong test, having failed to establish by a preponderance of the evidence that he performs a majority of the Counsel III Spec a majority of the time.

With regard to the first prong of the test applied by the Commission, applicants for the Counsel III position must have a Juris Doctor degree, at least 6 years of full-time professional experience in a specialized area that is relevant to the agency, of which at least 3 years must have been in a supervisory capacity. As found in the facts above, with the exception of 2 interns the Appellant has worked with, the Appellant has not supervised DCF personnel for whom he prepares an EPRS.

The rest of this prong requires Counsel IIIs to have a number of abilities at the time of hire (in addition to those required for Counsel I and Counsel II): extensive knowledge of the laws specific to the assignment, extensive knowledge of federal and state laws, knowledge of advocacy techniques and strategies, knowledge of the methods and ability to conduct complicated legal research and technical report writing, and ability to analyze and determine the

applicability of legal data, draw conclusions and make appropriate recommendations. The Appellant has seventeen years of care and protection litigation experience and, therefore, he has knowledge of the abiding care and protection state laws. However, as General Counsel Rome indicated, DCF has more than one hundred attorneys who are also knowledgeable about care and protection laws and applying them on a daily basis. The Appellant also identified several specific federal laws with which he is familiar, providing insufficient information about such laws and how and when he has applied them. As a result, the Appellant has not satisfied this part of the 3-pronged test. The letter of the Lowell Juvenile Court Judges indicates that the Appellant has knowledge of advocacy techniques and strategies. Similarly, 2 of the Appellant's colleagues who submitted affidavits support the Appellant's argument that he has such knowledge, although it is important to note that the 2 colleagues have significantly fewer years of experience compared to the Appellant. I have discounted the support of the Appellant's third colleague, Ms. Martin, since she has the same lengthy tenure DCF as the Appellant while asserting that she regularly seeks and relies on his advice, and since she disclosed that she is close friends with the Appellant's wife and the Appellant and Ms. Martin socialize outside of the office. Given the many years of the Appellant's DCF experience and his reference to certain federal laws, the Appellant has demonstrated that he is able to conduct complicated legal research. The letter from Massachusetts School of Law Asst. Dean Kaldis supports the Appellant's assertion that he conducts complicated legal research since she has overseen his work for more than a decade but I do not credit her assertion that the evaluations by students whom the Appellant is teaching research skills attest to the Appellant's complex research skills. However, there is insufficient information in the record to establish that the Appellant is able to prepare technical report writing

pursuant to this part of the Counsel III Spec. Thus, the Appellant has established some, but not all of the abilities required for the Counsel III position.

The second of the three prongs applied by the Commission in Counsel reclassification appeals is that, in this case, a Counsel III must have the “distinguishing characteristic” as THE most expert and experienced attorney in the agency in a specific area of expertise essential to a core mission of the agency. There is little question that the field of care and protection law is a “specific area” of the law, that care and protection law is essential to DCF’s core mission and that the Appellant has extensive experience with care and protection law in the Northeast office. However, a distinguishing characteristic of the Counsel III Class Spec states that, “The distinguishing characteristic of the Level III is incumbents at this level are statewide or agency expert with more legal experience and have greater expertise in a specialized area of the law. R.Ex. 4 (emphasis added). The Appellant has not met this distinguishing characteristic and he cannot do so. First, the Appellant represented DCF in Lowell Juvenile Court and then in the Cambridge Juvenile Court, not statewide and/or in other jurisdictions in the state. The letter from three Judges of the Lowell Juvenile Court laud the Appellant for the work they have seen him perform in their Court in Lowell. Each of the Appellant’s supporting colleagues refers to his expertise in their Northeast office; not one of the Appellant’s supporters asserts that he is a statewide or agency-wide expert. Further, General Counsel Rome, who meets monthly with the Appellant’s immediate superiors monthly, indicated that the Appellant is one of more than a hundred DCF attorneys handling care and protection cases. Hence, the Appellant has not established that he is a statewide or agency-wide expert as required of a Counsel III.

The third prong of the three—pronged test requires that a Counsel III perform, in the aggregate, at least a majority of the time, duties listed in the Counsel III Specifications under

“Supervision Exercised”, “Additional Functions Performed”, “Additional Key Accountabilities” and “Relationships with Others”, with the “Supervision Received” by a Counsel III. With respect to Supervision Exercised, the Counsel III may supervise others but the Appellant indicates that, with the exception of two interns, he does not supervise others.

First, as noted above, the Appellant has not established by a preponderance of the evidence that he performs the functions of a Counsel III a majority of the time as a **statewide or agency-wide expert**.

With respect to Additional Functions Performed, there is insufficient evidence in the record that the Appellant serves as a “technical expert” to management, that he assists agency management decision making and ensures compliance with agency, state and federal laws and regulations. Similarly, there is insufficient evidence in the record that the Appellant collaborates and confers with colleagues to implement new laws or changes to laws, hosts public forums to provide interested parties with an opportunity to comment on issues. Further, the Appellant has not established that he writes, recommends and reviews legislation, appears at hearings regarding legislation to represent the client, draft and implement internal and external policies and procedures, forms, notices, and other written material for adherence to new legislation.

With respect to the Counsel III Additional Key Accountabilities, there is no indication in the record that the Appellant works with the Attorney General to implement litigation strategy, issues legal opinions, develops official forms for approval, and recommends resources and budgetary requirements.

Regarding the Relationships with Others section of the Counsel III Spec, the Appellant has established that he has key contacts with court personnel, public officials, state agencies and community-based organizations but not with federal agencies and local municipalities.

With regard to the Supervision Received section of the Counsel III Spec, the Appellant has established that he receives general supervision from employees of a higher grade who provide policy direction and review his performance but there is no evidence in the record that they assign the Appellant work as provided in the Spec since distribution of DCF care and protection cases is determined by rotation.

Conclusion

For all of the above stated reasons, the appeal of Attorney Cook, under Docket No. C-14-287, is *denied*.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Tivnan, and Stein) on July 29, 2021.

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:

Christopher Cook, Esq. (Appellant)
Melinda Willis, Deputy General Counsel (HRD)