

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MARY ELLEN THOMPSON,
Appellant

v.

C-14-287

HUMAN RESOURCES DIVISION &
DIVISION OF INSURANCE,
Respondents

Appearance for Appellant:

Pro Se
Mary Ellen Thompson, Esq.

Appearance for Respondents:

Melissa Thomson, Esq.
Michele Heffernan, Esq.
Labor Counsel
Human Resources Division
One Ashburton Place, Room 301
Boston, MA 02108

Commissioner:

Cynthia A. Ittleman

Summary of Conclusion

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, especially between Counsel II and Counsel III, 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.

As stated above, the application of this paradigm to the facts of this case, establish that the Appellant has the requisite qualifications, holds the requisite expertise, and performs at a Counsel III level more than 50% of her time. Thus, she is entitled to be reclassified to Counsel III.

Nothing in this decision prevents HRD, in collaboration with other stakeholders, to review and revise the Counsel Specifications and resolve the ambiguities insofar as HRD or other stakeholders believe it would be appropriate.

DECISION

Mary Ellen Thompson (Ms. Thompson or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on December 10, 2014 under G.L. c. 30, § 49 challenging the decision of the state’s Human Resources Division (HRD) and the Division of Insurance (DOI

or Appointing Authority), within the Executive Office of Consumer Affairs and Business Regulation (OCABR), to deny her request to be reclassified from a Counsel II to a Counsel III.¹ A prehearing conference was held in this regard on January 6, 2015 at the offices of the Commission. A hearing² was held on this appeal on February 24 and March 11, 2015 at the Commission, at which HRD represented itself and DOI.³ At this hearing, the witnesses, except the Appellant, were sequestered. This hearing was digitally recorded and the parties received a CD of the proceeding.⁴ The parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT

Based on the thirty-four (34) exhibits entered into evidence and the testimony of:

Called by Respondents:

- Karen Malone Bratt (Bratt), Director of Human Resources, OCABR
- Kimberly Deeney, Personnel Analyst, Human Resources Department, OCABR
- Anita Holbrook, Personnel Analyst III, HRD
- Marianne Dill, Director of Office of Employee Relations (OER), HRD

¹ I take Administrative Notice that the Appellant filed an earlier appeal involving the same matter and it was docketed C-14-226. As a result of information obtained at the prehearing conference in that case on October 7, 2014, Chairman Bowman remanded the case to HRD for a hearing pursuant to G.L. c. 30, § 49, adding that if HRD affirmed the DOI/OCABR decision, “... Ms. Thompson may, within thirty (30) days of being notified of HRD’s decision, file a new appeal with the Commission contesting said decision, without the need to submit a new filing fee.” Procedural Order, October 10, 2014, C-14-226. Thereafter, the Appellant filed the instant appeal. This is the first of three reclassification appeals received from DOI Counsel IIs. The two (2) other appeals are: Mindy Merow Rubin v. Division of Insurance and Human Resources Division, Docket No. C-14-294; and Edward Phelan v. Division of Insurance and Human Resources Division, Docket No. C-15-118.

² The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with Chapter 31, or any Commission rules, taking precedence.

³ Attorneys Thomson and Heffernan, Counsels for HRD, who also represented DOI, were assisted by the Karen Blomquist, Deputy Commissioner for Communications and Operations at DOI, and Joanne Campo, Deputy General Counsel at OCABR, both of whom were present and did not testify.

⁴ 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 the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

- Regina Caggiano, Deputy Director of Civil Service and the Organizational Development Group, HRD
- Alexandra McInnis, Personnel Analyst III, HRD

Called by the Appellant:

- Mary Ellen Thompson, Esq., Counsel II, DOI
- Christopher Joyce, Esq., Deputy General Counsel, DOI⁵

and taking administrative notice of all matters filed in the case, including, without limitation, documents submitted to the Commission by HRD on January 5, 2015 concerning the Appellant's reclassification request, as well as all matters filed in the initial appeal in this matter docketed C-14-266, and pertinent statutes, regulations, case law and policies, and reasonable inferences from the evidence, a preponderance of evidence establishes the following findings of fact:

Stipulation

1. Ms. Thompson is a Counsel II employed with the DOI in the OCABR.
2. Ms. Thompson began her employment at DOI on or about September 24, 1999.
3. Ms. Thompson became a Counsel II on or about February 25, 2001.
4. DOI administers the laws of the Commonwealth as they pertain to the protection of the insurance consumer through the regulation of the insurance industry. The DOI monitors financial solvency, licenses insurance companies and producers, reviews and approves rates and forms, and coordinates the takeover and liquidation of insolvent insurance companies and the rehabilitation of financially troubled companies. The DOI investigates and enforces state laws and regulations pertaining to insurance and responds to consumer inquiries and complaints.

⁵ Mr. Joyce appeared by subpoena.

5. DOI employs approximately 130 people.
6. There are sixteen (16) Counsel IIs employed by the DOI.
7. The human resources-related transactions and support for the DOI are handled by OCABR. OCABR provides this service for a number of other agencies that report to it.
8. In January 2014, the Director of OCABR Human Resources, Ms. Karen Bratt, met with the Counsel IIs at DOI to explain the new Counsel series Specification and the creation of the Counsel III title.
9. Ms. Thompson submitted a “Request to appeal Classification form” on March 28, 2014⁶ requesting to be reclassified to the title of Counsel III.
10. On April 2, 2014, Ms. Thompson was notified that an appeal audit interview was scheduled for April 22, 2014. In this correspondence, Ms. Thompson was asked to complete the Interview Guide and return it by April 18, 2014.
11. Ms. Thompson prepared responses to the Interview Guide and participated in the interview on April 22, 2014.
12. On June 24, 2014, Ms. Thompson’s reclassification request was preliminarily denied and she was afforded the opportunity to submit a rebuttal to the preliminary denial within ten (10) days.
13. On July 2, 2014, Ms. Thompson submitted a rebuttal to the preliminary reclassification request.
14. On July 15, 2014, OCABR notified Ms. Thompson that it had denied her reclassification request.
15. On July 21, 2014, Ms. Thompson appealed the denial of her reclassification to HRD.

⁶ Ms. Thompson signed this Request on March 27, 2014. (Joint Exhibit 1)

16. On August 13, 2014, HRD notified Ms. Thompson that it concurred with the decision of OCABR and that her appeal to HRD was denied.
17. On September 13, 2014, Ms. Thompson appealed the denial of her reclassification request to the Commission for the first time in an appeal docketed C-14-226. (Administrative Notice)
18. On October 10, 2014, the Commission remanded the case to HRD for a hearing pursuant to G.L. c. 30, § 49.⁷
19. On November 5⁸, 2014, HRD conducted a hearing regarding Ms. Thompson's reclassification appeal.
20. On November 20, 2014, HRD denied Ms. Thompson's appeal.
21. On December 10⁹, 2014, Ms. Thompson filed an appeal at the Commission of the decision of HRD.

Appellant's Background

22. Appellant was admitted to the bar in 1989. Her first employment as an attorney was as a legal service attorney, working on family law and mental health commitments, among other areas. Thereafter, she was employed at DOR, working on child support enforcement cases. In 1999, she became employed by DOI as a Counsel I, working on health insurance matters. (Testimony of Thompson)

⁷ At the time, G.L. c. 30, § 49 stated, in part, "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 [at HRD] 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. ..." *Id.* In 2015, this provision was amended to delete the requirement that the personnel administrator conduct a hearing upon receipt of a civil service employee's appeal of the decision of his or her agency to deny his or her reclassification request. St. 2015, Chapter 46, § 49. As a result, HRD now decides such appeals based on documentation provided by the employee seeking the reclassification and by the agency that denied the employee's reclassification request.

⁸ Some references in evidence state that the HRD hearing took place on November 4, 2014 and others state that it occurred on November 5, 2014. Whether it occurred on November 4 or 5 in 2014 is not dispositive.

⁹ The parties' stipulation states that Ms. Thompson filed an appeal at this Commission on December 11, 2014 but the Commission records indicate that it was filed December 10, 2014 based on the date of the postmark.

23. Within a few years, the Appellant was appointed to Counsel II, at or about which time she began working on automobile insurance matters. She was assigned to represent the DOI Commissioner at the Commonwealth Automobile Reinsurers (CAR).¹⁰ At that time, insurance companies were leaving Massachusetts. The new administration then came into office, appointed a new DOI Commissioner and indicated that the state would transition to managed competition for car insurance. From approximately 2004 to 2006, the Appellant explored appropriate insurance risk information and from approximately 2007 to 2009, she was involved in implementation of the managed risk transition. During the market transitions, the Appellant spent approximately 80% of her time working on automobile insurance. For a while, the amount of time she worked on automobile insurance was reduced. (Testimony of Thompson) In or about the fall of 2012, the Appellant volunteered to work with two other DOI Counsel attorneys on enforcement matters in view of the reduced time involved in addressing automobile insurance matters. However, the Appellant's principal duty is still on automobile insurance matters. (Testimony of Thompson and Joyce) The Appellant is in direct communication with the Commissioner on CAR issues. The Appellant's automobile insurance work increased in the year preceding the Commission hearing because of the rideshare issues that have arisen regarding companies such as Uber and Lyft. (Testimony of Joyce) Ms. Thompson is the only DOI attorney who works on auto insurance. (Exhibit 17)

¹⁰ DOI Deputy General Counsel Joyce described CAR as a residual insurance overseer, a remnant of prior managed competition; prior to 2008, Massachusetts government set auto insurance rates. The CAR website describes the entity as "the industry operated residual market and statistical agent for motor vehicle insurance in the Commonwealth of Massachusetts." <http://www.commauto.com/aboutcar/default.aspx>

Organization of DOI Legal Department

24. Among the sixteen (16) attorneys in the DOI Legal Department, there are hearing officers and various counsels. Each Counsel II in the Legal Department has general duties and a specific duty, such as automobile insurance or health insurance. Each attorney has at least one specialty. The work flow changes over time for the attorneys. (Testimony of Deeney and Joyce) At least some DOI Counsel IIs have drafted or draft legislation and regulations. Assignments are based on subspecialties and what the General Counsel or Deputy General Counsel assigns. However, sometimes a DOI attorney will receive an assignment in a different specialty, as when there is a loss of personnel. Attorneys are supervised directly either by General Counsel Whitney or Deputy General Counsel Joyce.¹¹ Supervisors prepare Employee Performance Evaluation System (EPRS) reports during the year as appropriate. Deputy General Counsel Joyce does not assign percentages to the amount of time each attorney works in a particular field. In most cases, the work of experts would be reviewed by the General Counsel or Deputy General Counsel. (Testimony of Joyce)

Counsel III Job Specification (Spec), Compared with Counsel II Job Spec

25. The position of Counsel III in the Counsel series was established effective August 11, 2013. (Exhibit 4)
26. A civil service job series is defined as “a vertical grouping of related titles so that they form a career ladder”. (G.L. c. 31, § 1)
27. The Counsel series is marked Exhibit 5. Portions of the Counsel series quoted herein are from Exhibit 5, with emphasis added. (Administrative Notice)

¹¹ The DOI General Counsel supervises the DOI legal department attorneys who are hearing officers and Deputy General Counsel Joyce supervises the DOI legal department attorneys (among others) who are prosecutors to prevent conflicts of interest. (Testimony of Joyce)

28. 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 provide customer service and information to the public on agency functions, rules and regulations.
(Exhibit 5)

29. 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.
(Exhibit 5)

30. 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.
(Exhibit 5)

31. 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.

(Exhibit 5)

32. 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.

(Exhibit 5)

33. 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.

(Exhibit 5)

34. 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.

(Exhibit 5)

35. The Counsel III Spec for Additional Functions Performed provides that “Incumbents may perform the following”:

- Serve as technical experts, providing advanced and specialized expertise in a specific area of law (e.g., administrative, family, finance, labor and employment, litigation) to both internal and external clients, management and colleagues; provide specialized and/or broad consultative advice, insight, and recommendations on specialized legal issues to assist agency management decision making and to ensure compliance with agency, state and federal laws and regulations.

- Educate and effectively communicate the interpretation of area-specific laws to internal and external clients and, if relevant, subordinates to enhance knowledge and to enforce or promote the consistent administration of laws.
- Investigate an applied set of facts and obtain information needed for representation; research and analyze internal and external policies, rules, regulations, new legislation, federal and state case law and case history to frame a position, to determine accuracy of claims or to provide information or advice to others.
- Develop resolutions based on investigation, verification and critical analysis of legal and factual arguments and internal legal options; negotiate with opposing parties to reach a quick resolution, avoid litigation, mitigate damages and/or settle cases.
- Negotiate and review administrative, court and other legal documents ensuring that such documents are complete, accurate, and available for future review and in compliance with law.
- Collaborate and confer with colleagues within the division or department as well as with external resources to gather input for decisions or determination of a position, to achieve common goals or to implement new laws or changes to laws; may host public forums to provide interested parties with an opportunity to comment on issues.
- Write, recommend and review legislation; appear 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; evaluate, research and produce documentation regarding the interpretation of law; draft, circulate for input and issue public written statements to provide guidance to taxpayers.
(Exhibit 5)¹²

36. The DOI website states, in part,

National Association of Insurance Commissioners

The Massachusetts Division of Insurance is part of the U.S. insurance regulatory framework which is a highly coordinated state-based national system designed to protect policyholders and to serve the greater public interest through the effective regulation of the U.S. insurance marketplace.

(Administrative Notice: <http://www.mass.gov/ocabr/government/oca-agencies/doi-lp/>, November 16, 2016)(emphasis added)¹³

¹² In the interest of completeness, the last clause here referring to documents for taxpayers is retained. However, since it appears to refer to Counsel for the Department of Revenue, not DOI, no analysis of that provision is included herein.

¹³ With regard to federal or state regulation of auto insurance, *see, e.g.*, <http://www.naic.org/>; http://www.lexisnexis.com/legalnewsroom/insurance/b/insurance-law-blog/archive/2009/09/08/who-should-regulate-the-insurance-industry_3f00_.aspx?; <http://www.autoinsurance.org/who-oversees-auto-insurance-companies/>; <http://carinsurancequotes.com/articles/how-state-and-federal-laws-regulate-the-car-insurance-industry>.

37. The Counsel II Spec for Additional Functions Performed provides that “Incumbents may perform the following”:

- Communicate with representatives of other agencies, including the Legislature, and collaborate with cross-functional or cross-agency teams and stakeholder to share information, resolve issues and develop or implement new programs.
 - Draft new policies and regulations or amendments to existing policies and regulations, based on legal research and agency needs, to streamline agency practices, support operational efficiencies and ensure agency compliance with laws.
 - Present memoranda supporting or opposing legislation affecting agency operations.
- (Exhibit 5)

38. The Counsel III Spec for Additional Key Accountabilities provides, “Incumbents at this level may be granted the decision-making authority to:

- Recommend whether to settle, prosecute, or defend cases.
- Work with the Office of the Attorney General and independently to implement litigation strategy to be used in prosecution, defense or settlement of cases through all levels of court jurisdiction.
- Form legal opinions based on research, analysis and interpretation and address policy questions as the authoritative representative.
- Issue legal opinions based on legal interpretation of statutes, policies, regulations and court orders.
- Develop and recommend official forms for approval.
- Recommend resources and budgetary requirements to accomplish objectives.
- Lead and provide direct supervision to others.”

(Exhibit 5)

39. The Counsel II Spec for Additional Key Accountabilities provides, “Incumbents at this level have the decision-making authority to”:

- Allocate cases and assignments to supervisees most appropriately.
- Prioritize and manage personal (sic) assigned workloads and caseloads as well as the workloads and caseloads of direct reports.

- Issue recommendations for final decision or resolution of cases, and for some cases, to issue or agree to final resolution without further review.
(Exhibit 5)

40. 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. ...

(Exhibit 5)

41. 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.

(Exhibit 5)

42. 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. Based on assignment and supervisory responsibilities, three years in a supervisory capacity may be required. ...

(Exhibit 5)(emphasis added)

43. 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. ...

(Exhibit 5)(emphasis added)

44. 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 the:

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.
(Exhibit 5)¹⁴(emphasis added)

45. 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.
5. (Exhibit 5(emphasis added))

History of Counsel III Specification

46. Prior to the new Counsel III Specification, HRD examined various job classifications over a period of time. Specifically, in 1997, a special unit of HRD was assigned to study all job classifications. Ms. Regina Caggiano, currently HRD Deputy Director of Civil Service and the Organizational Development Group (ODG), began working at HRD in 1997, working on the job classification project for approximately two (2) years. In or about 2009, Ms. Caggiano worked with the ODG to conduct a classification study of state job titles. At that time, the Legislature provided HRD a line-item to review job specification update them. There were limited funds for this study so the study looked at the most populated job titles, which included 80% of state job titles at the time, which included eighty-six (86) different job series. (Testimony of Caggiano)

¹⁴ The Counsel III Spec was scanned and copied into this document, which resulted in certain format changes which do not have a substantive effect on the original document.

47. HRD retained the personnel consulting services of Hay Group to assist in the classification study. Hay Group worked with HRD and agency personnel in this endeavor. In this study, those involved interviewed employees in the identified jobs to determine, *inter alia*, whether the jobs changed over time, the essential functions of each job, the scope of the job, whether decision making was involved in the jobs, the reason for the functions of the job, the knowledge needed to begin the job, and the physical environment of the job. The information was reflected in a report in June 2009.
(Testimony of Caggiano)
48. The study report included a review of the Counsel I and Counsel II positions and developed the specifications for those positions. No action was taken regarding this study because of insufficient funding. (Testimony of Ms. Caggiano)
49. The next review of Counsel specifications began in 2010 when the Department of Revenue (DOR) asked HRD for assistance with Counsel job titles for Child Support Enforcement attorney positions. At that point, HRD looked into developing a four (4)-level Counsel series. An HRD staff person who worked on the DOR request prepared information for DOR in response to its request but no action was apparently taken on the information. (Testimony of Caggiano)
50. In 2011, some agencies asked HRD to review the Counsel series. In 2012, HRD gave the four (4)-level series to representatives of the Executive Office of Health and Human Services (HHS) and DOR because those agencies had the most employees in the Counsel series. Ms. Caggiano met with those agencies' representatives. The feedback she received was that the proposed four (4)-level Counsel series involved positions that were too similar to the Management positions. HHS and DOR provided recommendations for

the Counsel series to HRD and HRD recrafted the Counsel series, limiting it to three (3) levels. As redesigned, the Counsel III position was intended to have as its distinguishing characteristic that the employee was the most expert and experienced attorney in the series. The Counsel III position was not intended to be a promotion for all Counsel IIs. Rather, an agency would have to identify a specific need for a Counsel III in a field pertinent to the agency. (Testimony of Ms. Caggiano)

51. Marianne Dill, Director of the HRD Office of Employee Relations (OER), has been employed at HRD since August 2012. Ms. Dill was involved in the evolution of the Counsel III position. Prior to working at HRD, Ms. Dill was the Director of Labor Relations at HHS for the Department of Mental Health, the Department of Public Health and the office of Health Care Finance and Policy. She began working in state government in 1995. (Testimony of Dill)

52. At the time of the Commission hearing in the instant case, Ms. Dill was the lead negotiator at OER with pertinent units of the National Association of Government Employees (NAGE) and the American Federation of State, County and Municipal Employees (AFSCME), a Step 3 hearing officer in the grievance process, provided support to agency Human Resources offices, and oversaw OER Labor Advisors. (Testimony of Dill)

53. Ms. Dill first became involved in conversations relating to the Counsel series in November or December of 2012. She was in contact with Kevin Preston, the then-lead NAGE negotiator in this regard. Ms. Dill gave Mr. Preston a copy of the Counsel III Spec in July 2013. The only comment that Mr. Preston provided to Ms. Dill about the draft Counsel III Spec was to change part of the qualifications to say that the Counsel III

could be a first- or second-level supervisor (as opposed to a second-level supervisor only). Ms. Dill negotiated the Memorandum of Understanding with NAGE regarding the Counsel III position; the Counsel III position was to be exempt from overtime and standby pay, from which Counsel IIs are not exempt. (Testimony of Dill, Exhibit 31)

54. Neither Ms. Dill nor Ms. Caggiano recalled from their involvement that the creation of the Counsel III title considered that Counsel assignments change based on the needs of the agency. (Testimony of Dill and Caggiano)

Implementation of Counsel III Classification

55. By memorandum dated August 26, 2013 from Paul Dietl, who was then HRD's Chief Human Resources Officer, to Executive Department Agency Heads, HRAC Directors, Departmental Human Resources Directors, General Counsels, Labor Relations Directors and Chief Fiscal Officers, HRD announced the "newly expanded Counsel Job Specification" and provided a copy of the new Counsel III Spec. (Exhibit 4) This memorandum indicated, "... [o]n July 30, 2013, the Commonwealth of Massachusetts, through the Human Resources Division, signed a Memorandum of Understanding with the National Association of Government Employees, (NAGE) detailed updated job specifications for the Counsel Series, including the establishment of a new Counsel III, job grade 21." (Id.; see Exhibit 31) The August 26, 2013 memorandum from Mr. Deitl provided further, in part,

- The Counsel Series is expanded to add a third level, Counsel III, job grade 21.
- The Counsel III will be exempt from Articles 7.2, 7.5 and 7.6 (overtime, call back and standby pay) of the NAGE Unit 6, collective bargaining agreement. Counsel I and II will remain job grade 14 and 17 respectively and will maintain all contractual rights regarding overtime, callback and standby pay.

- The Counsel III title is anticipated to be utilized for positions that require ‘statewide’ or ‘agency’ experts, or that require greater expertise in a specialized area of law.
 - Agencies wishing to employ the counsel III job title should petition HRD’s Organizational Development Group (ODG) for the establishment of such position(s).
 - Agencies are expected to clearly define the tasks that rise to the ‘expert level’ in the Agency, and develop and submit a new Form 30¹⁵ for the title or titles. ODG has previously forwarded guidance to aid in the development of these new forms 30’s (sic).
 - Agencies shall secure prior approval from HRD/ODG prior to posting or reallocation of positions to Counsel III.
 - Agencies may be required to certify to the Fiscal Affairs Division that funds are available to support these positions.
- (Id.)(emphasis added)

56. Mr. Bibilos, Director of the HRD Organizational Development Group, provided guidance to all HRD Personnel Analysts indicating that before any Counsel III positions are created or if a Counsel II requests reclassification to Counsel III, they are to look at the Counsel III Spec and examine it closely. (Testimony of McInnis)

57. Maintenance reallocation is the process whereby an employer, not an employee, requests that an employee be reclassified; in that circumstance, a manager can make the request and update the employee’s Form 30 for processing. (Testimony of Bratt and McInnis)

58. Ms. Bratt, OCABR HR Director, had questions about how to handle the new Counsel III Spec so she called Ms. Latoya Odlum, HRD Human Resources Analyst; NAGE Local 6, Unit 207 President Theresa McGoldrick; and Executive Vice President Bobbi Kaplan. Ms. Bratt received guidance from HRD and the union representatives that the number of reclassifications to Counsel III would be small since it would involve attorneys who are “experts” and who are the “go to” person on a subject. Ms. Bratt then sent the new

¹⁵ In response to my request at the Commission hearing, the Respondents produced a Form 30 for Counsel III template; as a template, it has not been completed, for example, by an agency interested in reclassifying a Counsel II to a Counsel III. (Exhibit 34)

Counsel III Spec and memorandum from Mr. Dietl to agency heads within OCABR, asking them to inform her if anyone meets the new Counsel III Spec. Ms. Bratt understood this process to be a bit different from other situations in that if the employer wanted to request a reallocation, the employee would still need to complete an Interview Guide and have an audit interview. No OCABR managers requested reallocation of Counsel IIs to Counsel III. (Testimony of Bratt)

59. In or about January 2014, there was a meeting of DOI Counsel IIs regarding the new Counsel III position. The Appellant submitted a request to be reclassified as a Counsel III afterward on March 28, 2014. Those in attendance at the meeting with the DOI Counsel IIs included then-DOI Commissioner Joseph Murphy; Karen Bratt, OCABR Director of Human Resources; DOI General Counsel Robert Whitney; and DOI Deputy General Counsel Christopher Joyce. (Testimony of Joyce and Deeney) At this meeting, the DOI Counsel IIs were informed that DOI would not pursue a maintenance request to reclassify DOI Counsel IIs to Counsel IIIs. (Testimony of Thompson) They were also informed not to expect that a lot of Counsel IIs who requested reclassification would be reclassified to Counsel III but that they could apply. (Testimony of Bratt) Prior to this meeting, DOI Counsel IIs had not yet submitted reclassification requests but had sent email messages asking how the reclassification process would work. (Testimony of Bratt)

60. An outline brought by Ms. Bratt to the meeting with DOI Counsel IIs about the Counsel III position states, in part,

... We looked at the functions of the Counsel II's throughout DOI and determined that there are not currently any Counsel III's. We understand that each lawyer within the DOI is certainly an expert within the insurance world, but if we went by that measure, every Counsel throughout the state would be an expert in their

field! What we are looking for is the 1-2 employees in the agency who have become the expert among experts.

In the guidance we have received, we are looking for:

- An employee who represents the agency at conferences and events – both in state and across the country
- You interact regularly with colleagues inside the agency AND outside
 - EDUCATE AND EFFECTIVELY COMMUNICATE THE INTERPRETATION OF AREA-SPECIFIC LAWS TO INTERNAL AND EXTERNAL CLIENTS AND SOMETIMES SUBORDINATES ...
- The employee that everyone else goes to for guidance ...
- The Commissioner/General Counsel/Undersecretary and others know that you are the person to go to with any legal questions

Funds have to be available ...

Grades 14, 17, 21 – ...

Grade 14 - \$54,945 - \$79,658 [Counsel I]

Grade 17 - \$62,977 - \$91,004 [Counsel II]

Grade 21 - \$73,602 - \$106,304 [Counsel III]

To my knowledge (as of December), there is currently only 1 Counsel 3 within the state at this time.

All requests must be thoroughly reviewed by our Personnel Analyst, Kim Deeney, and she will need to complete a memo and updated Form 30 and submit the request to HRD – no requests will be authorized without HRD.

At this time, we do not believe there are any Counsel III's. If you strongly disagree, you may request a Classification Appeal with Kim Deeney. In this case, you will be asked to complete an Interview Guide ... You will meet with Kim personally and review all job duties. She will then follow back up with your supervisor (Chris/Rob) to determine if they agree with the duties stated in the guide. OCABR will make a recommendation to HRD, HRD will make the final decision. ...

(Exhibit 17)(emphasis in original)

61. Ms. Bratt began working at OCABR in 2009 as a Personnel Officer II, then she was appointed Personnel Analyst III and then OCABR Director of Human Resources. Ms. Bratt has worked on reclassifications, which involved meeting with employees who requested reclassification to determine their duties and whether they should be reclassified. If there is enough information supporting the request, the employee will be

reallocated. This happens, for example, when an employee has an outdated job title. She has been involved with maintenance reallocation of a Counsel I to a Counsel II but there are no attorney requests for reclassification in which she has been involved until this case. As HR Director, she also supervises staff regarding payroll, hiring, and diversity, among other matters. In addition, she works with HRD on projects as they arise.

(Testimony of Bratt)

62. Attorney Joyce has been Deputy General Counsel at DOI since 2012. The Deputy General Counsel and General Counsel review the work of experts in the legal department in most cases. Attorney Joyce was originally hired by DOI in 2008 as a Counsel II, in which position he worked on transactions and receivership matters. He has been an attorney since 2001. Prior to working at DOI, Attorney Joyce was in private practice.

(Testimony of Joyce)

63. Prior to the meeting with DOI Counsel IIs about the new Counsel III position, Ms. Bratt, Kimberly Deeney, OCABR HR Personnel Analyst III; DOI Attorney Whitney and DOI Attorney Joyce had a meeting. The purpose of this meeting was to discuss what would be discussed at the future meeting with DOI Counsel IIs regarding the new Counsel III position and to obtain information about the DOI Legal Department. (Testimony of Joyce) At this meeting, Ms. Deeney learned that the DOI Legal Department has sixteen (16) attorneys, that they each have specialties, that, for example, some DOI attorneys are hearing officers, three (3) work on enforcement cases (including the Appellant), some work on insurance rating issues, and others work on producer licensing matters. (Testimony of Deeney; *see* Exs. 25 and 26, DOI organizational charts) Working on enforcement cases involves prosecuting insurance companies that are believed to have

violated insurance law and reviewing and investigating the cases to determine if the companies have violated other insurance laws in Massachusetts or in other states.

(Testimony of Thompson)

64. Ms. Deeney began working at OCABR in 2012. Her title is Personnel Analyst III.

Among the matters she has worked on for the seven (7) agencies under OCABR are staffing, medical leave and reclassifications. Ms. Deeney received on the job training at OCABR; a retiree trained her and others at OCABR Human Resources about reclassification. Before working at OCABR, Ms. Deeney worked as a Personnel Coordinator at the state Department of Transportation. (Testimony of Deeney)

Appellant's Request for Reclassification

65. After the Appellant informed Ms. Deeney of her interest in being reclassified to the Counsel III position by filing a form she dated March 27, 2014 and OCABR received on March 28, 2014, Ms. Deeney sent Ms. Thompson a letter dated April 2, 2014 with a form to complete, referred to as an Interview Guide, and scheduled an appointment for 10:30a.m. on April 22, 2014 to discuss Ms. Thompson's request. At or around this time, Ms. Deeney also reviewed the Appellant's current Form 30 job description and fiscal year 2013 EPRS. (Testimony of Deeney; Exhibits 2, 6 and 7)

66. The Appellant completed the Interview Guide and signed and dated it on April 16, 2014.

In response to the statement on the Guide stating "Please describe what you view as the basis of the appeal", the Appellant wrote, in part,

I have been a licensed, practicing attorney for over 24 years. I have been employed by the [DOI] for over 14 years, first as health law attorney and later as the attorney designated as the Division's liaison to Commonwealth Automobile Reinsurers ("Car") and as a general auto insurance legal expert for the Division. I was part of the team of experts that implemented managed competition in the private passenger automobile market, which won the Manuel Carballo Governor's

Award for Excellence in Public Service award. ... I was also an integral part of the team that changed CAR from a residual market pooling mechanism to an assigned risk plan. During these transitions, I drafted regulations and bulletins relating to the changes in the market. Additionally, the Commissioner designated me to be her ombudsperson for insurance producers during the transition to the assigned risk plan.

As the CAR liaison, I provide legal review and analysis of all proposed changes to CAR's Rules of Operation and give my legal recommendation regarding the proposed changes. I attend and summarize all CAR Governing committee meetings as well as other CAR committee meetings, and keep relevant Division staff, including the Commissioner, apprised of issues that may require Division input, approval or consideration. I am the staff attorney member of the Commissioner's Auto Team, which meets bi-weekly to discuss issues facing the motor vehicle insurance industry and market. I respond to consumer and industry inquiries about motor vehicle laws and policies, and issues that come up between consumers, producers and insurance companies. I drafted the report from the legislatively mandated Commission on Auto Body Labor rates ... an issue that is raised at the legislature each session and a discussion that is currently ongoing at CAR. Prior to the market's changing to managed competition, each year I draft parts of the annual decision on private passenger automobile rates. The Commissioner has also designated me to be his representative to the [MassDOT RMV] Merit Rating Board ...

I have ... supervised the legal department's interns for nine years, including writing evaluations ... As their supervisor, I control their workflow, review and edit written drafts and provide training ...

Beginning a year and a half ago, I began to take on enforcement cases, essentially prosecuting producers and others who have violated insurance laws. I draft settlement agreements, and file Orders to Show Cause if a settlement agreement cannot be reached. I conduct additional investigation into these cases to determine if other violations of insurance law or regulation have occurred, or if a producer has committed any relevant wrongdoing in another jurisdiction.

... I have also drafted and promulgated new regulations and amendments to existing regulations, as well as drafted health, auto and other bulletins.

I have participated in a number of consumer events, assisting consumers in understanding various insurance issues and explaining various lines of insurance, as well as helping insureds understand their coverages after natural disasters, including the flooding on the North Shore and the tornados in Western Massachusetts.

I served as the Division's legislative specialist for a number of years, summarizing all insurance-related legislation and attending hearings of the Joint

Financial Services Committee. I tracked legislation, drafted comments for OCA and the Governor's office regarding the benefits and drawbacks of insurance-related bills. I have trained my colleagues in the use of the legislative tracking program ...

I have extensive knowledge in the specialized area of insurance law, and specific expertise in the area of motor vehicle insurance and the reinsurance mechanism for the motor vehicle insurance markets. ...
(Exhibit 10)

67. In response to the part of the Interview Guide that asks, "what people or groups ... do you come in contact with in the performance of your job both within and outside your agency ...", the Appellant wrote, in part,

Within Agency:

Robert Whitney, Deputy Commissioner and General Counsel
Christopher Joyce, Deputy General Counsel for receiving and reviewing assignments and for EPRS
Commissioner Joseph Murphy for Auto Team and CAR issues
Actuary Cara Blank for CAR and auto issues, to discuss CAR rule changes, contents of certain rate filings and/or rating issues
Diane Silverman Black, Director of Producer Licensing and Dot Raymond of [Special Investigations Unit], and SIU investigators for assistance, information and clarification of issues relating to enforcement cases
All other attorneys in the legal department for discussions of issues which overlap our areas of expertise
Members of consumer services to discuss inquiries they receive on issues that may have a legal component
The [DOI] Board of Appeal on issues relating to auto surcharges

Outside Agency:

CAR, primarily President Daniel Judson but also others, to discuss issues impacting CAR and the Division and to relay information between the Division and CAR
Insurance producers and company members of the CAR Governing Committee and various committees
Counsel to insurers
Consumers
(Exhibit 10)(emphasis in original Interview Guide)

68. Asked to briefly describe the overall basic purpose of her job on the form, the Appellant wrote in full, "the overall basic purpose of my job is to provide legal advice to the

commissioner, and then to implement decisions he makes based on that advice. I provide legal counsel to all sections of the agency.” (Exhibit 10)

69. Asked on the form if there have been “any significant job changes since her appointment”

the Appellant wrote,

I was originally hired in 1999 as a health insurance attorney. A year or two after that, I was assigned the additional duty as the Division’s CAR liaison. Later, when the general counsel asked for someone to assist with legislative matters, I volunteered and handled all legislative duties for several years. In 2005, I assumed the role of ... supervising the legal department interns. More recently I was asked to take on duties as an enforcement attorney to ease a need in the legal department for more attorneys in that area.

(Exhibit 10)

70. The Interview Guide form also asks “what do you currently do” and to indicate “the

percentage of time spent on each duty – total must equal no more than 100%”. The

Appellant wrote,

1. CAR and other auto related duties 30%
2. Enforcement cases 20%
3. Supervising interns 20%
4. Responding to miscellaneous consumer inquiries, questions from colleagues, or questions from other Division employees 10%
5. Conducting legal research and drafting memos on non-auto related matters 20%

(Exhibit 10)

71. Asked on the form who assigns her work and how it is assigned, the Appellant wrote in

full,

Most of my work is assigned by Deputy General Counsel Chris Joyce, who assigns either by email or in a face-to-face meeting. The other work that is assigned to me generally comes from General Counsel and Deputy Commissioner Robert Whitney, who usually assigns it by email.

On occasion, I receive assignments directly from the Commissioner of Insurance.

(Exhibit 10)

72. Asked on the form who reviews her work and the standards for review, the Appellant

wrote in full,

My work is reviewed by Robert Whitney, General Counsel and Deputy Commissioner and Christopher Joyce, Deputy General Counsel and reviewed pursuant to the EPRS.
(Exhibit 10)

73. Asked on the form whom she supervises, the Appellant wrote, in part,

... the legal department's interns. I meet informally with them on a regular basis, review their memos and suggest other avenues of research and other issues related to the topic they are researching.
(Exhibit 10)

An organizational chart of DOI also indicates that the Appellant supervises interns.

(Exhibit 25) No other attorneys in the DOI Legal Department supervise interns.

(Testimony of Deeney)

74. The last part of the form states, "**Additional Information**: explain any aspects of your job which you feel has (sic) not been covered by the previous questions and which you feel is important in understanding your duties." (Exhibit 10)(emphasis in original) The Appellant did not fill in this section. (Id.)

75. In April 2014, after the Appellant completed the Interview Guide and sent it to Ms.

Deeney, Ms. Deeney reviewed the Appellant's completed Interview Guide and then met with the Appellant on April 22, 2014 to conduct an audit, in which they discussed the Appellant's reclassification request. The Appellant gave Ms. Deeney a copy of her resume. Employees requesting a reclassification and attending such a meeting may be accompanied by a supervisor or union representative. The Appellant attended the meeting with Ms. Deeney unaccompanied. (Testimony of Deeney)

76. Prior to her April 2014 meeting with Ms. Thompson, Ms. Deeney was unaware that Ms.

Thompson was the "go to person" for auto insurance and that she had spent a considerable amount of her time working in that field. Ms. Thompson told Ms. Deeney

this because she (Ms. Deeney) had not reviewed Ms. Thompson's prior duties. Ms. Deeney found that the amount of auto insurance work had slowed down so the Appellant was now working on enforcement cases with two (2) other attorneys. In addition, Ms. Deeney learned that the attorneys in the DOI Legal Department each had subspecialties, such as handling insurance rates, conducting administrative hearings, and handling producer licensing, and that some of them reported to the General Counsel and some reported to the Deputy General Counsel. Further, Ms. Thompson informed Ms. Deeney at her interview that the percentage of time an attorney spends on various matters depends on issues as they arise. (Testimony of Deeney)

77. In May 2014, after Ms. Deeney met with the Appellant and before granting or denying the Appellant's reclassification request, Ms. Deeney and Ms. Bratt met with Latoya Odum, HRD Personnel Analyst (who had been assigned to address OCABR human resources issues); Alexandra McInnis, HRD Personnel Analyst III; Sarah Unsworth, HRD Manager of Classification and Compensation; and Amy Lynch at HRD. Asked at the Commission hearing if anyone from DOI attended this meeting, Ms. McInnis stated that she thought Ms. Deeney was from DOI and since Ms. Deeney was from OCABR, not from DOI, no one from DOI attended this meeting. (Testimony of McInnis) By this time, a number of Counsel IIs had requested reclassification to the Counsel III position. (Testimony of Deeney)

78. Ms. McInnis has worked at HRD for approximately seven and one-half years, much of it on classifications and compensation. Her current title is Personnel Analyst III. She has also worked at the Department of Correction (DOC), where she became the Director of Human Resources before returning to HRD. (Testimony of McInnis)

79. Ms. Deeney brought to the meeting with HRD the Appellant's EPRS for fiscal year 2013, the Appellant's job description (Form 30) and a summary of the Appellant's completed Interview Guide. (Testimony of Deeney; Exhibit 10)
80. DOI/OCABR did not prepare a Form 30 job description in regard to Ms. Thompson's request for reclassification, although HRD had distributed a Form 30 template to all agency human resources directors to complete if they were considering a Counsel III position. (Testimony of McInnis)
81. At the meeting with Ms. McInnis, the attendees reviewed pending reclassification appeals for the Counsel III position, including that of Ms. Thompson. Ms. McInnis informed the group that the Counsel III position was meant to be an expert level position and that Counsel IIIs were to perform at a high level in their field. All at the meeting stated that Ms. Thompson had expertise in auto insurance but she did not perform the duties of a Counsel III more than half of her time. (Testimony of McInnis) ¹⁶
82. The Counsel II Form 30 on which DOI/OCABR and HRD relied was signed by Ms. Thompson and Deputy General Counsel Joyce in 2012.¹⁷ The Appellant's 2012 Form 30 contains the following job description,

GENERAL STATEMENT OF DUTIES AND RESPONSIBILITIES

Represent the Division in court or at administrative hearings; advise agency staff on legal matters; draft administrative, court and legal documents; provide information to the public on agency functions, rules and regulations; and perform related work as required. The basic purpose of this work is to represent the agency's position and statutory obligations in legal matters, ensuring that agency activities comply with the law.

SUPERVISION RECEIVED ...

Reports to the General Counsel and Deputy General Counsel.

¹⁶ Ms. Deeney testified that OCABR did not receive a document from HRD indicating that the Appellant had expertise in auto insurance and that she did not perform the duties of a Counsel III a majority of the time.

¹⁷ The Appellant produced a Form 30 for her Counsel II position in Exhibit 17, which she signed in 2013 but is not signed by her supervisor. The Counsel II Form 30 signed by the Appellant in 2012 and 2013 are identical.

DIRECT REPORTING STAFF

None. ...

DETAILED STATEMENT OF DUTIES AND RESPONSIBILITIES

1. Responds to consumer, industry and legislative inquiries;
2. Provides inter- and intra-agency advice;
3. Provides legal advice on license applications;
4. Conducts audio-taped hearings of appeals of “SDIP”¹⁸ surcharges;
5. Drafts agency “8 Point Memorandum”;
6. Responds to market conditions by managing and coordinating litigation;
7. Provides legal advice to agency personnel as it regards Public Records Law;
8. Assist General Counsel and Deputy General Counsel in all matters deemed necessary;
9. Consult with legal counsel and agency officials regarding the appeal of court decisions to a higher court and maintain liaison with the Attorney General’s Office on suits filed in federal, State Supreme, Judicial and Superior Courts;
10. Confer with other agency staff in drafting proposed legislation for submission to the Legislature and analyze proposed legislation to determine its impact on agency activities;
11. Draft regulations for the implementation of agency programs;
12. Prepare instructions to agency units for the implementation of court decisions;
13. Prepare trial dockets and draft forms and form letters;
14. Render decisions at hearings and write final and/or recommended decisions based on law, agency rules and regulations and facts presented at hearings; and
15. Negotiate with legal staff of other agencies to develop memoranda of agreement concerning joint programs.
(Exhibit 6)(emphasis added)

83. The Appellant’s Counsel II Form 30 lists 31 “qualifications required at hire” which includes, for example,

1. Knowledge of the theory, principals and practices of law including constitutional law;
2. Knowledge of the procedures followed in courtroom proceedings;
3. Knowledge of the terminology, symbols and standard abbreviations in legal practice;
4. Knowledge of the methods of technical and general report writing;
5. Knowledge of legal research methods and procedures;
6. Ability to read and interpret legal documents such as decisions, briefs, opinions and contracts;

¹⁸ “SDIP” is not defined in the Form 30 but the DOI website indicates that it is the “Safe Driver Insurance Plan”.
<http://www.mass.gov/ocabr/insurance/vehicle/auto-insurance/safe-driver-plan/faqs-surcharge-appeal.html>

7. Ability to understand and apply the laws, rules and regulations governing agency operations and assigned unit activities;
 8. Ability to exercise sound judgment;
 9. Ability to exercise discretion in handling confidential information;
 10. Ability to prepare technical and general reports;
 11. Ability to explain the provisions of the laws, rules and regulations governing agency operations and assigned unit activities;
 12. Ability to explain the procedures, guidelines and policies governing agency operations and assigned unit activities;
 13. Ability to analyze and determine the applicability of legal data, to draw conclusions and make appropriate recommendations;
 14. Ability to work independently;
- (Exhibit 6)

84. The Minimum Entrance Requirements listed on the Appellant's Counsel II Form 30 are,

“Applicants must have at least (a) one full-time, or equivalent part-time, professional experience in the practice of law or in a position requiring membership in the Bar.”

(Exhibit 6)

85. The Appellant initialed this Form 30 on September 25, 2012; a supervisor initialed it on October 4, 2012. (Exhibit 6)

86. The Appellant's fiscal year 2013 EPRS indicates that Deputy General Counsel Joyce was the Appellant's supervisor and that General Counsel Whitney was the reviewer. In addition, this EPRS indicates that the Appellant's Progress Review Summary Rating in February 2013 was that her performance “meets” the applicable standards, her annual review summary rating in June 2013 was “meets”. This EPRS further indicates that the Appellant's rating for performance of five (5) duties at the Progress Review and Annual Review “meets” the applicable standards. (Exhibit 7) Deputy General Counsel Joyce does not assign percentages to the amount of work DOI Legal Department attorneys perform in a particular field. (Testimony of Joyce)

87. The Appellant's five (5) duties in her 2013 EPRS were:

1. Establish and/or oversee residual market mechanisms in the automobile insurance industry.
Performance Criteria: ...
 - a. Attend meetings of CAR Governing Committee and prepare summary reports of such meetings on a timely basis
 - b. Monitor and advise on rule changes and operational changes at CAR
 - c. Conduct necessary factual and legal research relative to appeals with regard to CAR rules
 - d. Assist in drafting legislation regarding the residual market for automobile insurance
 - e. Assist in writing decisions, when necessary, regarding CAR issues
 - f. Prepare and handle Withdrawals from the residual market
 - g. Assist with drafting any and all reforms to the residual market
2. Draft agency bulletins, regulations and legislation.
 - a. Conduct necessary background research in a thorough manner
 - b. Conduct necessary discussions with other Division personnel with expertise in the respective subject matter
 - c. Prepare drafts that are thorough and timely
3. Manage and coordinate litigation.
 - a. Participate in all assigned litigation
 - b. Work productively with assistant attorney generals as necessary
 - c. Work productively with Hearing Officers as necessary
4. Respond to internal, consumer, industry, legislative and administration inquiries.
 - a. Conduct necessary factual and legal research, including a thorough review of proposed legislation and corresponding law, as applicable, in a timely fashion
 - b. Speak with relevant agency personnel regarding appropriate response to inquiry or impact of proposed legislation.
 - c. Speak with industry personnel, as necessary, regarding appropriate response to inquiry or to understand the full impact of proposed legislation
 - d. Provide accurate and coherent responses to inquiries from any sources, including drafting all assigned memoranda related to proposed legislation, in a timely fashion.
 - e. Attend inter and intra agency meetings and participates as appropriate.
 - f. Coordinate with other agencies regarding legislative initiatives, including researching and rendering advice on policy initiatives.
 - g. Act as weekly duty attorney on a rotational basis.
5. Assist the General Counsel and the Deputy General Counsel in every and all matters deemed necessary.
 - a. Respond in a thorough and timely fashion to all assignments from the General Counsel and the Deputy General Counsel
 - b. Advise the General Counsel and Deputy General counsel as to any pending matters in the Legal Division for which one has an expertise
 - c. Attend meetings with the industry and the public at the request of the General counsel or the Deputy General counsel

- d. Act as a hearing officer in certain, specific matters
- e. Assist in disaster relief preparations and operations as instructed
- f. Act as intern coordinator and supervisor
(Exhibit 7)(emphasis added)

88. At both the progress review and the annual review, Attorney Joyce indicated that the Appellant's performance "meets" the appropriate standards. In addition, Attorney Joyce added a narrative stating, in part,

Mary Ellen is a solid contributor to the Legal Group. This past year she was asked to take on more enforcement cases, which was a new area to her. ... After getting up to speed, Mary Ellen has generally done a good job in this area ... In addition, Mary Ellen has continued her auto related work and has kept up with matters involving CAR and MAIP¹⁹.

Mary Ellen promptly responds to requests for legal assistance on certain legal matters as they arise and delivers consistently good work product. She also maintains good working relationship with other Division staff which greatly aides her in performing her duties. Finally, Mary Ellen's continued willingness to participate in consumer outreach events on behalf of the Division is appreciated. ... Mary Ellen has provided solid work in regard to the Division's on-going regulation review project.
(Exhibit 10)

89. After the OCABR meeting with HRD, Ms. Deeney informed Ms. Thompson by letter dated June 24, 2014, in part,

On April 22, 2014, an appeal audit was performed by the [OCABR] HR department in response to your classification appeal. A review of all information relating to your appeal has resulted in the preliminary recommendation for the denial of your classification appeal to the position of Counsel III.

Based on information in your recent Form 30, EPRS form, Interview Guide form, and the state job specifications for the Counsel job series, it has been determined that you are properly classified as a Counsel II at the [] (DOI). Per the Counsel II job specification, the distinguishing characteristics and functions of this title include:

- Possess greater experience and have specialized expertise in a specific area of law or broad knowledge of multiple areas;

¹⁹"MAIP" is not defined in Attorney Joyce's narrative but, according to a CAR website, it is the Massachusetts Automobile Insurance Plan, which apparently is related to CAR. <https://www.commauto.com/maip/>

- May seek guidance and advice from more senior colleagues on complex issues but will have a thorough knowledge of laws, legal principles and practices and have the ability to handle most cases independently;
- Handle more complex cases and collaborate and interact with others outside of the Agency;
- Exercise direct supervision over, assign work to, and review the performance of interns, support staff or other personnel;
- Participate in the interviewing process or make recommendations for new hires;
- Communicate with other agencies, including the Legislature, and collaborate with cross-functional and cross-agency teams to resolve issues and develop/implement new programs;
- Draft new policies and regulations or amendments, based on legal research and agency needs;
- Present memoranda supporting or opposing legislation affecting Agency operations;
- Allocate cases and assignments to supervisees most appropriately.

The majority of the job duties that you perform on a regular basis are most appropriated described by the Counsel II job specifications listed above.

The primary level-distinguishing characteristics between the Counsel II and counsel III are:

- Acting as a statewide or agency expert with more legal experience and have greater expertise in a specialized area of the law;
- Serve as technical experts, providing advanced and specialized expertise in a specific area of law.

You have been designated as DOI's liaison to Commonwealth Automobile Reinsurers (CAR) and are a primary legal contact for auto insurance issues. However, these duties comprise approximately 30% of your job and do not constitute the majority of the duties that you perform on a regular basis.

You have ten (10) calendar days to review this preliminary recommendation letter. ... If you do not agree with the preliminary recommendation, you may submit a rebuttal in writing to the OCA Human Resources Department with any additional information that you think is applicable. If I do not hear from you within then (10) days, a final decision will be issued to you in writing. ... (Exhibit 10)(emphasis in original)

A copy of the letter was sent to Karen Bratt, OCABR Director of Human Resources, and Karen Blomquist, DOI Deputy Commissioner of Communications and Operations.

(Id.)

90. Ms. Deeney did not meet with either of Ms. Thompson's supervisors, General Counsel Whitney and Deputy General Counsel Joyce, individually to consult them about Ms. Thompson's request for reclassification and her qualifications, although Attorneys Whitney and Joyce had attended the group meeting of all DOI Counsel IIs earlier with Ms. Deeney and others at DOI regarding the new Counsel III position, as well as a meeting at which Ms. Deeney and others met with DOI managers to obtain information about the number of Counsel IIs who were interested in reclassification. (Testimony of Deeney) Attorney Joyce received a call about Ms. Thompson's candidacy for the Counsel III position and her duties. However, he did not recommend anyone for the Counsel III position; he was not given the opportunity to do so. (Testimony of Joyce; *see* Fact 63))

91. By letter dated July 2, 2014 from Ms. Thompson to Ms. Deeney, the Appellant submitted a rebuttal, which stated, in part,

... The stated basis for the denial of my request for reclassification to a Counsel III is that my designation as the [DOI] liaison to [CAR] and as a primary legal contact for auto insurance issues comprise approximately 30% of my job and do not constitute the majority of duties that I perform on a regular basis.

Nothing in the attached Specifications for the Counsel III position requires that a certain percentage of time must be spent in any area of law or expertise to meet the specifications. Neither does the denial cite any statutory or regulatory requirement that the majority of work must be spent practicing in a subspecialty of law. ...

If, however, such a percentage of time requirement exists, I point out that the examples given in the counsel III specifications as areas of greater legal expertise are general legal areas. The distinguishing characteristics between those in Counsel II and Counsel III positions are that those in a Counsel III position possess '*greater experience and have specialized expertise in a specific areas of the law (e.g. **administrative, family, finance, labor and employment, litigation**)*'. The areas of administrative, family, finance, labor and employment and litigation are general areas of law. Insurance is a general area of law. The examples in the Counsel III specifications are not that one be an expert in a subspecialty of the

areas of law listed, such as regulation drafting in administrative law, or an international child custody expert in family law ... To the contrary, the expertise requirements are for general categories of law. Therefore the appropriate criterion for a Counsel III in my case is to have expertise in insurance law. Because my job consists 100% of work in insurance law, I fully satisfy that requirement. The Counsel III requirements relates to acquiring expertise in a particular area, not that the majority of my time is spent on any sub- area (sic) of expertise.

Since my request for reclassification and interview, I have been added as a full member of the enforcement counsel team ... I now handle more enforcement cases ... so that approximately 65% of my work is now in the different subspecialty of enforcement, 20% is auto insurance and CAR, and 15% is spent reviewing resumes, interviewing and supervising legal department interns.²⁰

Requiring an attorney to spend the majority of her day practicing one subspecialty of law in order to merit reclassification does not comport with the reality of practicing in a multi-faceted area such as insurance law. To deny reclassification on that basis that discourages attorneys from expanding their roles, from learning new sub-areas of the law and from volunteering to take on new duties. Because an agency's priorities may shift, it is important to encourage versatility and to prize the initiative that results in the development of newly emerging subspecialties.

... since 1999, [I have worked] in almost every subspecialty in the DOI legal department. I have been a health attorney, an auto attorney, part of a financial transaction team, and a legislative attorney. I am an enforcement attorney and a consumer attorney who participates in statewide outreach programs ...

The Counsel Series Classification Speciation describes the distinguishing characteristics of a Counsel III as the most expert and experienced attorneys who have greater experience and specialized expertise in an area of the law and general knowledge of other areas or broad knowledge of multiple areas. They are considered subject matter experts at a statewide or agency level. They have technical expertise and provide advice and recommendations on specialized legal issues.

... My denial says

‘The primary level-distinguishing characteristics between the counsel (sic) II and Counsel III are:

- Acting as a statewide or agency expert with more legal experience and have greater expertise in a specialized area of the law;

²⁰ As the Appellant indicates in her rebuttal, the percentages of the time that she worked on the various insurance subspecialties changed after she requested reclassification to Counsel III. Exhibit 11. The Commission views the percentages she provided in her initial request.

- Serve as technical experts, providing advanced and specialized expertise in a specific area of law.’

The Counsel III Specifications do not say these are the ‘primary’ level-distinguishing characteristics. ... The denial also ignores the rest of that section, as well as the rest of the Counsel III specifications.

... My expertise in the subspecialty of automobile insurance began in the era when the Commission fixed-and-established motor vehicle rates and the residual market consisted of a complex system that services a high percentage of Massachusetts consumers. It then continued through the multi-year process of shifting to a competitive market and to an assigned risk plan for the residual market. If the Counsel III position had been available at that time, it is unquestionable that the majority of my duties would have been in auto insurance ... Had I become a Counsel III then, would I be demoted now because the majority of my job duties no longer fall into one area? ... While [the subspecialty] requires fewer hours out of my day, the level of specialized expertise has not been reduced.

... I regularly provide advanced and specialized expertise in insurance law to both other areas of the agency, as well as to consumers, attorneys or industry professionals. I research varied issues and provide specialized and/or broad consultative advice, insight and recommendations on legal issues to assist the agency.

... Although I volunteered to handle the DOI’s legislation duties to fulfill a legal department need, the work enabled me to develop considerable experience and expertise on the widest possible range of insurance issues and to advise the agency on its responsibility. The ‘key accountabilities’ in the Counsel III description include making recommendations relating to litigation. In the attorney positions I held before joining the DOI I developed the litigation experience and skills that have proven useful since taking on more work in the enforcement area.

[Another] distinguishing characteristic of a Counsel III is assigning work to and supervising interns. Since 2005, I have managed the DOI’s legal intern program ... I review resumes of prospective interns, set up interviews, recommend candidates for hiring ... I give the interns a brief over of the insurance industry ... I often sit in with them when another attorney assigns work to them so I can assist them ... I review, edit and critique their work, monitor their projects, have informal meetings with them ... to make sure they have an appropriate workload This task was not acknowledged or discussed in my denial. ... Counsel IIs may provide functional direction to interns. Counsel IIIs may provide direct supervision over interns. Counsel IIIs educate and effectively communicate the interpretation of area-specific laws to internal and external clients and subordinates. I inform direct external clients such as consum4rs and

private attorneys to statutes. I inform direct external clients such as consumers and private attorneys to statutes or regulations that may prove useful in answering their questions. I explain and interpret insurance laws for other employees of the DOI and educate the interns ...

Counsel IIIs investigate applied facts and obtain information needed for representation. As an enforcement attorney, I review and apply the facts obtained by our Special Investigations Unit and investigate cases further if need. I also develop resolutions based on critical analysis of the arguments, negotiate with opposing parties and settle cases. I negotiate and review administrative and other legal documents.

Counsel IIIs collaborate and confer with colleagues within the DOI as well as external resources to get input for decisions or determination of a position. I have synthesized testimony in multiple hearings and acted as hearing officer in regulations hearings, and made changes to proposed regulations based on input received from both internal and external sources.

Counsel IIIs write, recommend and review legislation, draft forms and notices and produce documents to assist in implementing laws. I was the legislative attorney at the DOI for several years, and continue to review and analyze legislation as requested. I have reviewed hundreds of bills and attended dozens of legislative committee hearings. I have drafted and promulgated statutorily required regulations and drafted bulletins to implement new laws.

The above are all of the additional functions performed by Counsel IIIs that counsel IIs do not perform. I perform all of these functions, and they constitute the majority of my time. ...

... I perform the vast majority of the duties of a counsel III well more than 50% of my time. ...
(Exhibit 11)(emphasis in original)

92. Attached to the Appellant's rebuttal is her fiscal year 2014 EPRS. It contains the same duties listed in her 2013 EPRS. As in the 2013 EPRS, the Appellant's 2014 performance for the progress review and the annual review is rated "meets" for Duty 1, regarding automobile insurance, and Duty 4, regarding responses to internal, consumer, industry, legislative and administration inquiries. The Appellant's performance in the 2014 EPRS was rated "meets +" for the progress review and the annual review for Duty 2, regarding drafting of agency bulletins, regulations and legislation; for Duty 3, regarding

management and coordination of litigation; and for Duty 5, regarding assisting the General Counsel and Deputy General Counsel; whereas in the 2013 EPRS, the Appellant's performances for Duties 2, 3 and 5 were rated "meets". (Exhibit 11)

93. The narrative added to the Appellant's 2014 EPRS by Attorney Joyce was similar to the narrative he appended to the Appellant's 2013 EPRS but added that the Appellant "has done a good job" regarding enforcement matters and that she was "currently assigned enforcement cases on a regular basis"; that she "has continued her auto related work and has kept up with matters involving CAR and MAIP"; that she has also "worked with the Division's General Counsel in drafting and promulgating the Division's new Auto Glass Regulation, 211 CMR 135.00, as well as amendments to 211 CMR 96.00"; and that she has "worked with members of the [State Rating Bureau] relative to the Division's review of automobile share programs." (Exhibit 12)

94. The 2014 EPRS attached to Ms. Thompson's rebuttal showed that Ms. Thompson's EPRS duties had not changed; although DOI/OCABR considered Ms. Thompson's EPRS duties, it did not consider the Appellant's EPRS ratings. (Testimony of Deeney; Exhibit 11)

95. By letter dated July 15, 2014 from Ms. Bratt to Ms. Thompson, OCABR informed Ms.

Thompson, in significant part,

The Office of Consumer Affairs and business Regulation received your appeal of the classification of your position. You requested the reallocation of your position from Counsel II to Counsel III.

Personnel Analyst Kimberly Deeney met with you on April 22, 2014 and conducted an appeal audit. Kimberly reviewed the results and made a preliminary recommendation on June 24, 2014 to deny your appeal.

We received your detailed rebuttal letter on July 2, 2014. I, along with Secretariat Human Resources Director Sarah Unsworth, conducted an additional review of

your classification. We are in agreement that the duties you perform do not warrant the reallocation of your position. I regret to inform you that we must therefore deny your classification appeal.

You may appeal this decision to the Human Resources Division [HRD] as provided in Massachusetts General Laws, Chapter 30, Section 49. Appeals should be directed in writing to the Human Resources Division at One Ashburton Place, Boston, MA 02108. Please attach a copy of this decision letter to your appeal request.

If you have questions regarding this decision, you may contact Personnel Analyst Kim Deeney
(Exhibit 13)

96. By letter dated July 21, 2014 from Ms. Thompson to Ms. Odlum, at HRD, Ms.

Thompson appealed the denial of her request for reclassification to HRD stating, in significant part,

Please consider this my appeal from the denial of my request to be reclassified from a Counsel II to a Counsel III. To ensure you have a complete record, I am enclosing the following documents:

- The preliminary denial packet I received, which includes the denial letter dated June 24, 2014, my interview guide, my form 30, my FY 2013 EPRS, my resume, and the Counsel Series Job Specifications;
- My rebuttal letter dated July 2, 2014, which includes the Counsels II and III Job Specifications and my FY 2014 ERPS (sic); and
- The denial letter I received dated July 15, 2014.

... I would appreciate your letting me know when you receive this original letter. Please let me know if you have any questions or require any additional information.
(Exhibit 14)

97. By letter dated July 28, 2014 from Ms. Odlum at HRD to Ms. Bratt at OCABR, HRD

requested certain information and a number of documents concerning Ms. Thompson's

appeal. OCABR typed responses to the requests on to Ms. Odlum's letter and attached a number of documents thereto. (Exhibit 27²¹) OCABR responded, in part,

... Reason(s) for denying appeal[.] Ms. Thompson's job is comprised of a broad range of legal duties within DOI. Per the Interview Guide, in the last 2 years she has taken on a new role in handling enforcement cases (20%), she conducts legal research & drafts memos on non-auto insurance related matters (20%), she supervised 2 interns (20%), and she responds to inquiries from customers/colleagues (10%). These duties make up a majority (70%) of her work and they all fall within the Counsel II job spec. Ms. Thompson is a primary contact within DOI for auto insurance issues (30%). As part of her auto duties, she attends committee meetings & summarizes issues for DOI staff, she makes legal recommendations on proposed changes, she handles industry inquiries and drafts legislation. These duties are certainly in a specific area of insurance law, however they still fall within the Counsel II spec ...

A copy of the supervisors (sic) statement[.] Due to the large number of DOI legal staff that have requested class appeals, HR spent several hours meeting with with (sic) DOI's First Deputy Commissioner, General Counsel, Deputy General Counsel, and the Chairperson of the DOI Board of Appeals to discuss the duties of all DOI Counsel II's. These managers did not submit a written supervisor's statement regarding Ms. Thompson's specific duties, however, the duties as stated in the Interview Guide do match the duties as presented to HR during that meeting and the EPRS forms. ...

The appellant's EPRS for the preceding 12 months prior to the filing of the appeal[.] See attachment. Completed FY13 EPRS form is included in the prelim recommendation packet. The completed FY14 EPRS is also attached to this email, however, it was only just received in August, 2014 and was not reviewed prior to HR's decision being made. ...

(Exhibit 27²²)(*emphasis added to distinguish the information requested by HRD and the response by OCABR*)(*emphasis added*)

98. By letter dated August 13, 2014 from Ms. Odlum at HRD to Ms. Thompson, HRD denied

Ms. Thompson's appeal, without a hearing, stating, in significant part,

The purpose of this letter is to respond to your classification appeal dated July 21, 2014 in which you requested a reclassification review of your position from the title, Counsel II to Counsel III.

²¹ Exhibit 27 does not include the attachments, although it appears that many, if not most, of them are also in the record as other exhibits, such as Ms. Thompson's Form 30, Interview Guide, fiscal year 2013 EPRS, and the preliminary and final reclassifications decisions.

²² It is unknown who drafted the responses since they were typed directly onto the HRD letter to Ms. Bratt.

The Human Resources Division (HRD) has carefully reviewed the information concerning your job classification. We concur with the agency head's decision that the duties being performed by you do not warrant the reallocation of your position and therefore we must deny your appeal.

As provided in the *Massachusetts General Laws*, Chapter 30, Section 49, you may appeal HRD's classification decision to the Civil Service Commission (CSC). The CSC has a form that should be used in filing a job reclassification appeal. The reclassification form is available at the CSC web site, at <http://www.mass.gov/csc/> and at the CSC office, located at One Ashburton Place, Room 503, Boston, Massachusetts 02108-1517 (Exhibit 17)(emphasis in original)

99. On September 13, 2014, Ms. Thompson appealed HRD's decision to this Commission, which appeal was docketed as C-14-226. On October 10, 2014, following a prehearing conference at the Commission, the Commission issued a Procedural Order stating, in part,

... 3. Based on the documents submitted and the statements of the parties, it was agreed that the Counsel III title was recently created by HRD and that this is the first Counsel III-related appeal received by the Commission.

4. OCABR/DOI does not dispute that Ms. Thompson is the most expert and experienced (OCABR/DOI) attorney in regard to automobile-insurance related issues.

5. One of the issues in question here is whether the fact that Ms. Thompson spends less than 51% of her time on automobile insurance-related issues (she estimates 30%) prevents her from being reclassified as a Counsel III. Put another way, the question is whether an individual must dedicate more than 50% of their time in the subject area for which he/she is an expert in order to meet the criteria for reclassification to Counsel III.

6. It appears that this question, and other issues pertaining to this appeal, will have a potentially significant impact on other such appeals that are likely to be filed in regard to the Counsel III title.

7. For these reasons, and because no substantive information was received from HRD regarding the reasons for affirming OCABR/DOI's decision in this matter, I am remanding this case back to HRD for a hearing pursuant to G.L. c. 30, s. 49 ("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*").*(emphasis added)*
(Administrative Notice)

8. Ms. Thompson's appeal before the Commission under C-14-226 is hereby closed. Should HRD determine, after conducting said hearing, that OCABR/DOI's decision should be affirmed, Ms. Thompson may, within thirty (30) days of being notified of HRD's decision, file a new appeal with the Commission contesting said decision, without need to submit a new filing fee.
(Exhibit 18; Administrative Notice)

100. On November 5, 2014, HRD conducted a hearing concerning the Appellant's appeal. The hearing was conducted by Anita Holbrook, HRD Personnel Analyst III, who works on classification, compensation matters and hiring guidelines and she supports three (3) Secretariats. She is also involved in current efforts to consider the possible upgrade or change in specifications for various job titles. She was assisted at the HRD hearing by George Bibilos, Director of the HRD Organizational Development Group. Also in attendance at the HRD hearing were DOI Deputy General Counsel Joyce, Bobbi Kaplan of NAGE, and Ms. Deeney. (Testimony of Holbrook; Exhibit 19)

101. Ms. Holbrook began working for HRD approximately six (6) months prior to conducting HRD's appeal hearing for Ms. Thompson. This was Ms. Holbrook's first hearing on a Counsel III reclassification request.²³ Prior to working at HRD, Ms. Holbrook worked for the state for approximately twelve (12) years, beginning at the Unemployment Insurance office, then the State Police as a Personnel Analyst I, then at the Department of Correction as Personnel Officer I. Her experience with classifications at the State Police involved responding to requests for reclassifications and issuing decisions. When an employee appeals an agency's denial of reclassification, HRD

²³ HRD conducted two (2) Counsel III reclassification hearings on November 4, 2014. (Testimony of Holbrook)

reviews the employee's Interview Guide, Form 30, sometimes his or her EPRS, any rebuttal the employee has submitted and any information that the employee and the agency want to submit. (Testimony of Holbrook)

102. The HRD hearing on November 5, 2014 was rather informal but gave Ms. Thompson the chance to explain her duties and the agency the chance to respond and to hear both parties' rebuttals, if any. Ms. Thompson represented herself at this hearing, stating that she began at DOI as a health attorney; years later she more focused on auto insurance, which is her specialty; she is a Counsel to the DOI Commissioner; she was an expert on legislation; she is the "go to person" on auto insurance and she supervises interns. She added that although 30% of her time involves auto insurance, she is still an expert in it. Ms. Thompson also described her enforcement duties, which she started a year earlier, and that it was becoming more a part of her duties. Further, she added that she performs almost all of the duties in the Counsel III Spec. At this hearing, Ms. Deeney said Ms. Thompson is an expert in auto insurance, which is her specialty, that 70% of her time is spent on Counsel II duties and that she supervises interns. (Testimony of Holbrook; Exhibit 28 (Ms. Holbrook's notes taken at the HRD hearing)) As indicated in Ms. Holbrook's hearing notes, Ms. Kaplan, of NAGE, stated that the intent of the Counsel III position was to create a career ladder, that the Counsel III will be the "go to person", that insurance is a general subject of law and that auto insurance is a subspecialty, that Ms. Thompson is in a specialized area of law, and that there is no restriction on the number of Counsel IIIs for each agency. Ms. Holbrook's notes indicate that in her job, Ms. Thompson is in contact with financial people, the Board of Appeals, the DOT/RMV Merit Rating Board, CAR, agents, consumers, actuarials and analysts, and

the auto team, which meets weekly. Ms. Holbrook also wrote that Ms. Thompson's contacts are "purely state". (Testimony of Holbrook; Exhibit 28)

103. Ms. Holbrook found that the Counsel III position is the most expert position, an advanced functioning attorney and someone who spends the majority of his or her time in their specialty, which has agency-wide or statewide impact and that Ms. Thompson did not perform these functions. (Testimony of Ms. Holbrook)

104. By letter dated November 20, 2014 from Mr. Bibilos to Ms. Thompson, HRD denied her appeal stating, in full,

The Human Resources Division received your appeal of the classification of your position dated July 21, 2014. You requested the reallocation of you (sic) position from the classification of Counsel II to Counsel III.

A hearing was conducted at the Human Resources Division on Wednesday November 5, 2014. After careful review of the information presented at the hearing and the appeal documentation, we find the classification of Counsel II adequately reflects the duties being performed by you. We therefore regret to inform you that we affirm the decision of you (sic) agency and must deny your appeal.

You may appeal this decision to the Civil Service Commission as provided in Massachusetts General Laws, Chapter 30, Section 49. Appeals should be directed in writing to the Civil Service Commission, One Ashburton Place, Room 503, Boston, Massachusetts 02108-1517.
(Exhibit 20)

105. On December 10, 2014, Ms. Thompson appealed HRD's denial of her appeal after hearing to the Commission. (Exhibit 22, Administrative Notice)

106. The Counsel III Spec expertise characteristics are as follows:

Counsel III Spec: "Distinguishing Characteristics:

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 incumbents at this level are statewide or agency expert with more legal experience and have greater expertise in a specialized area of the law.”
(Exhibit 5)

The Appellant is a statewide or agency expert and subject matter expert in auto insurance. (Testimony of Appellant, Deeney, McInnis and Bratt). In addition, the Appellant has advanced knowledge of laws, legal principles and practices related thereto, pursuant to the Counsel III Spec regarding “Distinguishing Characteristics”. Specifically, the Appellant:

- is the “go to” person on auto insurance, which impacts car drivers and insurers across the state;
- responds to auto insurance market conditions by managing and coordinating related litigation;
- represents DOI at monthly CAR meetings with industry representatives, as well as a variety of other CAR meetings;
- provides legal review and analysis of all proposed changes to CAR’s Rules of Operation and provides legal recommendations thereon;
- sends summaries of CAR meetings to senior DOI management, including the DOI Commissioner, keeping them apprised of issues that may require DOI input, approval or consideration;
- communicates with the CAR President, as well as producer and company members;
- makes recommendations and possible rules changes regarding auto insurance;
- is the staff attorney for the DOI auto insurance team with the DOI Commissioner, General Counsel, the head of the DOT/RMV Merit Rating Board and others, involving issues facing the auto insurance industry and market;
- participated in the team that implemented managed competition in the private passenger automobile market;
- participated in the team that changed CAR from a residual market pooling mechanism to an assigned risk plan;
- drafted regulations and bulletins relating to the changes in the auto insurance market during the transitions in collaboration with internal and external sources; responds to related industry and legislative inquiries;
- assists with drafting any and all reforms to the residual auto insurance market; drafted the DOI report on Auto Body Labor rates in response to legislative mandate, which is an issue that is raised at the Legislature each session;
- drafted part of the annual decision on private passenger car rates prior to managed auto insurance competition;

- conferred with DOI staff to draft legislation regarding the residual market for auto insurance;
- is the DOI Commissioner's representative to the DOT/RMV Merit Rating Board;
- was the DOI Commissioner's ombudsperson for insurance producers during the transition to the assigned risk plan;
- comes in contact with the Commissioner, Board of Appeals, General Counsel, Deputy General Counsel, the CAR Actuary, the Director of Producer Licensing, the Special Investigations Unit, and other attorneys in the legal department at DOI; outside of DOI, she is in contact with the President of CAR, primarily, and other members through CAR Committees (such as the Committees on Governing, Commercial Autos, Compliance Audit, Personnel and Relocation); insurance producers, counsel to insurers; and consumers; and
- continues her auto related work and keeps up with matters involving CAR and the Mass. Automobile Insurance Plan.
(Exhibit 10, (which includes Appellant's Form 30, Interview Guide, 2013 EPRS, resume, and Counsel Series Spec), Exhibit 11, Testimony of Appellant)

The Appellant also has general knowledge of other areas or broad knowledge of multiple areas within the Division of Insurance, pursuant to the Counsel III Spec – "Distinguishing Characteristics", including, for example, legislation, financial transactions, health insurance, public records, and enforcement cases. (Exhibit 10)

107. Under the Counsel III Spec provisions regarding Supervision Received,

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.

(Exhibit 5)(emphasis added)

The Appellant receives the supervision of a Counsel III as she receives the supervision of the DOI General Counsel and Deputy Commissioner who provide the Appellant with policy direction, assign her work and review her performance, directly or indirectly, through her EPRS reports. In addition, the Commissioner of DOI assigns the Appellant work. Further, the Appellant represents the DOI Commissioner at the state DOT/RMV

Merit Rating Board and in the private sector CAR entity. She does not appear to receive supervision from other the legal executive and executive personnel in other agencies as authorized, but not required, by the Counsel III and neither authorized nor required in the Counsel II Spec. (Exhibit 10; Testimony of Appellant)

108. Under the Counsel III Spec regarding Supervision Exercised,

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.

(Exhibit 5)(emphasis added)

The Appellant performs a majority of the functions under the Counsel III Spec regarding Supervision Exercised. Specifically, at the time the Appellant completed the Interview Guide to apply for reclassification to the Counsel III position, she had been directly supervising the DOI legal department's interns for nine (9) years, including writing their evaluations, controlling their workflow, reviewing and editing written drafts and training them. She also reviews resumes of intern candidates, is involved in interviewing intern candidates and recommends which interns to accept. (Exhibit 10; Testimony of Appellant) Counsel IIs are authorized (not required) to supervise and evaluate the performance of interns, support staff and/or "other personnel". Counsel IIIs are authorized (not required) to supervise interns, support staff, "other personnel" and "professionals"²⁴ but are not authorized to evaluate the performance of those they may

²⁴ It is unclear if the term "other personnel" includes "professionals".

supervise. The Appellant supervises only interns. (Exhibit 10; Testimony of Appellant)

109. The Counsel III Spec for Additional Functions Performed provides that

“Incumbents may perform the following”:

- Serve as technical experts, providing advanced and specialized expertise in a specific area of law (e.g., administrative, family, finance, labor and employment, litigation) to both internal and external clients, management and colleagues; provide specialized and/or broad consultative advice, insight, and recommendations on specialized legal issues to assist agency management decision making and to ensure compliance with agency, state and federal laws and regulations.
 - Educate and effectively communicate the interpretation of area-specific laws to internal and external clients and, if relevant, subordinates to enhance knowledge and to enforce or promote the consistent administration of laws.
 - Investigate an applied set of facts and obtain information needed for representation; research and analyze internal and external policies, rules, regulations, new legislation, federal and state case law and case history to frame a position, to determine accuracy of claims or to provide information or advice to others.
 - Develop resolutions based on investigation, verification and critical analysis of legal and factual arguments and internal legal options; negotiate with opposing parties to reach a quick resolution, avoid litigation, mitigate damages and/or settle cases.
 - Negotiate and review administrative, court and other legal documents ensuring that such documents are complete, accurate, and available for future review and in compliance with law.
 - Collaborate and confer with colleagues within the division or department as well as with external resources to gather input for decisions or determination of a position, to achieve common goals or to implement new laws or changes to laws; may host public forums to provide interested parties with an opportunity to comment on issues.
 - Write, recommend and review legislation; appear 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; evaluate, research and produce documentation regarding the interpretation of law; draft, circulate for input and issue public written statements to provide guidance to taxpayers.
- (Exhibit 5)

The Appellant performs a majority of the Counsel III Additional Functions. Although Counsel IIIs “may” perform “Additional Functions” regarding their area of expertise,

the Appellant actually performs as a technical expert, providing advanced and specialized expertise in auto insurance to internal and external staff, management and clients. Internal clients include the Commissioner, General Counsel, Deputy General Counsel, the Appeals Board, an Actuary, Director of Producer Licensing, the Special Investigations Unit, and colleagues in the legal department and in the customer services department. External clients include the Legislature, the President of CAR (the private sector organization of insurers), its individual insurance company members and committees thereof, insurance producers, counsel to insurers, the DOT/RMV Merit Rating Board and consumers. In addition, the Appellant provides specialized and/or broad consultative advice, insight, and recommendations on auto insurance issues to assist DOI management decision making and ensure compliance with applicable state laws and regulations by analyzing proposed changes at CAR, proposed legislation, issues involving the DOT/RMV Merit Rating Board, and drafting appropriate legal documents to so advise and/or recommend action thereon. As noted above, the DOI website indicates that DOI is part of a state-based national system and the Appellant's assignments do not appear to involve federal law.

The Appellant also educates and effectively communicates the interpretation of auto insurance law to internal clients to enhance knowledge and to enforce or promote the consistent administration of laws by keeping them informed of issues arising at CAR, matters related to her communications with auto insurers, the insurers' counsel or consumers, and/or the effects of existing auto insurance law on the industry or consumers. The Appellant also educates and communicates the interpretation of auto insurance law to external clients by responding directly to the comments and inquiries of

auto insurers and consumers, thereby enforcing and/or promoting the consistent administration of auto insurance laws.

The Appellant investigates the facts of the enforcement cases to which she is assigned and obtains information to assess the accuracy of claims and represent DOI in the prosecution of such cases, as well as researches and analyzes applicable policies, rules, regulations, legislation and state caselaw to ensure enforcement of state insurance law. Further, in the course of handling enforcement cases, the Appellant develops resolutions of the cases based on investigation, verification and analysis of the facts and the law and negotiates with opposing parties to reach a timely resolution or settlement of such cases.

The Appellant collaborates and confers with colleagues within the division or department as well as with external resources to gather input for decisions or determination of a position or to implement new laws or changes to laws.

The Appellant writes, recommends and reviews legislation, appears at hearings regarding legislation to represent DOI and drafts and implements policies and bulletins and other written material for adherence to new legislation. In addition, she produces documentation regarding interpretation of the law.²⁵ (Exhibit 10; Testimony of Appellant)

110. The Counsel III Spec for Additional Key Accountabilities provides that

“Incumbents at this level may be granted the decision-making authority to:

- Recommend whether to settle, prosecute, or defend cases.

²⁵ Deputy General Counsel Joyce testified at the Commission hearing that the Appellant performs “at least” some of the Additional Functions of a Counsel III.

- Work with the Office of the Attorney General and independently to implement litigation strategy to be used in prosecution, defense or settlement of cases through all levels of court jurisdiction.
 - Form legal opinions based on research, analysis and interpretation and address policy questions as the authoritative representative.
 - Issue legal opinions based on legal interpretation of statutes, policies, regulations and court orders.
 - Develop and recommend official forms for approval.
 - Recommend resources and budgetary requirements to accomplish objectives.
 - Lead and provide direct supervision to others.”
- (Exhibit 5)

The Appellant performs a majority of the Additional Key Accountabilities. Specifically, in her work in enforcement, she recommends whether to settle or prosecute cases. The Appellant works with the Office of the Attorney General to implement litigation strategy in prosecution, defense, or settlement of cases through all court levels, although there is no indication in the record that she implements litigation strategy in court cases independently. The Appellant forms legal opinions based on research, analysis and interpretation and addresses policy questions as the authoritative representative regarding auto insurance matters. In addition, the Appellant leads and provides direct supervision to interns. The Appellant issues legal opinions based on legal interpretation of statutes, policies, regulations and court decisions. The Appellant does not develop and recommend official forms for approval nor recommend resources and budgetary requirements to accomplish objectives but there is no indication that either function is applicable to the DOI legal department.²⁶ (Exhibit 10; Testimony of Appellant)

111. The Counsel III Spec regarding Relationships with Others provides that,

“In addition to the key contacts listed for the Counsel Level 1 and II, key contacts and relationships for Counsel III incumbents include court personnel and public

²⁶ Deputy General Counsel Joyce testified at the Commission hearing that the Appellant performs “at least” some of the Additional Accountabilities of a Counsel III.

officials; federal and state agencies; community-based organizations; and local municipalities.”

The Appellant maintains some of the relationships referenced in the Counsel III Spec regarding Relationships with Others. “Public officials” is not defined but the Appellant is in contact with the Legislature, the DOI Commissioner and the RMV Merit Rating Board, other states’ insurance agencies and related entities, all of which appear to qualify broadly as public officials. There is no indication that the Appellant has direct contact with court personnel, federal agencies or local municipalities but insurance largely appears to be regulated largely by states, not the federal government, and there is no evidence in the record that municipalities play any role in state insurance regulation.

(Exhibit 10; Testimony of Appellant)

112. The Counsel III Spec regarding Knowledge, Education and Experience provides that a Counsel III “must have” at least six (6) years of 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” (Exhibit 5) The Appellant satisfies these requirements, having worked in insurance law at DOI since 1999, since on or about 2004 she has worked on auto insurance, and she has supervised interns for approximately nine (9) years at the time that she applied for reclassification to the Counsel III position.

(Exhibit 10; Testimony of Appellant)

113. The Counsel III Spec also provides that,

[i]ncumbents are required to have the following at the time of hire:

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

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.
(Exhibit 5)(emphasis in original)

At the time that she applied for reclassification, the Appellant met most of these requirements. For example, she was the “go to” person at DOI or statewide on auto insurance; she was responsible for “[r]espond[ing] to market conditions by managing and coordinating litigation” regarding auto insurance, she “provide[d] inter- and intra-agency advice” on the topic, she was required to be able to “work independently”, she prepared documents to implement legislation, regulations and court decisions, represented the DOI Commissioner at CAR, advised stakeholders in the auto insurance industry to ensure appropriate application of the law, advised DOI about CAR proceedings so that the agency could make appropriate decisions, and she drafted technical legislative reports. (Exhibit 10; Testimony of Appellant) These responsibilities demonstrate her extensive knowledge of auto insurance and other insurance-related laws, knowledge of advocacy and strategy on the DOI’s behalf in various settings, the ability to conduct complex legal research and draft technical writing, and to analyze auto insurance market conditions, draw conclusions and make recommendations. As noted above, this field is largely regulated by state law, not federal law. (Id.)

114. The Appellant is an expert in auto insurance with general knowledge of other areas of insurance law, she meets the knowledge and experience requirements of a Counsel III, and she has performed a majority of the functions of a Counsel III. As indicated when the Appellant requested reclassification, she spent a majority (80%) of her time performing the functions of a Counsel III as follows: 30% of her time on auto

insurance, 20% of her time supervising interns, 20% of her time conducting legal research and drafting memoranda on non-auto related matters, and 10% of her time responding to internal and external inquiries. The Appellant did not perform the functions of a Counsel III 20% of her time working on enforcement cases as she was relatively new to this assignment. (Exhibit 10; Testimony of Appellant)

115. Of the sixteen (16) attorneys in the DOI Legal Department, ten (10) applied for reclassification to Counsel III. (Testimony of Deeney and Bratt) At the time of the Commission hearing, only one (1) was reclassified as a Counsel III (on June 1, 2014) and that request was approved without rebuttal; that attorney spent 80% of the time working on health issues and supervises or mentors two (2) full time employees. The health insurance attorney works predominantly on integrating the state health insurance law with the federal Affordable Care Act, working with the state Health Connector program and the Health and Human Services Department, among others. The health insurance attorney has been a DOI employee for four (4) years and has previous industry experience. The other Counsel IIs who requested reclassification received preliminary denials of their requests. One (1) Counsel II in the Banks Division of OCABR requested reclassification to Counsel III; his or her request was denied, she or he submitted a rebuttal but apparently did not appeal the matter further. (Testimony of Deeney)²⁷
116. A Memorandum of Understanding between the HRD and NAGE, Unit 6, signed on July 30, 2013 provides, in pertinent part,

²⁷ I take administrative notice that in the Commission hearings in two (2) subsequent reclassification appeals filed at the Commission by other DOI Counsel IIs, the Commission learned that multiple Counsel IIs at the Department of Correction (DOC) Legal Department had been reclassified to Counsel III. HRD subsequently reviewed the matter and determined that some of the DOC reclassifications had occurred in error but since the error was made by HRD, some of the reclassified DOC attorneys would be allowed to retain their Counsel III titles, their positions would be flagged so that if their positions were vacant, they would revert to Counsel II titles.

The Commonwealth of Massachusetts, through [HRD] and the [NAGE] (Unit Six) have agreed to new Classification Specifications for the Counsel Series, which specifications are attached and hereby incorporated by reference.

The parties agree as follows:

- The Massachusetts Department of Personnel Administration Classification Specification for the Counsel Series will be expanded to include a three level series effective August 11, 2013.
- The Counsel III will be a job grade 21 and will be exempt from Articles 7.2, 7.5 and 7.6, (sic) (overtime, call back and standby pay) of the parties (sic) agreement. The Counsel I and II will remain job grade 14 and 17 respectively and will maintain all contractual rights regarding overtime, call back and standby pay.
- The Tax Counsel position will remain at job grade 21 and will maintain all current rights. The minimum entrance requirements for Tax Counsel will be updated to match that of the new Counsel III. Any employee currently in the Tax Counsel position that does not meet the new MER's²⁸ will be grandfathered in the position.

(Exhibit 31²⁹)

117. A Counsel III job posting with an application deadline of September 3, 2014

contains a number of duties, including the following,

The Counsel III, will serve as the primary agency expert on matters related to the oversight of litigation practice in Worcester County of the Central Region, overseeing agency litigation to establish paternity and establish, enforce, and modify child support orders in the Probate and Family Court. The incumbent will have advanced knowledge and expertise required to lead staff. ...

Serve as subject matter expert and have advanced knowledge of laws, legal principles and practices in the areas of paternity establishment, child support and medical support order[s] ...

Maintain relationships with other agency counsel, management, and staff, customers; outside counsel and bar associations; contractors and vendors; judges and court staff; the Legislature and other state agencies, federal offices; and members of advocacy groups, community organizations and the general public.

...

²⁸ The text does not provide a definition of MER but I interpret it to refer to the Minimum Entrance Requirements for the position.

²⁹ I understand this Memorandum of Agreement to be the Agreement referenced by Ms. Dill in her testimony, *supra*.

Provide secondary-level supervision of attorney and professional staff ...

Provide expert legal advice and counsel, insight and recommendations to staff and managers ... and to ensure compliance with agency, state and federal laws and regulations ...

Participate in statewide workgroups to exchange program and policy information, develop course of action for joint projects and implement new initiatives ...
Develop, implement and monitor interagency service agreements ...
(Exhibit 33)

Entrance requirements for this position include having a Juris Doctor degree, admission to the Massachusetts bar, and at least six (6) years of full-time, or equivalent part time, professional experience in a specialized area that is relevant to the assigned agency, of which at least three (3) years must have been in a supervisory capacity. (Id.)

Applicable Law

The phrase “basic merit principles” is defined in civil service law, in part, as follows,

“Basic merit principles”, shall mean (a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; ... (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration
(G.L. c. 31, § 1)

Pursuant to G.L. c. 30, § 45, HRD “ ... shall establish, administer and keep current and complete an office and position classification plan and a pay plan of the commonwealth.” Id. In addition,

[i]n pursuance of such responsibility as to the said classification plan, the said administrator shall classify all appointive offices and positions in the government of the commonwealth ... and he may from time to time reclassify any such office or position. In so classifying or reclassifying any such office or position the said administrator (a) shall ascertain and record the duties, responsibilities, organizations relationships, qualifications for, and other significant characteristics of the office or position; (b) shall group into single classes all such offices and positions, regardless of agency or geographical location, which are substantially alike in the duties, responsibilities,

organizational relationships, qualifications, and other significant characteristics; (c) for each such class shall establish specifications which shall include (i) an appropriate descriptive title and code number for the class, which shall be the official title of all offices and positions in the class and shall be set forth on all payrolls by name or code, and (ii) the common features of the duties, responsibilities and organizational relationships of, qualifications for, and other significant characteristics of all offices and positions in the class; and (d) may from time to time establish new classes and alter, divide, combine or abolish existing classes....
(Id.)

Under G.L. c. 30, § 49, civil service employees may seek to have their titles reclassified under appropriate circumstances. Specifically, this statute provides, in part,

Any manager or an employee of the commonwealth objecting to any provision of the classification affecting the manager or employee's office or position may appeal in writing to the personnel administrator. If the administrator finds that the office or position of the person appealing warrants a different position reallocation or that the class in which said position is classified should be reallocated to a higher job group, he shall report such recommendation to the budget director and the house and senate committees on ways and means in accordance with paragraph (4) of section forty-five. 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 or that the class in which said position is classified should be reallocated to a higher job group, it shall report such recommendation to the budget director and the house and senate committees on ways and means in accordance with paragraph (4) of section forty-five.

If the personnel administrator or the civil service commission finds that the office or position of the person appealing shall warrant a different position allocation or that the class in which said position is classified shall be reallocated to a higher job group and so recommends to the budget director and the house and senate committees on ways and means in accordance with the provisions of this section, and if such permanent allocation or reallocation shall have been included in a schedule of permanent offices and positions approved by the house and senate committees on ways and means, such permanent allocation or reallocation shall be effective as of the date of appeal to the personnel administrator.

G.L. c. 31, § 1, defines a job “series” as “a vertical grouping of related titles so that they form a career ladder.” Id.

G.L. c. 150E, § 1 defines a professional employee, in part, as,

'Professional employee', any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, (ii) involving the consistent exercise of discretion and judgment in its performance, (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes. ...
(Id.)(emphasis added)

A history of Commission decisions has established that in an appeal of the denial of a request for reclassification, the Appellant must prove, by a preponderance of evidence, that they perform a majority of the functions of the reclassification they seek and that they perform those functions a majority of the time. *See, e.g., Roman v. Department of Revenue*, 14 MCSR 184 (2001)(Counsel II – appeal denied); *Gruber v. Department of Revenue*, 14 MCSR 100 (2001)(Attorney – appeal denied); *Formichella v. Massachusetts Highway Department*, 21 MCSR 261 (2008)(Engineer – appeal denied); *Straub v. Department of Conservation and Recreation*, 22 MCSR 689 (2009)(Environmental Analyst III – appeal denied) *aff'd*, *Straub v. Civil Service Commission & another*, Superior Court C.A. No. SUCV2010-04143 (2013); *Kurker v. Department of Conservation and Recreation*, 22 MCSR 357 (2009)(Ranger II – appeal allowed); *Guidmond v. Department of Correction*, 27 MCSR 327 (2014)(Correction Program Officer – appeal denied); *Messier v. Department of Correction*, 13 MCSR 204 (2000)(Clerk III – appeal denied); *Lefebvre v. Department of Early Education and Care*, 22 MCSR 149 (2009)(Administrative Assistant II – appeal allowed); *McCollum v. Department of Environmental Protection*, 15 MCSR 23 (2002)(Environmental Engineer VI – appeal denied); *Towns v. Department of Mental Retardation*, 21 MCSR 17 (2008)(Vocational Instructor C – appeal denied); *Palmieri v. Department of Revenue*, 26 MCSR 180 (2013)(Management Analyst

II – appeal denied); Skinner v. Department of Revenue, 21 MCSR 379 (2008)(Systems Analyst II – appeal denied); O’Neill v. Department of Revenue, 19 MCSR 149 (2006)(Tax Auditor I – appeal denied); Erb v. Department of Revenue, 18 MCSR 202 (2005)(Program Coordinator III – appeal denied); Cote v. Department of Revenue, 18 MCSR 189 (2005)(Tax Examiner III – appeal denied); Velez v. Department of Revenue, 14 MCSR 93 (2001)(Child Support Enforcement Worker – appeal denied); Kasprzak v. Department of Revenue, 13 MCSR 120 (2000)(Child Support Enforcement worker – appeal denied); Guidara v. Department of Transitional Assistance, 24 MCSR 133 (2011)(EDP Systems Analyst III – appeal allowed); Baddeley v. Bristol Community College, 12 MCSR 103 (1999)(Clerk – appeal denied); Guarente v. University of Massachusetts at Lowell, 27 MCSR 102 (2014)(Clerk IV – appeal denied); and Kimball v. Metropolitan District Commission, 12 MCSR 155 (1999)(Park Foreman – appeal allowed). Straub v. Civil Service Commission & another, Superior Court C.A. No. SUCV2010-04143 (2013) is the sole Superior Court decision that directly references an appellant’s burden in a reclassification appeal in detail. In this Superior Court decision, the court wrote, addressing the issuance of a revised decision by the Commission, “The conclusion reached in the [Commission’s] Revised Decision, indicating that Straub did not ‘exercise supervisory functions over permanent professional staff, he has failed to establish that he performed (sic) majority of the level distinguishing functions of an [Environmental Analyst IV] more than 50% of the time,’ was a necessary clarification.” Id., at 9.³⁰ There is no caselaw from the Supreme Judicial Court,

³⁰ In Bowen v. Civil Service Commission, Suffolk Superior Court C.A. No. 2012-0197 (2013), the Appellant did not challenge the Commission’s denial of his reclassification but argued that he was entitled to a hearing at HRD (under G.L. c. 30, § 49 at that time), which he did not receive. The Court (MacLeod, J.) vacated the Commission’s decision and ordered the matter remanded to HRD for a hearing. The court decision did not rule on an appellant’s burden to prove that he performed a majority of the functions of the higher title and that he did so a majority of the time.

nor of the Appeals Court, of which I am aware that addresses this point regarding an individual's request for reclassification.³¹

The Parties' Arguments

Ms. Thompson argues that she is qualified to be a Counsel III. Specifically, she asserts,

My expertise in the subspecialty of automobile insurance began in the era when the Commission fixed-and-established motor vehicle rates and the residual market consisted of a complex system that services a high percentage of Massachusetts consumers. It then continued through the multi-year process of shifting to a competitive market and to an assigned risk plan for the residual market. If the Counsel III position had been available at that time, it is unquestionable that the majority of my duties would have been in auto insurance ...
Exhibit 11.

Ms. Thompson further avers that there is no requirement in the Counsel III Spec that those requesting reclassification to Counsel III serve as an expert a majority of the Counsel III functions a majority of the time. To this end, Ms. Thompson asserts that,

[r]equiring an attorney to spend the majority of her day practicing one subspecialty of law in order to merit reclassification does not comport with the reality of practicing in a multi-faceted area such as insurance law. To deny reclassification on that basis that discourages attorneys from expanding their roles, from learning new sub-areas of the law and from volunteering to take on new duties.
Exhibit 11.

In addition, or in the alternative, the Appellant argues that if the Counsel III Spec requires expertise in a broader field of law, such as family law, and labor and employment, insurance qualifies as an applicable field of law, which she performs 100% of the time and she is qualified to be reclassified to Counsel III.

³¹ The subject of "class" reclassifications, as opposed to individual reclassifications like that of Ms. Johnson here, is addressed in Murphy & others v. Administrator of the Division of Personnel Administration & others, 377 Mass. 217 (1979). In Murphy, the Court found that reclassification of a class or other group of certain attorneys purportedly by the Legislature was ineffective since those requesting reclassification did not follow the reclassification request process provided in G.L. c. 30, s. 49 requiring the appointing authority and HRD to consider such requests and, if they approve such requests, for HRD to submit a request for the reclassification and funding thereof to the Legislature. The Superior Court relied on Murphy to uphold the decision of the Commission on remand in DeRosa v. Civil Service Commission, Superior Court C.A. No. 10-4679-H (2012) finding, *inter alia*, that the Commission had no jurisdiction to consider DeRosa's request to reclassify her position into a different job group because it was the subject of a collective bargaining agreement under G.L. c. 150E, § 7.

As to the Counsel III Spec requiring that the candidate also have general knowledge of the field of law applicable to the agency in addition to an expertise, Ms. Thompson states that she has experience working on nearly every area in the DOI Legal Department, for example, having worked on health and auto insurance, financial transactions, public records, legislation and enforcement law, making her qualified to be reclassified as a Counsel III.

The Appellant also disputes the Respondents' arguments that the Counsel III Spec is only intended to apply to a limited number of expert attorneys, asserting that a union representative testified here that the Counsel III Spec is not limited because it is part of the Counsel "series", as defined in G.L. c. 31, § 1, and it is intended as part of a career ladder available to all qualified candidates.

The Respondents argue that Ms. Thompson failed to establish by a preponderance of the evidence that she performs a majority of the Counsel III functions a majority of the time, as evidenced by the Interview Guide that the Appellant completed and her response to the preliminary denial of her reclassification request, wherein the Appellant indicated that she performs in her area of expertise between 20 and 30% of the time. In addition, the Respondents aver that the Counsel III Spec is limited, by its own terms, to those Counsel IIs who are experts in a given area of law pertinent to the employing agency. This interpretation is supported, the Respondents state, by the August 23, 2013 HRD memorandum that was issued when the Counsel III Spec was promulgated, indicating, *inter alia*, that agencies would have to obtain HRD approval prior to posting or accepting requests for reclassification to Counsel III and ensure that there were available funds. Further, the Respondents argue that the the reclassification is not just based on the number of years an attorney has been a Counsel II. In addition, they assert, the union representative at the HRD hearing of Ms. Thompson's appeal stated the only request made

by a union representative prior to promulgating the Counsel III Spec was that HRD change part of the qualifications to say that the Counsel III could be a first- or second-level supervisor (as opposed to a second-level supervisor only) and he did not inquire whether the Counsel III title would be available to only a limited number of candidates.

Analysis

A preponderance of the evidence establishes that Ms. Thompson is an expert in auto insurance, has general knowledge in other fields of insurance law and performs a majority of the functions and or duties of a Counsel III a majority of the time as follows: 30% of the time, the Appellant works on auto insurance matters; 20% of the time, the Appellant supervises interns; and 10% of the time, the Appellant responds to internal and external inquiries; 20% of the time, the Appellant conducts legal research and drafting memoranda on non-auto related matters, thereby applying her “general knowledge of other areas or broad knowledge of multiple areas” pursuant to the Counsel III Spec; in total, the Appellant spends 80% of her time performing the duties of a Counsel III, warranting her reclassification to Counsel III. The remaining 20% of the Appellant’s time is spent working on enforcement cases. This conclusion was reached with the following analysis.

Construction of Counsel III Spec Terms

Although the Counsel III Spec is not a statute, certain rules of statutory construction shed light on the meaning of this Spec. In particular, “[a] fundamental maxim of statutory construction is to give clear, unambiguous language its plain meaning.” Daley v. Quincy Fire Department and Human Resources Division, 18 MCSR 363 (2005) citing Bronstein v. Prudential Ins. Co. of America, 390 Mass. 701, 704 (1984). Another rule of statutory construction provides that “statutes should be interpreted as a whole to constitute a harmonious provision”. Bousquet

v. Town of Leicester, 18 MCSR 341 (2005) citing Kargman v. Comm’r of Revenue, 389 Mass. 784, 788 (1983). Further, statutory language “‘is not to be enlarged or limited by construction unless its object and plain meaning require it.’” Joudrey v. Human Resources Division, 23 MCSR 289 (2010) citing Rambert v. Commonwealth, 389 Mass. 771, 773 (1983). In addition, “[a] statutory expression of one thing is an implied exclusion of other things omitted from the statute”. James v. Boston Police Department, 28 MCSR 185 (2015) citing Police Comm’r of Boston v. Cecil, 431 Mass. 410, 413 (2000). Yet another provision of statutory construction states that “‘[i] is axiomatic that the word ‘and’ is not synonymous with the word ‘or’; the word ‘or’ is disjunctive, while the word ‘and’ is conjunctive. Commonwealth v. Aponte, 71 Mass.App.Ct. 758, 761 (2008). ‘The word ‘or’ is not synonymous with the word ‘and,’ is a disjunction particle in its accurate use, and marks an alternative and not a conjunctive.’” Coach v. Human Resources Division, 23 MCSR 287 (2010).

Key terms of the Counsel III Spec include “expert”, “duty”, “accountability”, “characteristic” and “function”. I take administrative notice that these terms are defined as follows:

expert – “ ... having, involving, or displaying special skill or knowledge derived from training or experience ...”

duty – “ ... obligatory tasks, conduct, service, or functions that arise from one’s position ...”

accountability – “ ...an obligation or willingness to accept responsibility or to account for one’s action ...”

characteristic – “ ... a distinguishing trait, quality, or property ...”

function – “ ... professional or official position[;] ... the action for which a person or thing is specially fitted or used or for which a thing exists ...”

(www.merriam-webster.com/dictionary/ , November 2 and 3, 2016)

Meaning of “Expert” and Expert’s Field of Law (all quotations are from Exhibit 5 (emphasis added), unless noted otherwise)

Since the Counsel III Spec Distinguishing Characteristics indicates that being an expert is a “characteristic” and not a duty or function, it is not susceptible of numerical quantification like the amount of time an employee works on a certain function or duty. In fact, G.L. c. 150E, § 1 provides that the work of professionals “cannot be standardized in relation to a given period of time”. Id. Further, it was established here that the priorities of the DOI legal department, not unlike other agency legal departments, are subject to change, necessitating changes in attorney assignments. It is inconsistent with civil service merit principles to require legal department attorneys to take on different assignments that may consume a majority of their duties at certain times and in which they may become experts, only to deny their expertise when the department’s priorities change. Moreover, the change in priorities of an agency legal department does not, on its own, indicate that the attorney is no longer an expert. Once a candidate establishes the required expertise, the candidate does not necessarily lose it with the passage of time or because they spend more time on areas other than the candidate’s area of expertise. When an appointing authority asserts that the candidate’s expertise is stale, the candidate must show that her or his expertise is current, and that the expertise is relied on by the agency on an ongoing basis, which determination will be made by the Commission on a case by case basis. In addition, the Commission is aware of no precedent that provides that attorneys who are reclassified to the Counsel III title when they spend a majority of their time working in the field of their expertise are returned to the Counsel II title if they are subsequently required to spend most of their time in another field of law. Therefore, Counsel III candidates shall not be required to prove that they apply their expertise a majority of the time.

The varied references to an “expert” in the Counsel III Spec requires clarification. The Counsel III Distinguishing Characteristics section states,

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.
Exhibit 5(emphasis added).

The word “generally” conflicts with the words “most expert and experienced”, suggesting that candidates who are not the “most expert and experienced” may be eligible for the position. Further, referring to the “most expert” attorney is problematic since an expert would be the person with the most knowledge on a given topic. Also undermining the requirement that a candidate be the “most expert and experienced”, is the phrase, “[i]ncumbents typically possess greater experience”, suggesting that candidates need not be the “most expert and experienced”. Similarly, this part of the Counsel III Spec provides, “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 an area of law, which conflicts with the reference to the terms “most expert and experienced”. To give these terms consistent meaning, I interpret the reference to “more legal experience” and “greater expertise” to mean more experience and expertise than in the next lower title (Counsel II) and that a Counsel III must also be an expert in an area of law.

The parties dispute the meaning of the phrase, “statewide or agency expert” in this section of the Counsel III Spec.³² However, there is no internal inconsistency in this phrase. The use of the disjunctive “or” clearly indicates that a Counsel III candidate must be either a statewide expert or agency expert; candidates need not be both. Given this understanding of these Spec terms, I conclude that the wording of the Counsel III Spec Distinguishing Characteristics requires successful candidates to be an expert either in their agency or statewide.

A preponderance of the evidence establishes that she is an auto insurance expert. Specifically, the Appellant’s testimony, Interview Guide, Rebuttal to the DOI Preliminary Denial, Form 30, EPRS, and her supervisor’s testimony, indicate that prior to creation of the Counsel III Spec, the Appellant was an auto insurance expert who spent 80% of her time in her expertise. Even though the amount of time the Appellant spent on auto insurance was down to 30% when the Counsel III Spec was created and she applied for reclassification, her Form 30 and EPRS indicate that she is still required to work on auto insurance and there was no evidence indicating that her expertise was stale. In addition, Counsel III candidates are required to prove by a preponderance of the evidence that they perform a majority of the duties and or functions of a Counsel III a majority of the time, as the Appellant has done here.

The next part of the analysis requires interpreting the field of law in which a Counsel III candidate must be an expert. The Counsel III Spec states that the successful candidate has “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

³² The Counsel III section on Distinguishing Characteristics does not refer to “an” expert or “the” expert, which could have been used to more specifically indicate that the position was intended to apply to a smaller number of candidates but it did not.

multiple areas.” Exhibit 5 (emphasis added).³³ Clearly, this is not an exclusive and complete list. The term “e.g.” is an abbreviation of the Latin phrase “exempli gratia,” meaning “for example.” (www.merriam-webster.com/dictionary/, November 2 and 3, 2016) Given this meaning and the list of areas of law that follow in the Spec parenthesis, the areas of law listed are simply examples of the type of area of law in which a successful candidate may be an expert. Thus, given that state agencies employ attorneys who work in areas such as real estate, intellectual property, environmental law and tax law, attorneys with expertise in such areas may be considered for the Counsel III position. Since DOI has already approved the appointment of a DOI attorney with expertise in health insurance, it is clear that that subcategory of insurance is among the areas of law in which an attorney may have expertise. Given the remainder of the text of the Counsel III Spec, the history of the Counsel III position and the HRD memorandum regarding its implementation, this does not mean that every Counsel II is an expert in the law of their agency. Rather, as indicated by the appointment of the DOI health insurance Counsel III attorney, candidates must establish their expertise in a subspecialty field within the jurisdiction of their agency or department.

Supervision Received

With respect to Supervision Received, both Counsel II and Counsel III provide that “[i]ncumbents receive general supervision from employees of a higher grade” except that the supervisors in a higher grade provide “policy direction” to the Counsel III but provide “guidance” to the Counsel II. This section of the Counsel III Spec also contains a provision not in the Counsel II Spec, that the Counsel III may receive “functional direction” from legal and executive and executive personnel in other agencies “who provide final approval, assignments,

³³ A Counsel II is required to have greater experience and may have expertise or have certain general knowledge, among the differences between the Counsel II and Counsel III Specs. Exhibit 5 (emphasis added).

guidance and review.” Exhibit 5 (emphasis added). There is no indication of the difference between “policy direction” and “guidance” and the Appellant appears to receive both. There is no indication in the record that the Appellant receives functional supervision from the listed personnel in other agencies, although such supervision is permitted and not required for a Counsel III.

Supervision Exercised

This part of the Spec provides that Counsel IIIs may be a second level supervisor. In comparison, a Counsel II may be a first level supervisor. Although the Appellant’s Form 30 states that she does not supervise, at the time that she requested reclassification to Counsel III, she had been supervising interns for nearly nine (9) years, having been involved in interviewing intern candidates, making recommendations for hiring interns, evaluating interns, supervising interns and reviewing their work and training them.

Additional Functions Performed

This part of the Counsel III Spec lists seven (7) Additional Functions, indicating that the functions listed are in addition to the functions performed by a Counsel I and II. However, the Counsel III Spec states that incumbents “may” perform the seven (7) additional functions, not that they are required to perform them. The Additional Functions include “serve as technical experts ... to both internal and external clients, management and colleagues ... provide ... recommendations on specialized legal issues to assist agency management decision making[;]” “... effectively communicate the interpretation of area-specific laws to internal and external clients ...[;]” “... negotiate with opposing parties to reach a quick resolution, avoid litigation ...[;]” “... negotiate and review administrative, court and other legal documents ...[;]” “... collaborate and confer with colleagues within ... as well as with external resources to gather

input for decisions or determination of a position ...[;]” “ ... write, recommend and review legislation ... [;]” “ ... appear at hearings regarding legislation to represent the client ... [;]” “... draft and implement internal and external policies and procedures, forms, notices and other written material....” The Appellant established by a preponderance of the evidence that she serves as an auto insurance technical expert to DOI management and colleagues to assist in decision making, as well as to insurance providers in the private sector; she provides interpretation of auto insurance laws to communicate DOI’s position internally and to the industry; in enforcement cases, the Appellant negotiates with opposing parties to resolve them as appropriate; she confers with colleagues to gather their input for decisions and to determine the agency’s position on auto insurance matters; she drafts and reviews legislation and makes recommendations on legislation and attends legislative hearings to represent the agency; and she drafts regulations and bulletins and other written material. Pursuant to the Appellant’s Form 30, she drafts and reviews court and other legal documents and acquiring “effective trial practice” as a Counsel II. Exhibit 10.

Additional Key Accountabilities

The Counsel III Spec for Additional Key Accountabilities states that “[i]ncumbents at this level may be granted the decision-making authority to”; “ ... recommend whether to settle, prosecute, or defend cases[] ...”; “ ... work with the Office of the Attorney General and independently to implement litigation strategy ...”; “ ... form legal opinions ... as the authoritative representative[]”; “ ... develop and recommend official forms for approval”; “ ... recommend resources and budgetary requirements ...”. Exhibit 5 (emphasis added). By comparison, the Counsel II Spec provides that “[i]ncumbents ... have the decision-making authority to: [] Allocate cases and assignments to supervisees[;] [] Prioritize and manage

personal workloads and the workloads of direct reports[; and] Issue recommendations for final decision or resolution of cases, and for some cases, to issue or agree to final resolution without further review.” Id. The Appellant performs most of these functions. She works with the Office of the Attorney General regarding litigation but there is no indication in the record that she implements litigation strategy in court cases independently, as permitted but not required. In addition, the Appellant does not develop and recommend official forms for approval nor recommend resources and budgetary requirements to accomplish objectives but these are functions that are permitted, not required, and there is no indication that either function is applicable to the DOI legal department.

Relationships with Others

The Counsel III Spec regarding Relationships with Others includes relationships or contacts with those listed for counsels I and II. A Counsel I includes “other agency Counsel...; agency management and staff; clients and/or consumers; outside attorneys; contractors/vendors’ and the general public.” Exhibit 5. The Counsel II Spec includes “additional external contacts, including stakeholders.” The Counsel II Spec adds that “key contacts and relationships” “include court personnel and public officials; federal and state agencies; community-based organizations; and local municipalities.” Id. The Appellant’s direct contact with court personnel is unknown. The term “public officials” is undefined but the evidence shows that the Appellant is in contact with the DOI Commission, the RMV Merit Rating Board and the Legislature. As a state regulator, DOI does not appear to have regular contact with municipalities. However, the Appellant has been involved with local authorities and organizations when DOI responds to matters such as the tornado that touched down in western Massachusetts. There is no indication

that the Appellant has direct contact with federal agencies since the areas of insurance in which the Appellant works appears to be regulated by states, not the federal government.

Knowledge, Education and Experience

This part of the Counsel III Spec provides that, in addition to being an attorney licensed to practice in Massachusetts, the candidate must have at least six (6) years of professional experience 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. ...” Exhibit 5. The Appellant has the requisite insurance experience, having worked at DOI for approximately fourteen years when she requested reclassification to Counsel III. She also has the requisite experience in auto insurance, having begun work in the area not long after she was reclassified from Counsel I to Counsel II, which occurred a couple or a few years after she was hired in 1999. Since she has also supervised interns for approximately nine (9) years, the Appellant also satisfies the supervisory requirement.

Requirements at the Time of Hire

In addition to these Requirements for Counsel I and II, the Counsel III Spec provides that candidates “must have” the “extensive knowledge of the laws specific to assignment (e.g. administrative, finance, family, litigation)[;] extensive knowledge of federal and state laws[;] knowledge of advocacy techniques and strategies[;] knowledge of the methods and ability to conduct complex legal research and technical report writing[;] ability to address complicated legal issues[;] and ability to analyze and determine the applicability of legal data, draw conclusions and make appropriate recommendations.” At the time that she applied for reclassification, the Appellant met most of these requirements with regard to auto insurance. For example, she was the “go to” person at DOI or statewide on auto insurance; she was responsible

for “[r]espond[ing] to market conditions by managing and coordinating litigation” regarding auto insurance, she “provide[d] inter- and intra-agency advice” on the topic, she was required to be able to “work independently”, she prepared documents to implement legislation, regulations and court decisions, represented the DOI Commissioner at CAR, advised stakeholders in the auto insurance industry to ensure appropriate application of the law, advised DOI about CAR proceedings so that the agency could make appropriate decisions, and she drafted technical legislative reports. (Exhibit 10; Testimony of Appellant)

Conclusion

For all of the above stated reasons, the appeal of Ms. Thompson, under Docket No. C-14-287 is *allowed*.

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 December 8, 2016.

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:

Mary Ellen Thompson, Esq. (Appellant)
Melissa Thomson, Esq. (for Respondents)
Michele Heffernan, Esq. (for Respondents)
John Marra, Esq. (HRD)