

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

EDWARD M. PHELAN,
Appellant

v.

C-15-118

HUMAN RESOURCES DIVISION &
DIVISION OF INSURANCE,
Respondents

Appearance for Appellant:

Pro Se
Edward M. Phelan, 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

As noted in the Commission’s decision in the first two appeals¹ decided recently involving the addition of a Counsel III to the Counsel Series, the Commission has applied the following three-prong test: (a) the Counsel III must have the “Knowledge Education and Experience” as well as the additional requirements described for a Counsel III in the section of the specification entitled “Incumbents are required to have the following at the time of hire”; (b) a Counsel III must have the “distinguishing characteristic” as the most expert and experienced attorney in the agency in a specific area of expertise essential to a core mission of the agency; and (c) the Counsel III must perform, in the aggregate, at least a majority of the time, duties listed in the Counsel III Specifications under “Supervision Exercised”, “Additional Functions Performed”, “Additional Key Accountabilities” and “Relationships with Others”, with the “Supervision Received” by a Counsel III.

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

¹ The first two (2) appeals were: Thomson v. DOI and HRD, C-14-287 (2016) and Merow Rubin v. DOI and HRD, C-14-294 (2017). Both appeals were allowed.

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 a combination of the duties covered by the Counsel III job description as noted herein. In addition, the Commission will consider the frequency with which the agency (or a person outside the agency) relies on an appellant's expertise, i.e., is it sporadic or regular and sustained and is it current.

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.

Applying this paradigm to the facts of this case, the appeal is denied. Although the Appellant possesses expertise in the application of laws related to insurance producer licensing and he spends more than minimal time on this field of law, he does not possess and generally exercise the level of expertise in a core function of the type of complexity of legal work that distinguishes the Counsel III expert in the field from the less complex legal work performed at the Counsel I and Counsel II levels. Thus, the Appellant's work in the area of insurance producer licensing does not meet the distinguishing characteristics of a Counsel III; and he did not establish that he performs a majority of the functions of a Counsel III more than 50% of his time.

DECISION

Edward Phelan (Mr. Phelan or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on June 12, 2015, 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 his request to be reclassified from a Counsel II to a Counsel III. A prehearing conference was held in this regard on July 7, 2015 at the offices of the Commission. A hearing² was held on this appeal on July 28 and September 1, 2015 at the Commission, at which HRD represented itself and DOI.³ At this hearing, the witnesses, except the Appellant, were

² The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. 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.

sequestered. Both days of this hearing were digitally recorded and the parties received a CD of the proceedings.⁴ The parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT

Based on the thirty-two (32) exhibits entered into evidence and the testimony of:

Called by Respondents:

- Regina Caggiano, Deputy Director of Civil Service and the Organizational Development Group (ODG), HRD
- Marianne Dill, Director of Office of Employee Relations (OER), HRD
- Kimberly Deeney, Personnel Analyst, Human Resources Department, OCABR
- Karen Malone Bratt (Bratt), Director of Human Resources, OCABR
- Christopher Joyce, Esq., Deputy General Counsel, DOI⁵
- Anita Holbrook, Personnel Analyst III, HRD
- Nancy Daiute, Personnel Analyst, ODG, HRD
- Diane Silverman Black (Black), Director of Producer Licensing, OCABR

Called by the Appellant⁶:

- Edward Phelan, Esq., DOI, Appellant
- Christopher Joyce, Esq., Deputy General Counsel, DOI

and taking administrative notice of all matters filed in the case; pertinent statutes, including, without limitation, G.L. c. 150E, § 1; stipulations; pertinent regulations, case law and policies;

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.

⁵ Since both the Appellant and the Respondents called Deputy General Counsel Joyce to testify, I afforded them some latitude in their examinations of Deputy General Counsel Joyce.

⁶ Mr. Macullar, Deputy General Counsel Joyce, and Mr. Charbonnier appeared by subpoena. (Administrative Notice)

thirty-two (32) Exhibits⁷; Exhibits entered into the record in Thompson v. DOI and HRD, C-14-287 and Merow Rubin v. DOI and HRD, C-14-294; and reasonable inferences from the credible evidence; a preponderance of evidence establishes the following findings of fact:

Stipulation

1. Mr. Edward Phelan is a Counsel II employed by DOI.
2. Mr. Phelan began his employment at DOI on or about June 5, 2006 as a Counsel II.
3. DOI administers the laws of the Commonwealth as they pertain to the protection of the insurance consumer through the regulation of the insurance industry. 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. DOI investigates and enforces state laws and regulations pertaining to insurance and responds to consumer inquiries and complaints.
4. DOI employs approximately 130 people.
5. There are fourteen (14) employees in the title of Counsel II employed by DOI and two (2) employees in the title of Counsel III.⁸

⁷ The thirty-two (32) Exhibits include: two (2) different documents mistakenly marked as Joint Exs. 23 (one is the Commission notice of hearing and the other is the Commission notice of hearing but with the parties' stipulation at the Commission prehearing conference copied on the back of the notice of hearing); Exhibits 1 through 26, submitted jointly; Appellant's Exhibits 1 through 5; Respondents' Ex. 1. Appellant's Ex. 4, comprised of the Appellant's EPRS for fiscal year 2015 and his Form 30 for the same period of time, is given little weight since it covers the period beyond the date the Appellant requested reclassification, although the documents look similar to the Appellant's fiscal year 2014 EPRS and 2014 Form 30. Appellant's Ex. 5 is entitled, "Appellant's Testimony", which is considered in addition to his oral testimony at the Commission hearing. Exhibit 19 is given limited weight, as indicated at the hearing, since it pertains to the Appellant's appeal to HRD but was prepared by HRD and not provided to the Appellant and the Commission until the prehearing conference at the Commission.

⁸ The two (2) Counsel IIIs reclassified by the Respondents have expertise, individually, in health insurance and being a hearing officer. (Joint Ex. 24) A third DOI Counsel II was reclassified to Counsel III when the Commission allowed the appeal in Thompson v. HRD and DOI, C-14-287. In Merow Rubin v. DOI and HRD, C-14-294, the Commission allowed the reclassification request of another DOI Counsel II.

6. The human resources related transactions and support for DOI are handled by OCABR. OCABR provides this service for eight (8) agencies.
7. On or about January 23, 2014, the Director of Human Resources (HR) for OCABR, Ms. Bratt, held a meeting for DOI employees in the Counsel series to explain the newly implemented Counsel Series specification, including the creation of the Counsel III title.
8. Mr. Phelan submitted a "Request to Appeal Classification form" at DOI on June 12, 2014 requesting to be reclassified to the title of Counsel III.
9. By correspondence dated June 12, 2014, Mr. Phelan was notified by OCABR Personnel Analyst Kimberly Deeney that an appeal audit interview was scheduled for July 2, 2014. In this correspondence, Mr. Phelan was asked to complete the enclosed Interview Guide and return it by June 30, 2014. He was also asked to provide a current resume and was invited to bring samples of work. Mr. Phelan was notified that a supervisor or union representative could accompany him to this interview.
10. Mr. Phelan prepared responses to the Interview Guide and submitted them on June 27, 2014, in advance of his interview. Mr. Phelan also submitted his resume, and participated in the audit interview held on July 2, 2014.
11. On July 14, 2014, Mr. Phelan emailed Kimberly Deeney with information supplemental to his responses provided in the Interview Guide.
12. By correspondence dated November 18, 2014 from Ms. Deeney, Mr. Phelan was provided with a preliminary recommendation to deny his appeal. The correspondence attached the documents which were submitted to Ms. Deeney for consideration in the reclassification

request. Mr. Phelan was permitted an opportunity to provide a rebuttal to OCABR within ten (10) calendar days.

13. On December 8, 2014, Mr. Phelan submitted a rebuttal to the preliminary recommendation denying his appeal.
14. By correspondence dated January 16, 2015, Mr. Phelan was notified by OCABR that his classification appeal was denied.
15. On or about February 13, 2015 Mr. Phelan appealed the denial of his reclassification to HRD and requested a hearing. Mr. Phelan submitted correspondence dated February 12, 2015 with his appeal.
16. On April 1, 2015, HRD notified Mr. Phelan the appeal hearing was scheduled for April 16, 2015.
17. On April 16, 2015, an appeal hearing took place at HRD. Mr. Phelan submitted correspondence of the same date to HRD.
18. By correspondence dated May 15, 2015, HRD denied the appeal.
19. On June 12, 2015, Mr. Phelan appealed HRD's decision to the Commission.

Appellant's Background

20. At the time of the Commission hearing in this case, the Appellant had been working at DOI for approximately ten (10) years. Prior to working at DOI, the Appellant worked at the state Legislature's Joint Committee on Banks and Banking for eight (8) years, which Committee was merged with insurance matters into the Committee on Financial Services during the Appellant's tenure in the Legislature. Prior to his work in the Legislature, the Appellant worked in the insurance industry, working for approximately ten (10) years at John Hancock Mutual Life Insurance and two (2) years at New England Mutual Life

Insurance. At John Hancock, the Appellant was a Senior Computer Programmer in Life Underwriting Systems, a research attorney, and a legislative consultant. At New England, the Appellant was a Systems Analyst, devising tests for certain computer systems. (Joint Ex. 7) Although the Appellant worked in the private insurance industry prior to working at DOI, he did not work on insurance licensing prior to his employment at DOI. (Testimony of Appellant)

Organization of DOI Legal Unit

21. Among the sixteen (16) attorneys in the DOI Legal Unit, there are hearing officer Counsels, enforcement Counsels and other Counsels. Each of the Counsels in the Legal Unit has general duties and on or more specific duties, such as automobile insurance or health insurance. Each attorney has at least one specialty. (Testimony of Joyce) Attorneys are supervised directly either by General Counsel Whitney or Deputy General Counsel Joyce, among other reasons, so that hearing officer Counsels and enforcement Counsels are supervised by someone different for ethical reasons. Supervisors prepare Employee Performance Evaluation System (EPRS) reports during the year as appropriate. (Joint Exs. 6, 24; Testimony of Joyce)
22. Deputy General Counsel Joyce has supervised the Appellant since 2012 and completes the Appellant's EPRS. If the Appellant is assigned work by someone else, Deputy General Counsel Joyce oversees the work to be done by the Appellant. Deputy General Counsel Joyce was hired by DOI in 2008 to work on financial and receivership insurance matters. He was appointed Deputy General Counsel in 2012; he assists General Counsel Whitney and supervises approximately half of the Counsels in the DOI Legal Unit. Insurance producer licensing is a primary function of DOI. Producer license applications

are processed by non-attorneys in the Licensing Unit and are only given to a DOI attorney if there is a problem with the application. A majority of such applications are approved without being seen by a DOI attorney. The DOI insurance fields with the greatest number of regulations are either health insurance or insurance finance, not licensing. The Section 1033 Committee in which the Appellant participates meets approximately a couple of times per year and makes recommendations on licensing once or twice per year. The Appellant does not work on insurance company licenses, which is mostly addressed by the DOI financial staff, such as the Financial Receivership Counsel II. The Appellant is not involved in litigation. (Joint Exs. 6, 25; Testimony of Joyce)

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

23. The position of Counsel III in the Counsel series was established effective August 11, 2013. (Joint Exs. 3 and 4)
24. 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)
25. The Counsel series is marked Joint Ex. 4. Portions of the Counsel series quoted herein are from Joint Ex. 4, with emphasis added. (Administrative Notice)
26. 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.
(Joint Ex. 4)

27. 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.
(Joint Ex. 4)

28. 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.
(Joint Ex. 4)

29. 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.
(Joint Ex. 4)

30. 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.

(Joint Ex. 4)

31. 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.

(Joint Ex. 4)

32. 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.

(Joint Ex. 4)

33. 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.
(Joint Ex. 4)⁹

34. The DOI website states, in part,

National Association of Insurance Commissioners [NAIC]

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-1p/>, November 16, 2016)(emphasis added)

35. 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.

⁹ 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.

- Present memoranda supporting or opposing legislation affecting agency operations.
(Joint Ex. 4)

36. 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.”
(Joint Ex. 4)

37. 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.
(Joint Ex. 4)

38. 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. ...

(Joint Ex. 4)

39. 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.

(Joint Ex. 4)

40. 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. ...

(Joint Ex. 4)(emphasis added)¹⁰

41. 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. ...

(Joint Ex. 4)(emphasis added)

42. 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.

(Joint Ex. 4)(emphasis added)

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

¹⁰ Joint Ex. 4 states that at least three (3) years of supervisor experience is required. However, the Respondents advise that the wording is as it appears in this decision. Administrative Notice.

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.
(Joint Ex. 4)(emphasis added))

History of Counsel III Specification

44. Regina Caggiano was involved in the development of the current Counsel III Spec. Ms. Caggiano has been employed at HRD for approximately eighteen years. She has been a Program Manager in special units of HRD, Assistant Director in the Civil Service Unit, and is now Deputy Director for the HRD Organizational Development Group (ODG). Ms. Caggiano oversees both the Civil Service Unit and ODG, which are involved in test development, administration of tests, development of lists of those who took and pass civil service tests, and she oversees appointments of personnel. Within the ODG, Ms. Caggiano oversees reclassifications, management hires and any issues involving the Administration and Finance secretariat regarding the effect of human resource issues on state agencies. Over the years, in response to various requests, HRD reviewed proposed job specification changes for a variety of positions; this included proposed changes to the Counsel Series. The proposed changes involved some of the most heavily populated employment positions. Among other actions, HRD and a contractor interviewed state employees in approximately 86 different job titles and met with agencies to understand their current personnel needs. Department of Revenue (DOR) human resources

personnel were involved in drafting the Counsel Series, expanding the Series from two (2) to four (4) Counsel titles in or about 2009. Upon the departure of the DOR human resources staff involved with revising the Counsel Series in or around 2011, Ms. Caggiano was assigned to the project. Ms. Caggiano arranged meetings with DOR and EOHHS, which had the largest number of Counsel employees; the meetings included representatives of human resources offices and management. This group recommended eliminating the proposed 4 Counsel titles in favor of 3 Counsel titles, because the proposed Counsel IV position would too closely resemble a management position. The new Counsel III position was intended to be a position for an attorney with the most expertise and advanced knowledge of the principles and practice of a specific subject of law related to the employer, i.e. the attorney who would be “the” authority on a particular subject related to his or her employer. The new Counsel III would be required to spend a majority of his or her time on the special field of law for the employer. In addition, unless the employer established a need for the Counsel III, there would be none at an agency. A Counsel II is not entitled to the Counsel III title based on the number of years he or she has been employed at the employer. The functions of a Counsel I, II and III are cumulative, meaning that the higher positions include the functions performed by the lower positions in the series. Ms. Caggiano is not familiar with any limitation on the number of Counsel IIIs to be hired or appointed but as the Counsel III is the one who is the expert, with greater experienced and education, there will likely would not be a lot of them in an agency. (Testimony of Caggiano)

45. Marianne Dill was involved in the development of the Counsel III position. Ms. Dill, Assistant Director of the HRD Officer of Employee Relations (OER), has been employed

at HRD since 2012. She is the lead negotiator for National Association of Government Employees (NAGE), Units 1, 3 and 6 (Unit 6 represents Counsels); the American Federation of State, County and Municipal Employees AFSCME) Unit 2; and Service Employees International Union (SEIU) Unit 888. She is a Step 3 hearing officer in the grievance process and supervises two staff people. She worked with NAGE's lead negotiator, Kevin Preston, on the Counsel III Spec. The only request Mr. Preston made of Ms. Dill in this regard was minor – to change a requirement that the Counsel III have supervisory experience to permit, but not require, supervisory experience, although the need for supervisory experience would depend on the Counsel III assignments. The President of each pertinent Union section also reviews proposed Spec changes. The Counsel III title is the only classification in a union position that waives certain rights (such as overtime pay). In the development of the current Counsel III title, the indication was that the Counsel III would be a “guru” and, since not everyone can be a guru, there would be a limited number of them, although no number was specified. Not every agency would need Counsel IIIs. Most agency attorneys have knowledge of the fields of law pertinent to the agency but that alone is not enough to warrant reclassification of a Counsel II to a Counsel III. Ms. Dill acknowledges that the Counsel III spec is imperfect.

(Testimony of Dill)

Implementation of Counsel III Classification

46. 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. (Joint Ex. 3) This memorandum indicated, “ ... [o]n July 30, 2013, the Commonwealth of Massachusetts, through the Human Resources Division, signed a Memorandum of Understanding with NAGE detailed updated job specifications for the Counsel Series, including the establishment of a new Counsel III, job grade 21.” (Id.) 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 30 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)

47. A Memorandum of Understanding between the HRD and NAGE, Unit 6, signed on July 30, 2013 provides, in pertinent part,

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's¹¹ will be grandfathered in the position.
- (Joint Ex. 25; *see also* Joint Ex. 26 regarding Counsel series salaries)

48. There are two (2) ways a state employee can be reclassified. One way is through a maintenance reallocation, wherein an employer requests that an employee be reclassified; in that circumstance, a manager can make the request and update the employee's Form 30 for processing. The other way is for the employee to request reclassification, filling out an Interview Guide, having an audit interview and having the employer determine whether the employee should be reclassified. (Testimony of Holbrook)

49. The work of OCABR includes consumer protection, providing education and advocacy services, licensing, responding to complaints and conducting investigations. OCABR's human resources department handles personnel matters for all of the agencies within it. (Testimony of Deeney)

50. Ms. Bratt was involved in responding to the Appellant's reclassification request to Counsel III. Ms. Bratt began working at OCABR in or around 2009, working first as a Personnel Officer II, then Personnel Analyst III, and then as the OCABR Director of

¹¹ The text does not provide a definition of MER but I take administrative notice that it refers to the Minimum Entrance Requirements for the position.

Human Resources. Her duties as Human Resources Director include overseeing the classifications. Ms. Deeney is in charge of OCABR reclassifications but Ms. Bratt reviews reclassification requests with Ms. Deeney. If an employee's reclassification request is preliminarily denied and the candidate submits a rebuttal, Ms. Bratt makes the final decision about the reclassification for OCABR. (Testimony of Bratt)

51. Ms. Bratt learned about the new Counsel III Spec in August 2013 when she received an email message and memorandum from then-Personnel Administrator Paul Dietl. The union then sent a memorandum to employees about the Counsel III Spec. Thereafter, Ms. Bratt discussed the new Counsel III Spec with Marianne Dill at HRD, Ms. McGoldrick at Unit 6, and a few analysts at the OCABR human resources office about how to interpret the new Spec. Ms. Dill informed Ms. Bratt that the Counsel III would be the "guru"/expert in a specialized area of law and different from the Counsel I and II positions. Ms. McGoldrick's interpretation of the new Counsel III Spec was that it would involve a limited number of Counsels and involve an expert to whom all in the agency would go to for information in his or her specialty. There was no limit on the number of Counsel IIIs who could be reclassified but it was expected that there would be a small number of eligible Counsel IIs because it involved experts in specialized field of law, performing complex work and having a broad effect. (Testimony of Bratt)

52. Subsequently, a number of Counsels inquired about the new Counsel III Spec so Ms. Bratt set up a meeting with then-DOI Commissioner Murphy to discuss what to look for in a Counsel III reclassification request. At that time, the Appellant had not yet applied for reclassification so Ms. Bratt did not discuss his reclassification to Counsel III with then-Commissioner Murphy. (Testimony of Bratt)

53. Ms. Bratt then met with the DOI Counsel IIs, together with some DOI managers, to discuss the Counsel III Spec. At this meeting, Ms. Bratt said that DOI had not recommended that anyone be reclassified to Counsel III but the Counsel IIs could request reclassification nonetheless; she explained to the Counsel IIs that they would need to be experts and she explained how to apply for reclassification. (Testimony of Bratt)
54. After the meeting with the DOI Counsel IIs, Ms. Bratt met with DOI managers to discuss the Counsel III position. At this meeting, Ms. Bratt learned that the DOI Legal Unit has sixteen (16) attorneys, three (3) in the Board of Appeals, that the remaining attorneys report to either the General Counsel or Deputy General Counsel, and each has a specialty in the field of insurance law in addition to other legal work that they do. (Testimony of Bratt; Joint Ex. 24) This also occurred before the Appellant requested reclassification. (Administrative Notice)
55. Ms. Bratt became involved in the Appellant's reclassification request when Ms. Deeney, at the OCABR human resources office, was making a decision about the Appellant's request in the preliminary stage. (Testimony of Bratt)
56. Ms. Deeney was involved in responding to the Appellant's reclassification request to Counsel III. Ms. Deeney began working at OCABR in or around 2012. Her title is Personnel Analyst III. Her duties include primarily hiring and staffing, Family Medical Leave Act matters and job classifications in the OCABRA human resources office, which is an umbrella human resources office for all of the OCABR agencies. Prior to working at OCABR, Ms. Deeney worked at the state Department of Transportation ((DOT) for approximately eight (8) years as Program Coordinator I, then a Personnel Officer I, and then a Personnel Officer II. At DOT, Ms. Deeney was involved in recruitment and

staffing. In 2009, various transportation agencies were consolidated so she created a Classification Unit and reviewed all classifications of employees coming from the different agencies in the merger. (Testimony of Deeney)

57. Ms. Deeney is the primary contact for classification matters for all of the OCABR agencies. When an employee requests reclassification, Ms. Deeney sends them a letter, asking them to complete an Interview Guide and submit a resume, schedules an interview audit with the candidate, tells the candidates they can bring a union representative with them to the interview audit and informs the applicants that they can bring writing samples with them to the interview audit. At the interview audit, Ms. Deeney may put notes on the applicant's Interview Guide and she asks the applicant to review and sign it, indicating that the information in the Guide is accurate. Applicants can submit information to Ms. Deeney after the audit. (Testimony of Deeney)

58. The state Department of Correction (DOC) sought maintenance reallocation to Counsel III for six (6) Counsel IIs in its Legal Department without first obtaining HRD's approval.¹² Three (3) of the six (6) Counsel II reclassification requests were mistakenly approved prior to being reviewed. However, HRD informed DOC that the three (3) Counsel IIs whose requests were mistakenly approved would be allowed such that a classification flag would be placed on the three (3) positions so that if they are vacated, they will not be filled as Counsel IIIs. (Testimony of Daiute; *see also* Thompson v DOI and HRD, C-14-287 (2016) and Merow-Rubin v. DOI and HRD, C-14-294 (2017)).

¹² I take administrative notice that DOC has approximately 5,400 employees, including approximately twenty-seven (27) attorneys. Merow-Rubin v. HRD and DOI, C-14-294.

Appellant's Request for Reclassification

59. Prior to the Appellant's request for reclassification, Ms. Bratt and Ms. Deeney met with the DOI First Deputy Commissioner, General Counsel, Deputy General Counsel and Chair of the Board of Appeals to learn about the structure of the DOI Legal Unit, the Counsel IIs and their assignments. At that meeting, Ms. Bratt and Ms. Deeney were told that the Appellant works on matters such as producer licensing, legislation, legal service plans and the Section 1033 committee. (Testimony of Deeney)
60. By notice dated June 12, 2014, the Appellant informed Ms. Deeney of his request for reclassification to Counsel III. On the same day, Ms. Deeney sent the Appellant the Interview Guide to complete, informed him that his interview audit would take place July 2, 2014, and asked him to bring a resume with him, offering for the Appellant to bring any work samples, as well as a union representative or supervisor to join him. On June 27, 2014, Ms. Deeney received the Appellant's completed Interview Guide. The Appellant brought his resume with him to the interview audit. He came alone to the interview audit and did not bring any work samples. Ms. Deeney wrote a few notes on the Appellant's Interview Guide during the interview audit but the Interview Guide was fairly complete so she did not feel it necessary to take a lot of notes. (Testimony of Deeney; Joint Exs. 1 – 3, 5 - 8)
61. On his Interview Guide, 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,

Now in my eighth year as Counsel to the Commissioner, I am the Legal Unit attorney most experienced attorney (sic) with legal issues involving producer licensing ... I am the Division's resident expert on legal issues involving all of the Division's many producer licensees including individual and business entity insurance producers, public insurance adjusters, insurance advisors, life settlement brokers and soon-to-be portable electronics insurance vendors. ... I

am the division's specialist on public insurance adjuster contracts and insurance adviser contracts. I am also the Division's authority on licensing of banks, credit unions and certain lenders to sell insurance.

I also have substantial experience in the development of license application forms¹³ for new license types. ...

My prior experience serving as Legal Counsel to the House Chairman of the Joint committee on Banks and Banking provided me with legislative drafting experience that I have utilized in drafting proposed legislation as well as division regulations and bulletins. ...

... I have taken on a new responsibility as the Division's legislative liaison ... I attend all public hearings on insurance-related legislation before the Joint committee on financial Services. ...

I am a senior member of the §1033 Advisory Committee which is charged with reviewing applicants with serious criminal backgrounds and making a recommendation to the Commissioner...

I am the Division's specialist on the process for appointing, on behalf of the Commissioner under MGL Chapter 175, §100 and § 163, a "third referee" to serve on a reference panel. ... selecting a referee from the Division's pool of potential referees

On a daily basis, I respond to inquiries of a legal nature from colleagues, constituents within the Division as well as outside attorneys, licensees and others relative to various producer licenses or producer licensees. On such issues, ... [I provide] the Division's official interpretation of those laws. ... (Joint Ex. 8)¹⁴

62. 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:

¹³ I take administrative notice that the DOI website includes a Massachusetts DOI Licensing Information Handbook, for exams on and after January 15, 2015 (after the Appellant requested reclassification) that DOI also may use NAIC's Uniform paper license application form. (www.mass.gov/ocabr/docs/doi/producer/candidate-licensing-handbook.pdf)

¹⁴ The Appellant states, "[I]licensees include insurance producers, public insurance adjusters, insurance advisers, life settlement brokers, portable electronics insurance vendors, reinsurance intermediary brokers, reinsurance intermediary managers, and surplus lines brokers for individuals as well as business entities." (Joint Ex. 16, fn)

I work closely with Diane Silverman Black, the Director of Producer Licensing, on a variety of legal issues ... I also work closely with staff of the Producer Licensing Department responding to legal questions having to do with license applicants or existing licensees that arise on a daily basis.

... Dorothy Raymond, Director of Special Investigation Unit on a regular basis ... [involving] suspect activity involving a licensee of the Division, an ongoing investigation of a Division licensing or license applicant that requires further investigation.

... John Turchi, Deputy Commissioner of Financial and Market Regulation and members of his staff. ... I have handled several assumption agreements involving self-insurance groups licensed by the Division. ... working with the parties to the transaction [and] reviewing proposed changes to self-insurance group by-laws, drafting language for proposed amendments to financial regulations and on a variety of issues relative to licensed self-insurance groups.

I have worked with Matt Regan, Director of Market Conduct, researching legal questions involving loans on life policies and also the payment of interest on proceeds.

I work with Edward Charbonnier in the Division's Policy Form Review Department ... regarding insurance policy language and to develop checklists for new products and ... legal services plan.

... Bob Macullar, Acting Director, Financial Surveillance and Company Licensing when company licensing or registration questions come up.

... Frank Pesco, Senior Examiner, Surplus Lines audit department on ... legal questions involving surplus lines licensing, surplus lines premium tax, and surplus lines filings.

... Steve Belec and the staff of the Division's Consumer Services Department in response to consumer inquiries involving questions of law.

Outside Agency:

... Brenda Miller of the legal staff in the Division of Banks in conjunction with license applications from banks, credit unions and lenders seeking to be licensed to sell insurance products. ...

... I have occasionally worked with attorney Jennifer Crawford and attorney Lisa Pellegrino and other staff of the Joint Committee on Financial Services.

...attorney Marissa Soto-Ortiz at the MA Secretary of State's Corporations Office on issues involving business entities registered or seeking to register with the Corporations office.

On occasion, I work with attorney John E. Tully at the MA Department of Revenue on tax issues involving the sale of insurance products.

I am "CORI cleared" to obtain and review criminal background checks on license applicants. As a result, I have worked with attorney Agapi Koulouris at the Department of Criminal Justice Information Services involving submissions to CORI, obtaining CORI reports or other issues having to do with criminal background checks on applicants.
(Joint Ex. 8)

63. Asked to briefly describe the overall basic purpose of his job on the Interview Guide, the Appellant wrote, in part,

The fundamental purpose of my position is to provide legal counsel to the Commissioner of Insurance on issues that arise in the course of carrying out the Division's mission as the primary regulator of insurance in the Commonwealth. ... [M]ost of my work involves addressing a whole host of legal issues relative to producer licensing and producer licensees [M]y work is wide-ranging and involves many different aspects of the Division's regulatory function. On a daily basis, I am asked to respond to a variety of legal issues with the goal of helping the Division maintain its strong regulatory oversight of the insurance marketplace."
(Joint Ex. 8)

64. Asked on the form if there have been "any significant job changes" since his appointment the Appellant wrote, in part,

There have been many changes to the job since I started at the Division in 2006. ... I have worked on a number of financial transactions involving self-insurance groups ("SIGs"). Most of these transactions involved "assumption agreements" under which an insurer agrees to assume the liabilities of a SIG. ... I have also reviewed "merger agreements" between two SIGs. I have also reviewed and recommended significant changes to certain SIG bylaws. ... I have developed a significant amount of expertise in the regulation of self-insurance groups and I continue to field legal questions involving SIGs.

In recent years ... I have also been called upon to develop several new license application *forms* and to draft license information pages. For example, I developed the license application for new Life Settlement Brokers as well as Life

Settlement Providers and also for the Portable Electronics Insurance vendor license.

Early in 2012, the attorney who served as the Division's legislative liaison left the Division. ... I was asked to assume the role I attend legislative hearings of the Joint Committee on Financial Services ... I draft reports on the testimony given ... and ... update the Legal Unit and other[s] ... in the Division on the progress of legislation. On occasion, I consult with the staff of the Joint Committee I draft summaries of insurance-related legislation of particular interest. I consult the [Legislature's] website and an online legislative tracking system to gather information about pending legislation. I track the progress of insurance-related bills through the legislative process I have drafted the Division's comments on bills pending before the governor. (Joint Ex. 8)(*emphasis* in original)

65. 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, in part,

- **PRODUCER LICENSING:** I review applications for insurance producer licenses referred to me because of a legal issue from the Producer Licensing department. I check regulatory databases maintained by the National Association of Insurance Commissioners (NAIC) for prior or ongoing administrative actions against the applicant in other jurisdictions. I also review the criminal background of ... applicants with a criminal history. Depending on the outcome of my review, I may return the application and recommend the applicant be licensed or that the applicant be denied. ... I draft the denial letters for the Director's signature and ensure that the applicant's appeal rights are preserved. There are many tasks that are an essential part of ... [this] function. For example:

CRIMINAL BACKGROUND CHECKS: In cases where a Massachusetts resident applicant discloses a criminal history, I perform a CORI background check ... When an applicant's criminal history is serious and the Director of Producer Licensing decides to deny the license, I consult with the Division's enforcement counsel relative to an anticipated appeal of the license denial. Sometimes, ... an issue will come to light that requires the application be referred to the Special Investigations Unit. ... I draft a memo describing the issue and forward that matter to SIU Director Dorothy Raymond ... I often consult with Director Raymond on applicants and licensees who are subject to an SIU investigation.

CONTRACT/PLAN APPROVALS: ... I also review for approval certain required contracts and plans submitted by such applicants. For example:

- ... All new Public Insurance Adjuster license applicants must submit, for approval, a copy of the contract they will be using ... I review the submitted contract for legal sufficiency and compliance with the statutory requirements.
- ... new Insurance Advisor License applicants must submit, for approval, a copy of the insurance advising contract they will be using ... I review the application for legal sufficiency and compliance with the statutory requirements.
- ... New applicants for Life Settlement Broker licenses must submit, for approval, an “anti-fraud plan” with their application. I review the document submitted to determine if the plan is compliance (sic) with the statute.

BANK/CREDIT UNION PRODUCER LICENSING: I am the sole member of the Legal Unit that handles producer license applications from banks, credit unions, and lenders. ... I review *all* applications from banks, credit unions, and lenders seeking a producer’s license to sell insurance products. These entities must submit a “Plan of Operations” with their application. When the applicant is a state-chartered entity, I coordinate with attorney Brenda Miller in the Division of Banks which reviews the bank/credit union/lender for safety and soundness. When the applicant is a federally-chartered entity, I review the applicant’s Plan of Operations ... Where an issue arises ... I work with representatives of the bank or credit union to resolve the problem[.]

APPLICATIONS/FORMS DEVELOPMENT: I develop licensing forms and documentation for new license types. For example, in response to the passage of new laws, I ... drafted new license application forms and attendant documentation for the following:

Life Settlement *Broker* License Application/Information page ... on the DOI website.

Life Settlement *Provider* License/Application/Information page ... on the DOI website.

Portable Electronics Insurance Limited Lines License Application/Information page ... on the DOI website

LEGAL SERVICES PLANS: I am the Legal Unit’s expert on Legal Service Plans and the prerequisites for such plans to be approved and I am consulted whenever questions about legal services plans arise. I review inquiries and plan submissions from various entities ...

§1033 ADVISORY COMMITTEE: ... Federal law 18 U.S.C. §1033 requires individuals with *felony* criminal convictions involving dishonesty or fraud to obtain the Commissioner’s consent to engage in the business of insurance. The five-member Advisory Committee was established by the Division to review applications from affected individuals ... Work on this

Committee involves knowledge of Massachusetts law, applicable federal law and/or the laws of other states. ... I draft the recommendation ... to the Commissioner ... I am considered by the Committee to be the legal 'go to' person on the Committee. ...

(80%)[Producer licensing and related tasks]

- **LEGISLATIVE LIAISON** - ... I attend all legislative hearings on insurance-related bills before the Joint Committee on Financial Services ... and I report to the General Counsel [Appellant reiterates his legislative work, as noted above in response to the Interview Guide asking if there have been any significant changes in the applicant's job since he was appointed.]

(5%)

- **LEGISLATIVE DRAFTING:** I have drafted legislative language to amend state insurance *laws*. ...
- **REGULATORY DRAFTING:** ... This involves working with various constituencies in the Division to identify what regulations need to be revised and drafting language to accomplish that goal. I have also drafted Division administrative *bulletins* to address changing regulatory requirements.

(5%) [Legal drafting combined]

- **EXTERNAL LEGAL INQUIRIES:** ... Often such inquiries from our licensees or their representatives. I also field many questions left on voice mail on the Legal Unit's main telephone line. Because of my expertise in various areas, Legal Unit staff will often refer voice mail inquiries to me More often than not, I'll handle the matter or I will identify the issue and refer it to the attorney who handles that area.

(5%)

- **THIRD REFEREE APPOINTMENTS:** I am the Legal Unit's specialist on "third referee" issues and solely responsible for handling "third referee" appointments. Under state law, the Commissioner must appoint a third referee in certain circumstances at the request of a licensee or one of the parties. ... Once selected, I notify the parties and/or their attorneys and the other two party-selected referees of the appointment. ... I draft a Memorandum of Understanding between the parties, the appointed third referee and the Division. I continue to monitor the work of the third referee until the process is completed and a decision is issued by the reference panel.

(3%)

- **PUBLIC RECORDS REQUESTS:** From time to time, I handle public records requests that come into the Division. Handling public records requests requires

knowledge of Massachusetts public records law. Such requests can come from individuals, insurers or the media. Responding to such request (sic) involves contacting individual departments within the Division ... to locate documents responsive to the request. ... [I] review the materials gathered and ensure timely response to the requester.

(2%)¹⁵

(Joint Ex. 8)(emphasis and formatting in original)

66. Asked on the Interview Guide to describe the major problems he faces in performance of his job and how he resolves them, the Appellant wrote, “ ... I cannot say that I run into many ‘major problems’ ... If anything, sometimes it can be difficult to get others to focus on a particular matter if they ... are busy. This can lead to having to wait ...”

(Joint Ex. 8)

67. Asked on the Interview Guide who assigns his work and how it is assigned, the Appellant wrote, in part,

When work is assigned from Legal Unit management, it is assigned either by Robert A. Whitney, General Counsel or Christopher M. Joyce, Deputy General Counsel. ... I also receive many inquiries of a legal nature directly from the Producer Licensing Director Diane Silverman Black, ... staff, or from other units in the Division. Some work arises from working with other state agencies like the Division of Banks.

(Joint Ex. 8)

68. Asked on the Interview Guide who reviews his work and the standards for review, the Appellant wrote, in part,

When work is assigned by the General Counsel or the Deputy General Counsel, my work is reviewed by that person. I cannot speak to the standards used to review my work. ... Perhaps the best evidence ... can be found in my most recent State C Annual EPRS reviewed ... in which I was given an annual overall rating of “Exceeds.”

(Joint Ex. 8)

69. Asked on the Interview Guide whom he supervises, the Appellant wrote,

¹⁵ Ms. Deeney’s handwriting on the Appellant’s Interview Guide, apparently noting that the percentages totaled only 95% wrote, “SIG – 5% (see pg 4 – job changes) – probably should have been included in job duties list”. (Joint Ex. 8)

My position as Legal Counsel to the Commission is not a supervisory position, per se. Having said that, some aspects of my work require that I manage, to a greater or lesser degree, the work of others. For example, I often provide direction to Legal Unit support staff. Also, over the years, I have provided guidance and direction to the many legal interns who have worked at the Division. My work with Producer Licensing, to some degree, requires reviewing the work of others in that department. ... Certain aspects of my job, such as responding to public records requests, require that I supervise the work of others responsible for gathering documents. On occasion, my work involves reviewing memos or other documents drafted by others, lawyers, and non-lawyers. (Joint Ex. 8)

70. Asked on the Interview Guide about any special requirements for his job, the Appellant wrote,

Yes, my position requires that I hold a law degree and be a member of the Massachusetts Bar. I hold a Juris Doctor (JD) ... and a Master of Laws (LLM) (Joint Ex. 8)

71. The last part of the Interview Guide 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.” (Joint Ex. 8) In response, the Appellant wrote, in part,

Having been a member of the Legal Unit of [DOI] for more than eight years, I have worked for three different Commissioners and three different General Counsels. During that time, I have developed extensive knowledge of Massachusetts insurance laws and Division regulations. My particular expertise on all aspects of producer licensing makes me a valuable resource to the Legal Unit and to others in the Division as well as the general public. Additionally, my in-depth knowledge of several other areas within the Division’s regulatory purview (self-insurance groups, third referee appointments, insurance legislation) allows me to contribute in a substantial way to the Division’s continued success (Id.)

72. Other DOI Counsels may draft regulations but not in the Appellant’s area of expertise. Ultimately, the DOI Commissioner approves regulations. (Testimony of Joyce)

73. Ms. Deeney reviewed the Appellant's completed Interview Guide and then met with the Appellant on July 2, 2014 to conduct an audit interview in which they discussed the Appellant's reclassification request. (Testimony of Deeney; Joint Ex. 8)

74. By email message dated July 14, 2014 from the Appellant to Ms. Deeney, the Appellant added, in part,

In my Interview Guide submission, I discussed by role responding to "External Legal Inquiries." ... I may have been remiss in not stressing just how often I am called upon to respond to inquiries from outside the [DOI]. ... While a lot of inquiries relate directly to licensing, many others involve issues that may impact an insurer's or a producer's business activities. ... I field numerous inquiries regarding the state's "inducement" and/or "rebating" laws; the use of "dba" or "trade name" by an insurance producer; whether an insurance producer may charge fees' and questions involving the application of the surplus lines tax in certain transactions. ... I am very often the voice of [DOI] to these outside attorneys and insurance industry representatives. And, I believe I am viewed by numerous law firms and insurance industry representatives, many of whom I deal with on a regular basis, as the person within [DOI] that they can reach out to, and count on, to get an authoritative response. ... (Joint Ex. 9)

75. Although HRD was not involved when a Counsel I requested reclassification to Counsel II, HRD was involved, at least initially, when a Counsel II requested reclassification to Counsel III because it was a new Spec and it was to be consistently applied to ensure that candidates met the appropriate criteria. However, OCABR did not consult HRD before ruling on Mr. Phelan's reclassification request, as OCABR had done when two (2) other DOI Counsel IIs requested reclassification prior to Mr. Phelan. (Testimony of Bratt; Administrative Notice: *see* Thompson v. DOI and HRD, C-14-287 and Merow Rubin v. DOI and HRD, C1-14-294)

76. The Counsel II Form 30 on which DOI/OCABR and HRD relied in this matter was signed by the Appellant in 2014. The Appellant's 2014 Form 30 contains a number of provisions, such as,

GENERAL STATEMENT OF DUTIES AND RESPONSIBILITIES

represent the division in court or at administrative hearings; obtain information on cases and prepare cases or trials or 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, ensure that agency activities comply with the law, particularly as to matters concerning producer licensing, bank/insurance and legislative issues. Participate in division's 18 U.S.C. 1033 Committee.

SUPERVISION RECEIVED ...

Reports to the General Counsel and Deputy General Counsel.

DIRECT REPORTING STAFF

Counsel I's (sic) as directed by General Counsel and Deputy General Counsel

DETAILED STATEMENT OF DUTIES AND RESPONSIBILITIES

1. Advises agency staff on legal matter (sic) by interpreting laws, rules regulations (sic) and judicial or quasi-judicial decisions and opinions related to agency operations, particularly as related to producer licensing, bank/insurance and legislative issues; reviewing court decisions and newly enacted state and federal regulations to determine their applicability to agency activities; reviewing drafts of proposed agency regulations, guidelines and contracts for conformity with applicable laws and regulations; conducting legal research on matters related to agency functions; preparing opinions; reviewing draft decisions for clarity and for evidentiary and legal foundation; training agency staff in such matters as the laws., (sic) rules, regulations, policies and procedures governing agency operations; and drafting guidelines for conducting administrative hearings and writing administrative decisions and similar matters to resolve questions and ensure that all agency activities comply with applicable laws.
2. Participates in agency's 18 U.S.C. 1033 Committee and performs related duties.
3. Provides information to the public by answering inquiries related to agency functions, rules and regulations and by speaking before citizen groups and/or other interested parties ... to ensure the accurate presentation of the agency's functions, positions on various issues and polices.
4. Performs related duties such as writing correspondence and reports; scheduling hearings and conferences; updating reference materials such as laws, rules and regulations; and maintaining and updating periodic states (sic) and/or statistical reports on such matters as proposed legislation.
5. Represents agency in court or at administrative hearings by interviewing witnesses, presenting evidence and oral arguments in support of the agency's position, filing motions and answers to complaints, and conferring with judges and other counsel to promote the agency's position and statutory obligations.

6. Obtains information needed to represent the agency in court or at administrative hearings by conducting pre-hearing conferences to clarify issues or encourage settlement; interviewing witnesses; consulting other agency staff and legal representatives of the parties involved; reviewing case files, transcripts of previous hearings, administrative decisions and other records of case proceedings; conducting legal research; and reviewing memoranda submitted by litigant representatives for rebuttal to determine issues involved, legal precedents and whether further investigation is needed to provide additional documentation.
7. Prepares cases for trials or administrative hearings by evaluating complaints to determine if they warrant court action; deciding which cases to prosecute; determining legal strategy to be used in the prosecution, defense or settlement of cases through all levels of court jurisdiction; determining which documents or persons to subpoena; determining which witnesses will appear in court or at hearings in connection with civil or criminal cases; deciding which agency evidence may be released in accordance with the Public Information Act; preparing legal briefs, complaints and memoranda of law
8. Drafts administrative court and legal documents; prepares consent orders and regulations; and reviews legal documents to ensure that such documents are complete, accurate and in compliance with law ...
9. Reviews such documents as correspondence of the legislative committee reports to records information for future reference. (sic)
10. Recommends standard operating procedures to be adopted by the Agency.
11. Transports case materials to hearing locations.
12. Consults with other legal counsel and agency officials regarding the appeal of court decision to a higher court and maintains liaison with the Attorney General's office ion (sic) suits filed in Federal, state Supreme, Judicial (sic) and Superior Courts.
13. Confers with other agency staff in drafting proposed legislation ... and analyze proposed legislation to determine its impact on agency activities.
14. Drafts regulations and legislation ...
15. Prepares instructions to agency units for the implementation of court decisions.
16. Establishes and maintains liaison with representatives of other government agencies, including the legislature, through consultation and negotiation to develop memoranda of agreement on joint programs, to resolve problems involving personnel, and related issues and to exchange information on such matters as agency budget allocations and proposed legislation.
17. Presents memoranda to OCA and legislative committees supporting or opposing legislation ...
18. Negotiates settlements between consumers and company representatives ...
19. Consults the Attorney General's office concerning litigation brought by providers, recipients and/or their legal representatives ...
20. Prepares trial dockets and draft (sic) forms and form letters.
21. Determines if a motion to dismiss or an answer to the complaint is the appropriate document to be filed in action against the agency.

22. Conducts administrative hearings on disputes and other matters...
23. Renders decision at hearings and write (sic) final and/or recommended decisions ...
24. Negotiates with legal staff of other agencies to develop memoranda of agreement concerning joint programs.
(Joint Ex. 5)

There is no indication in the record that the Appellant, at the time he applied for reclassification, performed the following numbered duties and responsibilities: 5 – 8, 12, 18, 19 and 23. (Administrative Notice)

77. The Appellant's Counsel II Form 30 on which DOI/OCABR and HRD relied in this matter lists 35 "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;
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;
30. Knowledge of the theory, principles and practices of administrative law;
31. knowledge of the principals (sic) and practices of supervision;
32. Knowledge of training methods and techniques
(Joint Ex. 5)

The Appellant appears to have the qualifications required at hire (i.e., when he applied for reclassification). (Administrative Notice)

78. The Minimum Entrance Requirements listed on the Appellant's Counsel II Form 30 are, "Applicants must have at least (A) one (sic)¹⁶ full-time, or equivalent part-time, professional experience in the practice of law or in a position requiring membership in the Bar." (Joint Ex. 5) The Appellant meets the Minimum Entrance Requirements. (Administrative Notice)

79. The License and/or Certification Requirement in the Appellant's Form 30 is Membership in the Massachusetts Bar. (Joint Ex. 5) The Appellant satisfied this requirement. (Administrative Notice)

80. Ms. Deeney reviewed the Appellant's Form 30 (Job Description) and his 2014 Evaluation Performance Review System (EPRS) and found that the information in these two (2) sources was consistent with what the Appellant wrote in the Interview Guide. Ms. Deeney does not consider the employee's EPRS ratings when considering his request for reclassification. (Testimony of Deeney) Longevity is not a factor in determining whether reclassification to Counsel III is warranted. (Testimony of Deeney and Bratt)

81. The Appellant's fiscal year 2014 EPRS indicates that Deputy General Counsel Joyce was the Appellant's supervisor and General Counsel Whitney reviewed the EPRS. In addition, the EPRS indicates that thirteen (13) of the Appellant's seventeen (17) ratings were "exceeds" the applicable standards and two (2) were "meets".¹⁷ Two (2) of the "exceeds" ratings were for the Appellant's progress review and for his annual review. (Joint Ex. 6)

82. The Appellant's six (6) duties in his fiscal year 2014 EPRS were:

¹⁶ The "one" appears to be a reference to one year of full-time or equivalent professional experience.

¹⁷ EPRS ratings are "Exceeds", "Meets", or "Below". The Appellant was rated "meets" for his litigation duties because he did not perform them in 2014, as Deputy General Counsel Joyce indicated in his testimony.

1. Provide legal advice on license applications from banks.
 - a. Identifies and communicates issues to applicant
 - b. Consults with appropriate agency staff regarding issues involved with application
 - c. Participates in development of agency policy in connection with issues of first impression relative to applications
 - d. Interacts with Division of Banks employees to resolve any issues involving bank licensing applications
2. Provide legal advice on license applications from producers.
 - a. Identifies and communicates issues to applicant
 - b. Consults with appropriate agency staff regarding issues involved with application
 - c. Participates in development of agency policy in connection with issues of first impression relative to applications
3. Draft agency bulletins, regulations and legislation.
 - a. Conducts necessary background research in a thorough manner
 - b. Conducts necessary discussions with other Division personnel with expertise in the respective subject matter
 - c. Prepares drafts that are thorough and timely
4. Participate in the 1033 Committee.
 - a. Attends the majority of 1033 committee meetings
 - b. Conducts a thorough review of 1033 applications
 - c. Renders decisions with regard to 1033 applications
5. Respond to changing market conditions/manage and coordinate litigation.
 - a. Participates in all assigned litigation
 - b. Works productively with assistant attorney generals as necessary
 - c. Works productively with Hearing Officers as necessary
6. Respond to internal, consumer, industry, legislative and administration inquiries.
 - a. Conducts necessary factual and legal research, including a thorough review of proposed legislation and corresponding law, as applicable, in a timely fashion.
 - b. Speaks with relevant agency personnel regarding appropriate response to inquiry or impact of proposed legislation
 - c. Speaks with industry personnel, as necessary, regarding appropriate response to inquiry or to understand the full impact of proposed legislation
 - d. Provides accurate and coherent responses to inquiries from any source, including drafting all assigned memoranda related to proposed legislation, in a timely fashion
 - e. Attends inter and intra agency meetings and participates as appropriate
 - f. Coordinates with another agencies regarding legislative initiatives, including researching and rendering advice on policy initiatives
 - g. Acts as weekly duty attorney on a rotational basis
 - d. Assists the Financial Analysis Division in any financial matter
 - e. Reviews Companies' requests for transactions requiring regulatory approval

- f. Assists the Working Group in financial matters, as required
 - g. Acts as Hearing Officer for financial matters, as required
- (Joint Ex. 6)¹⁸

At the time the Appellant requested, reclassification, the Appellant appears to have been performing most of the duties in items 1 – 4 and 6. (Administrative Notice)

83. At the EPRS progress review, the Appellant’s supervisor wrote, in part,

Ed is a strong contributor to the Legal Group and is a terrific resource for any questions related to producer and public adjuster licensing, as well as bank license applications. He has also become the legal group’s first contact for all things SIG related, as well as assuming the role of monitoring the status of pending insurance legislation. In addition, he has continued to demonstrate a willingness to take on assignments outside of his comfort zone, which his greatly appreciated ... In this regard, Ed has recently been asked to work on matters relative to the possible adoption of Principle Based Reserving by the Commonwealth. ... He also maintains good working relationships with other Division staff, including the director of Producer Licensing, as well as the staff at the Division of Banks, which greatly aids him in performing his duties.

At the EPRS annual review, the Appellant’s supervisor wrote, in part,

.... In regard to SIGs ... Ed has recently worked with the Deputy General Counsel and the Financial Examinations Unit on drafting changes to the Division’s SIG regulation. He also has worked with the General Counsel relative to changes to the Division’s bank sold insurance regulation. ...
(Joint Ex. 6)

84. By letter dated November 18, 2014, Ms. Deeney informed the Appellant that the

information provided regarding his reclassification requested resulted in the “preliminary recommendation” to deny his request stating, in part,

... it has been determined you are properly classified as a Counsel II at [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 areas of law or broad knowledge of multiple areas;

¹⁸ The number and type of duties for DOI Counsel IIs can vary. See Thomson v. DOI and HRD, C-14-287 and Merow Rubin v. DOI and HRD, C-14-294.

- 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;
- Communicate with other agencies, including the Legislature, and collaborate with cross-functional and cross-agency teams to resolve issues and develop/implement new programs;
- Advise agency staff on legal matters by interpreting laws, rules, regulations (sic) judicial decisions and opinions related to agency operations;
- Provide functional direction to Agency personnel through guidance, instruction, and delegation of tasks and participate in the training and mentoring of new employees;
- Provide information to the public by answering inquiries regarding agency functions, services, rules and procedures to accurately represent the agency;
- Draft administrative, court, and other legal documents;
- Review contracts to ensure that all agency activities comply with applicable laws;
- Draft new policies and regulations or amendments, based on legal research and agency needs;
- Present memoranda supporting or opposing legislation affecting Agency operations;
- Issue recommendations for final decision or resolution of cases, and for some cases, to issue or agree to final resolution without further review.

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

You have ten (10) calendar days to review this preliminary recommendation letter. For your review, I have also enclosed all documentation that was used in developing this recommendation. [y]ou may submit a rebuttal ... If I do not hear from you within ten (10) days, a final decision will be issued (Joint Ex. 10)

85. Ms. Deeney did not meet with the Appellant's supervisor or reviewer individually to consult them about the Appellant's request for reclassification and his qualifications, although there was a meeting with senior DOI managers about the organizations of the DOI Legal Unit prior to the Appellant's request for reclassification. (Testimony of Deeney or Bratt)

86. By letter dated December 8, 2014 from the Appellant to Ms. Deeney, the Appellant submitted a rebuttal, stating, in pertinent part,

... [y]our letter failed to articulate HR's reasons for denying my request ... As evidence of my experience and expertise, I provide the following information addressed in the [Counsel III Spec]:

I. Distinguishing Characteristics

... I am the subject matter expert and have advanced knowledge and expertise in the laws, legal principles and practices of all aspects of insurance producer licensing. "Producer licensing" includes all aspects of qualifying and licensing individual and business entity *insurance producers* as well as individual and business entity *public insurance adjusters, insurance advisers, life settlement brokers, portable electronics insurance vendors, reinsurance intermediary brokers, reinsurance intermediary managers, and surplus lines brokers*. I am the DOI's subject matter expert on licensing *banks and credit unions* for the sale of insurance. I am the DOI's subject matter expert on *legal services plans* and the requirements for approval of such plans. My experience runs the gamut from reviewing questionable license applications, conducting criminal background checks, reviewing for approval proposed contracts and anti-fraud plans, to drafting license applications as well as drafting proposed legislation and regulations governing the Division's producer licensees...

Additional Functions Performed:

... I am the Division's technical expert providing advanced and specialized expertise in this specific area. My expertise is most often provided to internal clients including Division managers and legal colleagues. I provide specialized targeted advice and recommendations on specific legal issues involving producer licensee to support management decision-making ... I respond to a large number of legal questions from outside the Division ... In the course of my work ... often certain facts come to light relative to an applicant ... that call for further reinvestigation and possible enforcement action. In those cases I gather initial information, prepare a memo outlining the issues and the law, and refer the matter to the Division's Special Investigation Unit. When needed, I work with SIU to address and resolve the problem...

Additional Key Accountabilities: (sic)¹⁹

... As the Division expert on producer licensing matters ... I frequently research, analyze and interpret statutes and regulations and advise my various constituencies about the meaning and application of

¹⁹ The format of the Appellant's letter changes here.

legislation and/or division regulations or policies. Internally, interpretation and advice is often informal but can also be expressed in a formal legal memorandum. Where policy questions are involved, I work in collaboration with the General Counsel/Deputy General Counsel on the final legal opinion. ...

Relationships With Others:

...Through my prior work in the House Committee on Financial Services ..., I have many contacts in the House and Senate... I have cultivated contacts with federal agencies (SEC, FINRA²⁰).

Incumbents are required to have the following at the time of hire “in addition to the requirements listed for the Counsel Levels I and II...” The HR Department’s preliminary decision, as described in your letter, merely reiterates the qualifications for Counsel II and fails to articulate the reasons it believes I do not qualify for reclassification... I am currently working at a Counsel III level. This is further evident by my receiving a 2014 Governor’s Citation award for Outstanding Performance ...

(Joint Ex. 11)(emphasis in original)

87. Ms. Bratt reviewed the information submitted by the Appellant in support of his reclassification request, including the Appellant’s rebuttal to the preliminary denial of his request. By letter dated January 16, 2015 from Ms. Bratt to the Appellant, OCABR informed Mr. Phelan, 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 July 2, 2014 and conducted an appeal audit. Kimberly reviewed the results and made a preliminary recommendation on November 18, 2014 to deny your appeal.

Your rebuttal email was received on December 8, 2014. We are in agreement that the duties you perform, including all of those duties as stated in your rebuttal letter (sic) and completed Interview Guide, do not warrant the reallocation of your position. I regret to inform you that we must therefore deny your classification appeal.

²⁰ I take administrative notice that the SEC is the U.S. Securities and Exchange Commission and that FINRA is the Financial Industry Regulatory Authority. FINRA is a non-governmental organization that acts as a self-regulatory entity regarding member brokerage firms and dealers. (www.finra.org)

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
(Joint Ex. 12)

88. By an email message dated February 14, 2015 from the Appellant to Ms. Odlum, at HRD, the Appellant appealed OCABR's denial of his request for reclassification to HRD. This email message attached a number of documents, including the Performance Recognition award that the Appellant received in May 2014, a Citation for Outstanding Performance signed by the Governor and DOI Commissioner. (Joint Ex. 13)
89. By an email message dated April 1, 2015 Ms. Anita Holbrook, Senior Personnel Analyst at the HRD Organizational Development Group, informed the Appellant that HRD would conduct a hearing on April 16, 2015 regarding his appeal of OCABR's denial of his reclassification request. Ms. Holbrook works on classification, compensation matters, hiring guidelines and a job Specification update project at HRD. She supports three (3) Secretariats, including the Secretariat in which DOI functions. (Testimony of Holbrook; Joint Exs. 15 and 19) Ms. Holbrook began working for HRD approximately one (1) year prior to the HRD appeal hearing for the Appellant. This was the third hearing on a DOI Counsel II reclassification request in which Ms. Holbrook has participated. Prior to working at HRD, Ms. Holbrook worked for the state for approximately twelve (12) years, including working in Human Resources at the Department of Correction (DOC) and at the State Police Department, where she worked in compensation and classification. Her experience with classifications at the State Police involved responding to requests for

reclassifications and issuing decisions thereon. When an employee appeals an agency's denial of reclassification, HRD reviews the employee's Interview Guide and any information that the employee and the agency want to submit. (Testimony of Holbrook)

90. On April 16, 2015, HRD conducted a hearing on the Appellant's reclassification appeal.

The hearing was conducted by Ms. Holbrook and Ms. Sarah Unsworth, Manager of Statewide Classification in the HRD Organizational Development Group. Also in attendance at the HRD hearing were the Appellant; DOI Deputy General Counsel Joyce; and Ms. Bratt, HRD Director at OCABR. (Testimony of Holbrook; Joint Ex. 19)

91. At the HRD hearing, Ms. Holbrook took notes on a blank form of the Interview Guide.

Regarding the section for "Basis of Appeal", Ms. Holbrook wrote,

Agency expert most expertise w/ producer licensing & [illegible] activities. Only one in division w/ does it. – Statewide licensing

Under the heading, "Job changes", Ms. Holbrook wrote,

Legislative liaison piece about 4 years ago – been doing the producer licensing since I came on[.]

Under "Specific Duties", Ms. Holbrook wrote,

- Producer licensing – when there is a legal matter/issue
- reviewing applications
- answer questions
- more than 80% of the time on producer licensing
- write up memo – send to SIU & then enforcement dept
- reports to Chris & Rob Whitney (General Counsel)
- also approve legal services plans.
- other 20% - Div. Legislative liaison – attend all hearings on insurance related matters (bills) & report back to deputy & GC
- I summarize bills & testimony & forward to interested parties.
- monitor progress of legislation bills.
- draft when requested for Division opinions on legislation. I have done in past. Specialist in pending legislation.
- draft legislation to amend existing regulation.
- regulatory drafting – sometimes from scratch. Changes to regulations.
- drafted administrative bulletins – posted on website.
- producer – business entities & individuals/insurance agents insurance

- License public license adjusters
- They submit contracts – I review contracts & approve them
- insurance advisors – review & advises on portfolio – they have to have a contract approved – we license them.
- life settlement broker – we license them.
- portable licensing insurance vendor – we license them – review that plan & application
- license banks & credit unions – work closely w/ DOB.
- do CORI background & checks on them
 - Or applicants w/ criminal history I talk it over w/ director.
 - Fillings are handled different – consent of comm of insurance to work in industry. 1033 process Committee to handle – 5 members
- work independently – if a policy question comes up I run it by Chris – to one of the legal (illegible) – make recommendation to commissioner
- draft documents, applications & licensing requirements for public
- receive a lot of external inquiries. /other attorneys/ (illegible) questions about licensing. Answer a lot of external inquiries.
- 2nd referrry (sic) appointments (reference panel) for example.
 - Drafting MOU b/w parties & appointee. I appoint them.
- 2% - public records requests – some. Fill in for Mindy [Merow Rubin, DOI Counsel II]

Under “Relationships with Others”, Ms. Holbrook wrote,

Division of Banks – licensing side

Secretary of States (sic) office – deal w/ attorneys there.

SCC – Sec. of state securities division

CORI –

Attorneys

Licensing dept.

Working group formed @ DOB – addressing changes to flood insurance over the past 6 – 8 months.

RMV – fleet owner can self insure

DOR – occasionally – questions on taxes.

Under “Problem Solving”, she wrote,

- problem w/ CORI’s

Under “Supervisory Responsibility, she wrote,

- provide guidance/direction to interns, & members of staff in producer licensing area. I don’t supervise them.

Under “Additional Information”, Ms. Holbrook wrote,

- Karen [Bratt] – no comment
- Chris [Deputy General Counsel Joyce] – related to insurer producers re: statutory regulation/implementation – he would review as well

- Ed [Appellant] – questions about producer licensing – often times colleagues will come to me for questions.
 - speak to public – on producer licensing questioner.
 - self insurance groups – employer who didn't want to buy insurance – they have to be approved. Ed is the attorney who works w/ this – we work w/ financial people as well. A lot of paperwork involved - reviewed – the DOI approves.
- (Joint Ex. 17)

92. On April 17, 2015, the day after the HRD hearing, the Appellant sent an email message to Ms. Unsworth at HRD, reiterating his statements about the producer licensing work he does and stating that nothing about his work involving producer licensees is “routine”.

(Joint Ex. 16)

93. By letter dated May 15, 2015, Ms. Holbrook wrote to the Appellant denying his appeal stating, in full,

The Human Resources Division received your formal request to appeal the classification of your position on February 13, 2015. 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 Thursday, April 16, 2015. 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.

(Joint Ex. 18)

94. On June 12, 2015, the Appellant appealed HRD's decision to the Commission.

(Joint Ex. 20; Administrative Notice)

95. The Appellant's work includes application of G.L. c. 175, §§ 62H – X (licensing insurance producers), G.L. c. 175, § 172 (licensing for public insurance adjusters), G.L. c.

175, § 177E (continuing education for licensed insurance producers), and G.L. c. 175, § 176D (unfair practices in insurance). His work with respect to banks and credit unions as insurance producers involves application of banking regulations 211 CMR 142 and 209 CMR 49. (Testimony of Appellant)

96. The Appellant is the “go to” attorney in the DOI Legal Unit for problematic applications. He spends a majority of his time on producer licensing. If the Appellant recommends denial of a license application, the Director of Producer Licensing at DOI may disagree and the matter may go “up the chain” for further consideration. However, the Appellant’s recommendation is usually accepted. A denial letter sent to a license applicant is sent by the Director of Producer Licensing, although the Appellant drafts such letters for the Director. If the applicant challenges the license denial, the matter is referred to one of the DOI enforcement Counsels; it is not further handled by the Appellant. The Appellant drafts regulations and legislation, as do most other DOI Counsels. However, other DOI Counsels do not draft regulations and legislation regarding licensing. There is no title “legislation liaison” in the DOI Legal Unit. (Testimony of Joyce)

97. The Appellant receives inquiries from the DOI Producer Licensing Unit regarding problematic license applications. For example, an applicant may have a criminal history. The Appellant may be authorized to check an applicant’s Massachusetts criminal record, though not the National Criminal Information Center (NCIC). If the Appellant believes that the application should be denied, he drafts the denial letter to send to the applicant, which letter is signed by the Director of DOI Producer Licensing Unit. (Testimony of Appellant; Appellant’s Exs. 2 and 3)

98. The DOI Producer Licensing Unit referred a number of online new/renewal producer license applications to the Appellant for legal review as follows: in 2012, 545 applications (out of a total of 29,038 applications); in 2013, 1,315 applications (out of a total of 44,668 applications); and in 2014, 2,154 applications (out of a total of 52,045 applications). The Producer Licensing Unit also referred a number of paper new/renewal producer license applications to the Appellant for legal review as follows: in 2012, 1,333 applications (total not provided); in 2013, 570 applications (total not provided); and 2014, 339 (total not provided). (Testimony of Appellant; Appellant's Exs. 2 and 3)
99. A redacted example of the form license application denial letters that the Appellant drafts for the Director of the Producer Licensing Unit to sign provides,

This letter is in response to your application for a non-resident individual insurance producer license which you submitted to the [DOI] via NIPR on (date redacted). You answered "No" to all background questions on the application.

After a review of your entire application, the [DOI] denies it pursuant to M.G.L. c. 175, § 162R. § 162R (a) (1) authorizes the Commissioner of Insurance to refuse to issue an insurance producer's license to an applicant who is found to have provided "incorrect, misleading, incomplete or materially untrue information in the license application ..." In addition, § 162R (a) (3) authorizes the commissioner of Insurance to refuse to issue an insurance producer's license to an applicant for "...attempting to obtain a license through misrepresentation or fraud..."

The Division's denial is based on a review of your entire application. Records from your resident state of (state redacted) indicate you were the subject of two enforcement actions; one on (date redacted) and the second on (date redacted), and you were fined (amount redacted) for each of these actions. These enforcement actions were not reported on your application, nor were they reported to NIPR's Document Warehouse.

Although your application has been denied for more than one reason, be advised that I would have denied your license application independently for each reason listed. Pursuant to M.G.L. c. 175, § 162R (b), you are entitled to a hearing on this matter. Should you wish to appeal this decision, you are required, pursuant to M.G.L. c. 175, § 162R (b) and 801 CMR 1.01(6), to file your request for a hearing, in writing, within thirty (30) days of this Notice of Action. Please use the enclosed form if you decide to appeal this decision.

(Respondent's Ex. 1)²¹

100. The Appellant has expertise in producer insurance licensing. (Testimony of Black and Joyce)
101. When the Appellant receives a license application for review from the Producer Licensing Unit, he may investigate issues that it raises or refer it to the DOI Special Investigations Unit. (Testimony of Appellant and Joyce)
102. The Appellant's contacts with other states' insurance agencies and the National Association of Insurance Commissioners (NAIC) involve inquiring if Massachusetts applicants have had professional difficulties in other states and obtaining background information about Massachusetts applicants. (Testimony of Appellant; Appellant's Ex. 5)
103. The Appellant's work on federal law involves mainly 18 U.S.C. 1033 and provisions of federal law related to federally chartered banks. Section 1033 addresses crimes by or affecting persons in the business of insurance whose activities affect interstate commerce. (Id.; <https://www.law.cornell.edu/uscode/text/18/1033>) The Appellant is a member and senior attorney of the DOI Section 1033 Committee. This five (5)-person committee has no chairperson. Its other members are the Director of DOI Producer Licensing, the DOI Director of Special Investigations, the Manager of DOI Financial Analysis, and a newer DOI attorney. In addition to reviewing the application and voting on the Committee, the Appellant usually drafts the recommendation of the

²¹ At or about the time of the Commission's hearing on the Appellant's reclassification appeal, HRD asked DOI to produce,

... examples of the initial letter from DOI (Diane Silverman Black, specifically) denying producer licensees that have then been appealed. If it is possible to get a handful of those scanned to me so we can get an idea of what that type of letter looks like, I would appreciate it

(Respondent's Ex. 1)

In response, HRD received three (3) examples from September and October of 2014 and signed by Ms. Silverman Black. The three (3) examples use the format quoted herein.

committee, which recommendation is sent to the Commissioner for his decision, without prior review of the DOI General Counsel or Deputy General Counsel. The Appellant does not otherwise have that much involvement with federal law because insurance is mostly a state product. (Testimony of Appellant and Joyce; Appellant’s Ex. 5)

104. With regard to the Appellant’s contact with other Massachusetts state agencies, the Appellant contacts the RMV, for example, when an applicant is looking for a waiver related to automobile insurance, which does not occur very often. The Appellant contacts the state Department of Revenue to inquire whether a tax applies to surplus or excess lines of insurance.²² The Appellant interacts with the office of the Secretary of the Commonwealth, for example, when he needs to check if that office has received an application for an independent adjuster whom DOI has not licensed. More often than not, the Appellant is in contact with the office of the Secretary of the Commonwealth in order to obtain information. (Testimony of Appellant)

105. The Appellant is the only DOI attorney who appoints a third referee to address insurance disputes in certain scenarios. For example, when an insured and the insurer cannot agree on the amount of a loss, the parties each select a referee and the Appellant appoints a third referee to resolve the dispute. The Appellant makes approximately five (5) or six (6) referee appointments per year. The referee appointment process involves the issuance by DOI of an RFR for referees. At the time of the Commission hearing, there were six (6) referees in the referee pool. The Appellant selects a third referee and

²² I take Administrative Notice that “Surplus or excess lines of insurance” is defined by the National Conference of State Legislatures as, “insurance coverage that is not available from insurers licensed in the state, called admitted companies, and must be purchased from a non-admitted carrier. A consumer may need to purchase surplus lines insurance if the consumer needs more unique insurance than what is available from admitted insurers for property and casualty coverages such as commercial general liability insurance, fire insurance, mobile home policies, automobile physical damage coverage, and medical malpractice insurance.” <http://www.ncsl.org/research/financial-services-and-commerce/surplus-lines-insurance-2011-legislation.aspx> (January 11, 2017).

drafts a memorandum of understanding that he and the selected third referee sign in order to engage the third referee. (Testimony of Appellant) The third referees are involved in a process similar to arbitration, in which the Appellant is not involved. (Testimony of Appellant and Joyce)

106. In further detail, the Appellant offered written testimony, pertinent part, as follows:

... much of my work ... involves researching and responding to legal issues concerning the [DOI] licensees. Such queries include, ...unlawful inducements, rebating, paying referral fees; charging additional fees, website advertising, record retention; agent termination, agent appointment, privacy protection; surplus lines licensing, surplus lines taxes, contests, giveaways and raffles; charitable donations, bank/credit union licensing, continuing education requirements; line of authority questions ...

... I review for approval all anti-fraud plans statutorily required to be submitted by individual and business entity applicants for licensing as life settlement brokers. I work independently to approve or disapprove a submitted contract/antifraud plan.

... I review applications submitted by banks, credit unions and mortgage lenders seeking licensure to sell insurance products. For state-chartered institutions, I coordinate with the legal staff in the Division of Banks (“DOB”) which reviews the applicant from a ‘safety and soundness’ perspective. The DOB and DOI each have a regulatory role in the licensing ... and the two agencies share regulatory oversight of the insurance operations of banks and credit union licensees. For federally-chartered institutions, I review the entire license application and make the determination of whether to recommend that the institution be issued a producer license...

(Appellant’s Ex. 5)

107. The Appellant also works on other insurance matters. For example, the Appellant reviews contracts used by public insurance adjusters to ensure that the contracts include a right of the consumer to rescind a contract with a public adjuster. With regard to flood insurance, a year prior to the Commission’s hearing in this case, the Appellant was asked by the DOI General Counsel to participate in a group with employees of the Division of

Banks to develop regulations to ensure that mortgage lenders do not impose flood insurance requirements beyond the limitations of the applicable Massachusetts statute. The Appellant also sometimes responds to questions regarding legal services insurance plans and reviews such plans as required; he is the “go to” person in the DOI Legal Unit in this regard.²³ In the year prior to the Commission’s hearing, the Appellant assessed four (4) or five (5) legal services plans. Similarly, within the previous year or so, the Appellant was asked to be involved in matters related to G.L. c. 175, § 212, *et seq.*, which statute bars fraud in life settlement contracts involving, for example, those who are gravely ill; the Appellant has handled in the tens of numbers of such matters. The Appellant also reviews complicated assumption agreements between self-insurance groups (SIGs) and an insurer and merger agreements between two (2) SIGs, recommending to the Commissioner whether to approve them. He is the “go to” person on SIGs in the DOI Legal Unit. In the previous year, the Appellant reviewed two (2) or three (3) such matters. In the past year, the Appellant was also involved in the drafting of changes to the regulation regarding SIGs (211 CMR 67). Further, in the past year the Appellant has written two (2) or three (3) bulletins regarding various insurance matters. (Testimony of Appellant and Joyce; Appellant’s Ex. 5)

Comparison of Counsel III Spec to Appellant’s Record

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

Counsel III Spec: “Distinguishing Characteristics:

²³ I take Administrative Notice that 211 CMR 90 defines a legal services plan as, “... a risk-spreading program under which the cost of legal services is not allocated individually to those who actually use the services but instead is pooled and distributed among all those who potentially can use the services. The term does not include the provision of legal services incidental to other insurance coverages, such as the defense of lawsuits provided under automobile liability insurance, nor the arrangements specifically excluded by M.G.L. c. 176H, § 7. There are three types of legal services plans: insured indemnity; insured service; and membership. The characteristics of each are described in M.G.L. c. 176H.” (*Id.*)

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.”
(Joint Ex. 4)

The Appellant’s performance does not comport with the Counsel III Distinguishing Characteristics. He possesses expertise in the application of laws related to producer licensing. However, in the field of producer licensing, the Appellant:

- is the “go to” person when questions arise about producer insurance licensing applications and renewals, which is an important function of DOI bringing considerable revenue to the state. Typically, of the approximately 100,000 license applications DOI processes each year, he may be asked to review about 800 to 1000 of them where questions arise. He spends more than a minimal amount of his time on producer insurance licensing matters but, generally speaking, his work in this area does not involve particularly complex matters that require the level of legal experience and specialized expertise expected of a Counsel III;
- the DOI Producer Licensing Unit, which has no attorneys, processes most licensing and renewal applications but refers any problematic license applications or renewals it receives to the Appellant for legal review;
- either investigates problematic license applications or refers them to the DOI Special Investigations Unit;
- reviews problematic license applications, researches issues presented by the problematic license applications and drafts letters of denial according to the format referenced herein, which letters are signed by the Director of DOI Producer Licensing, not the Appellant;
- does not handle cases in which the applicant appeals the denial as such matters are referred to one of the DOI enforcement Counsels;
- is a member of the DOI Section 1033 Committee, which infrequently reviews insurance producer applications in which a question of fraud may be involved; he is the senior attorney on the Committee; in addition to reviewing such applications and voting on them as a member of this Committee, the Appellant usually drafts the Committee’s recommendation to the Commissioner about whether the pertinent license application should be approved;
- drafts legislation, regulations, bulletins and forms relating to his area of expertise, as do other DOI attorneys, but he also monitors other insurance legislation, attending pertinent legislative hearings, summarizes pending legislation and

informing DOI managers of legislative matters. He is not the “legislative liaison” as there is no such title in the DOI Legal Unit;

- works with the Division of Banks, with which DOI shares regulatory oversight with regard to licensing of insurance operations of banks and credit unions;
- reviews contracts used by public insurance adjusters to ensure that contracts include a right of the consumer to rescind a contract with a public adjuster; researches and responds to legal questions concerning insurance producer licenses, such as unlawful inducements, contests, charging added fees, and surplus lines of insurance licensing;
- does not handle company producer license applications, which are addressed by a Financial Receivership Counsel II at DOI to address the agency’s primary concern that insurance producers are financially sound to ensure that they are able to pay appropriate claims; and
- responds to consumer and industry inquiries regarding his area of expertise, as do other DOI attorneys in their areas of expertise, providing the DOI position in response to such inquiries.

(Joint Exs. 1, 3 – 8, 11, 13, 14, 16 – 18, and 24; Appellant’s Exs. 2 and 3; Respondent’s Ex. 1; Testimony of Appellant, Joyce, and Black)

The Appellant also has knowledge of some other areas of law within the Division of Insurance, including public records law; legal services plans, for which he is the “go to” Counsel at DOI; self-insurance groups (SIGs), including complex assumption and merger agreements, for which the Appellant is the “go to” Counsel at DOI; and he appoints third referees to address certain insurance disputes. However, the Appellant spends between 2% and 5% of his time on each of these areas. (Id.) These additional areas do not constitute “general knowledge of other areas or broad knowledge of multiple areas” under the Counsel III Distinguishing Characteristics. (Administrative Notice)

109. 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.

(Joint Ex. 4)(emphasis added)

Deputy General Counsel Joyce supervises the Appellant and provides the Appellant with policy direction, assigns his work and reviews the Appellant's performance in his EPRS reports. There is no indication that the Appellant received supervision from legal executive and executive personnel in other agencies in 2014 as authorized, but not required, by the Counsel III and neither authorized nor required in the Counsel II Spec.

(Joint Ex. 6; Testimony of Joyce)

110. 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.

(Joint Ex. 4)(emphasis added)

The Appellant does not provide direct supervision, as authorized, but not required, functions under the Counsel III Spec regarding Supervision Exercised. The Appellant provides functional direction, in the form of guidance and instruction, to others, such as the DOI Legal Unit support staff, legal interns, the non-attorney staff of the Producer Licensing Unit, and those responsible for gathering documents for public records requests. However, he does not delegate tasks and participate in the training and mentoring of new employees. (Joint Exs. 8 and 11)

111. 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.

(Joint Ex. 4)

The Appellant performs only some of the Counsel III Additional Functions. Counsel IIIs “may” perform “Additional Functions” regarding their area of expertise. The Appellant has expertise in insurance producer licensing, providing specialized expertise therein to internal clients and management and only some external sources. Internal clients include the Commissioner, General Counsel, Deputy General Counsel, and the

following DOI Units: Policy Form Review, Financial Surveillance and Insurance Company Licensing, the Director and staff of Insurance Producer Licensing, Director of Special Investigations, the Deputy Commissioner of Financial Market Regulations and staff, the Director of Market Conduct, Financial Surveillance and Company Licensing, Surplus Lines Audit, and Consumer Services. External clients include the Legislature (including the Joint Committee on Financial Services), the legal staff of the Division of Banks, and insurance representatives and consumers with inquiries. In addition, the Appellant provides specialized advice, insight, and recommendations on insurance producer licensing to assist DOI management decision making and ensure compliance with applicable state laws and regulations by analyzing proposed legislation (with any written comments to be submitted to the Legislature being approved by the DOI Commissioner) and drafting appropriate legal documents to so advise and/or recommend action thereon. However, the Appellant does not possess the level of expertise in a core function of the type of complexity of legal work that distinguishes the Counsel III expert in the field from the less complex legal work performed at the Counsel I and Counsel II levels.

The Appellant educates and effectively communicates the interpretation of insurance producer licensing to internal clients to enhance knowledge and to enforce or promote the consistent administration of laws by keeping them informed of related issues and his communications with the pertinent insurers, the insurers' counsel or consumers, and/or the effects of existing insurance law on the industry or consumers. The Appellant also educates and communicates the interpretation of insurance producer licensing to external clients by responding directly to the inquiries of insurers and consumers, thereby

enforcing and/or promoting the consistent administration of insurance producer licensing law.

The Appellant investigates some of the facts relating to insurance producer licensing applications that he reviews and obtains information to assess the accuracy of the applicants' positions, researching and analyzing applicable policies, rules, regulations, law and state caselaw to ensure enforcement of state insurance law. He also refers some applications to the Special Investigations Unit. However, the Appellant's actions in these regards are not taken "for representation" of DOI in litigation and are not taken, most of the time, in view of federal law since insurance producer licensing is primarily a function of state law.

The Appellant collaborates and confers with colleagues within DOI 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, attends hearings regarding legislation to represent DOI and drafts and implements policies and bulletins and other written material for adherence to new legislation. (Joint Exs. 1, 3 – 8, 11, 13, 14, 16 – 18, and 24; Appellant's Exs. 2 and 3; Respondent's Ex. 1; Testimony of Appellant, Joyce, and Black)

112. 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.
- 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.”
- (Joint Ex. 4)

In 2014, the Appellant did not perform most of the Additional Key Accountabilities that are authorized but not required, performing three (3) of the seven (7) Additional Key Accountabilities. Specifically, there is no indication that the Appellant recommended whether to settle, prosecute or defend cases; actually worked with the Office of the Attorney General to implement litigation strategy; implemented litigation strategy in court cases independently; recommended resources and budgetary requirements to accomplish objections; or led and provided direct supervision to others in 2014. The Appellant formed legal opinions based on research, analysis and interpretation and addressed policy questions as the authoritative representative regarding insurance producer licensing. The Appellant issues legal opinions based on legal interpretation of statutes, policies, regulations and court decisions. The Appellant develops and recommends official forms for approval. (Joint Exs. 1, 3 – 8, 11, 13, 14, 16 – 18, and 24; Appellant’s Exs. 2 and 3; Respondent’s Ex. 1; Testimony of Appellant, Joyce, and Black)

113. 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 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 other states’

agencies, all of which appear to qualify broadly as public officials. There is no indication that the Appellant has direct contact with court personnel. The Appellant has contacts with DOR, the RMV, the Secretary of the Commonwealth's office, the NAIC (a private organization, not a governmental office) and some other states' insurance agencies. However, in most cases the Appellant has "consulted and developed relationships with attorneys and other resources" (Joint Ex. 13); it does not appear that they "consult" him. There is no indication in the record to indicate that the Appellant has direct contact local municipalities. As insurance is largely a state-regulated industry, municipalities do not appear to play a role in insurance regulation.²⁴ (Joint Exs. 1, 3 – 8, 11, 13, 14, 16 – 18, and 24; Appellant's Exs. 2 and 3; Respondent's Ex. 1; Testimony of Appellant, Joyce, and Black)

114. The Counsel III Spec regarding Knowledge, Education and Experience provides that applicants must have at least six years of 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. ... (Joint Ex. 4)

The Appellant satisfies the general tenure requirement. There is no indication in the record to indicate that the Appellant has three (3) years of supervisory experience and if his assignment as a Counsel III would include supervisory responsibilities. (Joint Exs. 1, 3 – 8, 11, 13, 14, 16 – 18, and 24)

115. The Counsel III Spec also provides that, [i]ncumbents are required to have the following at the time of hire:

²⁴ DOI may not be in contact with municipalities on a regular, operational basis but it may be in contact with municipalities after a natural disaster, such as coastal flooding and the tornados that struck western Massachusetts a couple of years ago to assist consumers with insurance claims.

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.

(Joint Ex. 4)(emphasis in original) ...

At the time that he applied for reclassification, the Appellant met some of these requirements. He was the “go to” person at DOI on insurance producer licensing with extensive knowledge of the applicable laws, he had knowledge of the methods and ability to conduct complex legal research, and the ability to address complicated legal issues. However, the record does not indicate that the Appellant has knowledge of advocacy techniques and strategies. (Joint Exs. 1, 3 – 8, 11, 13, 14, 16 – 18, and 24)

Applicable Law

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 9.²⁵ There is no caselaw from the Supreme Judicial Court, nor of the Appeals Court, of which I am aware that addresses this point regarding an individual’s request for reclassification.²⁶

²⁵ 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.

²⁶ 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

The Parties' Arguments

The Appellant avers that he is the most expert and experienced attorney on insurance producer licensing, and that it is unrefuted that he spends most of his time working on insurance producer licensing, such that his reclassification to Counsel III is warranted. Licensing is a primary function of DOI, the agency receives more than 100,000 insurance producer license applications annually, generating millions of dollars in revenue for the Commonwealth, he argues. Further, the Appellant states that the Respondents failed to describe how they determine whether an attorney is the most expert and experienced attorney, with Respondents' witnesses stating that reclassification is an art, not a science. The Appellant asserts that the Respondent's assessments of his reclassification request involved quantifying the number of laws and regulations he works on and merely counting the number of functions and duties he performs without assessing his expertise.

The Appellant also argues that the Respondents' analyses of his reclassification request adds terms to the Counsel III Spec that are not there. For example, the Appellant states that the Respondents are, in effect, requiring a Counsel III to prove that he or she represents the agency throughout the state or performs a function that no other Counsel is performing. The Respondents' argument that an agency must establish a "need" for a Counsel III position, he asserts, is also not in the Counsel III Spec. In addition, the Appellant argues that Counsel III applicants need only perform the same functions and duties of a Counsel II but with greater

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.

expertise and experience. The Appellant also alleges that he performs most of the Additional Functions under the Counsel III Spec and has the required expertise.

The Appellant argues that he is not seeking reclassification based on “mere longevity.” (Appellant’s Post-Hearing Brief). Rather, he avers, he has proved that he is capable of performing the functions of a Counsel I and II and the only remaining question is whether he has the required level of expertise and experience. Since the Respondents failed to assess his level of expertise and experience, the Appellant states, the Respondents erroneously denied his reclassification request. However, he asserts, the Counsel III Spec does not include any requirements over and above the function of a Counsel II. What the Spec does, instead, he argues, is to establish a “qualitative standard” based on expertise and experience but which the Respondents failed to apply. Further, the Appellant states, the Respondents did not know how DOI managers assessed his expertise. In fact, he alleges, there was no evidence that DOI managers were asked how they defined “expert”. The Appellant states that his witnesses established that he possesses the requisite level of expertise and experience. In addition, he asserts, he provided documentation of his expertise and experience in the form of his 2014 EPRS “exceeds” performance ratings, by his immediate supervisor, and the 2014 Governor’s Citation Award for individual effort that he received.

The evidence proves, the Appellant avers further, that he is also the “go to” person for a number of other legal matters in addition to insurance producer licensing. This includes review matters related to self-insurance groups and legal services plans, making third referee appointments, being the legislative liaison, and working on the Section 1033 Committee. The Appellant argues that, in view of his expertise in these additional areas and that the Counsel series is intended to provide a career ladder, his reclassification to Counsel III is warranted. In

conclusion, the Appellant argues that he has established, by a preponderance of the evidence, that he meets the requirements of the Counsel III Spec and the Respondents have failed to provide any evidence that he does not meet the Spec standards.

The Respondents argue that the Appellant failed to establish by a preponderance of the evidence that he satisfies the requirements of the Counsel III Spec. Specifically, HRD found that the Appellant does not possess the level of expertise required for a Counsel III classification. Rather, the Respondents assert that the Appellant is an experienced attorney who works in a specialized area of the law, works independently and is a valuable Counsel II. Thus, although he asserts that he spends 80% of his time in an area of expertise, the Respondents aver that he does not qualify for reclassification. In fact, the Respondents suggest, the only reason the Appellant is referred to as the “go to” person for producer licensing is that he is the only DOI Counsel assigned to this focus. They allege further that the Appellant asserted that he was a producer licensing expert shortly after he was hired by DOI even though he had no prior experience on the topic. Also, the Respondents assert, although the Appellant may recommend approving or denying an applicant’s insurance producer license application, it is Ms. Silverman Black, as the Director of the DOI Insurance Producer Licensing Unit, who signs the denial letter and is the final authority on that topic (subject to the Commissioner’s determination) and she may overrule the Appellant’s recommendation. In addition, the Respondents argue that insurance producer licensing is not DOI’s main mission; rather the main mission “is to monitor the solvency of its licensees in order to promote a healthy, responsive and willing marketplace for consumers who purchase insurance products”, as reportedly testified by Deputy General Counsel Joyce and indicated on the DOI website. Id. While producer licensing is important, they say, it is not “a recognized area of law” and it does not serve the DOI solvency mission. The Respondents also

allege that the Appellant denies very few license applications each month, that the Appellant does not represent DOI if the denied licensee appeals because the matter is forwarded to DOI enforcement Counsel, and that the Appellant sometimes forwards the problematic license applications to the DOI Special Investigations Unit. The Respondents also assert that the Appellant failed to prove the need for his duties to be performed at the highest level of the Counsel series.

The Appellant had a number of opportunities at OCABR and HRD to provide information in support his request in the request for reclassification process to prove otherwise, the Respondents argue, and yet he failed to meet his burden. For example, the Respondents aver, although the Appellant submitted a rebuttal to the OCABR preliminary denial of his request and submitted other supplemental information, he did not provide writing samples of his work to help establish the level of his expertise.

The Respondents add that, in the reclassification process, they spoke with Union and Management representatives to ensure that they had an informed understanding of the intent of the Counsel III Spec. They also state that OCABR spoke with DOI managers to clarify each attorney's role and spoke to HRD for further clarification about implementation of the Counsel III Spec prior to ruling on the Appellant's reclassification request. From their inquiries, the Respondents argue that they determined that the Counsel III position was intended to serve as the agency expert or statewide expert in a particular area of law, as reflected in the Counsel III salary, which is four (4) salary grades higher than the Counsel II position, and Counsel IIIs are not eligible for overtime, callback or standby pay. The Respondents assert, "[t]his is the concrete evidence that indicates that incumbents serve in a special and unique role in the agency and can be distinguished from other attorneys who handle important work, but are employed to support

the general mission of the agency.” (Respondent’s Post-Hearing Brief). This reflects, the Respondents aver, that the Counsel series is cumulative but it is unique in requiring the level of expertise stated in the Spec. As a result, they state, not all of the employees in this series “will not necessarily reach its highest level.” *Id.* Therefore, the Respondents argue, “... producer licensing is not a main focus of DOI that garners the level of attention and creates the amount of work as health insurance does at the present time. *Id.* They add, “[s]ome areas of focus are by nature more complex than others. Health insurance, for example, is the most heavily regulated focus.” *Id.* By comparison, they allege, there are limited regulations for producer licensing.

The Appellant’s contacts with outside entities are further indication, the Respondents assert, that the Appellant does not possess the requisite expertise to be a Counsel III. The Appellant is in contact with DOR, the office of the Secretary of the Commonwealth, the RMV, and other states’ insurance agencies but it is to obtain information, not to provide it, although the Appellant provides advice to the Division of Banks concerning DOI’s position because DOI and the Division of Banks co-regulate insurance produced by banks and credit unions. By comparison, the DOI Counsel III’s opinion and expertise are regularly sought in her area of expertise by the Governor’s Office of Chief Legal Counsel, the Health Policy Commission (an independent agency), the Center for Health Information and Analysis (an independent agency), and the Executive Office of Health and Human Services, in addition to various DOI Units. In addition, the Health Counsel III had experience in health insurance prior to working at DOI.

Analysis

As noted in the Summary at the beginning of this decision, the Commission has established a three-prong test to distinguish the job performed by a Counsel III: (a) the Counsel III must have the “Knowledge Education and Experience” as well as the additional requirements

described for a Counsel III in the section of the specification entitled “Incumbents are required to have the following at the time of hire”; (b) a Counsel III must have the “distinguishing characteristic” as the most expert and experienced attorney in the agency in a specific area of expertise essential to a core mission of the agency; and (c) the Counsel III must perform, in the aggregate, at least a majority of the time, duties listed in the Counsel III Specifications under “Supervision Exercised”, “Additional Functions Performed”, “Additional Key Accountabilities” and “Relationships with Others”, with the “Supervision Received” by a Counsel III. In applying the “distinguishing characteristic” criterion, the Commission will consider the significance of the area of expertise to the core mission of the agency and the degree of specialization involved. The Appellant has not passed the three-prong test.

Although a preponderance of the evidence establishes that the Appellant spends the vast majority of his time working on insurance producer licensing, the Appellant did not establish that he is the expert in insurance producer licensing; rather, he has expertise in that field. In addition, generally speaking, his work in this area does not involve particularly complex matters that require the level of legal experience and specialized expertise expected of a Counsel III. Further, the Appellant has not established that he performs a majority of the functions and or duties of a Counsel III. The Appellant established that he worked in other areas, such as SIGs, legal service plans, and the Section 1033 Committee, at least some of which directly involve licensing, but his experience with each of them in 2014 was de minimus. As a result, the Appellant did not establish that he also has “general knowledge of other areas or broad knowledge of multiple areas” pursuant to the Counsel III Spec. I reach the conclusion in this case based on 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]t 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 Joint Ex. 4 (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. Therefore, Counsel III candidates are not required to prove that they apply their expertise a majority of the time.

The varied references to an “expert” in the Counsel III Spec require 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 (sic) with more legal experience and have greater expertise in a specialized area of the law.

Joint Ex. 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 the expert in a generally more complex area of law.

The Spec refers to “statewide or agency expert” in the Distinguishing Characteristics part of the Counsel III Spec.²⁷ 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 the experts either in their agency or statewide.

The next part of the analysis requires interpreting the field of law in which a Counsel III candidate must be the 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 multiple areas.” Joint Ex. 4 (emphasis added).²⁸ Clearly, this is not an exclusive and complete list of the fields of law to which the Counsel III Spec applies. The term “e.g.” is an abbreviation

²⁷ 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.

²⁸ 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. Joint Ex. 4 (emphasis added).

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 examples of the type of law in which a successful candidate must be the expert. In view of 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 the expert in the law of their agency. Rather, candidates must establish their expertise in a specialty within the core mission of their agency or department.

Distinguishing Characteristics

With the terms of this section of the Counsel III Spec defined above, Counsel IIs seeking reclassification must prove that they are the experts in more complex and specialized fields of law than typically handled at the Counsel I or Counsel II level in order to be reclassified. The Counsel III Spec indicates that administrative, family, finance, labor and employment, litigation and are examples of complex, substantive areas of law in which a Counsel III must be the expert. Health insurance was recognized by DOI as a recognized, complex substantive area of law under the Counsel III Distinguishing Characteristics when it reclassified the health insurance attorney. The Commission recognized auto insurance as a recognized, complex substantive area of law in Thompson v. DOI and HRD, C-14-287 and life insurance and annuities and long-term care insurance in Merow Rubin v. DOI and HRD, C-14-294. In addition, to qualify for reclassification to Counsel III, the area of law in which a Counsel is the most expert and experienced attorney must be one that is unique to the agency. Merow Rubin v. DOI and HRD, C-14-297.

The Appellant established that he has expertise in the field of insurance producer licensing, which is unique to DOI. The Appellant also established that he spends 80% of his time working on insurance producer licensing, primarily, in reviewing, investigating, and referring for further analysis by others a small proportion of the annual application DOI receives. The Commission agrees with the DOI, however, that Appellant did not establish that this type of legal work performed by the Appellant, represents the level of complexity that meets the test of “greater experience” and “greater expertise” in a specialized field of law as defined as part of the Distinguishing Characteristics for the Counsel III level, and what distinguishes the Counsel III from the level of experience and expertise that is expected of a Counsel I or Counsel II.

The Distinguishing Characteristics of a Counsel III also requires that the applicant have “general knowledge of other areas or broad knowledge of multiple areas.” (Ex. 4) The Appellant monitors insurance legislation (including producer licensing legislation), attends legislative hearings, and drafts comments on legislation. He previously worked on legislation in the State House Joint Committee on Insurance and or Financial Services and its predecessor, as well as the private sector. As a result, the Appellant has expertise in legislation. He also wrote that he drafts legislation and regulations, responds to legal inquiries apparently mostly related to producer licensing, makes third referee appointments, responds to public records requests and addresses issues regarding self-insurance groups (SIGs, as noted above). However, the Appellant wrote that he spends between 2% and 5% of his time on each of the latter narrow areas of law. Other attorneys in the DOI Legal Unit also work on legislation and regulations and respond to legal inquiries mostly in their own fields. *See* Thompson v. DOI and HRD, C-14-287 and Merow Rubin v. DOI and HRD, C-14-294. Thus, while the Appellant appears to have been the “go to”, or the only person at the DOI Legal Unit who worked on the narrow additional areas

of law he mentions, he worked on them in 2014 for limited amounts of time and this work does not establish the Appellant's general knowledge of other areas or broad knowledge of multiple areas of law so as to warrant reclassification.

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, guidance and review.” Joint Ex. 4. 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 provide direct supervision as a second level supervisor or functional supervision through “guidance, instruction and delegation of tasks to interns, professionals or other personnel.” (Ex. 4) In comparison, a Counsel II may be a first level supervisor. The Appellant's Form 30 states that he has the direct report of Counsel Is “as directed by General Counsel and Deputy General Counsel.” As noted above, there is no indication that the Appellant was directly supervising a Counsel I when he applied for reclassification. The Appellant functionally supervised staff in the Insurance Producer Licensing Unit, and, on occasion, to staff responding to public records requests and to interns by providing

guidance and or instruction in 2014. However, there is no indication that he delegated tasks to interns, professionals or other personnel.

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 ... [;]” and “... draft and implement internal and external policies and procedures, forms, notices and other written material....” Joint Ex. 4. The Appellant established that he has expertise in insurance producer licensing, which is not generally a more complex area of law under the Counsel III Spec. As such, the Appellant advises DOI managers and colleagues to assist them in decision making, as well as insurance producers and consumers; he provides interpretation of insurance producer licensing laws and policies to communicate DOI’s position internally and to some in the insurance industry; he confers with colleagues to gather their input for decisions and to determine the agency’s position on insurance producer licensing; he drafts and reviews

legislation and makes recommendations on legislation and attended legislative hearings; and he drafts regulations and other written material regarding insurance producer licensing. He does not negotiate court documents, or negotiate with opposing parties to reach a quick resolution and avoid litigation.

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 ...”. Joint Ex. 4 (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 does not perform a majority of the Additional Key Accountabilities, performing only three (3) of the seven (7) Accountabilities. There is no indication that the Appellant recommended whether to settle, prosecute or defend cases. The Appellant was authorized to work with the Office of the Attorney General to implement litigation strategy but there is no indication that he does so or that he implemented litigation strategy in court cases independently as permitted but not required. The Appellant does not recommend resources and budgetary requirements to accomplish objectives but there is no

indication that either function is applicable to the DOI Legal Unit. The Appellant does not lead and provide direct supervision to others.

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.” Joint Ex. 4. The Counsel II Spec includes “additional external contacts, including stakeholders.” Id. The Counsel III 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 term “public officials” is undefined but the evidence shows that the Appellant is in contact with other state agencies and the Legislature. However, there is no indication that the Appellant has direct contact with court officials. The Appellant has contacts with DOR, the RMV, the Secretary of the Commonwealth’s office, the NAIC and some other states’ insurance agencies. However, in most cases the Appellant has “consulted and developed relationships with attorneys and other resources”; it does not appear that they “consult” him in general or with regard to his expertise. (Joint Exs. 8 and 13) As an employee of the state agency that regulates insurance, the Appellant does not appear to have contact with municipalities.

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

Ex. 4. The Appellant has the requisite insurance experience, having worked at DOI for approximately ten (10) years and in the Legislative Committee with insurance jurisdiction and in the private sector. The Appellant does not supervise anyone at the DOI but it is unknown if the Appellant's position as a Counsel III were to include an appropriate assignment and supervisory responsibilities. The Appellant also has a Master of Laws degree, which is not required by the Counsel III Spec.

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." Joint Ex. 4. At the time that he applied for reclassification, the Appellant met only some of these requirements. He had knowledge of the methods and ability to conduct complex legal research, and the ability to address complicated legal issues, albeit not in an area of the law that qualifies under the Distinguishing Characteristics section of the Counsel III Spec. There is insufficient evidence to establish that the Appellant had knowledge of advocacy techniques and strategies. He had limited knowledge of federal law but insurance is mostly a function of state law.

The issue before the Commission in this case is whether the Appellant should be reclassified from a Counsel II to a Counsel III and that determination has been made based on the Counsel III Spec and the other evidence herein. This decision should not be read to derogate

or in any way subtract from the Appellant's accomplishments as a Counsel II, as acknowledged in his high 2014 EPRS ratings and the Governor's award he received in 2014.

Conclusion

For all of the above stated reasons, the appeal of Mr. Phelan, under Docket No. C-15-118 is *denied*.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Tivnan, and Stein) on February 2, 2017.

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:

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