

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

SHAUNA E. TANNENBAUM,
Appellant

v.

C-15-195

DEPARTMENT OF REVENUE
and
HUMAN RESOURCES DIVISION,
Respondents

Appearance for Appellant:

Kelly A. Hoffman, Esq.
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Appearance for Department of Revenue:

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Appearance for Human Resources Division:

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Commissioner:

Cynthia A. Ittleman

DECISION

Shauna E. Tannenbaum (Ms. Tannenbaum or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on October 16, 2015 under G.L. c. 30, § 49 challenging the decision of the state’s Human Resources Division (HRD) and the Department of Revenue (DOR or Appointing Authority) to deny her request to be

reclassified from a Counsel I to a Counsel II. A prehearing conference was held in this regard on November 3, 2015 at the offices of the Commission. A hearing¹ was held on this appeal on January 15 and 20, 2016 at the Commission. At this hearing, the witnesses, except the Appellant, were sequestered. This hearing was digitally recorded and the parties received a CD of the proceeding.² The parties submitted post-hearing briefs in the form of proposed decisions. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Based on the forty-eight (48) Exhibits³, including those admitted into evidence at the hearing and those submitted after the hearing after my request at the hearing and the testimony of:

Called by the DOR:

- Maureen Ford, Acting Associate Deputy Commissioner of Child Support Enforcement and Regional Director of the South Regional Office, DOR
- Joshua Fishbein, Counsel III, Child Support Enforcement (CSE) unit, Metro Regional Counsel/Region 1, DOR
- Sandra Antonucci, Program Coordinator III, (functional title: Classification Analyst), Human Resources Bureau (HRB), DOR

Called by HRD:

- Alexandra McInnis, Senior Personnel Analyst, Organizational Development

¹ The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with Chapter 31, or any Commission rules, taking precedence.

² 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.

³ The forty-eight (48) Exhibits are Exs. 1 – 25, 25A and 25B, Exs. 26 – 28, 39 – 48, 57-60, 60A, 60B, 61 and 62. Exhibits 25A and 25B are transcripts of the testimony of Bobbi Kaplan (Executive Vice President of NAGE, Local 207, Unit 6), Regina Caggiano (Deputy Director of the HRD Civil Service Unit and the Organizational Development Group) and Marianne Dill (Assistant Director of Office of Employee Relations, HRD, and lead negotiator for NAGE bargaining units 1, 3, and 6 and Unit 2 of AFSCME and SEIU) at a hearing on December 8, 2015 in Whitney Duvall-Paprocki v. DOR and HRD, C-15-190. The appellant in that case, as in the instant case, seeks reclassification from a Counsel I to a Counsel II title at the DOR Child Support Enforcement unit. A decision in Duvall-Paprocki is pending.

Group, HRD

Called by Appellant:

- Shauna E. Tannenbaum, Appellant

and taking administrative notice of all matters filed in the case, and pertinent statutes, regulations, case law and policies, and reasonable inferences from the evidence, a preponderance of evidence establishes the following findings of fact:

Introduction

1. The Appellant began employment at the DOR Child Support Enforcement [CSE] unit in 2002 as a Counsel I in Region 1. (Testimony of Appellant) The DOR Child Support Enforcement personnel function under Title IV-D of the federal Social Security Act of 1975. (Administrative Notice (DOR website)) Prior to her employment at DOR, the Appellant had practiced law in another state where she worked on workers compensation, domestic relations and personal injury law for approximately five (5) years. (Testimony of Appellant)
2. On October 15, 2013, the Appellant sent an email message to Ms. Montgomery-Gadbois requesting reclassification to Counsel II. (Ex. 11)

DOR/CSE Unit

3. Joshua Fishbein, Esq., is Regional Counsel for the DOR/CSE in Region 1. He began at DOR/CSE as a Counsel I some twenty (20) years prior to this appeal. When he was a Counsel II, Attorney Fishbein directly supervised the Appellant for years until he was appointed as a Counsel III in September 2015. There are sixteen (16) employees in Region 1, six (6) of whom are Counsels. There are two (2) Counsel IIs in Region 1 and four (4) Counsel Is (including the Appellant) in

Region 1. Five (5) attorneys from Region 1 handle child support enforcement (CSE) cases in Suffolk Probate and Family Court one day per week (block time), per agreement with the Trial Court. One (1) Counsel I works part-time and does not directly participate in block time. The five (5) participating attorneys bring, on average, a combined total of seventy (70) cases to the block time each week; approximately one-third of the cases are heard by a judge and most of the remaining cases are resolved by agreement. Attorney Fishbein has the authority to review the agreements. Counsel IIs have approximately seventeen (17) cases per week and Counsel Is have approximately fifteen (15) or sixteen (16). Eric Kirby, a Counsel II, currently directly supervises the Appellant. However, at block time, the Appellant consults Attorney Fishbein if she has questions because the Counsel IIs are working on their own cases and Attorney Fishbein does not. The Appellant consults Attorney Fishbein, for example, only when she has problems with uncooperative mothers and contempt orders. Attorney Kirby also consults Attorney Fishbein on occasion. It takes Region I attorneys approximately one (1) full day to prepare for block time each week. It takes approximately one (1) day per week to draft complaints in new cases. On other days of the week, Region I attorneys spend considerable time following up on court requests, drafting letters, making calls, and conducting discovery as needed. Attorney Fishbein only supervises the Appellant indirectly currently. (Testimony of Fishbein and Appellant)

4. The Appellant's unit does not operationally need another supervisor. There are no Counsel IIs in Region I who do not supervise. (Testimony of Fishbein)

5. The role of Counsel Is in Region I is to review cases, bring court actions to establish paternity, obtain support for children of unmarried parents, seek modification of child support orders and respond to operational groups within DOR. Counsel Is draft court complaints but some non-attorneys in Region I also draft complaints. Counsels I and II in the DOR/CSE use a variety of forms in routine cases. (Testimony of Fishbein; Exs. 20-22)
6. Cases are assigned to attorneys in Region I by alphabetical split, which ensures that all of the attorneys have the same number of cases. As a Counsel III, Attorney Fishbein is no longer assigned CSE cases. Attorney Fishbein assigns one (1) or two (2) non-routine cases per month to each Counsel. If he assigns a non-routine case to a Counsel I, he informs the supervising Counsel II.
(Testimony of Fishbein)
7. Non-routine cases may require different pleading forms, the filing of a memorandum of law or seeking reconsideration of a court order. Non-routine cases may or may not be addressed in court in block time, like routine cases. There are no law reporters of CSE case decisions so if Attorney Fishbein (as a Counsel I or II) had a case in which he needed a memorandum of law, he would contact the DOR/CSE Policies and Procedures unit to see if attorneys there had drafted one on the pertinent subject because CSE Region I attorneys do not usually draft legal memoranda, policies or procedures. (Testimony of Fishbein; Exs. 20-22) Attorneys in the CSE Policies and Procedures unit do not litigate child support cases like the attorneys in CSE Region I. (Testimony of Appellant)

8. New Counsel Is shadow other attorneys in the first month of their employment, at first handling one (1) or two (2) CSE cases. Thereafter, they start to handle cases on their own. The probationary period for new attorneys is six (6) months. When the Appellant began working as a Counsel I, she asked Attorney Fishbein questions about her cases more frequently. Attorney Fishbein does not recall how often the Appellant asks him questions about her cases now. (Testimony of Fishbein)
9. Attorney Fishbein gives Counsel Is, including the Appellant, feedback after observing them in court since Counsel IIs are busy handling their own cases in court. He also gives them feedback directly or through the Counsel I's direct supervisor concerning the number of cases each of them has, and how they are handling their caseload. He also observes and gives feedback to the CSE Counsel IIs. (Testimony of Fishbein)
10. The role of a Counsel II in Region I includes supervision of the Counsel Is. Supervision includes completing the Counsel I's EPRS, monitoring the Counsel I's time and attendance, mentoring, and discussing litigation strategy. Counsel IIs also supervise non-attorneys in Region I. (Testimony of Fishbein)
11. Cases that are not resolved in court in block time go to trial at another time. In the twenty-one (21) years that Attorney Fishbein has worked on CSE cases, he believes he has had approximately six (6) cases go to trial. He conducted a trial when he was a Counsel I, like the Appellant has. Limited formal discovery is conducted in CSE cases. (Testimony of Fishbein)

12. In one (1) case, the Appellant had a case in which the child's parents agreed that the child's father should not pay child support. Attorney Fishbein observed the Appellant in court and thought that child support should have been ordered because the child's father was about to finish high school and he thought it would send the wrong message to the father not to order him to pay child support. However, the Appellant exercised her discretion and decided not to obtain an order at that time because she knew that the child's father had learning difficulties (which Attorney Fishbein may have not known) and thought it would be better to give him time to graduate from high school and improve his earnings for child support in the long run. Attorney Fishbein did not withdraw the agreement. (Testimony of Appellant and Fishbein) It is unclear at what point in the Appellant's career that this took place. (Administrative Notice)
13. In another case, Attorney Fishbein observed the Appellant in block time leave the room to obtain a document when the presiding judge indicated that she or he could not read the mother's affidavit in support of the complaint for child support. The Appellant did not realize that the child's mother had the original affidavit with her and could explain it. Attorney Fishbein believed that the Appellant should have asked the court's permission to leave to obtain the file or ask to approach the bench to review a copy of the mother's affidavit. (Testimony of Fishbein) It is unclear at what point in the Appellant's career that this took place. (Administrative Notice)
14. In another case in block time, Attorney Fishbein believed that the Appellant should have requested an order to impound the child's mother's address because

the child's mother did not want her address in the child support order.

(Testimony of Fishbein) It is unclear at what point in the Appellant's career that this took place. (Administrative Notice)

15. In or about October 2015, about two (2) years after the Appellant requested reclassification, Attorney Fishbein reviewed five (5) of the Region I attorneys' case inventories and determined that the Appellant was scheduling thirteen (13) instead of fifteen (15) or sixteen (16) cases per week in court block time and she had a bigger case backlog than the four (4) other CSE attorneys, even though she was working later, because she was one of the people involved in a DOR/CSE computer system update. (*Infra*) During that time, the Appellant received assistance from an additional CSE court worker and a part-time Counsel I to process some of her cases. Attorney Fishbein had authorized the assistance but he was unaware of the full extent of the Appellant's work on the computer system update. The Appellant had discussed her involvement in the computer system update with Attorney Fishbein but he and the Appellant had different recollections about the discussion. The Appellant, Attorney Fishbein and Attorney Kirby clarified the amount of time the Appellant was to work on her cases and on the computer system update, as well as the available resources. The Appellant addressed her backlog. (Testimony of Appellant and Fishbein)

Counsel II Specification

16. Effective August 11, 2013, two (2) months before the Appellant applied for reclassification, HRD revised the previous Counsel Series issued in 1987. (Ex. 1) The revised Counsel Series (2013 Series) made certain revisions to the earlier

Counsel Series (1983 Series) in the Counsel I and Counsel II titles and added a Counsel III title. (Ex. 2) NAGE intended for the 2013 Series to create a “career path” for Counsels, meaning a mechanism for Counsels to move up in an agency. (Ex. 25A (Transcript of Testimony of Ms. Kaplan)) HRD told NAGE that it did not intend for the 2013 Series to provide that more experience and just meeting the Minimum Entrance Requirements in the Series requires reclassification. (Exs. 10 and 25B (Transcript of Testimony of Ms. Dill, Assistant Director of Employee Relations, HRD)⁴ The 2013 Counsel Series specifications for Counsels I, II and III are cumulative. (Ex. 25B (Transcript of Ms. Caggiano, Deputy Director of Organizational Development Group and the Civil Service Unit at HRD))

17. The differences between the 1987 Series and the 2013 Series include:

- a. The 2013 Series added “Distinguishing Characteristics” to each of the three (3) titles. To the Counsel I title, it added,

This is the **entry-level** professional classification in this series.⁵ Incumbents seek guidance and advice from more experienced colleagues and are focused on gaining the experience to perform more independently.” (Ex. 1)(emphasis added)

To the Counsel II title, the 2013 Series added the following “Distinguishing Characteristics”,
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, ... litigation) or general knowledge of other areas** or broad knowledge of multiple areas. While incumbents **may seek guidance** and advice

⁴ NAGE posted statements about the 2013 Counsel Series on its website with which HRD disagreed. In the end, HRD and NAGE agreed that the 2013 Counsel Series document speaks for itself. NAGE apparently made no changes in that regard to its website. (Ex. 25B (Transcript of Testimony of Ms. Dill))

⁵ The first sentence in the Distinguishing Characteristics also appeared in the 1987 Series; the 2013 Series added the second sentence.

from more senior colleagues **on complex issues and situations**, they have a 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.” (Ex. 1)(emphasis added)

- b. The 1987 Series section regarding “Supervision Exercised” for a Counsel II provided,
- “Incumbents of positions at this level exercise **direct supervision** (i.e., not through an intermediate supervisor), **over (sic) assign work to and review the performance of 1-5 professional personnel; and functional supervision** (i.e., over some or certain but not all work activities, or over some or all work activities on a temporary basis) **over 6 or more interns, students, professional (sic) or other personnel**.” (Ex. 2)(emphasis added)
- c. The 2013 Series provides that Counsel IIs “**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. ... [they] **may exercise direct supervision over, assign work to, and review the performance of interns, support staff or other personnel**. ... [they] may also participate in the interviewing process or may make recommendations for new hires.” (Ex. 2)(emphasis added)
- d. Although the 2013 Series Counsel II specification deleted the requirement in the 1987 Series that Counsel IIs exercise direct supervision to certain personnel and functional supervision over certain other personnel, it left in three (3) conflicting provisions in the section regarding the requirements candidates must meet at the time of hire:
1. “Ability to **lead** or work with cross-functional project **teams**.
 2. Ability to **manage** multiple projects and project **teams**.
 3. 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.”
(Ex. 1)

Further, the Additional Key Accountabilities provision in the 2013 Series Counsel II position also contradicts the change made eliminating the requirement to have direct supervision experience. Specifically, the

Additional Key Accountabilities state that **“[i]ncumbents at this level have the decision-making authority to: [a]llocate cases and assignments to supervisees most appropriately[]”** and **“[p]rioritize and manage personal assigned workloads and caseloads as well as the workloads and caseloads of direct reports.”**
(Id.)

18. A Memorandum of Understanding (MOU) concerning the 2013 Series was signed by HRD and NAGE on July 30, 2013, effective August 11, 2013. The MOU provides, *inter alia*, that the Counsel I remained a job grade 14, Counsel II remained a job grade 17 and the new Counsel III would be a job grade 21. (Ex. 9)
19. The 2013 Series provides that the Counsel I receives general supervision from employees of a higher grade who provide work assignments and review their performance. A Counsel II in the 2013 Series receives the same general supervision as a Counsel I but the higher grade employees also provide guidance. (Ex. 1)
20. Under the 2013 Series, Counsel Is may provide functional direction to students, interns and support staff. Counsel IIs may also exercise direct supervision over, assign work to and review the performance of interns, support staff or other personnel and may participate in interviews or make recommendations for hires. (Id.)
21. With respect to functions performed by the Counsel I and II in the 2013 Series, in addition to the functions of a Counsel I, a Counsel II may also “communicate with representatives of other agencies and collaborate with cross-functional or cross-agency teams”. (Ex. 1)
22. Under the 2013 Series, in addition to the Counsel I key accountabilities, a Counsel II “... may have the decision-making authority to: allocate cases and

- assignments to supervisees ...[,] prioritize and manage personal assigned workloads and caseloads as well as” those 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.)
23. Under the 2013 Series, in addition to the contacts of a Counsel I, a Counsel II has “key contacts and relationships” including “additional external contacts ...” (Ex. 1)
24. For Knowledge, Education and Experience, the Counsel II is required to have at least three (3) years of full-time professional experience as an attorney, whereas the Counsel I requires none under the 2013 Series. (Id.)
25. In addition to the requirements at the time of hire for a Counsel I under the 2013 Series, Counsel IIs are required to have the “[a]bility to lead or work with cross-functional project teams[,] [a]bility to manage multiple projects and project teams[,] [a]bility to exercise discretion in safeguarding information[,] [and a]bility to supervise, including planning and assigning work according to ... the job ...[,] the capabilities of subordinates, and available resources, controlling work through periodic reviews and/or evaluations, determining the need for and recommending disciplinary action.” (Ex. 1)

Appellant’s Request for Reclassification

26. On or about October 15, 2013, the Appellant spoke with Ms. Sandra Antonucci about her reclassification request. Sandra Antonucci is a Program Coordinator III at the DOR HRB. Ms. Antonucci was assigned to work with the Appellant regarding her request for reclassification. Ms. Antonucci’s functional title is

Classification Analyst. She has been involved in reclassifications for approximately fifteen (15) years. Ms. Antonucci's supervisor is Nancy McCone. (Testimony of Antonucci) Ms. Antonucci posed questions to the Appellant and wrote her responses in a Counsel Series Questionnaire. (Ex. 13)⁶

27. The Appellant's responses to the questions in the Questionnaire were similar to the information she provided subsequently in her Interview Guide form. (*See* below) In response to the Questionnaire, the Appellant added, in part,

“ [She] works in Child Support Enforcement with 6 other attorneys. She works alpha splits and mentions that both Counsels I and II work on the same lists. Counsel II employees do not work on anything more complex ... She has been performing these tasks for 11 years ... she turns in high quality work, and she carries a high volume caseload. .. She is in Chelsea once a week for Comets Project... “
(Ex. 13)(Comets is the Commonwealth of Massachusetts Enforcement Tracking System – Administrative Notice (DOR website)⁷

The Appellant volunteered to work on the COMETS update project (COMETS HD). (Testimony of Appellant and Fishbein) The DOR selected Subject Matter Experts (SME)(like the Appellant) from among the volunteers for the project “based on qualifications necessary to perform the required tasks associated with COMETS HD.” (Ex. 59)

28. An SME is a term that refers to agency employees who perform the functions at issue in the course of business to provide procedural context and functional information to the contractors engaged to update a computer system. (Testimony of Ford) Ms. Ford, Acting Associate Deputy Commissioner of Child Support

⁶ Since the Appellant did not complete a reclassification Interview Guide form and submit it to Ms. Antonucci until October 30, 2013, it appears that Ms. Antonucci may have asked the Appellant the questions on the Questionnaire on October 15, 2013, the date on the Questionnaire, which does not affect the outcome of this appeal.

⁷ COMETS is a twenty (20) year old platform that is being updated to COMETS HD, to handle child support enforcement cases with other agencies, track cases, assign work, and manage the cases in process. (Attorney Fishbein)

- Enforcement at the DOR, has worked at the DOR for more than two (2) decades. Ms. Ford was the business lead regarding COMETS HD at some point during the project and came in contact with the Appellant. Previously, Ms. Ford worked with the Appellant for some time in Region I. (Testimony of Ford)
29. The amount of time the Appellant spends on COMETS HD (the upgrade) can vary, depending upon the process involved at the time, although more recently there are periods of a couple of weeks or months where she is not attending COMETS HD meetings, although she may be responding to email messages or phone calls on the subject during that time. (Testimony of Appellant)
30. Asked why she feels she should be reclassified, the Appellant told Ms. Antonucci, in part, “There is no career ladder, so she feels she must take the initiative and request a reclassification. ...”. (Ex. 13)
31. Asked if she has a “specialized expertise in a specific area of law”, the Appellant answered, “Establishment.” (Ex. 13)(Later in the Questionnaire the Appellant added “Establishment, but specifically, child support.”)(Id.)
32. Asked with whom she interacts in other agencies on a regular basis, the Appellant answered that she “works extensively with computer companies regarding the Comets Project. She is also working with DTA [Department of Transitional Assistance], and other human service agencies on a regular basis.” (Id.) The Appellant also works with the Department of Children and Families (DCF). (Testimony of Appellant)
33. Asked if she “communicates with reps of other agencies, including [the] Legislature, and collaborate with cross-functional or cross-agency teams and

stakeholders,” the Appellant answered that she “works with [the Department of Children and Families], DTA on a regular basis. She does not have legislative contact” (Ex. 13)

34. The Questionnaire asked, “Do you present memoranda supporting or opposing legislation affecting agency operations”. The Appellant answered “N/A”. (Id.)
35. The Questionnaire asks, “Do you have decision-making authority to allocate cases and assignments to supervisees most appropriately” and the Appellant said that “[s]he has an intern in the Comets Program, and she has been giving work to another paralegal in CSE.” (Id.)
36. Asked if she has “the decision-making authority to prioritize and manage personal assigned workloads and caseloads as well as the workloads and caseloads of direct reports”, the Appellant answered “Yes” and that [s]he does this with interns and paralegals.” (Id.)
37. Asked if she has “the decision-making authority to issue recommendations for final decision or resolution of cases, and for some cases, to issue or agree to final resolution without further review”, the Appellant said “Yes.” (Id.)⁸
38. The Questionnaire does not ask if the Appellant has 1) the “[a]bility to manage multiple projects and project teams”; 2) the “[a]bility to exercise discretion in safeguarding information through compliance with rules of disclosure”; and 3) the “[a]bility 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,

⁸ Ms. Antonucci also wrote that the Appellant responded to a number of other questions on the bottom of page 1 of the Questionnaire and on pages 2 and 3 but those questions relate to the Counsel III title, not the Counsel II title. (Ex. 13) Therefore, the Appellant’s responses to those questions are not pertinent here.

determining the need for and recommending disciplinary action”, which are three (3) of the four (4) requirements for a Counsel II at the time of hire. (Exs. 12 and 13; Administrative Notice) However, the Appellant 1) manages multiple projects, working with other attorneys in the CSE unit, other agencies, court personnel and the computer company and others working on the COMETS HD project; 2) exercises discretion in safe guarding confidential information from disclosure; and 3) has functionally supervised and assigned work to CSE court workers and interns according to the job to be accomplished and their capabilities and reviewed their work. (Testimony of Appellant; Exs. 4, 5, 12 and 13)

39. In response to her reclassification request, the Appellant received an Interview Guide form (Form) to complete. On October 30, 2013, the Appellant completed this form and submitted it. (Ex. 12)

40. In the Form, the Appellant described the basic purpose of her position, stating, in part, that it is,

“ ... to represent the Massachusetts [DOR] Child Support Enforcement Division to establish paternity and child support orders, and to modify and enforce child support orders. ...”
(Ex. 12)

41. In the Form, the Appellant wrote, *inter alia*, the basis of her appeal:

“I do 90% of the work of a Counsel II ...
I handle complex cases skillfully, produce high quality work, handle a high volume caseload expeditiously, and serve as a[n SME] for the COMETS HD program. The only significant task I do not do as a Counsel I, that a Counsel II does, is direct supervision. ...
The [CSEU] attorneys, whether they are Counsel I or II, handle whatever kind of case falls within their alphabet split regardless of the complexity of the case. ...
I share my knowledge of state and federal laws, and CSE Policy and Procedures, to help design a new child support system that will automate workflow and scheduling. I also give presentations to CSE staff regarding

the progress of the COMETS HD program. I will be involved with this program until 2017.

No other attorney in the Metro region is part of the COMETS HD program. Of the three other attorneys state-wide who are [SME], two are Counsel IIs, and one is a Regional Counsel. I currently spend approximately 20% of my time as a[n] [SME] ...

While I am not the direct supervisor of my court worker, I supervise her in that I review her work, suggest revisions to the documents which she drafts for me, and help her work out strategies to get rid of caseload backlogs. Due to the additional workload I have taken on as a[n] [SME], I have two staff members assisting me at various times in addition to my court worker. While I am not their direct supervisor, I supervise them in the sense that I assign them work, review the work they do for me, meet with them concerning the revisions, and answer their questions. ...”
(Ex. 12)⁹

An entry level Counsel could not be an SME. (Testimony of Maureen Ford

(Acting Associate Deputy Commissioner of the Child Support Enforcement Unit, DOR))

42. Asked to describe in the Form her relationship with others, the Appellant wrote, in part,

“The person with whom I interact the most is my court worker. Her job title is Child Support Enforcement Specialist (C). I make sure that my court worker schedules sixteen cases each week in a timely manner, mails the appropriate trial packages, and prepares my cases so that I have all the information I need to get ready for trial... I work with other court workers at various times, for example, when they conference cases for me during court ...

I go to my supervisor, who is a Counsel II, when I have a legal or policy question, or when I have a case which can be handled several ways. I interact with Regional Counsel when I need assistance that only she can provide. For example, she assisted me in getting extra help from a court worker when I experienced time constraints due to my work as a [SME] in the COMETS HD program. I now have two people in the office assisting me. **While I am not their direct supervisor, I assign them work, review the work ... meet with (sic) concerning revisions ...** I interact with all the other attorneys in the office by discussing new case law and CSE policies, and how to handle cases with unusual fact patterns.

⁹ COMETS HD is an update of the DOR twenty (20)-year old platform new computer platform; it is supposed to handle CSE cases with contacts in other agencies, case-tracking, work assignments, and management of work in process. (Testimony of Fishbein)

I interact with other staff members in the Metro region as well, including providing guidance to establishment, enforcement, interstate, case initiation, and regional support staff. ...

As part of the COMETS HD program, I work with CSE staff from other offices ... My main focus is to suggest workflows for legal preparation and hearing preparation ...

Outside the agency, I interact with custodial and noncustodial parents, and their attorneys. I handle child support cases in court weekly, and handle a high volume of telephone calls regarding the litigation procedure. In court I interact with the judges, their judicial case managers, probation officers, and registry of probate staff.”

(Ex. 12)

43. Asked on the Form if there have been any significant job changes since she was appointed, the Appellant wrote, in part,

“In September 2012 I was selected to be an Establishment [SME] for the COMETS HD Program. As a[n SME], I attend meetings in Chelsea, participate in telephone conferences, and respond to emails. I have continued to perform my regular litigation duties. To ensure that all my work is done I have worked extra hours. I have had the assistance of a second court worker and a student intern to draft complaints for me and prepare my cases for data entry. ...”

(Ex. 12)

44. The Form also asks the candidates to list their duties and to indicate what percent of their time they work on each duty. The Appellant wrote, in part, that her main duties are:

“Appear weekly in court for a full day	20%
Participate as an Establishment [SME] for the COMETS HD program by attending meetings, participating in telephone conferences, and responding to e-mail	20%
Prepare for court	15%
Draft Complaints, Motions, and other legal documents	15%
Sign packages for trial	10%
Prepare cases for data entry	10%
Review cases on which staff have questions; Meet with staff who assist me ... answer questions from staff	5%
Telephone calls with customers, including	

parents, attorneys, and other child
support agencies; Respond to e-mails 5%”
(Ex. 12)

45. Asked to describe in the Form the major problems she faces in her job and how she resolves them, the Appellant wrote, in part,

“ ... [COMETS] HD program ... is quite time consuming. As I have a high volume caseload, I have expressed concerns to Regional Counsel and my supervisor that I would experience a backlog of cases in my inventory. They have asked another court worker and a student intern to assist me. I also work extra hours to avoid a backlog.
My job is time-sensitive: ... I meet with my court worker daily to ensure that the necessary tasks for the day will be done. We also ensure that her work is completed before she does on vacation. If she is out unexpectedly, I alert my supervisor, so that the job can get done by other court workers.”
(Id.)

46. Asked on the Form to describe how she is assigned work and who reviews and approves it, the Appellant wrote, in part,

“As an attorney, I handle the cases that need to go to court to establish, modify, or enforce a child support order. I am assigned a certain portion of the alphabet depending on the last name of the noncustodial parent. The establishment or enforcement worker gives me cases to handle by putting the agency file in my in-box.
... I will meet with my supervisor if I have a question about a document which I am drafting, or if it (sic) a particularly complex document which I would like him to review.”
(Id.)(emphasis added)

47. In response to the question on the Form about whom she supervises directly, the Appellant wrote, in full, “As a Counsel I, I do not directly supervise staff.” (Id.)

48. Asked on the Form whom she functionally supervises, the Appellant wrote, in part,

“ ... While I am not the official supervisor of my court worker, I supervise her in that I review her work, suggest revisions to the documents which she drafts for me, and help her work out strategies to get rid of caseload backlogs. Her job title is Child Support Enforcement Specialist (C).

Due to the additional workload I have taken on as [an SME], I have two staff members assisting me at various times in addition to my court worker. ... I supervise them in the sense that I assign them work, review the work they do for me, meet with them concerning the revisions, and answer their questions. ...”
(Id.)

49. Under “Additional Information” on the Form, the Appellant wrote, in part,

“The only significant task I do not do as a Counsel I, that a Counsel II does, is direct supervision. ... I have supervised two law students over two consecutive summers ...
I have also provided supervision in the past in that I initiated, designed, and presented a training session for the Metro court workers ... I presented the training session with a Counsel II.”
(Id.)

50. The last page of the Appellant’s completed Interview Guide form is a page “FOR APPELLANT’S DIRECT SUPERVISOR: Are the employee’s statements in response to all questions complete and accurate?” Attorney Joshua Fishbein, then a Counsel II and currently a Counsel III, checked off “yes”, signing and dating the Form 10/31/13. (Id.)(emphasis in original)

51. In deciding a request for reclassification, DOR considers the applicant’s Form 30 job description and EPRSs at the time the applicant applies for reclassification, although not the applicants’ EPRS ratings. (Testimony of Antonucci)

52. The Appellant’s Form 30 job description was unchanged from FY2013 to FY2015. (Exs. 4 – 7) The general statement of duties and responsibilities in the Appellant’s Form 30 states:

Responsible for assessing and litigating child support cases and handling **routine legal issues**. Provides Department staff with legal, policy and program advice and information. Performs related work as required.”
(Id.)(emphasis added)

53. Under her Form 30, the Appellant “[w]orks under the general supervision of

Regional Counsel.” (Id.)

54. Under the Form 30, the Appellant’s Detailed Statement of Duties &

Responsibilities includes:

“demonstrates working knowledge of state and federal laws, regulations and statutes pertaining to child support enforcement; demonstrates knowledge of agency policies, procedures and directives; ... demonstrates good research, writing and legal analytical skills; demonstrates good legal advocacy skills; demonstrates sound judgment and legal strategy skills; demonstrates ability to engage in complex legal analysis; demonstrates ability to engage in litigation practices appropriate to the facts and issue of each case; demonstrates ability to manage multiple case related assignments; demonstrates basic trial practice skills under the supervision of Regional Counsel or experienced Counsel II; demonstrates ability to effectively handle a high volume litigation caseload; demonstrates good negotiation skills; ... demonstrates ability to draft non-routine pleadings under the supervision of a Counsel II or Regional Counsel; ... ensures expedited timeframes are met when responding to referrals from the Commission’s office, PRO, or Executive staff; assists in handling special projects under the direction of Regional Counsel or CSE executive staff; ... (Id.)(emphasis added)

55. A couple of years prior to the Commission hearing, the Appellant worked with Janet Fennell, Esq., Regional Counsel for the Northern Region (Essex County) to develop a checklist form for use in Region I because it appeared there was insufficient uniformity in the information being provided in different cases. Attorney Fennell shared with the Appellant a checklist used in her Region. The Appellant made some suggestions, shared it with other Counsels in Region I and, working with Attorney Fennell, produced a final checklist form for Region I that was still in use at the time of the Commission hearing. (Testimony of Appellant)

56. The Appellant's Form 30 contains the following "Qualifications Required at Hire:

(List knowledge, skills, and abilities)

Knowledge of laws regarding child support, domestic relations and criminal law and procedure, collections, appellate procedure; research and writing ability; ability to deal tactfully with others; ability to establish rapport with persons from different ethnic, cultural and/or economic backgrounds; ability to establish and maintain harmonious working relationships with others; ability to exercise sound judgment; ability to exercise discretion in handling confidential information; ability to adjust to changing situations to meet changing program requirements ..."
(Id.)

57. The Appellant's Form 30 lists,

"Qualifications Acquired on Job: (List knowledge, skills, and abilities) Litigation experience; ability respond to impromptu requests for legal advice and assistance; knowledge of state and federal laws regarding child support; time management and caseload management skills." (Id.)

58. The Minimum Entrance Requirements in the Appellant's Form 30 are to be a law school graduate. The only required license for the Counsel I position is membership in the Massachusetts bar. (Id.)

59. The Appellant's EPRSs available at the time she requested reclassification were her FY2013 EPRS and Part A of her FY2014 EPRS.¹⁰ In her FY 2013 EPRS, the Appellant had seven (7) duties, each of which had various performance criteria.

The duties were:

- 1) "Represents the [DOR] in child support legal proceedings by correctly following and interpreting federal and state laws, regulations, statutes, agency policies and court procedures in order to ensure that the Department's interests are advocated in a professional and legally sound manner." (Ex. 4)

The performance criteria included:

"Correctly interprets and applies federal and state laws ...

¹⁰ I give little weight to the completed FY2014 and FY2015 EPRSs for the Appellant since they did not exist at the time the Appellant requested reclassification.

Participates in training meetings to maintain thorough knowledge of state and federal statutes ...
Correctly assesses and reports on potential impact of lower court's decision on agency's practices ... to supervisors. ...
Reports bribes, tendering of gifts and treats to ISD within 24 hours."
(Ex. 4)

In his narrative comments about the Appellant's performance of Duty #1, Attorney Fishbein wrote,
"Shauna performs well in Suffolk Probate and Family Court. In addition, she continues to serve as an Establishment [SME] on COMETS HD, our new computer system, with a focus on legal preparation and hearing preparation which at roll out will be a vital part of legal operations. She presented on the topic at a recent quarterly statewide attorney's (sic) meeting. She also continues to be a member of the Professional Development Committee." (Id.)(emphasis added)¹¹

- 2) "Establish paternity and establish, modify and enforce child support cases by drafting legal documents in compliance with state and federal law and DOR policy in order to protect the interests of the Commonwealth and provide quality legal services (sic) to customers."
(Id.)

The performance criteria included:

"Correctly and timely assess, process and litigate a high volume of cases ...
Correctly applies rules for service process. ...
Correctly and accurately prepares cases for post judgment relief and appellate review, assesses and processes cases timely ...
Correctly and timely drafts non-routine pleadings including, but not limited to, Motions for Reconsideration, Trustee Process, and Administration of Estates under the supervision of a Counsel II or Regional counsel. ..."
(Ex. 4)

In his narrative comments about the Appellant's performance of Duty #2, Attorney Fishbein wrote,
"Shauna is a hardworking and dedicated attorney. **She should continue to work with her case establishment team to increase productivity in establishing new orders and paternity. ... In**

¹¹ The Appellant's involvement in the COMETS HD project was not mentioned in her FY2012 EPRS, although the comments in that EPRS indicated that, "... [h]er case involving heavily mortgaged assets in excess of four million dollars resulted in a significant support order and is currently under appeal. ..." (Ex. 48)(emphasis added)

addition, she should devote more time to assessing cases and complaint drafting in order to reduce the occasion where cases are awaiting assessment. ... (Id.)(emphasis added)

- 3) “Litigates contested cases before the court by correctly and effectively presenting the agency’s position in order to ensure that the agency’s position is effectively advocated.” (Id.)(emphasis added)

The performance criteria included:

“... Effectively and professionally engages in litigation practices appropriate to the facts and issues in each case.

Exercises sound legal judgment.

Correctly and timely handles **routine** cases in litigation with minimal supervision....”

(Ex. 4)

In his narrative comments about the Appellant’s performance of Duty #3, Attorney Fishbein wrote,

“Shauna is effective in handling cases in the Suffolk Probate and Family Court.” (Id.)

- 4) “Keeps accurate account of individual case inventory and reports on case processing and order establishment activities by following DOR policies and timelines in order to ensure accurate records and timely completion of cases.” (Id.)

The performance criteria included:

“Establishes and maintains an accurate automated and paper records (sic), including COMETS, agency files, daily schedule

Timely and correctly follows through on individual cases

Updates COMETS and other automated databases ... (within 24 hours ...) upon assignment of case, at each stage of case processing activity”

(Ex. 4)

- 5) “Review and prepare cases for block time by completing the necessary research, paperwork and conferences in order to ensure timely and accurate establishment, enforcement and modification of child support orders.” (Id.)

The performance criteria included:

“Performs thorough, applicable legal research and analysis to correctly prepare cases.

Prepares case summaries prior to appearing in court

Engages in and conducts case conferencing expeditiously

Ensures that litigants are informed fully of court process, their right to present disputed facts and issues to the court”
(Ex. 4)

In his narrative comments about the Appellant’s performance of Duty #5, Attorney Fishbein wrote,
“Shauna is thorough in her preparation and handling of cases for hearing and always treats litigants respectfully.”
(Id.)

- 6) “Answers inquiries from customers, DOR staff, other IV-D agencies or other state agencies by conducting **necessary research** of the case in order to ensure quality customer service.” (Id.)(emphasis added)

The performance criteria included:

“ ... Accurately informs custodial and non-custodial parent customers that DOR reserves the right to process his or her case in a manner consistent with the law

Accurately and timely responds to written inquiries within five to ten working days

Upholds confidentiality of customer records....”

(Ex. 4)

- 7) “Data integrity – to create and maintain accurate case information by securing required supporting documentation: by creating and modifying case records based on the supporting documentation; by verifying completed COMETS data entry; by reviewing case records for consistency between COMETS and case files; by resolving discrepancies in case records; by entering event notes to record and clarify case activity; by attending data integrity training sessions; and by complying with policy and procedures governing case information in order to meet the division’s 100% data reliability standard, maximize federal incentive funds and deliver quality customer service.”(Ex. 4)

The performance criteria included:

“Case information entered on COMETS and into the case files is accurate.

Event notes are thorough, accurate and timely

The employee will work closely with their supervisor to accept feedback on data reliability”

(Id.)

Attorney Fishbein made no narrative comments for the Appellant’s performance of her duties 4, 6, and 7. (Administrative Notice: Ex. 4)

60. In the Appellant’s FY 2014 EPRS September Part A (Performance Planning), the most recent action taken on the Appellant’s EPRS before she requested reclassification, there were only three (3) duties and her direct supervisor was still Attorney Fishbein, then-Counsel II. Some of the FY2013 duties and/or performance criteria for each duty were consolidated in the FY2014 EPRS Part A, some were deleted and some new duties were added to the FY2014 EPRS. The three (3) duties in the FY2014 EPRS, each of which has a number of performance criteria, were:

1. “Manages a high volume litigation caseload effectively and efficiently.”
(Ex. 5)

The performance criteria included:

“Assesses, processes, and litigates a high volume of cases accurately and timely for paternity establishment; child support establishment, modification and enforcement; and defensive litigation, in compliance with statutory and procedural requirements, state and federal timelines ... ; ...

Prepares for court action by ... performing necessary legal research and analysis; (sic) preparing case summaries and organizing case information;

Drafts **non-routine pleadings** timely and correctly, including post judgement relief and appellate review; ...

Updates COMETS and other case tracking systems timely and accurately ...; ...

Reports data integrity issues to supervisor ...”

(Id.)(emphasis added)

2. “Appears in probate and family courts and other courts, as assigned, on behalf of DOR to establish paternity; establish, modify and enforce child support obligations; and represents DOR in defensive litigation.”

(Id.)

The performance criteria for this duty included:

“Maintains a working knowledge of state and federal child support laws and regulations, domestic relations laws and procedural rules ... ; ...

Ensures that a sufficient number of cases are scheduled for weekly block time sessions to maximize block time efficiency, meet federal performance measures ...; ...

Argues contested cases before the court in a professional manner ... presenting ... sound and persuasive legal arguments;
Develops and maintains good ... legal analytical skills and basic trial skills;
Educates the court on issues of fact, rulings of law, recent case law, DOR policies and procedures and the impact on CSE cases; ...
Files responsive pleadings, motions, notices, memoranda, briefs and other legal action in a timely manner, **under the supervision of Regional Counsel or experienced Counsel II**;” (Id.)(emphasis added)

3. “Serves as in house (sic) CSE counsel by responding to inquiries from internal and external CSE customers, including, but not limited to, providing legal case consultation to CSE managers and staff; informing judges, private counsel, and other customers of DOR policy and procedures; and delivering quality legal services to CSE litigants.” (Id.)(emphasis added)

The performance criteria for this duty included:

“ ... Promotes and fosters a positive image of DOR ...;
Responds to inquiries from internal and external DOR customers by conducting necessary research to ensure quality customer service, including thoroughly reviewing facts, documents, financial and litigation history in cases presented for consultation, promptly providing accurate legal advice and recommending appropriate agency action;
Upholds confidentiality of CSE customer information; and
Develops and maintains ongoing communication with CSE employees by providing legal case consultation, collaborating on case strategy and responding to inquiries in a timely manner.” (Id.)(emphasis added)

61. There are a number of notable differences between the Appellant’s duties and performance criteria in her FY2013 EPRS and her FY2014 EPRS Part A. For example, there are fewer and less detailed instructions concerning COMETS data in the FY2014 EPRS than in the FY2014 EPRS; there is no specific training requirement in the FY2014 EPRS as there was in the FY2013 EPRS, although the Appellant is expected to maintain working knowledge of the applicable laws; there is no reference to “routine cases” in the FY2014 EPRS as there was in the

FY2013 EPRS; the FY2014 EPRS adds that the Appellant is to file “responsive pleadings, motions, notices, memoranda, briefs and other legal action”, which was not in the FY2013 EPRS; the FY2014 EPRS added that the Appellant was expected to “ensure that a sufficient number of cases are scheduled for ... block time”; the FY2013 EPRS stated the specific time periods within which the Appellant was to respond to inquiries but the FY2014 EPRS does not; and the FY2014 EPRS added that the Appellant is to “educate[] the court on issues of fact, rulings of law, recent case law, DOR policies and procedures and the impact on CSE cases”. In both the FY2013 and 2014 EPRSs, the Appellant was expected to maintain confidentiality of appropriate information. (Exs. 4 and 5)

62. The Appellant’s overall strengths are that she is very hardworking, dedicated, reliable, professional, respectful of customers, thorough, and participates in the monthly Questions and Answers Center for the public after hours in cooperation with the courts and other agencies and volunteers on other matters. (Testimony of Fishbein)

63. After Ms. Antonucci met with the Appellant to discuss her reclassification request, Ms. Antonucci discussed the Appellant’s reclassification request with Paul Cronin (then-Deputy Commissioner of Child Support Enforcement at DOR) and Johana Moran (Chief Legal Counsel of CSE at DOR) to learn what the CSE department does and how the person requesting reclassification performs in that department. The Appellant has not worked with Mr. Cronin or Attorney Moran; they have not seen her work in court. Neither Mr. Cronin nor Attorney Moran provided written comments about the Appellant and her request for

reclassification. Ms. Antonucci did not discuss the Appellant's request for reclassification with Attorney Kirby, the Appellant's current direct supervisor, or Attorney Fishbein, although Attorney Fishbein did sign the Appellant's completed Interview Guide indicating that it was accurate. Attorney Moran has attended COMETS HD meetings once or twice but she is unaware of the full extent of the Appellant's work as a COMETS HD SME. Neither Mr. Cronin nor Attorney Moran discussed the Appellant's reclassification with her. (Testimony of Antonucci and Appellant)

64. Ms. Antonucci reviewed the Appellant's Interview Guide, Form 30 Job Description and pertinent EPRSs. Thereafter, met with her own supervisor, Ms. McCone, and they decided to recommend denying the Appellant's reclassification request. (Testimony of Antonucci)

65. By letter dated June 25, 2015, Melissa Diorio, Acting Director of the DOR HRB, informed the Appellant that that her request for reclassification was preliminarily denied and that she had ten (10) days in which to submit a rebuttal. Attached to this letter was a DOR memorandum stating, in full, that the reclassification request was denied because the Appellant "does not perform, on a regular basis, the level distinguishing duties required for reclassification to the title requested. The duties are:

- May be first level of supervision of staff.
- Specialized expertise in a specific area of law.
- General knowledge of other areas or broad knowledge of multiple areas.
- Thorough knowledge of laws, legal principles and practices and have the ability to handle most cases independently.
- Handle complex cases.
- Interact with others outside of the agency more often than Counsels I.

At this level Counsels II receive less supervision than Counsel I and exercise greater independence in decision-making.
May provide functional direction to interns, support staff, or other personnel.
May participate in the interviewing process or may make recommendation for new hires.
Communicate with representatives of other agencies, including the Legislature, and collaborate with cross-functional or cross-agency teams and stakeholders ...
Draft new policies and regulations or amendments to existing policies and regulations, based on legal research and agency needs to streamline agency practices support (sic) operational efficiencies, and ensure agency compliance with laws.
Present memoranda supporting or opposing legislation affecting agency operations.
Allocate cases and assignment to supervisees most appropriately.
Prioritize and manage personnel assigned workloads and caseloads as well as the workloads and caseloads of direct report.
Issue recommendations for final decision or resolution of cases, and for some cases, to issue or agree to final resolution without further review.”
(Ex. 15)

66. By letter dated July 13, 2015, the Appellant submitted a four (4)-page, rebuttal to the DOR preliminary denial of her reclassification request, reiterating her previous statements with some added detail. (Ex. 16)

67. By letter dated August 17, 2015, Ms. Diorio informed the Appellant,
“Your appeal for the reclassification of your position was received in this Department on October 15, 2013. You requested the reallocation of your position from the title of Counsel I to the class (sic) of a Counsel II. Please know that the duties you performed at the time you filed did not warrant the reallocation of your position. We, therefore, regret to inform you that we must deny your appeal.
You may appeal this decision to the Human Resources Division (HRD) as provided in the General Laws, Chapter 30, Section 49 ...”
(Ex. 17).

68. By letter dated August 28, 2015, the Appellant appealed the DOR decision to HRD. (Ex. 18)

69. By letter dated October 2, 2015, Ms. McInnis, at HRD, informed the Appellant,

“The Human Resources Division received your appeal of the classification of your position. You requested the reallocation of you (sic) position from the class of Counsel I to the class of Counsel II.

After review of the appeal documentation we find the classification of Counsel I covers the duties being performed by you. We therefore, regret to inform you that we must deny your appeal.

You may appeal this decision to the Civil Service Commission”

(Ex. 19)

Ms. McInnis has worked at HRD for eight (8) years and worked elsewhere for the state for seven (7) additional years and has worked on classification matters for years. Since the DOR is an agency assigned to Ms. McInnis, she was assigned to respond to the Appellant’s appeal to HRD. Ms. McInnis had obtained from Ms. Antonucci at the DOR and reviewed the documents upon which the DOR relied to deny the Appellant’s reclassification request. Ms. McInnis acknowledged that since the Appellant had been employed at the DOR/CSE since 2002, she was performing the job duties with more experience and expertise than a new Counsel I but denied that she handled more complex matters or that she was interacting more with others outside the agency. (Testimony of McInnis)

70. At or about the time the Appellant requested reclassification to Counsel II, she also twice applied for a Counsel II position. The DOR advised the Appellant in April 2013 (before the October 2013 changes were made to the Counsel II position) and in November 2014 (after the changes were made to the Counsel II position) that she was not selected for either appointment. (Testimony of Antonucci; Exs. 61 and 62)¹²

¹² The Appellant complains that CSE Counsel Is are not promoted at the same rate and frequency as Counsel Is in the DOR Tax Administration unit. Tax Counsels have a different Form 30 than the Form 30 for CSE Counsel Is. (Ex. 57)

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.

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. Thompson v. Division of Insurance and HRD*, C-14-287, and numerous Commission decisions cited therein in this regard. *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 *Straub*, the Superior 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 9.¹³ There is no caselaw from the Supreme Judicial Court, nor the Appeals Court,

¹³ 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

of which I am aware that addresses the point regarding an individual's request for reclassification.¹⁴

Analysis

The Appellant has failed to prove by a preponderance of the evidence that she performs the Counsel II functions a majority of the time and that she should be reclassified to that title. While she has been a Counsel I for more than a decade and performs well according to the EPRSs and Interview Guide that Attorney Fishbein signed, other evidence indicates that she is not performing as a Counsel II a majority of the time. For example, the Appellant is not involved in legislation. She is not involved in drafting policies and procedures.¹⁵ She does not directly supervise others, as the DOR organization charts indicate Counsel IIs do. Through the alphabetical case assignment, the Appellant receives the same types of cases that both the Counsel Is and Counsel IIs in CSE receive. There is no indication that the Appellant is assigned, through the alphabetical assignment process or otherwise, more complex cases than others. She does not have more external contacts like a Counsel II. The Appellant is involved in the COMETS HD project, her work in that regard is valued and it puts her into contact with the contractor responsible for updating the CSE software and others at the DOR.

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.

¹⁴ The subject of "class" reclassifications, as opposed to individual reclassifications 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, § 49 requiring the appointing authority and HRD to consider such requests and, if they approve such requests, for HRD to submit a request for the reclassification and funding thereof to the Legislature. The Superior Court relied on Murphy to uphold the decision of the Commission on remand in DeRosa v. Civil Service Commission, Superior Court C.A. No. 10-4679-H (2012) finding, *inter alia*, that the Commission had no jurisdiction to consider DeRosa's request to reclassify her position into a different job group because it was the subject of a collective bargaining agreement under G.L. c. 150E, § 7.

¹⁵ CSE Counsel IIs are also not involved in legislation and drafting policies and procedures as that function is performed in another CSE office.

However, it is not the work for which she is responsible on her Form 30 or her EPRS. In addition, although she, and others at the DOR, are referred to as Subject Matter Experts for the COMETS HD project, it is a term of art used by software contractors working with agency personnel to understand their roles and needs in order to develop appropriate software. Further, the Appellant indicated that the amount of time she is involved in COMETS HD varies and there have been weeks and, sometimes, months in which she was not spending time on the project.

Attorney Fishbein's testimony included several criticisms of the Appellant's performance which also undermine the Appellant's request for reclassification. Although Attorney's Fishbein memory was limited in some respects, he recalled several concerns about the Appellant's performance.

One of Attorney Fishbein's criticisms involved one (1) paternity case to which the Appellant was assigned. He disagreed with her decision in that case not to pursue a child support order at the time against a young man with learning difficulties because she was concerned that if he was not given the time to obtain a high school degree, he would not be able to improve his employment opportunities and his ability to pay child support. The next criticism was that the Appellant left the courtroom in block time on one (1) occasion in order to obtain a document. Also, Attorney Fishbein believed in a case where a mother did not want her address in the child support complaint, that the Appellant should have requested an order to impound the address. This undermined the Appellant's obligation to maintain appropriate confidentiality. Attorney Fishbein further testified that the Appellant's weaknesses were that he would expect that her overall command of the courtroom would be better after the years she has been a Counsel I in the CSE unit and,

although she has progressed well, he believed that she is not as quick in responding to novel questions from the bench in block time. Although Attorney Fishbein made no comments in the Appellant's EPRSs in these regards, such level of detail may not be warranted in an EPRS.

One other criticism Attorney Fishbein had of the Appellant was of greater concern and further undermines the Appellant's request for reclassification. In October 2015, the Appellant's case backlog was significantly larger than the other attorneys in the CSE unit while she was working longer hours and relying on the help of the part-time CSC unit Counsel I and an additional CSE unit court worker more than her supervisors were aware. She asserted that this was the result of the work she was performing on the COMETS HD project. Further, the number of cases that she handled at block time reduced from either fifteen (15) or sixteen (16) to thirteen (13) or fourteen (14). After a meeting involving the Appellant, Attorney Kirby and Attorney Fishbein, they clarified that the Appellant was authorized to continue seeking some assistance from others in the unit but with the understanding that she would make every effort to process her caseload appropriately and reduce her backlog.

Conclusion

For all of the above stated reasons, the appeal of Ms. Tannenbaum, under Docket No. C-15-195, is *denied*.

Civil Service Commission

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

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan, and Stein) on March 30, 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)(1), 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:

Kelly A. Hoffman, Esq. (for Appellant)

Elisabeth M. Baker, Esq. (for DOR)

Melissa Thomson, Esq. (for HRD)

John Marra, Esq. (HRD)