

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

WHITNEY DUVALL PAPROCKI,
Appellant

v.

C-15-190

DEPARTMENT OF REVENUE
and
HUMAN RESOURCES DIVISION,
Respondents

Appearance for Appellant:

Kelly A. Hoffman, Esq.
Marshall Halem LLC
27 Mica Lane, Suite 102
Wellesley, MA 02481

Appearance for Department of Revenue:

Elisabeth M. Baker, Esq.
Labor Counsel
Office of Labor Relations
Department of Revenue
P.O. Box 9553
Boston, MA 02114-9553

Appearance for Human Resources Division:

Melissa Thomson, Esq.
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Human Resources Division
One Ashburton Place, Room 301
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Commissioner:

Cynthia A. Ittleman, Esq.

DECISION

Whitney Duvall Paprocki (Ms. Duvall Paprocki or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on October 13, 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.¹ A prehearing conference was held in this regard on October 27, 2015 at the offices of the Commission. A hearing² was held on this appeal on December 8 and 15, 2015 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.³ 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 thirty-eight (38) Exhibits⁴ and the testimony of:

Called by the DOR:

- Joshua Fishbein, Counsel III, Child Support Enforcement (CSE) Division, Metro Regional Counsel/Region 1, DOR
- Sandra Antonucci, Program Coordinator III, (functional title: Classification Analyst), Human Resources Bureau (HRB), DOR, and
- Eric Kirby, Counsel II, CSE Division, Region 1, DOR (Attorney Kirby also testified on behalf of the DOR and the Appellant)

Called by HRD:

- Regina Caggiano, Deputy Director of the Organizational Development Group (ODG), HRD
- Maryann Dill, Assistant director of the Office of Employee Relations (OER), HRD, and

¹ In Tannenbaum v. DOR and HRD, Docket No. C-15-190 (March 30, 2017), the Commission recently ruled on the appeal of another DOR Counsel I seeking reclassification to Counsel II, denying that appeal.

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

³ 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.

⁴ The thirty-eight (38) Exhibits are Exhibits 1-33 entered at the hearing; and 34 and 34A-34D produced post-hearing in response to the Commission's request at the hearing.

- Alexandra McInnis, Senior Personnel Analyst, Organizational Development Group, HRD

Called by Appellant:

- Whitney Duvall Paprocki, Appellant
- Bobbi Kaplan, Executive Vice President of the National Association of Government Attorneys (NAGE), Local 207, representing Unit 6 employees

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:

Stipulations

1. The Appellant became a full-time employee with the Department of Revenue in December 2007.
2. The Appellant was hired into the title of Counsel I, the position she currently holds.
3. Prior to this date, the Appellant worked as a student intern in 2007 at the DOR CSE Division, Region 1.
4. The Appellant is a member of Unit 6 of NAGE, which has bargained terms of the Appellant's employment under a Collective Bargaining Agreement ("CBA") with the Commonwealth.
5. The Counsel I title is a Grade 14 title, subject to the bargained salaries set forth in the NAGE/Commonwealth CBA.
6. The Counsel II title is a Grade 17 title, subject to the bargained salaries set forth in the NAGE/Commonwealth CBA.

7. The Appellant currently works in the Metro Office of the CSE Division, where she has worked since becoming a Counsel I.
8. On October 23, 2014, the Appellant submitted a classification appeal to the Department's Human Resources Bureau ("HRB").
9. DOR HRB Personnel Classification Reviewer Sandra Antonucci ("Ms. Antonucci") was assigned to the Appellant's appeal.
10. Appellants are given an "Interview Guide" prior to meeting with the assigned classification reviewer, by which each respective appellant answers a series of questions relative to his or her duties, and which his or her supervisor signs attesting to the accuracy of the statements made therein. (emphasis added)
11. The Appellant completed an Interview Guide (Guide), which was signed by the Appellant on November 18, 2014 and signed by the Appellant's supervisor, Attorney Erik Kirby on November 20, 2014.
12. Attorney Kirby holds the title of Counsel II.
13. In the Guide, the Appellant stated that the basis for her appeal is that "[d]ue to new job specifications for the Counsel I and Counsel II positions, [her] current job title no longer accurately describes [her] duties and responsibilities."
14. The "new job specifications" referenced by the Appellant are the most recent classification specifications for the Counsel Series, effective August 11, 2013.
15. Prior to August 2013 specifications, the Counsel Classification Specifications were last updated in 1987.

16. Ms. Antonucci interviewed the Appellant on December 30, 2014.⁵
17. The Department notified the Appellant of its preliminary decision to deny the appeal by letter dated June 25, 2015.
18. The letter informed the Appellant of the basis for denial and notified the Appellant of her right to submit a rebuttal for consideration.
19. The Appellant submitted a rebuttal by letter dated July 1, 2015.
20. The Department notified the Appellant that her appeal was denied by letter dated July 29, 2015 and notified the Appellant of her right to appeal to HRD.
21. The Appellant submitted an Appeal to HRD and requested a hearing.
22. HRD heard the matter on September 16, 2015.
23. HRD denied the appeal on September 30, 2015.
24. The Appellant filed an appeal with the Commission on October 13, 2015.
(Administrative Notice)
25. The July 2015 Organizational Chart adequately reflects the structure of the Appellant's unit at the time she filed. (Stipulation and Ex. 3)⁶

Additional Findings of Fact - Introduction

26. The Appellant graduated from Suffolk University Law School and became a member of the Massachusetts bar in 2007. In law school she interned in the office of the U.S. Attorney, the Norfolk County District Attorney's office, the Boston Rape Crisis Center, the Executive Office of Public Safety and the DOR CSE Unit. She began employment at the DOR CSE Unit, in Region I, in 2007 as a Counsel I. The DOR Child Support Enforcement personnel function under Title IV-D of the

⁵ Ms. Antonucci testified that she interviewed the Appellant on December 30, 2014 even though the questionnaire in which she wrote the Appellant's responses to the questions is dated December 23, 2014.

⁶ For additional DOR organizational charts see Exs. 23 and 23A.

federal Social Security Act of 1975. CSE Counsel Is and IIs litigate child support and addresses related matters including, for example, domestic relations and paternity matters. In law school, the Appellant had been a legal intern in the DOR CSE unit in 2007. The Appellant applied for a Counsel II position posted in the spring of 2013 but she was not selected. She is not the most senior Counsel I in the DOR CSE. (Stipulation; Administrative Notice (DOR website); Testimony of Appellant)

27. Most of what the Appellant does is prepare for and go to court to process her caseload. In preparing her cases, including complex cases, she first assesses them, reviews their procedural history, reviews notes on the Commonwealth of Massachusetts Enforcement and Tracking System (COMETS) database, confirms the appropriate addresses, researches the noncustodial parents' income and assets and then decides what should be in the pleadings and drafts them, exercising discretion regarding confidential information and safeguarding it. The complexity is not necessarily in the cases themselves but in the way that she handles them and with less supervision and more independence. She uses certain forms in her cases but filling out forms is not her primary work; she performs the work behind the forms, involving conferences with the custodial parent, obtaining background information, comparing what the custodial parent says compared to the information she has obtained, and negotiating a proposed agreement. (Testimony of Appellant)(*See* Ex. 14-16)

28. The Appellant processes between fifteen (15) and twenty (20) cases in court each week. On occasion, she has had complex cases including, for example,

conducting discovery of a trust disbursing income to a defendant, a case involving a DOR employee, finding hidden assets, securing service of process on defendants evading service and researching to find that a defendant was the beneficiary of a will, noncustodial parents with multiple children from different relationships, children with medical needs, cases involving noncustodial parents living in another state, and retroactive child support for a teenager. She meets with the parties in court to discuss each case, reviews the forms they complete and prepares a child support calculation. (Testimony of Appellant)

29. When preparing for court appearances, the Appellant, like other CSE Counsel Is, reviews the case history, looks for any additional information about the cases and again checks the noncustodial parent's income and assets. She checks the noncustodial parents' tax returns and requests information from their employers. If the cases involve contempt of court charges, the Appellant checks the Registry of Motor vehicle, for example, for information about the noncustodial parents' license and/or assets and contact the custodial parent if needed. (Testimony of Appellant)

30. Whenever possible, like other CSE Counsel Is, the Appellant pursues resolution of her cases by an agreement that she drafts, which is reviewed by the court. Regional Counsel Fishbein reviews the proposed agreements of all CSE Counsel Is and IIs before they go to the judge. After court, the Appellant enters information about the court disposition into the CSE database. A lot of her job involves responding to custodial parents. She prioritizes her cases so that, for

example, she knows when a defendant is being released from jail and would be available to address child support issues. (Testimony of Appellant)

31. The Appellant agreed to handle much of the case worker function herself when the DOR CSE was short-staffed, which she does on the day she works from home. (Testimony of Kirby) However, Ms. Dickson, a non-attorney staff person, assists her mostly in scheduling cases for court, sending capiases to constables, sending DNA results to the parties, and notifying DTA if the custodial parent is not cooperating with the DOR. The Appellant provides guidance to Ms. Dickson in these regards, reviews her work and identifies any errors to be corrected. Although she does not directly supervise case workers, she assigns them some work, giving them feedback and they come to her with their questions. She does not discipline anyone. (Testimony of Appellant)

32. Over the years of her employment at the DOR CSE, the Appellant has gained experience and has come to work on her cases with greater independence, seeking less guidance, but there have been no changes in the Appellant's duties. (Testimony of Appellant)

33. Since early in her DOR CSE career, the Appellant has worked with external contacts including private counsel, court personnel, judges, probation, the Department of Transitional Assistance (DTA) and the Department of Children and Families (DCF) to obtain and, occasionally, provides appropriate information to the state agencies. (Testimony of Appellant)

34. The Appellant does not collaborate with cross-agency teams because such matters are handled by the DOR Policies and Procedures Unit. Similarly, she does not

draft policies, regulations and memoranda related to legislation because those matters are handled by the Policies and Procedures Unit. (Testimony of Appellant)

35. DOR CSE Counsels and DOR Tax attorneys perform different work.⁷

(Testimony of Appellant)

DOR CSE Unit

36. Joshua Fishbein, Esq., was appointed to the title Counsel III, as Regional Counsel for the DOR CSE Unit in Region I in September 2014. (Testimony of Fishbein) the Counsel II position he left upon being appointed to the title Counsel III has not been filled. (Testimony of Fishbein, Kirby and Appellant) There may not be a current need to fill his former Counsel II position but if there was another Counsel in the CSE Unit, they could schedule more cases in weekly court sessions (block time) in which CSE Counsels participate. (Testimony of Fishbein)

37. Attorney Fishbein supervises Attorney Kirby, a Counsel II, who supervises the Appellant. Counsel IIs prepare the EPRSs for Counsel Is whom they supervise

⁷ The Appellant complains that CSE Counsel Is are reclassified more in the Tax Administration Unit and that the Tax attorneys often have less experience than Counsel Is in the CSE Unit. For example, nine (9) DOR Legal Unit Counsel Is hired in or about 2013 were reclassified to Counsel II approximately one (1) year later. (Ex. 34D) The DOR produced redacted supporting information pertaining to these nine (9) attorneys, some of whom had prior tax law experience and were involved at the DOR in active practice in varied trial and appellate courts and administrative proceedings on complex matters, developing policies and procedures, and/or practicing in fields such as the DOR confidentiality law, corporate tax laws, telephone valuations, and tax seizures with limited supervision. (Ex. 21) As the Appellant has noted, attorneys in CSE and attorneys in the Tax Unit perform different functions. Indeed, Tax Counsels have a different Form 30 than the Form 30 for CSE Counsels. This reflects certain different departmental needs. (Ex. 57) The DOR's different needs are also reflected in the number and titles of Counsels in the different units. At the time of the Commission hearing, there were a similar number of attorneys in the Tax Administration Unit (approximately 57) and the CSE Unit (approximately 54). (Ex. 34A) However, the number of attorneys in each unit in the Counsel I, II, III and/or Tax Counsel titles varied. In CSE, there were 21 Counsel Is, 26 Counsel IIs, 2 Counsel IIIs and 7 Tax Counsels. (Id.) In the Tax Administration Unit, there were 7 Counsel Is, 10 Counsel IIs, and 39 Tax Counsels. (Id.)

and they review non-routine pleadings drafted by the Counsel Is they supervise.

(Testimony of Fishbein)

38. CSE Region I Counsel Is and IIs review cases, bring court actions to establish paternity, obtain child support largely involving custodial parents receiving public assistance, seek modification of child support orders and respond to internal DOR inquiries. Counsels I and II in the DOR CSE use a variety of forms in routine cases. (Testimony of Fishbein; Exs. 14-16)

39. There are six (6) Counsels in the DOR CSE Unit Region I: two (2) Counsel IIs and four (4) Counsel Is (including the Appellant). Cases are distributed evenly to the Counsel Is and Counsel IIs by alphabetical split. If complex cases are assigned to Counsel Is, Attorney Fishbein notifies their direct supervisor. Complex cases can include, for example, those requiring discovery, addressing the requirements of the federal Service Members' Civil Relief Act (50 U.S.C. ss. 501 et seq) and related state laws when noncustodial parents are away on active military duty, and when a noncustodial parent attempts to conceal their income and/or assets. (Testimony of Fishbein and Kirby)

40. At the time of the Commission hearing, there were approximately 30,000 child support enforcement and related cases in Region I, with each CSE Counsel assigned to approximately 4,000 of the cases. However, the number of cases in which a complaint is being drafted, the defendant is being served and/or the case is otherwise being actively followed by individual CSE Counsels was approximately 300. (Testimony of Fishbein)

41. Under an agreement with the Suffolk Probate and Family Court, CSE Region I can schedule up to 100 child support and related cases for hearing for block time on Thursdays each week. (Testimony of Fishbein)
42. As Counsel III, Attorney Fishbein reviews the cases that go to court and proposed agreements. (Testimony of Fishbein and Appellant) He observes weekly block time in the Suffolk Probate and Family Court but cases are not assigned to him. He provides guidance to Counsel Is at block time if the supervising Counsel II is presenting his or her own cases, and to Counsel IIs who have questions. Attorney Fishbein may provide feedback to the Counsel Is and IIs on their performance in court or thereafter. (Testimony of Fishbein)
43. Five (5) of the six (6) Counsels in CSE Region I handle child support and related cases in block time. One (1) Counsel I works part-time and does not directly participate in block time. When CSE receives new cases, the staff checks various computer sources for related information. The CSE Counsels check the information provided, assess the information and decide the appropriate information to include in the pleadings. The five (5) participating attorneys bring, on average, a combined total of seventy (70) cases to block time each week.⁸ Attorney Fishbein has the authority to review any agreements between the parties. (Testimony of Fishbein)
44. The DOR CSE Counsels have contact with private attorneys, judges, court staff, and court case managers. They also have the opportunity to interact with others in a monthly, after-hours workshop in court. (Testimony of Fishbein)

⁸ The DOR CSE Counsels I and II scheduled the following total number of hearings: in FY2010 5,766; in FY2011 5,436; in FY2012 5,866; in FY2013 5,414; in FY2014 5,334; and in FY2015 3,801. (Ex. 34C)

45. Attorney Kirby began working in the DOR CSE in 2001. Prior to that, he worked in the DOR Policies and Procedures Unit. Attorney Kirby is assigned cases like the other Counsel II and the Counsel Is at CSE. He supervises the Appellant, another Counsel I and non-attorney staff. CSE Counsel Is and IIs perform the same work except that Counsel IIs supervise Counsel Is. They are competent attorneys with experience and they are skilled at handling difficult clientele with emotionally charged issues while those present overhear each other's cases. They ask questions on occasion but handle most of their cases independently except that Counsel Is are required to obtain authorization from a Counsel II in regard to non-routine matters. (Testimony of Kirby)
46. When the Appellant was hired, her training time was shorter than usual because she had been a legal intern at CSE. (Testimony of Kirby)
47. The Appellant asks Attorney Kirby perhaps one (1) or two (2) questions per week about her cases. Counsels should ask questions. Attorney Kirby has asked the other Counsel II and Counsel Is questions about matters they had addressed and that he has not. The Appellant once asked Attorney Kirby about a case in which a noncustodial parent was being paid in stock held in a trust. Attorney Kirby had not dealt with a similar case before and they worked on it together. The Appellant subpoenaed the trust to inquire about disbursements to the noncustodial parent. Although the effort was unsuccessful, the Appellant had asked the right question. (Testimony of Kirby)
48. The Appellant, like Attorney Kirby and other CSE Counsels, file between ten (10) and twenty (20) non-routine pleadings each year. The Appellant files pretrial

memoranda regularly but not trial memoranda because none of her cases have gone to trial. (Testimony of Kirby)

49. The Appellant performs the same duties as the other Counsel Is at CSE. Her duties have not changed. Of the three (3) Counsel Is at CSE, the Appellant is the most competent and speedy one and can handle whatever is coming at her.

Attorney Kirby has observed her in court and believes that the Appellant's work is superior, that the courts respect her and that she has credibility because of her work. (Attorney Kirby)

50. Typically, Counsels take up to one (1) hour to prepare a case for block time.

They review the information compiled by staff but dig deeper if additional information is needed. It takes approximately one (1) day for Counsels to prepare cases for block time. All told, CSE Counsel Is and IIs spend three (3) days preparing for and participating in block time; the other two (2) days of the week are "mop up duty", providing information for data entry, forwarding documents from court, reviewing court orders and performing any added work required.

(Testimony of Kirby)

51. Attorney Kirby also reviews the DOR block time computer screens to make sure that the Counsels are consistently provided the information they need from the non-attorney staff.

52. Most of the child support and related cases are not complex. Complex cases stay with the Counsel to whom they are initially assigned. The complex cases are the ones that require more resources to obtain a strong factual understanding of the case and how to proceed. (Testimony of Kirby)

53. It is rare for the Counsel Is and IIs to need to draft legal memoranda for their cases and they are precluded from doing so in cases of first impression because the DOR attorneys who draft such memoranda are in the Policies and Procedures Unit. (Testimony of Kirby)

Appellant's Request for Reclassification

54. The Appellant requested reclassification to the title of Counsel II on October 23, 2014. She did so because in 2013, the Counsel Series Specification changed to provide that the Counsel IIs were no longer required to have supervision experience and because the Counsel I title no longer reflects the work that she performs. After the Appellant requested reclassification on October 23, 2014, she received an Interview Guide from DOR HRB to complete. The Appellant completed the Interview Guide on November 18, 2014. The Appellant's supervisor, Attorney Kirby, signed the Interview Guide on November 20, 2014, checking the box "yes" in response to the Interview Guide question, "Are the employee's statements in responses to all questions complete and accurate?" (Exs. 6 and 7)

55. Asked in the Interview Guide the basis of her appeal, the Appellant wrote, "Due to new job specifications for the Counsel I and Counsel II positions, my current job title no longer accurately describes my duties and responsibilities." (Ex. 7)

56. The Interview Guide asks, "What people or groups of people do you come in contact with in the performance of your job both within and outside your agency? Indicate where appropriate the job titles or functions of your contacts. Also describe the nature and purpose of your interpersonal relationships." (Ex. 7)

The Appellant responded, in part,

Outside DOR:

- 1) DOR customers, including custodial parents, noncustodial parents, and guardians. Respond to inquiries and process litigants' cases while in court.
- 2) Family Service Office Probation Officers. Confer with probation officers regarding officers' supervision of job search orders of the Court.
- 3) Court staff, including Assistant Judicial Case Managers ..., Registry workers, and court officers. Work with staff to process child support cases being heard before the Court.
- 4) Attorneys representing both custodial parents and noncustodial parents. ... assist in child support related negotiations, ...
- 5) Case owners from The (sic) Department of Transitional Assistance (DTA) and The (sic) Department of Children & Families. Inquire about case information needed to process cases; provide general information regarding DOR legal policies and practices.
- 6) Case owners from IVD child support enforcement agencies nationwide. Respond to inquiries and work with IVD staff to obtain information needed to pursue litigation and/or the enforcement of a support order where one party resides outside of the Commonwealth ...

Within DOR:

- 7) Other attorneys, both within the Metro Region and statewide ...
- 8) Case owners ... both within the Metro Region and statewide ...
- 9) ... Provide current employer information and request follow-up steps as needed."
- 10) Data entry staff. Respond to inquiries and assist staff in interpreting court orders ...(Ex. 7)

57. Asked in the Interview Guide the basic purpose of her position, the Appellant responded,

“ ... to evaluate and litigate child support cases as well as respond to inquiries from both customers and staff and provide legal assistance as required.” (Ex. 7)

58. The Interview Guide asks, “[h]ave there been any significant job changes since your appointment? If so, indicate the dates the changes took place and briefly describe the nature of the changes.” (Ex. 7) The Appellant responded,

“Since being hired in 2007, I now require little direct supervision and only seek assistance when needed on complex cases. ... I am more involved in outreach programs created to serve our customers, such as speaking at a program for teen parents ... in November 2012 and representing the Department at a family work shop sponsored by the Court Services Center in November 2014.” (Ex. 7)

59. The Interview Guide asks the applicant to list his or her specific duties, listing the most important first, and the percentage of time spent on each. The Appellant responded,

- 1) Litigate child support cases ... which includes meeting with litigants; assisting litigants in completing necessary paperwork; calculating support orders; drafting agreements; presenting argument to the court. 20%
- 2) Prepare for court, which includes researching income and assets of litigants; reviewing relevant procedural history; preparing documents for hearing; contacting litigants. 30%
- 3) Complete data entry, which includes making details notations in the DOR system regarding what went on during, and the outcomes of, support hearings; preparing the file for scanning; and performing additional follow-up ..., such as contacting case owners or the employer group for further action. 10%
- 4) Respond to inquiries via telephone, email, and in-person, from DOR staff, DOR customers, and perform follow-up ...20%
- 5) Draft pleadings for filing in court, which includes researching various data bases to confirm litigants’ addresses for service of process ...; reviewing prior court action ...; reviewing all case notes ... in the DOR system; and contacting litigants. 10%

6) Review and approve trial notices ... of upcoming court dates. 10%

60. Asked on the Interview Guide who assigns, reviews and approves her work and

how she receives it, the Appellant responded,

“Work is assigned by Metro Regional Counsel, Joshua Fishbein, via an alphabetical allocation. Work is reviewed and approved, if needed, by supervisor, Counsel II Erik Kirby. Work is primarily received from case owners or as a result of direct customer contact. Complex or unique cases are also received directly from Regional Counsel.” (Ex. 7)

61. Asked her supervisory responsibilities, the Appellant responded,

“While court workers (CSWII & PCIII) do not report to me directly, I oversee their work by reviewing trial notices they have drafted and assessing child support calculations and stipulations they have drafted while in court. If a problem with their performance arises, I address the issue directly with the court worker.

Furthermore, supervisory responsibilities are no longer a requirement of the Counsel II position, per new job specifications, and other DOR attorneys hold Counsel II titles without performing supervisory responsibilities. ...” (Ex. 7)(emphasis added)

62. Asked about her working conditions, the Appellant responded,

“One day per week, work is performed in a courtroom setting which requires standing for prolonged periods of time and meeting with multiple litigants in a noisy environment. Parties can be hostile to DOR staff and physical altercations between litigants, requiring court office intervention, have occurred. ...” (Ex. 7)

63. Asked for additional information, the Appellant responded,

“On December 3, 20-14, I will have been with the Department for seven years. Given my experience and current responsibilities, the title of Counsel I no longer accurately reflects my position as I do not require close supervision. The Counsel II position, labeled as the journeyman level, correctly describes my duties, responsibilities, and skills level.” (Ex. 7)

64. On December 30, 2014, Ms. Sandra Antonucci conducted an interview of the

Appellant. (Ex. 8) Ms. 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, whom she consulted to make a decision about the Appellant's reclassification request. (Testimony of Antonucci)
65. Reclassification is appropriate when the candidate is working outside his or her current job title. Reclassification candidates must meet the minimum entry requirements (MERs) of the title they seek, although meeting the minimum requirements does not require that an applicant be reclassified. (Testimony of Antonucci)
66. Ms. Antonucci posed questions to the Appellant and wrote her responses in a memorandum. Asked her current duties, Ms. Antonucci wrote that the Appellant stated,
- “She litigates cases in court. She prepares case by researching history, locating parties, etc. Drafts complaint. Signs off on scheduled cases. Handles case in court – using all systems to conduct research, reading case notes, getting forms prepared. In court, she meets with parties, works with DTA or probation officer, drafts arguments, presents case in court, and resolves (sic) case. She does data entry work on system in regards to notes on the system that she took in court, she processes the file, scans items after. She receives multiple inquiries from clients, and there are 2 caseworker groups. ... She makes sure cases are scheduled, notices go out, and follow-up is done with all agencies.” (Ex. 8)
67. Asked why she feels she should be reclassified, Ms. Antonucci wrote that the Appellant said, in part, “ ... She is not entry-level. The Counsel II is now considered a journeyman, with more independence, and she feels this is where she falls.” (Ex. 8)
68. Asked by Ms. Antonucci if she works on cases independently, the Appellant answered “yes”.” (Id.)

69. Asked if she handles complex cases, the Appellant answered “Yes. Procedural history does not follow traditional path. Figuring out new ways to proceed.” (Id.)
70. Asked if she “collaborates and interact[s] with outside agencies on a regular basis, the Appellant answered “Yes, DTA, DSS, Social Security, Probation Office, Court, Registry.” (Id.) CSE Counsel Is regularly collaborate and interact with such outside agencies. (Administrative Notice: Tannenbaum v. DOR and HRD, C-15-190 (march 30, 2017)
71. Ms. Antonucci asked the Appellant if she “communicate[s] with reps of other agencies, including Legislature, and collaborate with cross-functional or cross-agency teams and stakeholders to share information, resolve issues, and develop or implement new programs”, the Appellant replied that she does not work with the Legislature. (Id.)
72. Ms. Antonucci wrote “N/A” upon asking the Appellant:
- if she drafts new policies and regulations or amendments toe (sic) existing policies and regulations, based on legal research and agency needs, to streamline agency practices, support operational efficiencies, and ensure agency compliance with the laws”;
 - if she “presents memoranda supporting or opposition legislation affecting agency operations;
 - if she has “decision-making authority to allocate cases and assignments to supervisees most appropriately”; and
 - if she has the “decision-making authority to prioritize and manage personal assigned workloads ... as well as the workloads and caseloads of direct report”. (Ex. 8)
73. Asked if the Appellant 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”, Ms. Antonucci wrote

- that the Appellant stated, “Before court yes. She has to propose DOR’s recommendations.” (Id.)
74. Ms. Antonucci’s notes concerning the Appellant’s response to her questions also state, “**Counsel III additional duties: Must supervise. She does not supervise.**” (Id.) (emphasis added)⁹
75. Asked if there is anything else to add, Ms. Antonucci’s notes indicate that the Appellant stated, “[t] new spec does not require a Counsel II to supervise and that is why she filed for reclass.” (Id.)
76. In deciding a request for reclassification, the 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) HRD does not consider a candidate’s EPRS ratings because reclassifications are based on the functions performed, not how well you perform existing functions. (Testimony of McInnis)
77. 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.” (Ex. 5)(emphasis added)
78. Under her Form 30, the Appellant “[w]orks under the general supervision of Regional Counsel.” (Id.)
79. Under “Directing Staff” and “Their Staff”, the Appellant’s Form 30 indicates “N/A”. (Id.)

⁹ Since the Appellant requested reclassification to the title Counsel II, it appears that this was intended to refer to Counsel IIs.

80. Under her 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)

81. 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.)

82. Regarding “Qualifications Acquired on Job”, the Appellant’s Form 30 lists,

“... 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.)

83. 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.)¹⁰

84. The Appellant’s FY 2014 EPRS contains three (3) duties and her direct supervisor was Attorney Kirby (Counsel II). Attorney Valinda Corbin reviewed the EPRS.¹¹

The Appellant’s three (3) duties in FY2014 were:

Duty 1 – “Manages a high volume litigation caseload effectively and efficiently.” (Ex. 26)

Performance criteria include:

“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 ... ; ...

¹⁰ I take administrative notice that the Appellant’s Form 30 is the same as the Form 30 of Ms. Tannenbaum in Tannenbaum v. DOR and HRD, C-15-195, decided recently.

¹¹ In the record here, at the Appellant’s request, are also her EPRSs for FY2008 – 2013. (Exs. 25, 27-31) As indicated at the Commission hearing, I give little weight to the Appellant’s EPRSs in FY2008 to FY 2013, given that they do not describe her duties at the time she requested reclassification. The Appellant’s FY2014 EPRS (Ex. 26) receives full weight since it covers the year prior to her reclassification request but it only covers one-half year because the appellant was on family leave. I give full weight to the first part of the Appellant’s FY2015 EPRS (Ex. 4) since that is the part that was completed before she requested reclassification in October, 2014.

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)

Duty 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 include:

“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)

Duty 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)¹²

85. Attorney Kirby’s comments on the Appellant’s EPRS annual review (Stage C)

FY2014 report states, in part,

Duty 1 – “... She is a very skilled attorney who handles her caseload competently and effectively. Her court cases are always well prepared which contributes to her effectiveness as a litigator when presenting cases before the court. Her diligent and effective work has ensured that she never has a backlog of cases. Whitney handles all aspects of managing her cases independently and competently, asking for advise in appropriate circumstances. She consistently maintains a professional demeanor and demonstrates high ethical standards.”

Duty 2 – “... generally Whitney has always ranked among the higher performing attorneys in the unit ...Whitney continues to be a highly effective attorney who manages her high volume case load effectively. She conferences her cases thoroughly, expeditiously, and professionally, yet always courteously. Her oral arguments are always concise, factual, and persuasive resulting in the effective representation of the Commonwealth”

Duty 3 – Whitney continues to serve DOR effectively as counsel by providing accurate and timely responses to internal and external customers, as well as the private bar and the courts. Her effectiveness is a result of her overall understanding and command of DOR policies and relevant state and federal laws and regulations.”
(Ex. 26)

Attorney Kirby’s comments on the Appellant’s FY2014 EPRS progress review

(Stage B) is very similar to the annual review for FY2014 noted above. (*Id.*)

¹² I take administrative notice that the Appellant’s EPRS duties are the same as those of the appellant in Tannenbaum v. DOR and HRD, C-15-195 (decided recently) when her request for reclassification was being considered.

86. The Appellant's duties were the same in her FY2015 EPRS. (Ex. 4)

Counsel II Specification

87. Effective August 11, 2013, the HRD revised the previous Counsel Series issued in 1987. (Ex. 1)¹³

88. Ms. Caggiano, Deputy Director of the Organizational Development Group (ODG) at HRD, has been involved in the development of the 2013 Counsel Series classifications. She began working for HRD in 1997, when she worked on a classification study, was later appointed Assistant Director of the HRD Civil Service Unit, and then Assistant Director of the HRD Organizational development Group. In 2009, the Reorganizational Development Group and Civil Service Unit were reorganized under Director George Bibilos; Ms. Caggiano was appointed Deputy Director. In 2009, there was another classification study supported by a limited budget in which Ms. Caggiano participated. The Hay Group, a consultant, was hired to develop job specification for larger employment series. In 2011, the DOR and Executive Office of Human Health Services (EOHHS) requested an expanded Counsel Series. An HRD staff member worked on a revised Counsel Series, which had been drafted to include Counsels I, II, III and IV. That staff person left HRD. Ms. Caggiano sent the revised draft Counsel Series to the DOR and EOHHS for comments. The DOR and EOHHS told the HRD that the proposed Counsel IV title in the draft Counsel Series too closely reflected a non-attorney management position. As a result, Ms. Caggiano removed the proposed Counsel IV position from the draft Counsel Series. The 2013 Counsel Series specifications for Counsels I, II and III are

¹³ At the time of the Commission hearing, there were approximately 74 Counsel Is, 470 counsel IIs and 15 Counsel IIIs. (Testimony of Kaplan)

cumulative. Reclassification is based on the needs of the employer. Ms. Caggiano did not have knowledge of the facts of the instant appeal. (Ex. 1; Testimony of Caggiano)

89. Ms. Dill, Assistant Director of the HRD Office of Employee Relations, was also involved in negotiations involving the 2013 Counsel Series but with respect to the Counsel III title its implementation. At the time of the Commission hearing, Ms. Dill had been working at the HRD for approximately three (3) years. Her duties include being the lead negotiator with NAGE and mid-term bargaining. Ms. Dill discussed with Kevin Preston of NAGE the 2013 Counsel Series and changing the requirement of supervision in the Counsel III title to permission to supervise but Ms. Dill was not involved in discussions about whether a Counsel II is required or permitted to supervise. Longevity in a title does not entitle someone to be automatically reclassified. (Testimony of Dill)

90. NAGE intended for the 2013 Series to create a “career path” for Counsels, meaning a mechanism for Counsels to move up in an agency. (Testimony of Kaplan¹⁴) HRD told NAGE that it did not intend for the 2013 Series to provide an automatic upgrade for Counsels I and II after a specific period of time or after meeting the minimum requirements of the next title in the 2013 Series. (Ex. 24; Testimony of Dill)¹⁵

91. The revised Counsel Series (2013 Series) made certain revisions to the earlier Counsel Series (1987 Series) in the Counsel I and Counsel II titles and added a

¹⁴ Ms. Kaplan was not directly involved with the negotiations with Ms. Dill, at HRD, in negotiations relating to the Counsel III series, although she discussed them with other union officials at the time who were involved in the negotiations. (Testimony of Dill)

¹⁵ 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. 24; Testimony of Dill)

Counsel III title. (Exs. 1 and 2) In the 1987 Series, the Counsel II was to be first level supervisor. In the 2013 Series, Counsel II “may” supervise, which is only one (1) part of the job. That change acknowledges the changes in the workforce, including changing technology, and it gives managers more staffing flexibility to either require or permit Counsel IIs to supervise others. Further, an agency may require Counsel II candidates for one (1) unit to supervise while not requiring Counsel II candidates in another unit to supervise. Counsel II candidates who do not supervise others need to show that they handle more complex cases, are experts in an applicable field of law and have a wider range of internal and external contacts than a Counsel I. (Testimony of Caggiano)

92. 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.¹⁶ 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 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**

¹⁶ The first sentence in the Distinguishing Characteristics also appeared in the 1987 Series; the 2013 Series added the second sentence.

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) provisions in the section regarding the **requirements candidates must meet at the time of hire:**
- i. “**Ability to lead** or work with cross-functional project **teams.**
 - ii. **Ability to manage** multiple projects and project **teams.**
 - iii. **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 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.)

93. 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. Further, it provides,

“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’s will be grandfathered in the position.” (Ex. 20)

The Counsel II title consists of fourteen (14) steps, resulting in fourteen (14) annual salary increases of approximately 1.5-2%, in addition to a cost of living increase, if any. These steps have not been changed as a result of the 2013 Series or the MOU.

(Testimony of Kaplan)

94. 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)

95. 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.)

96. 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)

97. 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.)
98. 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)
99. 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.)
100. 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)
101. 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, who is not an attorney) 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. (Testimony of Antonucci and Appellant)]

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

(Testimony of Antonucci)

103. By letter dated June 25, 2015, Melissa Diorio, then-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 reports.

Issue recommendations for final decision or resolution of cases, and for some cases, to issue or agree to final resolution without further review.”
(Ex. 9)¹⁷

104. By letter dated July 1, 2015, the Appellant submitted a brief rebuttal to the DOR preliminary denial of her reclassification request, stating, in part,

“... The justification is boilerplate language of Form 30 duties of a Counsel II and does not specifically address which duties I fail to perform. For

¹⁷ I take administrative notice that the preliminary denial letter the DOR sent to the Appellant here is the same as the preliminary denial letter sent by DOR to the appellant in Tannenbaum v. DOR and HRD, C-15-195, decided recently.

example, the first duty listed is “may be first level of supervision of staff.’ However, ... the Counsel II position is no longer required to supervise staff. Furthermore, other duties, such as ‘draft new policies and regulations’ are not performed by any attorneys – Counsel I or Counsel II – in the Litigation division. Such function is handled by the Policy & Procedure Division. As such, I am seeking from the Department the *specific* criteria used to evaluate reclassification requests.

... After seven and a half years of service at the Department, I no longer require close supervision. Additionally, I continue to participate in outreach programs on behalf of the Department. For example, I again represented the Department at a family law workshop at the Suffolk Probate Court on May 14, 2015. ...”

In addition, the Appellant reiterated her previous statements with some added detail. (Ex. 10)(emphasis in original)

105. By letter dated July 29, 2015, Ms. Diorio, then-Director of the DOR HRB, informed the Appellant,

“Your appeal for the reclassification of your position was received in this Department on October 23, 2014. You requested the reallocation of your position from the title of Counsel I to the class (sic) of a Counsel II. Accordingly, we find that the duties being performed by you do not warrant the reallocation of your position. We, therefore, regret to inform you that we must deny your appeal.

Please return the enclosed form to the [**HRD**], **Organizational Development Group, One Ashburton Place, Room 301, Boston, MA 02108 RE: Classification Appeal**, at your earliest convenience. Please submit the completed form with a check next to your preference of an official hearing or a complete review of all documentation pertaining to your reclassification appeal. Please enclose a copy of this letter with your Classification Appeal Request Form.

Inquiries regarding this matter may be directed to Sandra Antonucci in Human Capital Development ...”

(Ex. 11)(emphasis in original)

106. In a Classification Appeal Request Form dated July 31, 2015, the Appellant requested that HRD conduct a classification hearing. (Ex. 12)

107. Ms. McInnis, at HRD was assigned to respond to the Appellant’s appeal to HRD

since DOR is an agency to which she is assigned. At the time of the Commission hearing, Ms. McInnis had worked at HRD for eight (8) years and worked elsewhere for the state for seven (7) additional years and had worked on classification matters for years. Ms. McInnis obtained from Ms. Antonucci documents on which the DOR relied to respond to the Appellant's request for reclassification. (Testimony of McInnis)

108. Ms. McInnis conducted a hearing in mid-September 2015 in response to the Appellant's request. Those at the hearing included the Appellant; Ms. Bobbi Kaplan, Executive Vice President of NAGE, Local 7 (representing Unit 6); Ms. Antonucci; Ms. Moran; and Ms. Odlum (from HRD). The DOR representatives did not make any presentations at the HRD hearing. Ms. McInnis found that the Appellant stated, *inter alia*, that since the 2013 Counsel Series made supervision permissive, not required, her duties were in line with the specification for Counsel II, she handles more complex cases, she provides functional supervision to a case worker and she performs data entry regarding in COMETS after her cases are addressed in court. The Appellant did not state the amount of time she performed the duties of a Counsel II. The Appellant added that she reports to Attorney Kirby, who is a Counsel II. After the HRD hearing, Ms. McInnis and Ms. Odlum compared the information they received at the hearing with the Counsel II specification. Ms. McInnis found that a major factor was that the Appellant reports to a Counsel II; in addition, the Appellant's Form 30 and EPRS contained Counsel I descriptions. Also, since the Appellant did not assign work to someone, she was not a functional supervisor. The Appellant had stated that she communicates with other agencies but

it is in order for her to obtain information, not to provide it. Further, Ms. McInnis found that the Appellant did not indicate that she drafts policies, presents memoranda to the Legislature, allocates cases to others, prioritize others' work or issue recommended decisions without approval, and that the Appellant's Form 30 indicates that she prepares routine documents and that there's not a lot of complexity in the Appellant's cases. Ms. McInnis acknowledged that since the Appellant had been employed at the DOR CSE since 2007, she was performing the job duties with more experience but denied that she handled more complex matters. (Testimony of McInnis; Ex. 34)

109. By letter dated September 30, 2015, Ms. McInnis, at HRD, informed the Appellant, in part,

“The Human Resources Division received your appeal of the classification of your position on August 5, 2015. You requested the reallocation of you (sic) position from the class of Counsel I to Counsel II.

A hearing was conducted at the [HRD] on Wednesday, September 16, 2015. After careful review of the information presented at the hearing and the appeal documentation, we find the classification of Counsel I 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.

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 as provided in Massachusetts General Laws, Chapter 30, Section 49. ...”
(Ex. 13)

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 the level distinguishing duties of the reclassification title they seek 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*, Superior 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 (emphasis added).¹⁸

¹⁸ 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.

There is no caselaw from the Supreme Judicial Court, nor the Appeals Court, of which I am aware that addresses the point regarding an individual's request for reclassification.¹⁹

Analysis

The Appellant has not proved by a preponderance of the evidence that she performs the level distinguishing Counsel II functions a majority of the time. First, the Appellant concedes that she does not perform certain Counsel II functions. Specifically, she agrees that she does not communicate with the Legislature nor present memoranda in support of, or in opposition to legislation, she does not draft new policies and regulations as those matters are addressed by the Policies and Procedures Unit. She has not proven that she has the requirements at the time of hire of a Counsel II involving the “ability to lead or work with cross-functional project teams[, the] ability to manage multiple projects and project teams[,] ... [the] 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) In addition, the Appellant acknowledges that her duties have not changed. Although the Appellant has a number of external contacts, she has not proven that she has more external contacts, as provided by the Counsel II specification.

¹⁹ 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.

The Appellant does not handle more complex cases since all case assignments are made alphabetically, not by complexity. She asserts that although the cases she is assigned may not appear to be more complex, she addresses them in a complex manner since she has more experience and expertise and can dig deeper to resolve cases more favorably. As her supervisors indicate, there is no question that the Appellant performs at a high level and that she is very effective, productive and well-respected. She handles confidential matters appropriately as required. To be sure, those are desirable attributes but they do not convert the work she does to the work of a Counsel II.

The Appellant also states that she performs her work more independently now and she asks fewer questions because of experience and expertise. While she may be performing more independently, the fact remains that she has not conducted any trials or legal memoranda, her limited non-routine work requires approval by Attorney Kirby and Attorney Fishbein reviews all agreements drafted by the Appellant and other CSE Counsels.

The Appellant acknowledges that she does not directly supervise anyone but avers that she functionally supervises Ms. Dixon and a number of case workers. However, the Appellant has not proved that she functionally supervises them; she gives them certain assignments, provides them with guidance and answers their questions. The Appellant also argues that the 2013 Series eliminated the requirement that a Counsel II supervise others. In her testimony, Ms. Caggiano indicated that replacing the supervisory requirement in the Counsel II position in the 2013 Series with text that permits supervision was intended to provide appointing authorities the flexibility to either require or permit Counsel IIs to supervise others. The DOR CSE Region 1 appears to require

Counsel IIs to supervise Counsel Is. However, the same cannot be said for all Counsel IIs in three (3) of the DOR CSE regional offices: Pittsfield, Taunton and the “Northern” office.²⁰ While Ms. Caggiano indicated that an appointing authority is authorized to apply the supervisory requirement in some units but not in others in the same agency, it is not appropriate for an agency to require a Counsel II to supervise in some geographic regions of one unit and not other regions in the same unit. Nonetheless, the Appellant’s reclassification is not warranted since she does not perform the level distinguishing functions of a Counsel II a majority of the time.

Conclusion

For all of the above stated reasons, the appeal of Ms. Duvall Paprocki, under Docket C-15-190, 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 April 13, 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)(I), 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

²⁰ Exs. 23 and 23A are 2015 DOR organization charts. In addition, DOR produced a 2013 (the year the Appellant requested reclassification) organization chart for the Metro Region in which the Appellant works. These charts appear to show in the Taunton office that Counsel IIs supervise other Counsel IIs and that the Counsel IIs being supervised do not supervise anyone; in the Northern office a number of Counsel IIs do not supervise anyone; and in the Pittsfield office the Counsel II does not supervise anyone. Counsel IIs in the Tax Unit do not appear to supervise Counsel Is as they do in the CSE Unit.

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)