

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MARIA FERNANDES,
Appellant

v.

C-15-95

DEPARTMENT OF REVENUE,
Respondent

Appearance for Appellant:

Stephen Kobialka¹
Marc Dobrusin, Esq.

Appearance for Respondent:

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

Commissioner:

Cynthia A. Ittleman

DECISION

Maria Fernandes (Ms. Fernandes or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on May 21, 2015, under G.L. c. 30, § 49 challenging the decision of the state's Department of Revenue (DOR) denying her request to be reclassified from Tax Examiner III to Auditor I, which decision was affirmed by the state's Human Resources Division (HRD). A prehearing conference was held in this regard on June 9, 2015 at the offices

¹ Mr. Kobialka is the Appellant's husband and a retired DOR employee. He is not an attorney. He represented the Appellant at the hearing in this matter and also testified in support of the Appellant. Mr. Dobrusin, an attorney and also a retired DOR employee, participated in the hearing only for the purpose of examining Mr. Kobialka.

of the Commission. A hearing² was held on this appeal on October 20, 2015 and November 6, 2015 at the Commission. At this hearing, the witnesses were sequestered, except the Appellant and her representative, Mr. Kobialka (who was also a witness). The hearing was digitally recorded and the parties received a CD of the proceedings.³ The parties submitted post-hearing briefs in the form of proposed decisions. Having found herein that the Appellant does not perform the duties of a Tax Auditor I a majority of the time, the appeal is denied.

FINDINGS OF FACT

Based on the fifty (50) exhibits⁴ entered into evidence, in addition to the Exhibits I requested at the hearing that were submitted post-hearing (marked collectively “Post-Hearing Exhibits”)⁵, and the testimony of:

Called by Respondent:

- Allen Rosenberg, former supervisor, Department of Revenue
- Isabel Mack, Supervisor, Department of Revenue
- Melisa Diorio, Human Capital Development director, Department of Revenue
- Sandra Antonucci, Classification Reviewer, Department of Revenue

Called by the Appellant:

- Maria Fernandes, Appellant
- Stephen Kobialka, former Department of Revenue Supervisor and Appellant’s husband

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

³ 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 fifty (50) exhibits include Exhibits 1 through 21, 21A, 21B and Exhibits 22 through 48.

⁵ The Post-Hearing Exhibits include the Respondent’s Responses 1, 2 and 3 and the Respondent’s related email dated 12/11/15, the Appellant’s related email on 12/12/15, and the Respondent’s related email on 12/21/15.

and taking administrative notice of all matters filed in the case; pertinent statutes, including, without limitation, stipulations, pertinent regulations, case law⁶ and policies; and reasonable inferences from the credible evidence; a preponderance of evidence establishes the following findings of fact:

Background

1. The Appellant has a Bachelor of Science Degree in Business Management. She began working at the DOR in 1988 as a Tax Examiner (TE) I in the Taxpayer Assistance Bureau. In 1993, the Appellant was appointed to TE II. She was appointed TE III in 1996 and was assigned to the DOR Problem Resolution Office as a Caseworker. In or about 2005, the Appellant was assigned to the DOR Bankruptcy Unit of the Legal Division where she works on Chapter 13 bankruptcies.⁷ In 2001 and 2009, the Appellant was a member of a group recognized by the DOR for outstanding performance. She requested reclassification to Tax Auditor I (TA) but was denied in February 2015.

(Testimony of Appellant; Exs. 4 and 46)

⁶ At the hearing, I took administrative notice of the Appellant's previous case at the Commission: Fernandes v. Department of Revenue, G2-13-252.

⁷ I take administrative notice of the DOR website (<http://www.mass.gov/dor/businesses/current-tax-info/guide-to-employer-tax-obligations/bankruptcy.html>) (May 4, 2017) containing, *inter alia*, the following brief information about bankruptcies:

"... Bankruptcy is a legal procedure for dealing with debt problems of individuals and businesses, or more specifically, a case that is filed under one of the chapters of title 11 of the United States Code (the Bankruptcy Code). ..."

"... Chapter 11 is designed primarily for the reorganization of a business but is also available to individual debtors who exceed the thresholds for Chapter 13 bankruptcies. Under Chapter 11 the Bankruptcy Court approves a plan of reorganization which provides for payment of claims in full or in part, depending on the priority and type of claim. ..."

"... Chapter 13 is designed for individuals with regular income who are temporarily unable to pay their debts but would like to pay them in installments over a period of time. You are eligible for Chapter 13 if your debts do not exceed certain dollar amounts set forth in the Bankruptcy Code. Under Chapter 13 you must file a plan with the court to repay your creditors all or part of the money that you owe them, using your future earnings...." (*Id.*)

2. The Bankruptcy Unit is led by John Giamattei, who is Assistant Chief and Director; Mr. Giamattei supervises Allen Rosenberg, a TE VI; Mr. Rosenberg supervises six (6) employees; one (1) of the six (6) employees supervised by Mr. Rosenberg is William Connor, a TE V; Mr. Connor, in turn, supervised the Appellant, two (2) other TE IIIs and two (2) TE IIs. Isabel Mack, a TE IV in the Bankruptcy Unit, began supervising the Appellant on December 9, 2013 but Mr. Connor was the Appellant’s supervisor for the purpose of preparing her EPRS Progress Review. The Appellant and her supervisors signed her EPRS Progress Review in January and February 2014, approximately one (1) month prior to the Appellant’s request for reclassification. The Appellant does not supervise anyone. (Exs. 1 and 4; Testimony of Mack) Stephen Kobialka, a TE VII, worked at the DOR beginning in 2004. At a later point, Mr. Kobialka transferred to the Bankruptcy Unit, where he worked on Chapter 11 bankruptcies until he retired in 2012. At some point in time at the Bankruptcy Unit, Mr. Kobialka supervised people in the Unit but he did not supervise the Appellant. (Testimony of Kobialka; Ex. 4)
3. There are two main types of DOR audits: desk audits and field audits⁸. Desk audits “can be completed quickly via letters between the Department and the taxpayer.” Field audits “may have to examine a taxpayer’s books, records, etc., to verify his or her tax liability.” Further, “[b]efore the field audit, an auditor will contact [the taxpayer] to arrange a convenient time to meet at a DOR office or, if a business, at the business’ location. ...” (Administrative Notice: DOR website <http://www.mass.gov/dor/audit-info/audit-questions.html> (April 21, 2017))

⁸ The DOR Field Audit Manual (Ex. 12) is hundreds of pages long, describing the audit process in detail, for example, from the point at which the auditor is assigned an audit through the Audit Workbench Case Plan, providing formal notice to the taxpayer, examination of the taxpayer records, the exit conference, audit completion, and contested audits.

4. At the time the Appellant filed the instant appeal at the Commission, there was a Tax Auditor (TA) who had been transferred to the Bankruptcy Unit but he functioned as a TE in this Unit. The DOR Audit Unit is responsible for performing audits, not the Bankruptcy Unit. The DOR Litigation Bureau has hired at least one (1) TA to assist the Bureau's attorneys with audit matters that arise in litigation. The Appellant checks sources such as the MassTax computer system for information about debtors. She does not check source documents like auditors do, or write audit reports. If the Appellant finds that a debtor has not filed tax returns, she investigates the matter and may file a claim in Bankruptcy Court⁹ but her investigation does not constitute an audit. If the Appellant reviews a debtor's file and finds discrepancies in it, she is to inform her supervisor and/or discuss it with Mr. Rosenberg in order to determine if an audit is necessary, in which case the file may be sent to the Audit Division. (Exs. 1, 4 and 30; Testimony of Mack and Rosenberg) "[T]he Bankruptcy Unit does not have the authority to complete audits pursuant to MGL c.62C". (Ex. 4 (Response of Appellant to Comments of Ms. Mack and Mr. Rosenberg to Appellant's Interview Guide requesting reclassification)) The Audit Division conducts nearly all of the audits conducted at the DOR; one (1) or two (2) other DOR units may conduct audits but with limited authority. (Testimony of Kobialka) When the Appellant is prepared to file a claim, her supervisor initials it. (Testimony of Appellant; Exs. 35 and 39)
5. In November 2013, the Appellant filed an appeal at the Commission, docketed G2-13-252, contesting her non-selection for provisional appointment to the title of TE IV (not a TA title) at the DOR. The Commission granted the DOR's Motion to Dismiss the appeal docketed G2-13-252 and denied the Appellant's request for an investigation in a decision

⁹ The DOR Bankruptcy Unit files Bankruptcy Court claims online. See Exs. 35 and 39.

dated February 20, 2014. (Testimony of Appellant; Exs. 4 and 46; Administrative Notice: Fernandes v. Department of Revenue, G2-13-252)

The Appellant's Request for Reclassification

6. The Appellant emailed Ms. Sandra Antonucci at the DOR Human Capital Development (HCD) office¹⁰ on February 21, 2014, one (1) day after the Commission denied the Appellant's previous appeal and two (2) weeks after the Appellant signed her EPRS Part B Progress Review (February 10, 2014). The Appellant requested the information, procedures and forms necessary to request a reclassification to Tax Auditor (TA) I. (Ex. 13) Ms. Antonucci responded to the Appellant on the same day and provided her with information.¹¹ (Id.)
7. Ms. Antonucci has been employed at the DOR HCD for approximately fourteen (14) years. Her title is Program Coordinator III; her functional title is Classification Analyst. Ms. Antonucci sent the Appellant an Interview Guide to complete. In addition to the completed Interview Guide and comments from supervisors, Ms. Antonucci reviews reclassification candidates' Form 30 Job Description (Form 30) and the candidates' current EPRS to determine what duties the candidates are performing at the time they request reclassification. Ms. Antonucci does not consider the candidates' EPRS ratings because they do not determine their duties. (Testimony of Antonucci)

¹⁰ HCD is the current name of the DOR human resources office. At the time that the Appellant requested reclassification, it was called the Human Resources Bureau.

¹¹ It is unclear what information Ms. Antonucci provided the Appellant beside the Interview Guide she would need to complete for her reclassification request. DOR should give all employees requesting reclassification a copy of their Form 30, showing their current duties, and any and all Specification Series and applicable Level-Distinguishing Duties for the position to which they seek to be reclassified.

8. The Appellant's Form 30 was signed and dated by the Appellant and a supervisor in October 2013. In the General Statement of Duties and Responsibilities section, the Form 30 provides,

“Researches Bankruptcy cases upon receipt of notice, enters petition into MASSTAX for pre-petition liability periods; submits monthly reports; uses MASSTAX NOTES, prioritizes Bankruptcy notices; closed Bankruptcy cases based on unit procedures, performs related work as required.”
(Ex. 4)

9. The Form 30 “Supervision Received” provides,

“Works under general supervision of Unit Supervisor and respective Group Leaders. ... adheres to Bureau and Unit policies and procedures, [G.L.] Chapter 62C, Federal Bankruptcy Code and MASSTAX procedures. The incumbent's work is reviewed through daily contact with the Unit Supervisor, staff meetings and reports.”
(Id.)

10. Under this Form 30, the Appellant has no “direct reporting staff”. (Ex. 4)

11. The Appellant's Form 30 “Duties and Responsibilities” include:

“Researches Bankruptcy cases upon receipt of notice from the Bankruptcy Court by checking the taxpayer's history on MASSTAX, the taxpayer's Bankruptcy schedule of assets, liabilities and objections to claim to ensure the accurate and timely filing of proofs of claim, the efficient handling of objections in conjunction with the Litigation Bureau. Closes cases within 10 days of notification from court or other source.

Records and tracks Bankruptcy activities on MASSTAX including entering the petition date for pre-petition liability periods to maintain a true list of receivables and stop further accumulation of interest and penalties and entering dates that proofs of claim are filed, bar dates, close dates and confirmation dates as verified by Chapters 11, 13 and 7 attorneys, the Bankruptcy Court or Pacer computer system.

Submits required monthly reports

Processes checks within 14 days of receipt and prepares payments for posting ...

Reviews Plans of Reorganization by requesting them from the taxpayer's attorney and review them with Group Leader and/or Unit Supervisor ...

Tracks cases for conversion or dismissal using PACER and reviews for immediate levy of money on account of trustee.

Pursues Responsible Person cases for trust fund liabilities by researching DOR, Bankruptcy Court and Secretary of State Records ...

Reviews tax returns for accuracy ..., then contacts taxpayer ...to inform them of discrepancies, obtain delinquent tax returns and provides technical assistance by answering questions and explaining state and federal tax laws ...
Works with minimal supervision on cases that are more complex or require more extensive involvement.
Trains and assists employees of a lesser grade to complete assigned duties.
Attends tax education classes as required by the Legal Division.
Performs limited backup (sic) Supervision for functional duties over other employees in emergency situations.
Reviews audits for content, accuracy and completeness.
Assists in valuation and calculation regarding Litigation cases.

12. The qualifications required at hire of a TE III, according to the Appellant's Form 30 are:

Knowledge of the principles and practices of general accounting ...
Ability to analyze and determine applicability of tax data such as financial reports, accounts, ledger and other documents ...
Ability to work independently and in a team setting.
Ability to perform mathematical calculations using formulae to solve problems.
Ability to give and follow precise written and oral instructions.
Ability to gather information by examining records and through questioning individuals,
Maintaining accurate records ...
Ability to write, in a concise manner, to express thoughts clearly and to develop ideas in logical sequence ... to produce accurate and informative reports.
Ability to communicate effectively, exercise sound judgment and handle confidential matters with discretion.”
(Ex. 4)

13. Under the Form 30, the qualifications required on the job are,

Knowledge of the laws, rules, regulations, policies, procedures, etc. governing assigned Unit activities.
Knowledge of the state and federal laws, rules and regulations governing taxation, including terminology.
Knowledge of the types and uses of agency forms.
Knowledge of the principles, practices and procedures of the U.S. Bankruptcy Code and related case law.
(Ex. 4)

14. The Minimum Entry Requirements (MERs) on the TE III Form 30 are that candidates,

“ ... must have at least (A) two years of full-time or equivalent part-time professional experience in accounting, auditing or tax examining work, or (B) any equivalent combination of the required experience and the substitutions below:

Substitutions:

1. A Bachelor's or higher degree with a major in accounting, business administration, or business management may be substituted for the required experience. ...”
(Ex. 4)(emphasis added)

15. Ms. Antonucci also considered Parts A (Performance Planning section) and B (Progress Review section) of the Appellant's most recent EPRS (signed in February 2014) prior to her request for reclassification. (Testimony of Antonucci; Exs. 3 and 4) The EPRS was signed by Mr. Condon and reviewed by Mr. Rosenberg.¹² The Appellant's eight (8)

EPRS duties were:

1. “Researches bankruptcy cases and prepares proofs of claim in order to protect DOR's interests in bankruptcy proceedings.” (Ex. 4)
Some of the performance criteria for this duty include researching all liabilities for income and business taxes using taxpayer profile screen, enters case notes and information on other account-related screens; enters information into MassTax; verifies existence of liens; files proofs of claims in Bankruptcy Court or claims center; files amended claims; appropriately prioritizes cases; and notifies supervisor immediately when a Bar Date has passed or if proofs of claim were not filed.
The Appellant's supervisor wrote that the Appellant's claims are accurate “to the penny”. (Id.)
2. “Submits all required unit and interdepartmental forms timely, nearly (sic) and accurately.” (Ex. 4)
Some of the performance criteria for this duty include submitting monthly reports for research totals, claims filing totals and dollars and payment processing totals; processing all payments, checks and returns within fourteen (14) days of receipt; preparing internal bill payment forms and all other DOR forms; completing FEFT Forms for all prior year returns; and ensures 880 code is applied to all pre-petition periods for which tax due returns are received. (Id.)

¹² The Appellant's Annual Review (Part C of the EPRS) was signed on July 16, 2015 by Ms. Mack, who began supervising the Appellant only a couple of months prior to the date the Appellant's request for reclassification in March 2014, and Mr. Rosenberg. The Appellant refused to sign the Annual review, suggesting she received a lower rating than she had in many years without adequate explanation as a result of factors such as having filed the instant reclassification appeal at the Commission; requesting “written clarification of the EPRS Review procedures” (which request was denied); a 2013 “reorganization” that she alleges was roundly criticized by the Appellant and other TEs who attend 341 meetings; she was not selected for Tax Examiner IV in 2013; and in 2012 her marriage that year to Mr. Kobialka, a Bankruptcy Unit employee who retired soon thereafter and had been “very unpopular” in the Litigation Bureau. (Exs. 40 and 30)

3. “Process bankruptcy cases by consistent adherence to established policies, procedures and practices relating, but not limited to, the U.S. Bankruptcy Code, MassTax, Mass. General Laws, CMRs and other official sources.” (Ex. 4)
Some of the performance criteria for this duty include demonstrates knowledge of the Bankruptcy Code, G.L. c. 62C, MassTax and pertinent policies to properly prepare responses to correspondence from attorneys, courts and others; and uses PACER to determine status and deadlines of cases and other information in Bankruptcy Court docket entries. (Id.)
4. “Manages and monitors assigned case inventory through the utilization of MassTax and Microsoft Office, as well as regular review of case folders following confirmation and assignment to the examiner.” (Ex. 4)
Some of the performance criteria for this duty includes cases are monitors to ensure that payments are applied according to the terms of pertinent Plan and DOR Proof of Claims are filed; tracks and refers cases for legal action if post-petition compliance issues develop; records major actions in debtors’ case folders and on MassTax/Note; recommends changes in Unit guidelines and procedures; notifies supervisor immediately if plan payments are more than 90 days overdue; and performs payment transfers and accounting adjustments. (Id.)
5. “Reads and reviews all DOR communications and publications that become available, becomes familiar with all means of communication available to DOR.” (Ex. 4)
Some of the performance criteria for this duty includes reading email regularly, “regularly reviews DOR NET for current information regarding job postings, announcements, etc.”; uses DOR NET to access reference information such as DOR policies and procedures; save important Unit memoranda relating directly to policies, procedures, job function and duties; and requests training classes in subjects with a direct impact on job function. (Id.)
6. “Provide professional customer service.” (Ex. 4)
Some of the performance criteria for this duty includes being courteous to all taxpayers and colleagues; thoroughly researches all information pertinent to the case/issue; and uniformly applies policies and procedures. (Id.)
7. “Attends creditor meetings (341 hearings) at the Bankruptcy Court to assist the Department’s processing of Chapter 13 Bankruptcy cases.” (Ex. 4)¹³
Some of the performance criteria for this duty includes ensures that, with clerical support, standard letters are sent to the debtor, attorneys and Chapter 13 Trustee; corresponds with the Trustee’s office regarding scheduling of 341 hearings; attends hearings and questions debtors under oath; completes follow-up on cases after 341 hearing; enters taxpayer notes into MassTax and closes cases; and selects cases for referral for objection. (Id.)

¹³ The 341 meetings are held at the U.S. Bankruptcy Court in Boston not because they are judicial proceedings but because the Bankruptcy Court is a convenient location for creditors; creditors attending 341 meetings need not be attorneys. (Testimony of Rosenberg)

The Appellant's supervisor wrote that the Appellant "asks the necessary questions of debtors in Ch. 13 at those [341] meetings. She will attempt to resolve issues that arise during case research and at these meetings." (Ex. 4)

8. "Provides assistance as required regarding values for litigation cases." (Ex. 4)
Some of the performance criteria for this duty includes works with Litigation bureau attorneys to determine proper value of cases; prepares settlement calculation for Litigation Bureau attorneys under direction of Bankruptcy Unit manager; and demonstrates proficiency of the MassTax system and DCPI calculation program. (Id.)

16. The Appellant completed and submitted the Interview Guide on or about March 21, 2014, providing lengthy and detailed responses to the Interview Guide prompts or questions:

1. Asked the basis of her appeal, the Appellant referred to a memo, dated August 13, 2007, that proposed that the Appellant and others be reclassified; this memo was drafted by Mr. Kobialka to be reviewed by Mr. Giamattei and Mr. Rosenberg and to be sent under their names to Mr. Condon, Chief of the Litigation Bureau. (Ex. 4; Testimony of Kobialka) There is no indication whether Mr. Giamattei and/or Mr. Rosenberg revised and/or sent the 2007 memo to Mr. Condon. There is no indication that Mr. Condon approved the memo, if he received it, and sent it to the DOR human resources office for processing. (Administrative Notice)
2. Asked to describe her relationship with others, the Appellant wrote that within DOR she 1) advises the Bankruptcy Unit Director and Bankruptcy Unit Chapter 13 Supervisor of the status of cases before and after attending creditor 341 bankruptcy meetings¹⁴ at which she represented the DOR; 2) refers appropriate case matters for problem resolution; and completes all reports of activity; 3) conducts research her cases and assist other Case Administrators in researching their cases and assisted in resolving MassTax computer account issues and cases are prepared for the Bankruptcy Trustee; 4) she works with Bankruptcy Unit support staff, regarding notices to taxpayers/debtors; 5) she works with Litigation Attorneys regarding support such as performing calculations of projected case value; 6) works with the Collection Bureau regarding permissible actions against taxpayers in Bankruptcy proceedings; confirm liens, etc., to assure payment of tax debts; 7) Audit Division regarding Taxpayers/debtors in bankruptcy; refers cases to Audit Division for

¹⁴ I take administrative notice that the U.S. Bankruptcy Court website states that a 341 meeting is,

"... referred to as the "meeting of creditors." It is commonly referred to as a "341 meeting" because the authority to conduct the meeting is found in Section 341 of the Bankruptcy Code. All creditors are notified of the meeting so that they may attend, but their attendance is not required. Debtors must appear, testify under oath and answer questions by creditors and the trustee. This meeting is presided over by the trustee assigned to the case and is held approximately 40 days after the petition is filed. Debtors are required to provide photo identification and proof of social security number to the assigned trustee. A Debtor's failure to appear may result in dismissal of the case."

<http://www.mab.uscourts.gov/mab/faqs-debtors>

- possible audit; 8) confers with the DOR Problem Resolution Office as requested; 9) she works with the DOR Office of Appeals as requested; and 10) she confers with Taxpayer Service Division as requested. Case Administrators are TE IIs and IIIs. Outside DOR, the Appellant is in contact with 1) the U.S. Bankruptcy Trustee at 341 meetings regarding debtors; 2) IRS Bankruptcy Specialists at 341 meetings; 3) taxpayer/debtors and their attorneys; 4) Massachusetts Secretary of State regarding research of taxpayers/debtors; 5) Registry of Motor Vehicles for research related to taxpayer/debtor address and assets; 6) Registries of Deeds researching taxpayer/debtor real estate assets; 7) Mass. Division of Professional Licensure regarding research of taxpayers/debtors; and 8) other states' revenue agencies for research about taxpayers/debtors.
3. Asked the basic purpose of her position, the Appellant wrote that she 1) identifies any tax and related debts owed to the Commonwealth by a taxpayer/debtor that has filed for Chapter 13 bankruptcy; 2) determines the value of such debts under law; 3) determines if the DOR has security to ensure payment of debt, files claims for such debt; 4) ensures payments on the debt are made and properly applied; 5) ensures adjustments are made as needed with MassTax accounts; 6) maintains records of actions in each of her cases; 7) ensures that the research in the cases of fellow Case Administrators is adequate prior to 341 meetings; 8) ensures that case folders contain all required documents; and generally, 9) provides taxpayer services, examines tax returns, checks financial records of taxpayers, collects debts and applies payments, informs taxpayers and other DOR personnel about bankruptcy, works with DOR Litigation Bureau attorneys to value cases for possible settlement, and performs assignments and prepare reports for supervisors as requested.
 4. Asked if there have been “any significant job changes” since her appointment, the Appellant wrote, in pertinent part, that,
 - in 2005, she performed MassTax account adjustments, completed payment transfers, assisted Litigation Bureau attorneys by valuing tax debts in cases for settlement;
 - in 2006, she was a “back-up” to supervisor to David Blomberg by attending 341 meetings for him; as needed, she also reviewed and filed claims and developed a “payment reconciliation form” for the Bankruptcy Unit;
 - in 2007, she took responsibility for attending 341 meetings for Mr. Blomberg, she was consulted by other Bankruptcy Unit employees for technical assistance with MassTax;
 - in 2008, she developed a “payment monitoring system” for the Bankruptcy Unit;
 - in 2011, she became a key contact for email communications with the U.S. Trustee’s Office;
 - in 2012, the functional title of the Appellant and other TEs was changed to Case Administrator and she was assigned responsibility for all bankruptcy tasks in her cases and to ensure that case folders for all of the Case Administrators had adequate research and documentation in preparation for the 341 meetings;
 - in 2013, her EPRS form was revised so that EPRS Duty #1 was expanded to include the duty to prepare and file claims in bankruptcy; Duty #6 was changed

regarding the criteria for filing monthly reports and assigned her responsibility for the accuracy/recording of internal payment forms; Duty #5 was revised, adding responsibility of tracking taxpayer/debtors' bankruptcy post-petition tax records for referral for litigation; and added "... responsibility for identifying all plan repayments more than 90 days overdue"; Duty #2 was revised to add responsibility to demonstrate knowledge of the Bankruptcy Code and Mass. Gen. Laws, putting her in contact with taxpayer/debtor attorneys, tax preparers and bankruptcy Court staff; Duty #3 was revised to add that she ensures that the folders of other Case Administrators had necessary research and documentation.

5. Asked what duties she performs and the percentage of time involved in performing such duties, the Appellant wrote, in pertinent part,
 - attends 341 meetings – 20%;
 - researches cases to “identify and value tax debts”, including “examination of tax returns, financial information” contained in bankruptcy filings and “other data sources” – 20%;
 - “prepare[s], sign[s] and, file[s] claims” – 15%;
 - check other Case Administrators' case files for adequate research and documentation for 341 meetings – 10%;
 - “applies payments and forwards returns for processing” – 10%
 - “assist Litigation Attorneys with cases referred for action, calculations, settlement values and responses to objections to claims. NOTE: This duty has diminished since the Litigation Bureau recently hired two (2) tax auditors to perform this activity full time” – 5%;
 - interact with different parts of the DOR and the IRS, taxpayers/debtors and their attorneys, the U.S. trustee in bankruptcies and his or her staff – 10%;
 - provide “technical assistance” with MassTax – 5%; and
 - “related duties, record keeping, and reports” – 5%.(Ex. 4)(emphasis added)

6. Asked to describe “major problems” she has faced and how she resolved them, the Appellant wrote, in pertinent part, that,

She works in “an environment of few formal policies and procedures. Often tasks are assigned with no direction. For example: in 2012 [she] was given an additional duty of referring all cases with payments more than 90 days in arrears for action, a task previously performed by the Unit Director on an inconsistent, ad hoc basis. [She] was given no tools, no control over files for my cases, no inventory recording and no precedent for accomplishing this task. Furthermore there was no coordination to assure best practices among Case Administrators ... [she has] begun to explore new methods of recording inventory, developing new tools for tracking payment performance and [she is] trying to schedule time for this new task. As [she has] done in the past, [she] will consult with [her] colleagues, refine [her] efforts, come up with a favored approach and share this with others in the Unit...”

When she was asked to attend the 341 meetings, she “slowly and methodically established [herself] as a capable, self-disciplined participant who made accurate

assessments, raised pertinent issues and demonstrated an ability to work with others to resolve problems. ...

When [her] position was retitled to Case Administrator [she] had a number of concerns as did other Unit employees that attended 341 meetings. Not only were [they] being given more duties, [they] were now formally required to assure that the work of others was adequately performed. [They] made many requests for formal procedures to no avail. [They] were thrust into the role of preparing claims with little training. Then, EPRS lowered (sic) after expressing our concerns”¹⁵

The Appellant complains that multiple attempts were made to reclassify her and others in the Bankruptcy Unit in 2007 and 2011 but she was not one of the employees who has been reclassified and morale is low in the Unit. (Ex. 4)¹⁶

7. Asked who assigns, reviews and approves her work and how she receives it, the Appellant wrote, in pertinent part,
“... After 2012, the [Bankruptcy] Unit Director directs 341 meeting information to [her] for all such cases assigned to [her] (by alphabet). [She] perform[s] [her] research for all such cases. If such cases are to be discussed at 341 meetings [she] attend[s], [she] assume[s] complete responsibility ...for such cases, to be discussed at 341 meetings [she] will not attend, [she] direct[s] the appropriate Case Administrator as to any issues [she] wish[es] raised. For cases to be discussed at 341 meetings [she] attend[s] but are assigned to other Case Administrators, [she] must review their case folders to assure proper research and documentation, and then discuss any issues they wish raised, identify additional issues that should be raised and then report the outcomes from the meetings. ... The [Bankruptcy] Unit Manager would direct [her] to perform specific tasks, especially to assist other Unit staff and Litigation Bureau Attorneys with Mass Tax research, liability calculations and in valuing cases for settlements. ... Once assigned the task of assisting a Litigation Bureau Attorney, [her] duties were directed by that Attorney”
Most of her assignments are from division of cases by alphabet but the Chapter 13 Supervisor also gives her plan repayment checks for the Appellant’s cases; she also responds to the Chapter 13 Supervisor as issues arise and as reports are required; upon receiving her cases, the Appellant handles them independently; (Ex. 4)
8. Asked whom she supervises, the Appellant answered, “None”. (Ex. 4)
9. Asked to indicate “by official payroll title those positions which report to [her] for only a portion of their total job assignments”, the Appellant wrote, in pertinent part,

¹⁵ The Appellant also notes that not all Bankruptcy Unit TEs attend 341 meetings. (Ex. 4)

¹⁶ The Appellant also complains that the Bankruptcy Unit was lacking specified procedures and policies for handling of bankruptcy cases. In March, 2015, a year after the Appellant filed the instant reclassification appeal, the DOR produced a Report of the Bankruptcy Work Group, addressing a number of issues facing the Bankruptcy Unit, including the lack of certain procedures and policies. However, there is no indication that the Bankruptcy Unit was facing these issues when the Appellant requested reclassification. (Ex. 28)

she works with Bankruptcy Unit Support staff regarding certain correspondence to be sent to taxpayers/debtors regarding requirements to file returns; she works with others DOR employees – especially the Taxpayer Assistance and Collections Bureau “regarding proper procedures to use when enforcing tax laws for taxpayers in bankruptcy” on her own initiative for cases in which she is involved, at the request of others in the Bankruptcy Unit and when such employees ask her for assistance; and she works with others in the DOR in relation to her cases.

(Ex. 4)

10. Asked to explain any unusual working conditions such as stress that are “important elements for anyone in her job, the Appellant complains, in pertinent part, “Unit employees find themselves trapped in an environment with few possibilities for promotion or advancement.”

(Ex. 4)

11. Asks if there are any special requirements for her job, such as a certificate, license, degree or other special requirement, the Appellant wrote, in pertinent part, her EPRS Duty#3 requires her to have knowledge of the Bankruptcy Code and pertinent parts of the Mass. General Laws; proficient in various bankruptcy court computer systems for “retrieving document (sic) and for electronically filing claims”; working with MassTax; assisting the DOR Litigation Attorneys.

(Ex. 4)

12. Asked to explain “any aspect of [her] job which [she] feel[s] has not been covered by the previous questions and which [she] feel[s] is important in understanding [her] duties”, the Appellant complained, in part, that,

She has been told “on multiple occasions” that she would be reclassified; and “[i]n the past few years, several employees in Tax Auditor positions have been brought into the Litigation Bureau to assist attorneys with MassTax interpretations, tax liability calculations and in valuing cases for settlement”

(Ex. 4)

13. On April 8, 2014, Ms. Mack, the Appellant’s then-immediate supervisor, who had supervised her for only a few months at that time, signed the Appellant’s completed Interview Guide indicating that it was not accurate and she added three (3) pages of critical comments. At the time, Ms. Mack had not observed the Appellant at 341 meetings but she attended 341 meetings in which other TEs were involved. Ms. Mack’s comments on the Appellant’s Interview Guide included, in pertinent part,

Relationship with others in the DOR

“All information is to be passed through the supervisor. There is no direct reporting relationship with others with respect to any matter to the Unit Director or the Unit Manager and [the Appellant] does not refer cases directly to Bankruptcy Attorney’s (sic), or the Audit Division for subsequent action. Such

referrals are made in the form of a recommendation to the supervisor. [The Appellant] will provide general case information to Customer Service, Problem Resolution, Audit and Collections as requested by examiners in those departments. ...”

Relationship with others outside the DOR

“[The Appellant] does not act as liaison between Bankruptcy Trustees or debtors (sic) attorneys and the [DOR]. [She] attends Creditor hearings pursuant to her current EPRS duty. ... Under no circumstances are efforts coordinated with representatives from the [IRS] as such activities are generally prohibited under MGL, C. 62C, S. 21. ...”

Cases assigned to other Case Administrators

“[The Appellant’s] function is limited to the review of the research done by other case administrators to insure that she has all information required in order to attend the [341] hearing. Missing information may be requested informally from other Case Administrators prior to the hearing or through the supervisor. ...”

Generally

“The Appellant] does not audit financial records. As part of assigned duties, she does solicit tax returns and reviews for accuracy and potential mis-representations (sic). Returns requiring further examination are referred through the supervisor either to a Bankruptcy Attorney ... or to the Audit Division. ...”

Assignment, review and approval of work

“[The Appellant] works under my direct supervision. Of course there is interaction with the Unit Manager, Unit Director Litigation Attorneys and other staff ... [The Appellant] has not performed the duty regarding Masstax Research and tax account research for other Litigation Attorneys including the adjustment of accounts since I have been the Supervisor. I have been informed by the Unit Manager that this duty was left in EPRS at Maria’s option should there be a special or isolated need. ... If there is any official liaison at DOR with the US Trustee ... it is one or all of the Litigation Attorneys.

... Information is reviewed from public records as part of routine case research. Liaisons with these other agencies [in this regard] is usually the Collections Bureau.

[The Appellant] does not generally take direction from Litigation or bankruptcy Attorneys ... If the attorney has a general question regarding the case or the account, the examiner is expected to answer it. ...”

Summary

“[The Appellant’s] duties consist of 4 primary functions.

1. Research of assigned cases
2. Filing Claims
3. Processing collections from trustees
4. Attending 341 Creditor hearings.

I have been informed by the Unit Manager that all TE-III’s (sic) also may have an additional level distinguishing duty based on specific skills and expertise. [The Appellant’s] additional duty historically was ‘Provides assistance as required regarding values for litigation.’ ... [the Appellant] does not currently perform this function and the duty exists only if there is a special or isolated need.”

(Ex. 4 (regarding all quotes in this finding of fact))

17. On April 8, 2014¹⁷, Ms. Mack's supervisor, Mr. Rosenberg, also provided a couple of pages of detailed comments critical of the Appellant's completed Interview Guide. His comments include, in pertinent part,

“Maria has emphasized and asserted that she has historically performed the same duties that are now performed by Auditor I titles. Specifically, this assertion relates to the duty regarding assistance to determine values for Litigation Attorneys. Litigation attorneys will often need to project a balance due or refund due as a result of a settlement. Masstax has within, a conversation, DCPI (sic) that allows the user to replicate an existing account along with any proposed change. DCPI is a data entry conversation (sic). The data to be entered exists on either the actual account or as a proposal of a line item entry from the attorney. All TE-III's (sic) are expected in [the Customer Service Bureau (CSB)], Collection, Audit and [the Problem Resolution Office (PRO)] are expected to be proficient with DCPI. Supervision regarding this duty was often done by me. Before Litigation hired dedicated staff to be responsible for this function, the Bankruptcy Unit was asked to perform it on occasion. [The Appellant] performed the function very well. However, I also assigned this work to other examiners and supervisors in the unit that were proficient with DCPI ... As far back as 2008, the Litigation Bureau has had dedicated staff that perform this function and as a result there have been only a small number of requests for assistance from the Bankruptcy Unit over the last several years ...

... we found that the Attorney's often needed more assistance than just balance due or refund projections on DCPI. Staff was needed to review audit files, and make recommendations regarding accuracy and project proposals based on alternative sampling techniques of alternative line item entries. Expertise in the audit process was often needed in order to assist with counter proposals regarding the merits of the audit. Based on these needs, Auditor I positions were created in the Litigation the Litigation Bureau that would not only do the DCPI data entry on Masstax but also be responsible for meeting these additional needs. Thus, there is a level distinction between the duty for DCPI data entry and the additional duties and responsibilities of the Auditor I positions currently in the Litigation Bureau. Maria has interpreted her duties and responsibilities as to imply that she develops policies and procedures, acts as liaison with Trustees and Debtors Counsel (sic), exercises a level of indirect supervision over other unit staff and reports and responds directly to managers, directors and attorneys. As [Ms. Mack] the supervisor has correctly pointed out, Maria reports to the supervisor and makes all recommendations regarding future action and legal intervention through the supervisor. Any representations at creditor hearings concerning the

¹⁷ The date that Mr. Rosenberg wrote on his comments appears to be “4/8/18”, which I understand to mean 4/8/14.

amount owed or potentially owed to DOR and any subsequent legal action may only be mentioned as a potential future action. ...

Maria does not audit financial records but consistent with the duties of a TE-III is required to review tax returns.

Maria asserts that in 2012 and 2013 the unit revised its workflow to make examiners responsible for all aspects of their case administration and claims that assignment by the alphabet does not create equal distribution of the work. To the contrary, the decision to change the workflow was made in part to create a more equitable distribution ... This decision was made in order to be able to measure performance ... Examiners with the duty of attending hearings were given a proportionately small inventory and management was always reviewing case filings by the alphabet in order to determine if adjustments needed to be made. Additionally, it was unfair that certain lower level TE-II staff were trained regarding all duties but some TE-III's (sic) only performed the duty of research

...

Maria was asked at one time to perform a 90 day review of cases ... as were other examiners at various times. ...”

(Ex. 4; *see also* Ex. 30))

18. On April 11, 2014, the Appellant submitted a detailed, four (4)-page response to the written criticisms of Ms. Mack and Mr. Rosenberg regarding the Appellant's completed Interview Guide, reasserting some of the statements she made in the completed Interview Guide. (Ex. 4)
19. Ms. Antonucci met with the Appellant on April 30, 2014 to ask her a number of questions concerning her request for reclassification. Ms. Antonucci took notes about the Appellant's responses to her questions at this meeting. (Ex. 45) Ms. Antonucci's notes of this meeting state, in pertinent part, that the Appellant added that although a TA I performs field audits of taxpayers, she “does not work in the field”; she reviews cases for proposed audit and reviews IRS audits; and that her EPRS and form 30 do not reflect her duty of “auditing financial statements that are filed in bankruptcy” cases.
(Id.)
20. In considering the Appellant's reclassification request, Ms. Antonucci reviewed the Appellant's written responses to the Interview Guide, the Appellant's comments at her

interview, the Appellant's Form 30 job description, and her EPRS for fiscal year 2014 (Parts A and B). Ms. Antonucci obtained this information because reclassifications are based on the duties that the applicant is performing at the time of their request (but not the candidate's EPRS ratings). Ms. Antonucci received comments on the Appellant's request for reclassification from Ms. Mack and Mr. Rosenberg. In reviewing the Appellant's request, Ms. Antonucci's goal was to obtain the reclassification the Appellant requested or another position higher than her current position if possible. However, Ms. Antonucci was unable to do so because there was nothing in the information that she obtained that would support a recommendation for even one (1) grade higher in the Tax Examiner title. (Ex. 4; Testimony of Antonucci)

21. Ms. Antonucci measured the Appellant's request for reclassification against the HRD Classification Specification for Auditor, which was issued in 1987 and again in 2013.¹⁸ In addition, Ms. Antonucci compared the Appellant's request with the 2008 TA Level-Distinguishing Duties, dated February 13, 2008, which the HRD authorized the DOR to use for human resources purposes since the only Classification Specification for Auditor in existence at that time was dated 1987 and was somewhat outdated. (Testimony of Antonucci; Post-Hearing Exhibits)

22. The pertinent provisions of the 1987 Classification Specification, Auditor Series (1987 Spec) are:

Summary of Series:

“Incumbents of positions in this series audit financial and tax records of individuals and businesses; develop reports and information for further action; provide technical assistance to agency personnel and taxpayers; and perform related work”

¹⁸ Ms. Antonucci received the 2013 Specification after the Appellant requested reclassification but before she made a determination regarding the Appellant's appeal. (Testimony of Antonucci) The Classification Specification for Tax Examiner was also issued in 1987 but it was not updated in 2013. (Administrative Notice)

Examples of Duties Common to all Levels in Series:

1. “Conducts examinations **and** audits of tax returns by analyzing financial report, records and documents of individuals, partnerships and businesses (sole proprietorships, corporations, etc.) to determine compliance with established laws, rules, regulations and procedures.
2. Develops information for use in preparing guidelines, making recommendations on rules, regulations and procedures and in preparing cases for tax investigation by reviewing appropriate documentation and conferring with agency staff.
3. Provides technical assistance to agency staff regarding tax liability of individuals, partnerships and businesses ... and corporations.”

Relationships with Others:

“Major work contacts are with agency staff, corporate employees and the general public.”

Supervision Received:

Tax Auditor 1:

“ ... receive general supervision from administrative employees of higher grade who provide policy and procedural guidance, assign work and review performance through conferences and reports for conformance with applicable laws, rules, policies and procedures.”

Supervision Exercised:

Tax Auditor I:

“None”

Qualifications Required at Hire for all Levels in Series:

“Knowledge of the principles and practices of auditing.

Knowledge of principles and practices of general accounting.

Knowledge of principles and practices of tax accounting. ...

Ability to read and interpret documents such as tax forms, financial reports, accounts and ledgers.

Ability to understand, apply and explain provisions of the laws, rules, regulations, policies and procedures governing assigned unit activities including those of taxation. ...

Ability to gather information by examining records and documents and questioning individuals.

Ability to maintain accurate records.

Ability to write concisely, to express thoughts clearly and to develop ideas in logical sequence. ...

Minimum Entrance Requirements:

Tax Auditor I:

“Applicants must have at least (A) two years of full-time, or equivalent part-time, professional experience in accounting or auditing, or (B) any equivalent combination of the required experience and the [educational] substitutions

Substitutions:

A Bachelor’s or higher degree with a major in accounting, business administration, or business management ...”

(Ex. 14)

23. The February 13, 2008 Level-Distinguishing Duties for Tax Auditor Is (2008 Level-Distinguishing Duties) in the “General” section are the same as #1 and #2 under Duties Common to All Levels in the 1987 Spec (*supra*) except that the 2008 Level-Distinguishing Duties add the following sentence, “Provides technical assistance to agency staff regarding tax liability of individuals, partnerships, businesses, and corporations[.]” and it deletes the parenthetical reference to “sole proprietorships, corporations, etc.” (Ex. 14; *supra*) However, the 2008 Level-Distinguishing Duties add:

“**Audit, BODA***: NIA [notice of intention to assess] delegation up o (sic) \$10,000 for BODA [Bureau of Desk Audit]

Audit, NEAB: Performs field audits of taxpayers located in New England.

Office of Appeals: Appeals officer.

*Tax Auditor position is classified as an NEAB [New England Audit Bureau] position – should not be posted or classified to this position in BODA.”

(Ex. 15)(*emphasis* in original)(emphasis added)

24. The pertinent provisions of the 2013 Classification Specification, Auditor Series (2013 Spec) are:

“Tax Auditor Levels I-III:

There are three levels of work in the Tax Auditor series. Incumbents ... review and perform field work or complicated desk exams on individual and business’ financial and tax records; determine compliance with tax remittance and filing requirements to develop work papers and reports of findings. ...

Tax Auditor I:

Distinguishing Characteristics:

This is the entry-level professional classification in this series. Incumbents perform routine field work or complicated desk exams within a framework of

established procedures, policies, and laws. Incumbents may seek guidance and advice from more experienced colleagues.

Supervision Received:

Incumbents receive general supervision from employees of higher grade who provide training, instruction, work assignments and work review on a consistent basis. Performance is reviewed through frequent formal and informal verbal and/or written reports for effectiveness and conformance to laws, rules, regulations and agency policies and procedures.

Supervision Exercised:

Incumbents may assist in the training of new employees through advice and guidance.

Functions Performed: ...

- Review taxpayer financial records, filings and returns of select companies or individuals that meet audit criteria; and submit audit selections to supervisor for approval.
- Notify taxpayer of audit and inform them of their rights; schedule an opening conference, provide taxpayer with financial document requests and send confirmation.
- Conduct field work or complicated desk exams of tax returns by analyzing financial reports, records and related documentation to determine compliance with established laws, rules, regulations, and procedures.
- Develop work papers that capture the analysis and record of the field work or complicated desk exams, including recommendations and outcomes; utilize internal tax systems to develop, edit, modify and save work papers.
- Review work papers with supervisor for any changes or modifications; review work papers with the taxpayer and explain the legal regulations and laws that support the recommendations; prepare revisions to work papers based on additional taxpayer documentation that may change the outcome or recommendations of the field work or complicated desk exams.
- Finalize work papers and close the audit case; document findings and write narratives to provide a summary of the entire case.

Key Accountabilities:

Incumbents at this level have the decision-making authority to:

- Plan, organize and schedule the field work or complicated desk exams.
- Determine what is or isn't taxable during the course of field work or a complicated desk exam.
- Choose the samples and test periods to use within the audit.
- Apply the assessment to the entire audit period or to the sample period.
- Recommend penalties or changes to address non-compliance areas.

Relationships with Others:

... include tax auditors, supervisor, taxpayers, taxpayer representatives others (sic) who have obtained power of attorney, vendors, other agencies, and technical support. ...

“Physical Abilities:

... incumbents are regularly required to sit for long periods of time ... [and] are occasionally required to ... lift, carry, push, or pull up to 25 pounds of office supplies or equipment. Work assignments may be performed with or without reasonable accommodation to a known disability.

Knowledge, Education and Experience:

Applicants must have at least (A) three years of full-time or equivalent part-time professional experience in accounting, auditing, or tax examination, or (B) any equivalent combination of the required experience and the [educational] substitution

Incumbents are required to have the following at the time of hire:

Working knowledge of the principles and practices of accounting and auditing.

Knowledge of the methods of general report-writing.

Ability to use a computer to produce written documents and conduct research.

Ability to read and interpret financial reports, documents and records.

Ability to analyze and determine the applicability of tax data, draw conclusions and make appropriate recommendations.

Ability to understand and explain laws, rules, and regulations and assigned unit policies and procedures.

Ability to gather information by examining records and documents or by interacting with others to probe on the issues.

Ability to communicate effectively, both verbally and in writing, to clearly and concisely express thoughts and develop ideas in a logical manner.

Ability to deal tactfully with others and exercise sound judgment.

Ability to work independently.

Ability to exercise discretion in handling confidential information.”

(Ex. 16)(emphasis added)

25. After reviewing the Appellant’s information and comparing it with the 1987 Spec, the 2013 Spec and the 2008 Level-Distinguishing Duties for TA Is, Ms. Antonucci consulted Nancy McCone, a Personnel Analyst III at the DOR HCD. Ms. Antonucci and Ms. McCone, in turn, discussed the reclassification with Melissa Diorio, Acting Director at

the DOR Office of Diversity and Equal Opportunity. (Testimony of Antonucci) Ms.

Diorio had worked on a number of reclassification requests. (Testimony of Ms. Diorio)

26. On January 21, 2015¹⁹, the DOR sent the Appellant a letter stating that her request for reclassification was preliminarily denied, that the reasons therefor were attached and that the Appellant could submit a rebuttal within ten (10) days. (Ex. 31) The attachment states, in pertinent part,

“Justification: Incumbent does not perform, on a regular basis, the level-distinguishing duties required for reclassification to the title requested. These duties are:

- Develops information for use in preparing guidelines, making recommendations on rules, regulations, and procedures, and in preparing cases for tax investigation by reviewing appropriate documentation and conferring with agency staff.
- Provides technical assistance to agency staff regarding tax liability of individuals, partnerships, businesses, and corporations.
- NIA [Notice of Intention to Assess] delegation up to \$10,000.
- Performs field audits or complicated desk exams of tax returns of taxpayers located in New England at least 51 percent of the time. This involves analyzing financial reports, records, and related documentation to determine compliance with established laws, rules, regulations, and procedures.
- Appeals officer.
- Reviews taxpayer financial records, filing, and returns of select companies or individuals that meet audit criteria, submit audit criteria, submit audit selections to supervisor for approval.
- Notify taxpayer of audit and inform them of their rights; schedule an opening conference, provide taxpayer with financial document requests and send confirmation.
- Develop work papers that capture the analysis and record of the field work or complicated desk exams, including recommendations and outcomes; utilize internal tax systems to develop, edit, modify, and save work papers.
- Review work papers with supervisor for any changes or modifications; review work paper with the taxpayer and explain the legal regulations and laws that support the recommendations; prepare revisions to work papers based on additional taxpayer documentation that may change the outcome or recommendations of the field work or complicated desk exams.
- Finalize work papers and close the audit case; document findings and write narratives to provide a summary of the entire case.” (Ex. 17)

This attachment is signed by Ms. Antonucci and Manager Melissa Diorio. (Id.)

¹⁹ The parties concur that although the preliminary denial letter is dated January 21, 2014, it was sent on January 21, 2015.

27. On January 26, 2015, the Appellant sent an email message to Ms. Antonucci, copying Ms. Diorio, Ms. McCone and others, asking where the duties listed in the DOR preliminary denial of her reclassification request come from, stating that some of them are different from the ones she was given when she first requested reclassification, and requesting a copy of the job duties listed in the preliminary denial so that she could submit a written response within ten (10) days as required. (Ex. 31)
28. On January 30, 2015, the Appellant sent an email message to Ms. Antonucci, copying Ms. Diorio, Ms. McCone and others, stating that she would not submit a rebuttal to the preliminary denial because she had submitted a lengthy Interview Guide, that her statements had not been disproved and that she performs the duties of a TA I more than 70% of the time. (Ex. 18)
29. By letter dated February 6, 2015 from the DOR to the Appellant, her request for reclassification was summarily denied, without explanation. This letter also informed the Appellant that she could appeal the denial of her request to HRD pursuant to G.L. c. 30, s. 49. (Ex. 19)
30. The Appellant appealed the DOR denial to HRD. By letter dated April 24, 2015, HRD informed the Appellant that it reviewed “appeal documentation”, concluded that the TE III title cover the duties that she performs from HRD to the Appellant and denied her appeal. The letter informed the Appellant that she could appeal HRD’s decision to the Commission under G.L. c. 30, s. 49. (Ex. 20)
31. The Appellant filed the instant appeal. (Administrative Notice)

32. Mr. Kobialka and the Appellant began dating in 2009; their fellow employees were not made aware of their relationship until they were married in July 2012. Mr. Kobialka retired in September 2012. (Testimony of Kobialka; Exs. 4 and 40)
33. In 2007 or 2008, Mr. Kobialka was involved in the drafting of memoranda²⁰ proposed to be sent by Mr. Giamattei and Mr. Rosenberg to Mr. Condon, the Chief of the DOR Litigation Bureau, about the classification of certain Bankruptcy personnel, including the Appellant. It has not been established that these memoranda were sent to Mr. Condon and the DOR HCD as written or edited. The memoranda recommend, in part, that the Appellant be reclassified to Tax Auditor (TA) I. A 2011 memorandum recommends, in part, that the Appellant be reclassified to Tax Examiner IV. It has not been established that Mr. Kobialka drafted the 2011 memorandum. Some personnel, at unknown dates, may have been reclassified but not the Appellant (as a result of the 2011 memorandum or otherwise). (Testimony of Appellant, Kobialka and Rosenberg; Exs. 2, 4 (including written comments of Mr. Kobialka responding to the criticisms of Mr. Rosenberg and Ms. Mack concerning the Appellant's completed Interview Guide) , 11, 30, 41-43, 45, 47, 48²¹)²²

²⁰ Mr. Kobialka refers to himself as the "ghost writer" for Mr. Giamattei and Mr. Rosenberg. (Ex. 4)

²¹ Exhibits 11, 30, 41-43, 47 and 48 were offered by the Appellant; Exhibits 2 and 4 were offered by the DOR. Exs. 30, 41 and 42 are dated 2011 – 2012 and are non-dispositive email messages between various DOR Litigation/Bankruptcy managers concerning the possible transfer of certain personnel to the Bankruptcy Unit and/or the maintenance allocation or reclassification of various Bankruptcy personnel; Ex. 43 (relating to Ms. Mack's title) is dated 2014. The Post-Hearing Exhibits in the record include various other memoranda proposing reclassification of various Bankruptcy personnel, some including the Appellant, over the years prior to the Appellant's request for reclassification to TA I. It is unclear if Mr. Kobialka was involved in drafting them and whether each of them was processed up the management chain and approved by the DOR. I am not aware of any law that requires an agency to approve such maintenance or reclassification requests.

²² Provisions of the State Conflicts of Interest Law, G.L. c. 268A, such as sections 6, 23(b)(2), 23(c) and 26, may or not be applicable in these circumstances.

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....

Id.

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 functions of the reclassification they seek a majority of the time. *See, e.g., Roman v. Department of Revenue*, 14 MCSR 184 (2001)(Counsel II – appeal denied); *Gruber v. Department of Revenue*, 14 MCSR 100 (2001)(Attorney – appeal denied); *Formichella v. Massachusetts Highway Department*, 21 MCSR 261 (2008)(Engineer – appeal denied); *Straub v. Department of Conservation and Recreation*, 22 MCSR 689 (2009)(Environmental Analyst III – appeal denied) *aff'd*, *Straub v. Civil Service Commission & another*, Superior Court C.A. No. SUCV2010-04143 (2013); *Kurker v. Department of Conservation and Recreation*, 22 MCSR 357 (2009)(Ranger II – appeal allowed); *Guidmond v. Department of Correction*, 27 MCSR 327 (2014)(Correction Program Officer – appeal denied); *Messier v. Department of Correction*, 13 MCSR 204 (2000)(Clerk III – appeal denied); *Lefebvre v. Department of Early Education and Care*, 22 MCSR 149 (2009)(Administrative Assistant II – appeal allowed); *McCollum v. Department of Environmental Protection*, 15 MCSR 23 (2002)(Environmental Engineer VI – appeal denied); *Towns v. Department of Mental Retardation*, 21 MCSR 17 (2008)(Vocational Instructor C – appeal denied); *Palmieri v. Department of Revenue*, 26 MCSR 180 (2013)(Management Analyst II – appeal denied); *Skinner v. Department of Revenue*, 21 MCSR 379 (2008)(Systems Analyst II – appeal denied); *O’Neill v. Department of Revenue*, 19 MCSR 149 (2006)(Tax Auditor I – appeal denied); *Erb v. Department of Revenue*, 18 MCSR 202

(2005)(Program Coordinator III – appeal denied); Cote v. Department of Revenue, 18 MCSR 189 (2005)(Tax Examiner III – appeal denied); Velez v. Department of Revenue, 14 MCSR 93 (2001)(Child Support Enforcement Worker – appeal denied); Kasprzak v. Department of Revenue, 13 MCSR 120 (2000)(Child Support Enforcement worker – appeal denied); Guidara v. Department of Transitional Assistance, 24 MCSR 133 (2011)(EDP Systems Analyst III – appeal allowed); Baddeley v. Bristol Community College, 12 MCSR 103 (1999)(Clerk – appeal denied); Guarente v. University of Massachusetts at Lowell, 27 MCSR 102 (2014)(Clerk IV – appeal denied); and Kimball v. Metropolitan District Commission, 12 MCSR 155 (1999)(Park Foreman – appeal allowed). Straub v. Civil Service Commission & another, Superior Court C.A. No. SUCV2010-04143 (2013) is the sole Superior Court decision that directly references an appellant’s burden in a reclassification appeal in detail. In this Superior Court decision, the court wrote, addressing the issuance of a revised decision by the Commission, “The conclusion reached in the [Commission’s] Revised Decision, indicating that Straub did not ‘exercise supervisory functions over permanent professional staff, he has failed to establish that he performed (sic) majority of the level distinguishing functions of an [Environmental Analyst IV] more than 50% of the time,’ was a necessary clarification.” Id., at 9.²³ There is no caselaw from the Supreme Judicial Court, nor of the Appeals Court, of which I am aware that addresses this point regarding an individual’s request for reclassification.²⁴

²³ 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.

²⁴ The subject of “class” reclassifications, as opposed to individual reclassifications like that of Ms. Johnson here, is addressed in Murphy & others v. Administrator of the Division of Personnel Administration & others, 377 Mass. 217 (1979). In Murphy, the Court found that reclassification of a class or other group of certain attorneys purportedly by the Legislature was ineffective since those requesting reclassification did not follow the reclassification request process provided in G.L. c. 30, s. 49 requiring the appointing authority and HRD to consider such requests and, if they approve such requests, for HRD to submit a request for the reclassification and funding

Analysis

The Appellant has failed to establish by a preponderance of the evidence that she performs as a Tax Auditor I more than 50% of her time under the 1987 Spec, the 2008 Level-Distinguishing Duties or the 2013 Spec. In the course of reaching this determination, I gave appropriate weight to Exhibits and assessed the witnesses' credibility. The Appellant is an effective TE III, by all accounts. However, her credibility was marred for multiple reasons. Although one could certainly understand an employee's disappointment and frustration at not obtaining a position for which she believes she is qualified, the Appellant also shows considerable disdain for superiors for not having promoted, appointed or reclassified her. This is based, to a degree, on her perception that draft memoranda from 2007-2008 and 2011 suggested that she and others in the Bankruptcy Unit be reclassified. She deems these as promises not kept when it appears that they were proposals, which her superiors were under no obligation to accept. In addition, she refers to her work using words that are inaccurate. She insists that she "audits" taxpayer/debtor information and yet there is no indication that she consults original documents that are involved in audits. She refers to herself as the DOR "liaison" to the U.S. Trustee when other TEs also attend 341 meetings representing the DOR and attorneys in the Litigation Bureau who litigate the active cases are the DOR liaison's or contacts. She refers to herself as a supervisor of other TEs because they give her their case files to address at 341 meetings she attends and because she can ask them for further documentation and or research in support of the claims in others' case files. However, other TEs ask the Appellant for the same information when they are attending the 341 meetings. Further, the Appellant withheld from

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.

those she worked with that she was romantically involved with a superior (although he did not supervisor her) as of 2009 until they married in 2012.

Mr. Kobialka testified in support of the Appellant, his wife. His credibility is also marred. Although his emotional support of his wife's reclassification is certainly understandable, it is clear that he stands to benefit directly by the Appellant's reclassification for multiple reasons. First, if the Appellant's appeal is successful, she would be reclassified and earn a higher salary, of which he would be a direct beneficiary as her husband. Second, Mr. Kobialka's comments about the managers he worked with in the Bankruptcy unit from 2004 until he retired in 2012 (shortly after he married the Appellant) were highly critical and imputed ill will to the managers when they did not reclassify certain personnel, including the Appellant. Further, Mr. Kobialka testified that although his name does not appear on the memoranda on which the Appellant relies to assert that she was supposed to be reclassified, he wrote them (although it does not appear that Mr. Kobialka and the Appellant were romantically involved at the time). He testified he wrote them for two (2) other managers to give to a superior and that even though he was never told that the memoranda were sent and approved, they should have been and, therefore, his wife's appeal should be allowed.²⁵ Lastly, like the Appellant, Mr. Kobialka withheld from the Bankruptcy Unit the fact that he was romantically involved with the Appellant for three (3) years. Although Mr. Kobialka did not supervise the Appellant, he was a manager in the same Unit as the Appellant and conflicts of interest, if any, or the appearance thereof, could have been addressed.

I have also assessed the credibility of the other witnesses. Mr. Rosenberg's testimony reflected considerable knowledge of the workings of the Bankruptcy Unit and related DOR

²⁵ Mr. Kobialka testified that he wrote the memoranda for two other managers to send because the person to whom the proposed memoranda may be sent did not like personnel recommendations that Mr. Kobialka made in his unit.

offices, the functions of the Appellant and other Unit employees, and the events leading up to the Appellant's appeal of the DOR denial of her reclassification request. For these reasons, I find that Mr. Rosenberg's credibility intact and he showed no bias against the Appellant. Ms. Mack readily related most of the details of her processing of the Appellant's request and the work performed by the Appellant. The Appellant complained that Ms. Mack did not attend the 341 meetings in which she (the Appellant) participated and that, therefore, she did not know what the Appellant does at such meetings. Ms. Mack testified that she had observed other TEs' performance at the 341 meetings on occasion and that based on that experience and her observations of the Appellant's work, she was well informed of the Appellant's functions and performance. There was no evidence of bias in Ms. Mack's testimony. For these reasons, I find that Ms. Mack was credible. Ms. Antonucci has years of experience responding to requests for reclassification. Her testimony provided fairly detailed information about the manner in which she reviewed the Appellant's request, whom she consulted in that regard, and the responses she received to her requests for information. She recounted that in addition to reviewing the information pertaining to the TA I title, she also reviewed the Appellant's duties to the duties of other superior titles, to ensure that she had given the Appellant additional opportunities for reclassification. Her testimony in this regard was supported by the pertinent Exhibits. Therefore, Ms. Mack's testimony was credible. Ms. Diorio testified briefly and straightforwardly. She addressed the DOR's receipt of the 2013 Spec and its effective date, which I find credible.

The Appellant has the education and experience required of a Tax Auditor I under the 1987 Spec and the 2013 Spec (there are none in the 2008 Level-Distinguishing Duties). She meets the qualifications required at the time of hire and the MERs of the 1987 Spec. She does not meet the Distinguishing Characteristics and the Functions Performed or the Key

accountabilities of the 2013 Spec. She appears to have all but one of the qualifications at the time of hire in the 2013 Spec – the one that involves having a working knowledge of the principles and practices of auditing. However, she does not perform the duties of a TA I a majority of the time. She asserts that she performs “audits” in that she examines taxpayer/debtor tax records (which may include reviewing IRS audits), while admitting that she does not perform field audits. Even assuming that the Appellant performs what may qualify as desk audits, the evidence does not show that she performs complicated desk audits. At the DOR, the term “audits” involves mainly desk audits and field audits. Field audits appear to involve the review of the source documents underlying a taxpayer’s tax liability in the field whereas a desk audit involves the review of tax documents at the DOR, with perhaps production of some source documents requested by the DOR. Further, the initiation of an audit appears to trigger specific notification to the taxpayer indicating that the DOR is conducting an audit of him or her.

The 1987 Spec and the 2008 Level-Distinguishing Duties both provide that all Tax Auditors conduct “examinations and audits of tax returns by analyzing financial reports, records and documents of individuals, partnerships and business”; the evidence does not show that the Appellant performs audits as prescribed. The 1987 Spec and the 2008 Level-Distinguishing Duties both provide that all TAs are to develop “information for use in preparing guidelines, making recommendations on rules, regulations and procedures”; the evidence does not show that the Appellant performs in this manner. The 2013 Spec Distinguishing Characteristics provide that, “[i]ncumbents perform routine field work or complicated desk exams within a framework of established procedures, policies, and laws ...”. The Appellant admits that she does not perform field work. Further, while the Appellant avers that she “audits” taxpayer/debtor tax information,

the evidence does not show that she obtains and review source documents (as in an audit) or that the work she performs constitutes “complicated desk exams” pursuant to the 2013 Spec.

The evidence does not show that the Appellant performs the “Functions Performed” by TA Is in the 2013 Spec:

“Review taxpayer financial records, filings and returns of select companies or individuals that meet audit criteria; and submit audit selections to supervisor for approval.

Notify taxpayer of audit and inform them of their rights; schedule an opening conference; provide taxpayer with financial document requests and send confirmation.

Conduct field work or complicated desk exams of tax returns by analyzing financial reports, records and related documentation to determine compliance with established laws, rules, regulations, and procedures.

Develop work papers that capture the analysis and record of the field work or complicated desk exams, including recommendations and outcomes; utilize internal tax systems to develop, edit, modify and save work papers.

Review work papers with supervisor for any changes or modifications; review work papers with the taxpayer and explain the legal regulations and laws that support the recommendations; prepare revisions to work papers based on additional taxpayer documentation that may change the outcome or recommendations of the field work or complicated desk exams.

Finalize work papers and close the audit case; document findings and write narratives to provide a summary of the entire case.”

Ex. 16

Likewise, there is no indication that the Appellant has the decision-making authority under the 2013 Spec section regarding Key Accountabilities to:

“Plan, organize and schedule the field work or complicated desk exams.

Determine what is or isn’t taxable during the course of field work or a complicated desk exam.

Choose the samples and test periods to use within the audit.

Apply the assessment to the entire audit period or to the sample period.

Recommend penalties or changes to address non-compliance areas.”

Ex. 16

Furthermore, the Appellant does not supervise anyone. Having failed to establish by a preponderance of the evidence that she performs the duties of a TA I a majority of the time, the Appellant may not be reclassified to that title.

Conclusion

For all of the above stated reasons, the appeal of Ms. Fernandes, under Docket No. C-15-95 is *denied*.

Civil Service Commission
/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Tivnan, and Stein) on May 11, 2017.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice to:

Stephen Kobialka (for Appellant)
Marc Dobrusin, Esq. (for Appellant)
Elisabeth M. Baker, Esq. (for Respondent)