

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MINDY MEROW RUBIN,  
*Appellant*

v.

C-14-294

HUMAN RESOURCES DIVISION &  
DIVISION OF INSURANCE,  
*Respondents*

Appearance for Appellant:

Pro Se  
Mindy Merow Rubin, Esq.

Appearance for Respondents:

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

Commissioner:

Cynthia A. Ittleman

Summary of Conclusion

This is the second appeal filed at the Commission seeking reclassification from Counsel II to Counsel III under the Counsel Series Specifications issued in 2013. This decision provides additional guidance on the assessment of the amount of time that a Counsel II requesting reclassification to Counsel III spends on her or his duties and assignments.

As noted in the Commission’s decision in the first such appeal, *see Thompson v. DOI and HRD*, C-14-287 (2016), it is clear that a considerable amount of time, effort and thought was devoted to the development of the new Counsel Series Specifications. The Commission acknowledges that the process was especially complicated because it presented challenges to craft a specification that would be effective to distinguish, by level of expertise, the work performed by skilled legal counsel employed in a wide variety of diverse jobs across state government. By definition, all legal counsel employed by the Commonwealth hold a post-graduate doctorate-level degree and have attained some level of accomplishment in the law. Many come into state government with prior, often extensive experience in a particular field within the practice of law. In addition, unlike many other job specifications that provide a clear civil service “career ladder” from entry level into management roles, the new Counsel Specifications were not intended to be used to provide such a path; indeed, the original drafts were expressly rejected because they overlapped with management positions in the legal area.

Given these factors, the new Counsel Specifications, understandably, depart from the typical job and class specifications that have been the focus of prior Commission reclassification appeals. In addition, the degree of overlap from one Counsel job title to another, especially between Counsel II and Counsel III, is much more pronounced than found in most other class specifications.

Accordingly, the Commission reviewed this reclassification appeal under a slightly modified paradigm tailored to resolve the ambiguities in the unique terminology used and to fit that terminology into a workable means to differentiate the work performed by each of the three Counsel job titles. In brief, the Commission has applied a three-prong test to distinguish the job performed by a Counsel III: (a) the Counsel III must have the “Knowledge, Education and Experience” as well as the additional requirements described for a Counsel III in the section of the specification entitled “Incumbents are required to have the following at the time of hire”; (b) a Counsel III must have the “distinguishing characteristic” as THE most expert and experienced attorney in the agency in a specific area of expertise essential to a core mission of the agency; and (c) the Counsel III must perform, in the aggregate, at least a majority of the time, duties listed in the Counsel III Specifications under “Supervision Exercised”, “Additional Functions Performed”, “Additional Key Accountabilities” and “Relationships with Others”, with the “Supervision Received” by a Counsel III.

In applying the “distinguishing characteristic” criterion, the Commission will consider the significance of the area of expertise to the core mission of the agency and the degree of specialization involved. Generalized expertise, such as knowledge of administrative law or trial practice, would be less likely to meet the “distinguishing characteristic” criterion than, say, a subject-specific expertise, such as the long-term care insurance and life insurance and annuities expertise held by the Appellant in this case. In addition, the Commission would consider the frequency with which the agency (or a person outside the agency) relies on that expertise, i.e., is it sporadic or regular and sustained and is it current. Although some regular level of work above *de minimus* would be expected in the area of expertise, the Commission does not construe the Counsel III Specification to require that the employee must be working in the area of expertise more than 50% of the time; that threshold can be met so long as the aggregate duties performed a majority of the time involve any combination of the duties covered by the Counsel III job description as noted herein. Finally, in view of the unusual level of overlap between Counsel II and Counsel III, and the ambiguity in the language used in the specification that purports to “distinguish” those duties, the fact that some of the duties may describe work that can be done by either a Counsel II or Counsel III, the Commission will not exclude from the calculation of the over 50% paradigm work solely because it fits both categories, but will consider all of the facts presented on a case-by-case basis.

Applying this paradigm to the facts of this case, the appeal is allowed. The Appellant is the DOI expert in long-term insurance and life insurance and annuities and performs, in these regards, together with other matters, as a Counsel III a majority of the time.

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

## DECISION

Mindy Merow Rubin (Ms. Merow Rubin or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on December 17, 2014 under G.L. c. 30, § 49 challenging the decision of the state's Human Resources Division (HRD) and the Division of Insurance (DOI or Appointing Authority), within the Executive Office of Consumer Affairs and Business Regulation (OCABR), to deny her request to be reclassified from a Counsel II to a Counsel III.<sup>1</sup> A prehearing conference was held in this regard on January 6, 2015 at the offices of the Commission. A hearing<sup>2</sup> was held on this appeal on April 14 and May 1, 2015 at the Commission, at which HRD represented itself and DOI.<sup>3</sup> At this hearing, the witnesses, except the Appellant, were sequestered, although the Respondents requested that Ms. Blomquist be allowed to remain in the hearing room after she testified and the request was granted. This hearing was digitally recorded and the parties received a CD of the proceeding.<sup>4</sup> The parties submitted post-hearing briefs in the form of proposed decisions.

### FINDINGS OF FACT

Based on the forty (40) exhibits entered into evidence and the testimony of:

*Called by Respondents:*

- Regina Caggiano, Deputy Director of Civil Service and the Organizational Development

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<sup>1</sup> This is the second of three reclassification appeals received from DOI Counsel IIs. The two (2) other appeals are: Mary Ellen Thompson v. Division of Insurance and Human Resources Division, Docket No. C-14-287, which appeal has been allowed; and Edward Phelan v. Division of Insurance and Human Resources Division, Docket No. C-15-118, on which a decision is pending. The Commission has since received a reclassification appeal from a Counsel II in an EOHHS agency.

<sup>2</sup> 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.

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

<sup>4</sup> 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.

Group (ODG), HRD

- Marianne Dill, Director of Office of Employee Relations (OER), HRD
- Nancy Daiute, Personnel Analyst, ODG, HRD
- Alexandra McInnis, Personnel Analyst III, ODG, HRD
- Karen Blomquist, Deputy commissioner of Communication and Operations, DOI
- Kimberly Deeney, Personnel Analyst, Human Resources Department, OCABR
- Karen Malone Bratt (Bratt), Director of Human Resources, OCABR
- Anita Holbrook, Personnel Analyst III, HRD

*Called by the Appellant<sup>5</sup>:*

- Mindy Merow Rubin, Esq., DOI, Appellant
- Robert Macullar, Acting Director of Financial Surveillance and Insurance Company Licensing, DOI
- Christopher Joyce, Esq., Deputy General Counsel, DOI
- Edward Charbonnier, Director of Policy Form Review, DOI

and taking administrative notice of all matters filed in the case, and pertinent statutes, including, without limitation, G.L. c. 150E, § 1; Mass. regulation 950 CMR 32.00 (regulations of the Secretary of the Commonwealth regarding public records); other pertinent regulations, case law and policies; forty (40) Exhibits<sup>6</sup> and reasonable inferences from the evidence, a preponderance of evidence establishes the following findings of fact:

*Stipulation*

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<sup>5</sup> Mr. Macullar, Deputy General Counsel Joyce, and Mr. Charbonnier appeared by subpoena. (Administrative Notice)

<sup>6</sup> The forty (40) Exhibits include twenty-nine (29) Joint Exhibits, eight (8) Exhibit submitted by the Appellant and three (3) submitted by the Respondents. Joint Exhibits 25 – 29 were produced by the parties post-hearing in response to my request at the hearing. The Respondents' Exs. 1 and 2 are given limited weight, as indicated at the hearing, since they pertain to the Appellant's appeal to HRD but were prepared by HRD and not provided to the Appellant and the Commission until the prehearing conference at the Commission.

1. Ms. Merow Rubin is a Counsel II employed by DOI.
2. Ms. Merow Rubin began her employment at DOI on or about October 28, 1990 as a Counsel I.
3. Ms. Merow Rubin became a Counsel II at DOI on or about May 7, 1995.
4. DOI administers the laws of the Commonwealth as they pertain to the protection of the insurance consumer through the regulation of the insurance industry. DOI monitors financial solvency, licenses insurance companies and producers, reviews and approves rates and forms, and coordinates the takeover and liquidation of insolvent insurance companies and the rehabilitation of financially troubled companies. DOI investigates and enforces state laws and regulations pertaining to insurance and responds to consumer inquiries and complaints.
5. DOI employs approximately 130 people.
6. There are fifteen (15) Counsel IIs employed by DOI and one (1) Counsel III.<sup>7</sup>
7. The human resources related transactions and support for DOI are handled by OCABR. OCABR provides this service for eight (8) agencies.
8. On or about January 23, 2014, the Director of Human Resources (HR) for OCABR, Ms. Bratt, met with the Counsel IIs at DOI to explain the newly implemented Counsel Series specification, including the creation of the Counsel III title.
9. Ms. Merow Rubin submitted a "Request to Appeal Classification form" at DOI on February 12, 2014 requesting to be reclassified to the title of Counsel III.

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<sup>7</sup> Since the hearing in this case, three (3) DOI Counsel IIs have been reclassified to the position of Counsel III, two (2) by the Respondents and one (1) by this Commission. The two (2) Counsel IIIs reclassified by the Respondents have expertise, individually, in health insurance and being a hearing officer. The third DOI Counsel III reclassification was a result of the reclassification appeal granted by the Commission in Thompson v. HRD and DOI, C-14-287 in which it was determined that Ms. Thompson's expertise is in auto insurance.

10. By correspondence dated February 18, 2014, Ms. Merow Rubin was notified that an appeal audit interview was scheduled for March 11, 2014. In this correspondence, Ms. Merow Rubin was asked to complete the Interview Guide and return it by March 10, 2014. She was also asked to provide a current resume.
11. Ms. Merow Rubin prepared responses to the Interview Guide and her resume, and participated in the audit interview held on March 11, 2014.
12. By correspondence dated June 24, 2014, Ms. Merow Rubin was provided a preliminary recommendation that her appeal would be denied. Ms. Merow Rubin was permitted an opportunity to provide a rebuttal to the OCABR within the (10) calendar days. Upon Appellant's request, extensions of time were granted to allow Ms. Merow Rubin through July 18, 2014 to submit her rebuttal.
13. On July 18, 2014, Ms. Merow Rubin submitted a rebuttal to the preliminary recommendation denying her appeal.
14. On August 8, 2014, Ms. Merow Rubin was notified by OCABR that her position did not warrant a reallocation and her classification appeal was denied.
15. By email dated August 15, 2014m Ms. Merow Rubin appealed the denial of her reclassification to HRD.
16. Ms. Merow Rubin provided supplemental information to HRD by email messages dated August 20, 2014, September 5, 2014, and September 19, 2014.
17. By correspondence dated October 28, 2014, H R D n o t i f i e d M s . Merow Rubin of the appeal hearing scheduled in her matter.
18. On November 5, 2014, an appeal hearing took place at HRD.
19. By correspondence dated November 20, 2014, HRD denied the appeal.

### *Appellant's Background*

20. The Appellant was admitted to the Massachusetts bar in 1988 and began working for the state in the Department of Public Health as compliance director in a regulatory setting for the Determination of Need Program. In 1990, when the Determination of Need program ended, the Appellant worked on the AIDs program for the state. Later in 1990, the Appellant was hired by DOI as a health attorney. She was promoted to Counsel II at DOI in 1995. (Testimony of Appellant; Joint Ex. 29) The Appellant has developed expertise in multiple areas of insurance regulatory law. She is the most expert DOI Counsel regarding life insurance and annuities and long-term care insurance. (Testimony of Appellant, Bratt, Joyce, Deeney; Joint Ex. 20) She is the “go to” person for responding to public record requests, which is a legal function, addressing most of the public record requests for DOI, and related confidentiality legal matters uniquely related to insurance. (Testimony of Appellant and Joyce; Joint Ex. 20) In addition, the Appellant has greater knowledge in other areas such as fraternal benefit societies, the infertility program, and life settlements. (Testimony of Appellant; Joint Ex. 29) The Appellant also has greater knowledge of financial transactions, although there is at least one (1) DOI Counsel beside the Appellant who works extensively on financial transactions. (Testimony of Deeney) The Appellant responds to “inquiries from, and provides advice to, DOI management and staff, insurance company management and their counsel, trade associations, consumers and state and federal agencies.” (Joint Ex. 20)<sup>8</sup>

21. In further detail, the Appellant reported,

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<sup>8</sup> Additional evidence of the Appellant's public record request advice to DOI management and others is contained in Appellant's Exs. 3, 4, 5, 7, and 8, which are email messages involving various managers, stating that the Appellant was to weigh in or otherwise address the public record request at issue.

With respect to confidentiality and public records, [DOI] holds records containing very sensitive commercial and financial information of private businesses. The insurance laws are vast and complicated, and have very specific requirements about what may or may not be available for public review. Issues of confidentiality must be dealt with by someone with expertise in both insurance law and public records law. ...

I am the Division's recognized expert in the laws related to public records access and confidentiality, and the only lawyer at [DOI] with experience and specialized expertise in this area of the law. ... This includes requests by the media, which for policy reasons are always subject to review by the Administration prior to release of documents. ...<sup>9</sup>

... I provide training to all [DOI] personnel on the laws and regulations concerning public records access and confidentiality, and how these rules apply to the work each section of the agency performs and the documents each section holds. Additionally, I train [DOI] staff in the clerical functions of responding to public record requests. The training includes instruction on search, copying and redacting the techniques; I am not the person locating responsive documents, redacting information and making the copies! Over the years I have been sought out by other agencies based on my acknowledged expertise. Over the years I have provided my legal expertise, advice and training to the Department of Environmental Protection, the Division of Banks and at the invitation of the head of OCA to all of the OCA agency heads.

With respect to confidentiality, the Division is a party to many confidentiality agreements with other state agencies, federal agencies, other state governments and foreign countries. I am responsible for negotiating, drafting and/or reviewing those confidentiality agreements, and advising the Commissioner whether to sign. I am the primary author of [DOI]'s internal policy on privacy and data breach, required to be reviewed and signed by all employees ... I drafted the recently enacted law providing for enhanced confidentiality for the required periodic financial examinations of all domestic insurance entities. (Testimony of Appellant; Joint Ex. 29)<sup>10</sup>

All individual life insurance and annuity forms must be approved by [DOI] prior to sale. Sales and marketing practices of life insurance and annuities are extensively regulated by [DOI] to ensure adequate consumer protection. I have

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<sup>9</sup> Joint Ex. 27 is the response to public record requests process of the administration of Governor Baker, following his election in November 2014. Joint Ex. 28 is the response to public record requests process of the administration of Governor Patrick "updated: April 22, 2013". Since the Appellant requested reclassification in February 2014, her involvement with DOI's responses to public record requests would have been guided by the process of the Patrick administration. The process of both administrations addressed "routine" and "non-routine" public record requests and indicate involvement of the Governor's communications staff and/or Office of Chief Legal Counsel but differ to varying degrees otherwise. Neither process, on its own, is dispositive in deciding the instant reclassification appeal.

<sup>10</sup> Joint Ex. 29 is a written statement by the Appellant that she read aloud into the record.



drafted and/or amended almost all of the regulations and bulletins affecting life insurance and annuities. I am in-house counsel to the staff who review all insurance policy language and I provide technical expertise to companies that wish to expand their product offerings. Senior management regularly asks me to attend meetings with companies seeking to bring innovative life insurance products to residents of the Commonwealth and to advise the Commissioner as to the compliance of these products with [the law]. ...

... I meet regularly with the Life Insurance Association of Massachusetts and the American Council of Life Insurers, trade associations, to advise them on [DOI's] interpretation of law ...

In the late 1990's (sic), I drafted the Commonwealth's original regulation governing long-term care insurance. The issue returned to the forefront around 2011, when I provided legal analysis to the legislature during the promulgation of the long-term care insurance law. Highly controversial, long-term care insurance required much of my time since then. I am the primary drafter of the pending amended regulations, required by the new law. I am currently working with senior management to develop the policy position regarding possible rate increases for long-term care insurance ...<sup>11</sup>

Insurance companies must receive regulatory approval prior to implementing many business decisions, including, mergers, acquisitions, corporate restructuring, and financing deals, to name a few. I have both led and been the legal member of review teams consisting of [DOI] financial staff, investment bankers, outside counsel and other professionals tasked with reviewing these proposals and providing a recommendation to the Commissioner. The Acting Director of Financial Surveillance and Company Licensing often consults me ....

(Testimony of Appellant; Joint Ex. 29)

Deputy General Counsel Joyce does not base his assessments of expertise on the amount of time a Counsel spends on a particular field of insurance law. (Testimony of Joyce; Joint Ex. 29) The Appellant works mostly on long-term care, life insurance and annuities and public records and the amount of time she spends on them can vary day to day. Deputy General Counsel Joyce could not say what percent of the Appellant's time is spent on each of these fields of insurance law. (Testimony of Joyce)

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<sup>11</sup> See Appellant's Ex. 6 in which then-Commissioner Murphy wrote that the Appellant should look at model changes by the National Association of Insurance Commissioners for possible effects on a DOI draft regulation.

### *Organization of DOI Legal Department*

22. Among the sixteen (16) attorneys in the DOI Legal Department, there are hearing officer Counsels and other Counsels. (Joint Ex. 23) Each of the Counsels in the Legal Department has general duties and one or more specific duties, such as automobile insurance or health insurance. Each attorney has at least one specialty. (Testimony of Deeney and Joyce) The work changes depending, for example, on what is happening in the insurance industry. (Testimony of Joyce) Attorneys are supervised directly either by General Counsel Whitney or Deputy General Counsel Joyce.<sup>12</sup> Supervisors prepare Employee Performance Evaluation System (EPRS) reports during the year as appropriate. (Joint Ex. 7)

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

23. The position of Counsel III in the Counsel series was established effective August 11, 2013. (Joint Ex. 4)

24. A civil service job series is defined as “a vertical grouping of related titles so that they form a career ladder”. (G.L. c. 31, § 1)

25. The Counsel series is marked Joint Ex. 5. Portions of the Counsel series quoted herein are from Joint Ex. 5, with emphasis added. (Administrative Notice)

26. The Counsel series provides, in part,

There are three levels of work in the counsel series. Incumbents of classifications in this series represent the interests of assigned agencies in dispute resolution and legal proceedings; collect facts and evidence; perform legal research and analysis; prepare and manage cases for review by a tribunal; provide guidance, advice and recommendations to agency staff and others on legal matters; draft administrative

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<sup>12</sup> I take Administrative Notice of Thompson v HRD and DOI, C-16-287, in which decision the Commission noted that the DOI General Counsel supervises the DOI legal department attorneys who are hearing officers and Deputy General Counsel Joyce supervises the DOI legal department attorneys (among others) who are prosecutors to prevent conflicts of interest. (Testimony of Joyce) I take further Administrative Notice from the Thompson decision that some other DOI Legal Department Counsels also draft legislation and regulations in their specialties.

and legal documents; and provide customer service and information to the public on agency functions, rules and regulations.  
(Joint Ex. 5)

27. The Counsel III “Distinguishing Characteristics” are:

This generally is the most expert and experienced attorney in this series, and in some work environments can also be the second-level supervisory classification. Incumbents typically possess greater experience and have specialized expertise in a specific area of the law (e.g., administrative, family, finance, labor and employment, litigation) and general knowledge of other areas or broad knowledge of multiple areas. Incumbents at this level serve as subject matter experts and have advanced knowledge of laws, legal principles and practices. The distinguishing characteristic of the Level III is incumbents at this level are statewide or agency expert with more legal experience and have greater expertise in a specialized area of the law.  
(Joint Ex. 5)

28. Counsel II Distinguishing Characteristics are:

This is the experienced professional level classification in this series, and in some work environments can also be the first level of supervision. Incumbents typically possess greater experience and may have specialized expertise in a specific area of law (e.g. administrative, family, finance, labor and employment, litigation) or general knowledge of other areas or broad knowledge of multiple areas. While incumbents may seek guidance and advice from more senior colleagues on complex issues and situations, they have thorough knowledge of laws, legal principles and practices and have the ability to handle most cases independently. At this level, incumbents are expected to perform the duties described for Level I, but generally will have more experience and expertise, handle more complex cases and collaborate and interact with others outside of the agency more often. At this level, incumbents may receive less supervision than incumbents at Level I and may also exercise greater independence in decision making.  
(Joint Ex. 5)

29. The Counsel III Supervision Received is:

Incumbents receive general supervision from employees of a higher grade who provide policy direction, assign work, and review performance through reports, case reviews, and conferences for accuracy and conformance to applicable laws, regulations, policies and agency procedures.

Incumbents may also receive functional direction from the legal executive and executive personnel in other agencies who provide final approval, assignments, guidance and review.  
(Joint Ex. 5)

30. The Counsel II Supervision Received is:

Incumbents receive general supervision from employees of a higher grade who provide guidance, work assignments, and review of performance through both formal and informal verbal and written reports for effectiveness and conformance to laws, regulations and agency policy.

(Joint Ex. 5)

31. The Counsel III Supervision Exercised is:

Incumbents may provide direct supervision over and assign work to interns, professionals, support staff and/or other personnel.

Incumbents may provide functional direction to interns, professional or other personnel through guidance, instruction and delegation of tasks and participate in the training and mentoring of new employees.

Incumbents may also participate in the interviewing process or may make recommendations for new hires.

(Joint Ex. 5)

32. The Counsel II Supervision Exercised is:

Incumbents may provide functional direction to interns, support staff, or other personnel through guidance, instruction and delegation of tasks and participate in the training and mentoring of new employees.

Incumbents may exercise direct supervision over, assign work to, and review the performance of interns, support staff or other personnel. Incumbents may also participate in the interviewing process or may make recommendations for new hires.

(Joint Ex. 5)

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

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

- Investigate an applied set of facts and obtain information needed for representation; research and analyze internal and external policies, rules, regulations, new legislation, federal and state case law and case history to frame a position, to determine accuracy of claims or to provide information or advice to others.
- Develop resolutions based on investigation, verification and critical analysis of legal and factual arguments and internal legal options; negotiate with opposing parties to reach a quick resolution, avoid litigation, mitigate damages and/or settle cases.
- Negotiate and review administrative, court and other legal documents ensuring that such documents are complete, accurate, and available for future review and in compliance with law.
- Collaborate and confer with colleagues within the division or department as well as with external resources to gather input for decisions or determination of a position, to achieve common goals or to implement new laws or changes to laws; may host public forums to provide interested parties with an opportunity to comment on issues.
- Write, recommend and review legislation; appear at hearings regarding legislation to represent the client; draft and implement internal and external policies and procedures, forms, notices, and other written material for adherence to new legislation; evaluate, research and produce documentation regarding the interpretation of law; draft, circulate for input and issue public written statements to provide guidance to taxpayers.  
(Joint Ex. 5)<sup>13</sup>

34. The DOI website states, in part,

National Association of Insurance Commissioners [NAIC]

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

(Administrative Notice: <http://www.mass.gov/ocabr/government/oca-agencies/doi-lp/>, November 16, 2016)(emphasis added)<sup>14</sup>

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

<sup>13</sup> In the interest of completeness, the last clause here referring to documents for taxpayers is retained. However, since it appears to refer to Counsel for the Department of Revenue, not DOI, no analysis of that provision is included herein.

<sup>14</sup> With regard to federal or state regulation of auto insurance, *see, e.g.*, <http://www.naic.org/>; [http://www.lexisnexis.com/legalnewsroom/insurance/b/insurance-law-blog/archive/2009/09/08/who-should-regulate-the-insurance-industry\\_3f00\\_.aspx?](http://www.lexisnexis.com/legalnewsroom/insurance/b/insurance-law-blog/archive/2009/09/08/who-should-regulate-the-insurance-industry_3f00_.aspx?); <http://www.autoinsurance.org/who-oversees-auto-insurance-companies/>; <http://carinsurancequotes.com/articles/how-state-and-federal-laws-regulate-the-car-insurance-industry>.

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

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

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

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

- Allocate cases and assignments to supervisees most appropriately.
- Prioritize and manage personal (sic) assigned workloads and caseloads as well as the workloads and caseloads of direct reports.
- Issue recommendations for final decision or resolution of cases, and for some cases, to issue or agree to final resolution without further review.  
(Joint Ex. 5)

38. The Counsel III Spec for Relationships with Others provides, in part,

In addition to the key contacts listed for the Counsel Level I and II, key contacts and relationships for Counsel III incumbents include court personnel and public officials; federal and state agencies; community-based organizations; and local municipalities. ...  
(Joint Ex. 5)

39. The Counsel II Spec for Relationships with Others provides,

In addition to the contacts listed for the Counsel Level I, key contacts and relationships for Counsel Level II incumbents include additional external contacts, including stakeholders.  
(Joint Ex. 5)

40. The Counsel III Spec for Knowledge, Education and Experience provides, in part,

Applicants must have a Juris Doctor (JD) degree, admission to the Massachusetts Bar Association (sic), and at least (A) six years of full-time, or equivalent part time, professional experience in the practice of law in a specialized area that is relevant to the assigned agency. Based on assignment and supervisory responsibilities, three years in a supervisory capacity may be required. ...  
(Joint Ex. 5)(emphasis added)<sup>15</sup>

41. The Counsel II Spec for Knowledge, Education and Experience provides, in part,

Applicants must have a Juris Doctor (JD) degree, admission to the Massachusetts Bar and (A) at least three years of full-time, or equivalent part-time, professional experience in the practice of law. ...  
(Joint Ex. 5)(emphasis added)

42. The Counsel III Spec for Requirements at the Time of Hire provides,

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

1. Extensive knowledge of the laws specific to assignment (e.g., administrative, finance, family, litigation).
2. Extensive knowledge of federal and state laws.
3. Knowledge of advocacy techniques and strategies.
4. Knowledge of the methods and ability to conduct complex legal research and technical report writing.
5. Ability to address complicated legal issues.

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<sup>15</sup> Joint Ex. 5 states that at least three (3) years of supervisor experience is required. However, the Respondents advise that the wording is as it appears in this decision. Administrative Notice.

6. Ability to analyze and determine the applicability of legal data, draw conclusions and make appropriate recommendations.  
(Joint Ex. 5)<sup>16</sup>(emphasis added)

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

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

1. Ability to lead or work with cross-functional project teams.
2. Ability to manage multiple projects and project teams.
3. Ability to exercise discretion in safeguarding information through compliance with rules of disclosure.
4. Ability to supervise, including planning and assigning work according to the nature of the job to be accomplished, the capabilities of subordinates, and available resources; controlling work through periodic reviews and/or evaluations; determining the need for and recommending disciplinary action.  
(Joint Ex. 5)(emphasis added))

#### *History of Counsel III Specification*

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

45. HRD retained the personnel consulting services of Hay Group to assist in the classification study. Hay Group worked with HRD and agency personnel in this

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<sup>16</sup> The Counsel III Spec was scanned and copied into this document, which resulted in certain format changes which do not have a substantive effect on the original document.



endeavor. In this study, those involved interviewed employees in the identified jobs to determine, *inter alia*, whether the jobs had changed over time, the essential functions of each job, the scope of the job, whether decision making was involved in the jobs, the reason for the functions of the job, the education required, the knowledge needed to begin the job, and the physical environment of the job. The information was reflected in a report in June 2009. (Testimony of Caggiano)

46. The study report included a review of the Counsel I and Counsel II positions and developed the specifications for those positions. No action was taken regarding this study because of insufficient funding. (Testimony of Ms. Caggiano)
47. The next review of Counsel specifications began in 2010 when the Department of Revenue (DOR) asked HRD for assistance with Counsel job titles for certain attorney positions at DOR. At that point, HRD looked into developing a four (4)-level Counsel series. An HRD staff person who worked on the DOR request prepared information for DOR in response to its request but no action was apparently taken thereon. (Testimony of Caggiano)
48. In 2011, some agencies asked HRD to review the Counsel series. In 2012, HRD gave the four (4)-level series to representatives of the Executive Office of Health and Human Services (EOHHS) and DOR, two (2) of the biggest agencies in the state. Ms. Caggiano met with those agencies' representatives. The feedback she received was that the proposed four (4)-level Counsel series involved positions that were too similar to the Management positions. EOHHS and DOR provided recommendations for the Counsel series to HRD and HRD recrafted the Counsel series, limiting it to three (3) levels. As redesigned, the Counsel III position was intended to have as its distinguishing

characteristic that the employee was most expert and experienced attorneys in the series, with broad experience as an attorney. The Counsel III position was not intended to be a promotion for all Counsel IIs. Rather, an agency would have to identify a specific need for a Counsel III in a field pertinent to the agency. A draft of the Counsel III Spec was given to the HRD Office of Employee Relations and the pertinent unions for comment. (Testimony of Ms. Caggiano)

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

50. Ms. Dill began working at HRD in August 2012. She is the Assistant Director of Employee Relations. She is the lead negotiator at the Office of Employee Relations (OER) with pertinent units of the National Association of Government Employees (NAGE) Units 1, 3, and 6, the American Federation of State, County and Municipal Employees (AFSCME) Unit 2 and Service Employees International Union (SEIU) Local 888; she is a Step 3 hearing officer in the grievance process, she provides support to agency Human Resources offices, and she oversees OER Labor Advisors. (Testimony of Dill)

51. Ms. Dill first became involved in conversations relating to the Counsel series in November or December of 2012. She was in contact with Kevin Preston, the then-lead NAGE negotiator in this regard. Ms. Dill gave Mr. Preston a copy of the Counsel III

Spec in July 2013. The only comment that Mr. Preston provided to Ms. Dill about the draft Counsel III Spec was his request to change part of the qualifications to say that the Counsel III could be a first- or second-level supervisor (as opposed to a second-level supervisor only). There was no indication regarding the number of Counsel IIs that would be reclassified to Counsel IIIs but since it was to be the highest level of the Counsel Series and each agency had to determine if it needed a Counsel III, Ms. Dill understood that the number of Counsel IIIs would be limited. At the time that the Counsel III Spec was created, there were approximately 470 Counsel IIs and less than 100 Counsel Is in the state. Ms. Dill negotiated the Memorandum of Understanding with NAGE regarding the Counsel III position; the Counsel III position was to be exempt from overtime and standby pay, from which Counsel IIs are not exempt. (Testimony of Dill, Joint Ex. 24)

#### *Implementation of Counsel III Classification*

52. By memorandum dated August 26, 2013 from Paul Dietl, who was then HRD's Chief Human Resources Officer, to Executive Department Agency Heads, HRAC Directors, Departmental Human Resources Directors, General Counsels, Labor Relations Directors and Chief Fiscal Officers, HRD announced the "newly expanded Counsel Job Specification" and provided a copy of the new Counsel III Spec. (Joint Ex. 4) This memorandum indicated, "... [o]n July 30, 2013, the Commonwealth of Massachusetts, through the Human Resources Division, signed a Memorandum of Understanding with NAGE detailed updated job specifications for the Counsel Series, including the establishment of a new Counsel III, job grade 21." (*Id.*; see Joint Ex. 24) The August 26, 2013 memorandum from Mr. Deitl provided further, in part,

- The Counsel Series is expanded to add a third level, Counsel III, job grade 21.
  - The Counsel III will be exempt from Articles 7.2, 7.5 and 7.6 (overtime, call back and standby pay) of the NAGE Unit 6, collective bargaining agreement. Counsel I and II will remain job grade 14 and 17 respectively and will maintain all contractual rights regarding overtime, callback and standby pay.
  - The Counsel III title is anticipated to be utilized for positions that require 'statewide' or 'agency' experts, or that require greater expertise in a specialized area of law.
  - Agencies wishing to employ the counsel III job title should petition HRD's Organizational Development Group (ODG) for the establishment of such position(s).
  - Agencies are expected to clearly define the tasks that rise to the 'expert level' in the Agency, and develop and submit a new Form 30 for the title or titles. ODG has previously forwarded guidance to aid in the development of these new forms 30's (sic).
  - Agencies shall secure prior approval from HRD/ODG prior to posting or reallocation of positions to Counsel III.
  - Agencies may be required to certify to the Fiscal Affairs Division that funds are available to support these positions.
- (Id.)(emphasis added)

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

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

- The Massachusetts Department of Personnel Administration Classification Specification for the Counsel Series will be expanded to include a three level series effective August 11, 2013.
- The Counsel III will be a job grade 21 and will be exempt from Articles 7.2, 7.5 and 7.6, (sic) (overtime, call back and standby pay) of the parties (sic) agreement. The Counsel I and II will remain job grade 14 and 17 respectively and will maintain all contractual rights regarding overtime, call back and standby pay.
- The Tax Counsel position will remain at job grade 21 and will maintain all current rights. The minimum entrance requirements for Tax Counsel will be updated to match that of the new Counsel III. Any employee currently

in the Tax Counsel position that does not meet the new MER's<sup>17</sup> will be grandfathered in the position.  
(Joint Ex. 24)

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

55. Ms. Bratt is the OCABR Director of Human Resources. Prior to working at OCABR, Ms. Bratt was human resources coordinator briefly at a local college. Ms. Bratt began working at OCABR in 2009 as a Personnel Officer II and then she was appointed Personnel Analyst III. In 2012, Ms. Bratt was appointed OCABR Director of Human Resources. As Director, Ms. Bratt provides human resources services, including payroll, classification and benefits to six (6) agencies, supervises two (2) staff people and works on HRD projects as they arise. Ms. Bratt is not familiar with public records law.  
(Testimony of Bratt)

56. Ms. Bratt first learned about the Counsel III Spec in August 2013, when the HRD memorandum on the matter was issued, although there was some talk about the subject one (1) year earlier. When Ms. Bratt received the HRD Memorandum, she called HRD and NAGE with questions about the new Counsel III Spec. Ms. Bratt was told that the number of reclassifications to Counsel III would be small since it would involve attorneys who are "experts", that it was not based on longevity alone. Ms. Bratt then

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<sup>17</sup> The text does not provide a definition of MER but I interpret it to refer to the Minimum Entrance Requirements for the position.

sent the new Counsel III Spec and memorandum from Mr. Dietl to leadership in the OCABR agencies, including DOI, asking them to inform her if anyone meets the new Counsel III Spec. Ms. Bratt understood this process to be a bit different from other situations in that if the employer wanted to request a reallocation, the employee would still need to complete an Interview Guide and have an audit interview. NAGE had sent the Counsel III information to Counsels so Ms. Bratt did not reach out to them at that time. DOI reclassification requests are submitted first to Ms. Deeney and then to Ms. Bratt. (Testimony of Bratt)

57. Thereafter, Ms. Bratt started receiving questions from Counsel IIs about the Counsel III Spec. (Testimony of Bratt)

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

59. Ms. Bratt and senior DOI managers, including Deputy General Counsel Joyce, had a meeting to discuss the new Counsel III position and for her to obtain information about the DOI Legal Department and whether they agreed with the comments of the Counsel IIs who requested reclassification and submitted Interview Guides. (Testimony of Bratt and Deeney) At this meeting, Ms. Bratt learned that about the number of Counsels in the DOI Legal Department and that they each have specialties and that the Appellant's supervisors confirmed the areas of insurance law that the Appellant works on. The group

did not discuss the percentages of time on which the Appellant and other applicants performed their various functions. (Testimony of Deeney and Bratt; *see* Joint Ex. 23, DOI organizational charts, indicating there was a total of sixteen (16) Counsels in the DOI Legal Department) (Testimony of Joyce)

60. Ms. Deeney began working at OCABR in 2012. Her title is Personnel Analyst III. Among the matters she has worked on for the seven (7) agencies under OCABR are staffing, medical leave and reclassifications. Before working at OCABR, Ms. Deeney worked as a Personnel Coordinator at the state Department of Transportation, where she worked on reclassifications, including reclassifications related to the integration of transport agencies. (Testimony of Deeney)
61. In or about January 2014, there was a meeting of DOI Counsels regarding the new Counsel III position. At least ten (10) of the sixteen (16) DOI Counsels attended this meeting. Also at the meeting were then-DOI Commissioner Joseph Murphy; Karen Bratt, OCABR Director of Human Resources; Ms. Deeney, OCABR; and DOI General Counsel Robert Whitney; Ms. Blomquist and DOI Deputy General Counsel Joyce attended at least part of this meeting. (Testimony of Joyce and Bratt) At this meeting, the DOI Counsel IIs were informed that DOI would not pursue a maintenance request to reclassify DOI Counsel IIs to Counsel IIIs. (Testimony of Appellant) They were also informed not to expect that a lot of Counsel IIs who requested reclassification would be reclassified to Counsel III but that they could apply. (Testimony of Bratt;) The Appellant submitted a request to be reclassified as a Counsel III approximately one month after the meeting of DOI Counsels. (Joint Ex. 1)

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

... We looked at the functions of the Counsel II's throughout DOI and determined that there are not currently any Counsel III's. We understand that each lawyer within the DOI is certainly an expert within the insurance world, but if we went by that measure, every Counsel throughout the state would be an expert in their field! What we are looking for is the 1-2 employees in the agency who have become the expert among experts.

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

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

Funds have to be available ...

Grades 14, 17, 21 – ...

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

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

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

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

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

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

(Joint Ex. 16 (Ex. 4 thereto))(EMPHASIS in original)



63. The state Department of Correction (DOC) sought maintenance reallocation to Counsel III for a number of Counsel IIs in its Legal Department. Nancy Daiute, an HRD Personnel Analyst in the Organizational Development Group, has worked at HRD for eighteen (18) years. She works on classification and compensation matters and supports the human resources functions of a number of agencies, including DOC. DOC has approximately 5,400 employees, including approximately twenty-seven (27) attorneys, six (6) of the DOC attorneys are Counsel IIIs pursuant to maintenance reallocations requested by DOC. The agency sought reallocation to the Counsel III title for six (6) of its Counsel II employees without first obtaining HRD's approval. When DOC sent Form 30s for each of the six (6) Counsel IIs, HRD advised DOC that it required additional information. A maintenance reallocation request is usually not reviewed by HRD but they are/were for Counsel III requests. While HRD waited for the added documents it requested, DOC took the final step in the requested reallocations, transmitting an "E request" to HRD to implement the reallocations; however, there was a personnel change at that time at the HRD Employee Service Center (ESC) and the "E request" was mistakenly approved by ESC even though DOC had yet to provide the additional information HRD requested or approve the requests. HRD received the appropriate documents for three (3) of the six (6) Counsel IIs for whom reallocation was requested and the three (3) requests were approved.<sup>18</sup> The areas of expertise of the DOC Counsel IIIs include First Amendment and Eighth Amendment Constitutional rights of prisoners,

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<sup>18</sup> Subsequently, with respect to the three (3) Counsel IIs whose reallocation HRD had not approved, HRD worked with DOC and ultimately concluded that it did not want to harm them, leaving all six (6) reallocations to Counsel III in place but the latter three (3) positions will return to Counsel II titles when the positions are vacant. (Testimony of Daiute)

gender identification issues, issues relating to prisoners representing themselves, and workers' compensation. (Testimony of Daiute)

*Appellant's Request for Reclassification*

64. In response to the Appellant's request for reclassification, Ms. Deeney sent the Appellant a letter dated February 18, 2014 with a form to complete, referred to as an Interview Guide, and scheduled an appointment for 10:30 a.m. on March 11, 2014 for an audit interview regarding Ms. Merow Rubin's request. (Joint Exs. 1, 2) The February 18, 2014 letter states that the Appellant may bring her supervisor or a union representative to the audit interview and asks the Appellant to complete the Interview guide and return it to Ms. Deeney prior to the March 11 audit date and advises the Appellant to bring a current resume, and stating "you are welcome to bring samples of work that you feel are relevant to your appeal request." (Joint Ex. 2) The Appellant brought her resume to the audit interview but did not bring work samples, a supervisor or a union representative. (Testimony of Deeney) The Interview Guide is used for all NAGE reclassification requests, not just for Counsel reclassification requests. (Testimony of Deeney) At or around this time, Ms. Deeney also reviewed the Appellant's current Form 30 job description and fiscal year 2013 EPRS. Ms. Deeney does not consider the applicant's EPRS ratings while consideration a reclassification request. (Testimony of Deeney; Joint Exs. 2, 6 and 7) The audit interview lasted between one and a half and two hours. (Testimony of Deeney)
65. The Appellant completed the Interview Guide and signed and dated it on March 10, 2014. In response to the statement on the Guide stating "Please describe what you view as the basis of the appeal", the Appellant wrote, in part,

I possess the distinguishing characteristics as listed in the specifications for the Counsel III position. Specifically, I am a statewide or agency expert on a number of topics and have practiced as a Counsel II at the Division of Insurance for 19 years. I have acquired broad general knowledge in the field of insurance, and deep specialized knowledge regarding public records and confidentiality, life insurance and annuities, insurance company licensing and financial transactions, mandated benefits, long-term care insurance and life settlements, I am the Public Records Officer for the agency, responsible for training all agency personnel, supervising all responses to public record requests and ultimately providing legal analysis and responses to all denials of access to public records. I provide education and training on the public records law to all new hires and interns and provide regular updates to all employees in a section-specific session, in order to tailor the materials to the work of each section of the agency.  
(Joint Ex. 3)

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

Within Agency:

I have contact with all sections of the agency, with both management and staff on matters involving the public records law and confidentiality. I provide training, supervision, legal advice and guidance on issues relating to the public records law to all personnel.

I advise the Director of Policy Form Review Edward Charbonnier and his staff on all legal issues relating to life insurance and annuities. I provide legal analysis and advice to Robert Macullar, Acting Director of Financial Surveillance and Company Licensing and his staff regarding financial transactions and life settlement provider/company licensing. I provide legal analysis and advice to Kevin Beagan, Deputy Commissioner, Health Care Access Bureau, regarding mandated benefits (specifically infertility), long-term care insurance and other health related matters. I provide legal analysis and advice to Steven Belec, Director of Consumer Services and his staff on any issues consumers bring to the Division.

Outside the Agency:

I have direct contact with consumers, responding to questions relating to any and all aspects of insurance, including public records, life insurance, long-term care insurance, life settlements and mandated benefits. I work closely with insurance company management, in-house attorneys and outside counsel for insurers, providing statutory interpretation, advice and guidance relating to all insurance matters. I interact with staff at the Life Insurance Association of Massachusetts, the American Council of Life Insurers and the Life Insurance Settlement Association to provide statutory interpretation and regulatory guidance and information. I work directly with staff at the Office of the Attorney General, the

Office of the Secretary of State, MassHealth and the Department of Public Health  
on matters of common concern.  
(Joint Ex. 3; Testimony of Appellant)

67. Mr. Robert Macullar was the then-Acting Director of Financial Surveillance and Insurance Company Licensing (Surveillance and Licensing) at DOI and had been Acting Director for five (5) years at that time. There are eight (8) analysts in Surveillance and Licensing. This section of DOI ensures that the approximately ninety (90) insurance companies in the state maintain solvency so that their customers' claims are paid.<sup>19</sup> It also reviews insurance company mergers, acquisitions and consolidations, among other matters. Although other DOI Counsels work on legal issues for Surveillance and Licensing, between 80% and 90% of the legal assistance he needs is provided by the Appellant. The Appellant, like others, does not have final authority on the legal matters she addresses since such matters must go through the DOI Commissioner. (Testimony of Macullar)

68. Mr. Charbonnier was the then-Director of Policy Form Review at DOI, where he had been employed for eight (8) years. The Policy Form Review section of DOI was responsible for the form and rate review of life insurance, annuity, property and casualty insurance to ensure their compliance with Massachusetts law, including checking

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<sup>19</sup> I take administrative notice that a DOI website provides, “[t]he Financial Surveillance Section monitors the solvency of domestic and foreign (domiciled in another state) insurance companies. As of December 31, 2013 there were 1,543 insurance companies licensed, authorized or eligible to transact insurance business in the Commonwealth. Included in this number are life insurers, accident and health insurers, property & casualty insurers, health maintenance organizations, non-profit hospital and medical service corporations, dental service plans, vision service plans, fraternal benefit societies, title insurers, risk retention groups, self-insurance groups, surplus lines insurers, eligible alien unauthorized insurers, reinsurers, service contract providers and life settlement companies. Financial Surveillance also monitors transactions entered into by Massachusetts' domestic insurers. The Company Licensing staff is responsible for the review and processing of all applications from insurers seeking to obtain or amend licenses to transact insurance business in the Commonwealth. They process license certifications, analyze annual statement filings and manage other revenue collections in connection with surveillance and licensing.”

insurance rates to ensure that they were not discriminatory. Although Mr. Charbonnier's primary contact in the DOI Legal Department was not the Appellant, he or the examiners he worked with would regularly consult the Appellant when there was a new insurance product or changes in statutes or regulations mostly regarding life insurance, long-term care insurance and individual health insurance products. Mr. Charbonnier and his staff often meet with insurance company representatives. Whenever an insurance company included its attorney in its discussions with his office regarding life insurance and long-term care insurance, Mr. Charbonnier included the Appellant and scheduled meetings and conference calls so she could participate. He also consults the Appellant, as well as other DOI Counsels, regarding other areas of insurance law. (Testimony of Charbonnier)

69. The Appellant also conducts administrative and financial transactions hearings and she has participated in a number of working groups with specific assignments in which she has been the staff attorney or the chair of the group. (Testimony of Appellant and Joyce)

70. Ms. Karen Blomquist is the DOI Deputy Commissioner for Communications and Operations, working on external affairs, including responding to press inquiries, and she reviews some legislation and conducts consumer outreach. Some press inquiries received by DOI are sent to OCABR, which may assign it to DOI. DOI has a public records room, which is maintained by the State Rating Bureau for the public with a self-service process. Ms. Blomquist also oversees the administration functions related to payroll. She has been at DOI since February 2012 and her duties include addressing external affairs, press matters, constituent requests, and outreach to consumers. When Ms. Blomquist arrived at DOI, the Appellant trained her regarding public record requests. The training took approximately one hour. In 2013, there were approximately fifteen (15) new DOI

employees whom the Appellant also trained in public records law. The Appellant also provides training updates about public records to DOI employees. The Appellant and DOI attorneys higher in rank than the Appellant can respond to public records requests but routine public record requests may not require an attorney's response. If public records requests are not routine and/or involve controversial matters, DOI forwards the request to higher authorities. It is very common in high profile public record requests that higher management will ask if the Appellant has weighed in on the records sought. Ms. Blomquist has general knowledge of the manner in which reclassification requests are handled. (Testimony of Blomquist; Appellant's Ex. 8)

71. Asked to briefly describe the overall basic purpose of her job on the Interview Guide, the Appellant wrote in full, "I support the Commissioner of Insurance by providing legal advice on a wide spectrum of insurance issues, and provide legal counsel to all sections of the Division. I represent the agency's position and statutory obligations in legal matters, ensuring that agency activities comply with the law." (Joint Ex. 3)
72. Asked on the form if there have been "any significant job changes since her appointment" the Appellant wrote, in part,

I was originally hired as a health attorney. Several years after starting here, in the late 1990's (sic), I was appointed the Division's public records expert. I developed education and training seminars and set up a standard response system. I drafted legislation, currently pending, to increase the confidentiality of certain documents in order to take advantage of protections granted under the public records law. Starting around 2000, I was assigned to work on the initial long-term care regulation and have been the agency expert on long-term care insurance since that time. In 2004 I was assigned all matters of life insurance and annuities, including drafting and amending relevant regulations providing legal assistance on all life insurance and annuity issues. More recently this agency became responsible for regulating life settlements, and I developed the initial licensing and regulatory process. I worked closely with industry trade associations to ensure that this newly regulated market was able to proceed smoothly with licensure.

(Joint Ex. 3)

73. The Interview Guide form also asks “what do you currently do” and to indicate “the percentage of time spent on each duty – total must equal no more than 100%”. The Appellant wrote,

1. **Public Records:** I am the Public Records Officer for the agency, responsible for training all agency personnel, supervising all responses to public record requests and ultimately providing legal analysis and responses to all denials of access to public records. I provide education and training on the public records law to all new hires and interns and provide regular updates to all employees in section-specific sessions, in order to tailor the materials to the work of each section of the agency. I train and supervise personnel in each section of the agency to respond to public record requests for purely public documents and provide guidance and assistance for those responses. I draft all denials of access to public records with the appropriate legal analysis. I respond to any appeals of denials of access to public records, working closely with the Secretary of State’s Public Records Division, to provide all requested information and legal analysis. I work directly with requestors to explain the law, discuss document availability and frame their request. I analyze and respond to questions regarding the public record status of documents from the public and agency personnel. I work closely with the NAIC and insurance regulators of other states, providing analysis and comment on proposed laws, regulations and systems relating to public records and confidentiality. I review all Confidentiality Agreements and Memorandum (sic) to which this agency, or any subdivision, is a party and advise the Commissioner. 50%
2. **Financial Transactions and Company Licensing:** I provide legal analysis and advice to agency staff and insurance company staff regarding insurance company licensing and financial transactions to assure compliance with laws and regulations. I work directly with insurance company representatives, in-house counsel and outside counsel to ensure all filings are accurate and appropriate by reviewing draft documents, providing statutory and regulatory interpretation and negotiating approved language. I serve as Hearing Officer on public hearings regarding all types of insurance company transactions ... drafting decisions and orders ... 10%
3. **Long-Term Care Insurance:** I have been the legal resource for long-term care insurance since the drafting of the original regulation in the late 1990’s (sic), including providing analysis and comment to legislative staff and the industry during the bill promulgation process. I am the legal resource for all meetings related to long-term care, attend all Special Sessions for public comment on long-term care regulations and all meetings of the Long-Term Care Rate Stabilization Working Group. I have drafted and amended long-term care

regulations pursuant to the newly enacted long-term care law, ensuring that all comments received by interested parties were considered in the draft document. 10%

4. Life Insurance: I advise the Policy Form Review Section on all questions of law and regulation pertaining to life insurance and annuities. I research and respond to all consumer questions relative to life insurance. I interact directly with insurance company representatives to ensure answer (sic) questions relating to life insurance and annuities, provide statutory and regulatory analysis and assure compliance with Massachusetts law. I provide legal guidance to the Commissioner on any new products proposed by insurers. 10%
5. I review legislation and provide comments as needed. I work with industry representatives and legislative staff to provide guidance on the impact of the legislation on the insurance industry and consumers. I have drafted legislation, including a bill currently pending before the General Court, increasing the examination authority of the agency and providing greater confidentiality of examination documents for all entities regulated by the agency. I draft new regulations and amendments to existing regulations. I review public comments, make recommendations regarding changes to the proposed regulation, draft administrative documents regarding small business impacts of proposed regulations and impacts of the regulation on municipalities. I shepherd the regulation from drafting through the entire promulgation process. I act as Hearing Officer during public hearings on regulations, ensuring that the requirements of the Administrative Procedures Act are met. 10%
6. I am called on to respond to all questions that no other staff can answer. I am the person that everyone goes to when they don't know how to proceed. I am the go-to person for all personnel when it is not clear which section of the agency should handle the inquiry or when it is a question that has never been dealt with before. 10%  
(Joint Ex. 3)

74. The Appellant works on long-term care insurance and life insurance and annuities, legislation, insurance company licensing and financial transactions, and confidentiality legal matters related to public records requests. In this work, the Appellant performs most of the seven (7) of the Counsel III Additional Functions, to some extent. Briefly, the seven (7) Additional Functions are: 1) serve as technical expert in life insurance and annuities and long-term care insurance; 2) educate and communicate interpretation of



area-specific laws to internal and external clients; 3) investigate facts needed for representation and research and analyze various forms of law to frame a position; 4) develop resolutions based on investigation and critical analysis and negotiates to resolve cases; 5) negotiate and review administrative, court and other legal documents; 6) collaborate with colleagues internally and externally to determine a position, achieve common goals and implement new laws; and 7) draft and review legislation, attend Legislative hearings, and draft documents to implement new law, (except that written statements to the Legislature must be approved by senior management). (Testimony of Joyce; Joint Ex. 5)

75. Asked to describe the major problems she faces in performance of her job and how she resolves them, the Appellant wrote, “I encounter no major problems in the performance of my job.” (Joint Ex. 3) However, by email message dated March 17, 2014 to Ms. Deeney, following an audit meeting with Ms. Deeney, the Appellant amended this response stating,

As my major area of responsibility is to provide legal review and advice on all matters of confidentiality and public records, the biggest problem I face in performing my job is when I must advise the Commissioner that the law does not allow the agency to sign a memorandum of understanding or enter into an agreement as proposed. These documents are requested by state or federal agencies, the NAIC or parties to litigation and I work directly with representatives of these entities to explain the law and attempt to craft language that is acceptable to all parties involved. I work to negotiate language that will allow the document to meet the standards of Massachusetts law and be acceptable to the proposing party, and have been successful much of the time.  
(Joint Ex. 20; Testimony of Appellant)

Also in her March 17, 2014 email to Ms. Deeney, the Appellant added, regarding her public records and confidentiality work,

... I was requested by the Executive Office of Environmental Affairs to train the staff of the TURA<sup>20</sup> Program on the public records law and confidentiality. I spent time with the program staff training and helping them set up a system of record-keeping and response that was in compliance with the public records law. I was asked to do this for another agency as I had previously provided training for all OCABR Commissioners and was known as an expert in this area.  
(Joint Ex. 20)

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

Work is assigned to me primarily by Christopher Joyce, Deputy General Counsel and Robert A. Whitney, Deputy Commissioner and general Counsel. Work is also assigned to me by Joseph G. Murphy, [then-] Commissioner of Insurance; Kevin Beagan Deputy Commissioner, Health Care Access Bureau; Karen Blomquist, Deputy Commissioner, Communications and Operations. Work is assigned either via an email or an in-person meeting and conversation.  
(Joint Ex. 3)

77. Asked on the form who reviews her work and the standards for review, the Appellant wrote that Deputy General Counsel Joyce, and General Counsel and Deputy Commissioner Whitney review her work and that Deputy Commissioner Beagan may also review her work. The Appellant adds, “... I have been counsel at this agency for more than twenty years, and my supervisors use my vast experience and institutional memory to assist them. My work is reviewed pursuant to the EPRS system and I have always received superior reviews.”

(Joint Ex. 3)

78. Asked on the form whom she supervises, the Appellant wrote,

I supervise all Division personnel regarding public records. I review responses and provide form language for responses of purely public documents. I review redacted documents provided in response to a public record request. I advise colleagues and management on what constitutes a public record, what can be considered confidential, and how to preserve confidentiality ... I answer frequent

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<sup>20</sup> I take administrative notice that “TURA” is the Toxics Use Reduction Act program operated within the Executive Office of Energy and Environmental Affairs. [www.mass.gov/eea/agencies/massdep/toxics/tur/](http://www.mass.gov/eea/agencies/massdep/toxics/tur/)

questions from Division employees on whether or not something is confidential or a public record. I also supervise legal interns on tasks with which they are assisting me, providing regular feedback and constructive criticism.

(Joint Ex. 3)

However, the Appellant's Form 30 indicates that she has no direct reporting staff and her 2013 EPRS does not indicate that she has any reporting staff. (Joint Exs. 6 and 7; Testimony of Joyce)

79. The last part of the form states, "**Additional Information**: explain any aspects of your job which you feel has (sic) not been covered by the previous questions and which you feel is important in understanding your duties." (Joint Ex. 3) In response, the Appellant wrote,

Having served as Counsel in the [DOI] for more than twenty-three years I have acquired broad and deep knowledge and experience with all areas of insurance law and regulation. I have experience with areas of insurance law that no one else at the agency has, including fraternal benefit societies, liquor liability insurance demutualization and conversion of insurers into a holding company system. ... I have developed close working relationships with industry representatives and other agency staff that allow me to provide invaluable assistance to the Commissioner and staff.

(Id.)

80. Between 2011 and 2013 alone, the Appellant was the primary author of original regulations, or amendments thereto, as follows:

- 211 CMR 42.00 Form and Contents of Individual Accident and Sickness Insurance
- 211 CMR 55.00 Disclosure Requirements for Life Insurance Policies with Accelerated Benefit Provisions and Annuity Contracts
- 211 CMR 65.00 Long Term Care Insurance
- 211 CMR 7.00 Massachusetts Insurance Holding Company System
- 211 CMR 34.00 Replacement of Life Insurance and Annuities
- 211 CMR 37.00 Infertility Benefits

Between 2005 and 2012 alone, the Appellant was the primary author of original regulations or amendments thereto as follows:

211 CMR 27.00 Military Sales Practices  
211 CMR 28.00 Life Insurance Illustrations  
211 CMR 29.00 Valuation of Life Insurance Policies  
211 CMR 31.00 Life Insurance Solicitation  
211 CMR 39.00 Annuity Mortality Tables for Use In Determining Reserve  
Liabilities for Annuities  
211 CMR 55.00 Disclosure Requirements for Life Insurance Policies with  
Accelerated Benefit Provisions and Annuity Contract  
211 CMR 58.00 Permitting the Recognition of Preferred Mortality Tables for Use  
in Determining Minimum Reserve Liabilities  
211 CMR 95.00 Variable Life Insurance  
211 CMR 132.00 Actuarial Opinion and Memorandum Regulation

Other DOI Counsels may draft regulations but not in the Appellant's areas of expertise.

(Testimony of Appellant) Ultimately, the DOI Commissioner approves regulations.

(Testimony of Joyce)

In recent years, the Appellant was also the primary author, or provided significant redrafting, of the following legislation:

St. 2014, Chapter 409, An Act Relative to Confidentiality in Financial  
Examinations  
St. 2012, Chapter 312, An Act Establishing Standards in Long-Term Care  
Insurance  
St. 2012, chapter 434, An Act Relative to Life Settlements and Stranger  
Originated Life Insurance  
(Joint Ex. 26)<sup>21</sup>

81. In March 2014, after the Appellant completed the Interview Guide and sent it to Ms.

Deeney, Ms. Deeney reviewed the Appellant's completed Interview Guide and then met with the Appellant on March 11, 2014 to conduct an audit interview in which they discussed the Appellant's reclassification request. (Joint Ex. 3)

82. Ms. Bratt and the director of human resources in the Executive Office of Housing and Economic Development (EOHED) reviewed the Appellant's information. EOHED is

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<sup>21</sup> The Respondents did not have this list of regulations and statutes for which the Appellant was either the primary author or she provided significant redrafting since the Appellant produced it after the Commission hearing in response to my request at the hearing. (Administrative Notice) However, the Appellant referenced certain of these regulations and statutes in her testimony.

the Secretariat for OCABR and, therefore, for DOI. Then Ms. Bratt met with senior managers at DOI. (Testimony of Deeney; Administrative Notice)

83. After the meeting with senior DOI managers, but before ruling on the Appellant's reclassification request, Ms. Deeney, Ms. Bratt and a representative of EOHED (now HRD Manager of Classification and Compensation) met with Latoya Odlum, HRD Personnel Analyst (who was assigned to address OCABR human resources issues); Alexandra McInnis, HRD Personnel Analyst III; Sarah Unsworth, then-EOHED HR Director; and Amy Lynch at HRD. (Testimony of Deeney and Bratt) No one from DOI attended this meeting. (Administrative Notice) At this meeting, OCABR presented the Form 30, EPRS, and resume regarding the requests for reclassification of the Appellant and a number of other DOI Counsel IIs who requested reclassification. The consensus was that the Appellant was properly classified as a Counsel II because the Appellant's work on public records requests, drafting legislation, responding to colleagues' questions are performed by Counsel IIs. Further, the attendees found that the Appellant is an experienced attorney who performs complex matters and operates at least somewhat independently, which conforms to the duties of a Counsel II. The group found that the Appellant is an expert in life insurance and long-term-care insurance and that no one else in the DOI Legal Department works in those areas but that the Appellant only spends 20% of her time in those areas. The group also discussed the Appellant's work on public record requests but said that she does not have the final say on DOI's responses to public record requests, that public record requests are not specific or unique to DOI and that Counsel IIs work on this subject at other agencies. (Testimony of Bratt and Deeney) There was a consensus among those at the meeting that the Appellant does not perform at

the level of a Counsel III a majority of the time and that only one of the Counsel IIs who requested reclassification that they had reviewed would be reclassified. (Testimony of Deeney and Bratt)

84. Ms. McInnis has worked at HRD for approximately seven and one-half years, much of it on classification and compensation as a Personnel Analyst III; she also provides human resource support to the Department of Transportation (DOT), Administration and Finance (ANF) and the Department of Revenue (DOR). Previously, Ms. McInnis also worked at the Department of Correction (DOC), where she became the Director of Human Resources before returning to work at HRD. DOR is the largest agency under ANF, although overall it is medium-sized. DOR has approximately twenty-five (25) Counsel Is, thirty-eight (38) Counsel IIs, 58 Tax Counsels, and two (2) Counsel IIIs. Ms. McInnis is not familiar with public records law. (Testimony of McInnis)

85. The Counsel II Form 30 on which DOI/OCABR and HRD relied was signed by Ms. Merow Rubin and Deputy General Counsel Joyce in 2012. The Appellant's 2012 Form 30 contains the following job description,

**GENERAL STATEMENT OF DUTIES AND RESPONSIBILITIES**

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

**SUPERVISION RECEIVED ...**

Reports to the General Counsel and Deputy General Counsel.

**DIRECT REPORTING STAFF**

None. ...

**DETAILED STATEMENT OF DUTIES AND RESPONSIBILITIES**

1. Responds to consumer, industry and legislative inquiries;

2. Provides inter- and intra-agency advice;
3. Responds to Public Records requests;
4. Act as Long-Term Care Liaison;
5. Provides legal advice on license applications;
6. Conducts audio-taped hearings of appeals of “SDIP”<sup>22</sup> surcharges;
7. Drafts agency “8 Point Memorandum”;
8. Provides legal advice to agency personnel as it regards Public Records Law;
9. Assist General Counsel and Deputy General Counsel in all matters deemed necessary;
10. Consult with legal counsel and agency officials regarding the appeal of court decisions to a higher court and maintain liaison with the Attorney General’s Office on suits filed in Federal, State Supreme, Judicial and Superior Courts;
11. Confer with agency staff in drafting proposed legislation for submission to the Legislature and analyze proposed legislation to determine its impact on agency activities;
12. Draft regulations for the implementation of agency programs;
13. Prepare instructions to agency units for the implementation of court decisions;
14. Present memoranda to legislative committees supporting or opposing legislation affecting agency operations;
15. Prepare trial dockets and draft forms and form letters;
16. Render decisions at hearings and write final and/or recommended decisions based on law, agency rules and regulations and facts presented at hearings; and
17. Negotiate with legal staff of other agencies to develop memoranda of agreement concerning joint programs.  
(Joint Ex. 6<sup>23</sup>)

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

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

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<sup>22</sup> “SDIP” is not defined in the Form 30 but the DOI website indicates that it is the “Safe Driver Insurance Plan”.  
<http://www.mass.gov/ocabr/insurance/vehicle/auto-insurance/safe-driver-plan/faqs-surcharge-appeal.html>

<sup>23</sup> The vast majority of these Duties and Responsibilities are the same as the DOI Counsel II appellant in Thompson v. HRD and DOI, C-14-287.

7. Ability to understand and apply the laws, rules and regulations governing agency operations and assigned unit activities;
  8. Ability to exercise sound judgment;
  9. Ability to exercise discretion in handling confidential information;
  10. Ability to prepare technical and general reports;
  11. Ability to explain the provisions of the laws, rules and regulations governing agency operations and assigned unit activities;
  12. Ability to explain the procedures, guidelines and policies governing agency operations and assigned unit activities;
  13. Ability to analyze and determine the applicability of legal data, to draw conclusions and make appropriate recommendations;
  14. Ability to work independently; ....
- (Joint Ex. 6<sup>24</sup>)

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

“Applicants must have at least (a) one (sic)<sup>25</sup> full-time, or equivalent part-time, professional experience in the practice of law or in a position requiring membership in the Bar.” (Joint Ex. 6<sup>26</sup>)

88. The Appellant's Form 30 does not with specificity reflect her duties at the time she applied for reclassification to Counsel III. (Testimony of Joyce)

89. The Appellant initialed this Form 30 on October 1, 2012; a supervisor initialed it on October 4, 2012. (Joint Ex. 6)

90. The Appellant's fiscal year 2013 EPRS indicates that General Counsel and Deputy Commissioner Robert Whitney or Deputy General Counsel Christopher Joyce were the Appellant's supervisor on certain occasions and EPRS reviewer on other occasions. In addition, this EPRS indicates that nineteen (19) of the Appellant's twenty-one (21) ratings up to July 9, 2013 were “exceeds” the applicable standards and two (2) were

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<sup>24</sup> The “qualifications required at hire” are the same here as in Thompson v. HRD and DOI, C-14-287.

<sup>25</sup> The “one” appears to be a reference to one year of full-time or equivalent professional experience.

<sup>26</sup> The “qualifications required for hire” are the same in the instant case as in the Form 30 for the appellant in Thompson v. HRD and DOI, C-14-287.



“meets”.<sup>27</sup> (Joint Ex. 7) The duties listed in the Appellant’s 2013 EPRS are correct.

(Testimony of Joyce)

91. The Appellant’s five (5) duties in her fiscal year 2013 EPRS were:

1. Act as Public Records Liaison
  - a. Respond to requests within statutory time frames
  - b. Clarify requests, where needed, to respond more efficiently
  - c. Respond in a thorough and timely fashion to all requests regarding the Division’s responsibilities under the Public Records Law
  - d. Periodically speak to Division Staff about requirements under the Public Records Law
2. Act as Division Life Insurance Attorney
  - a. Meet Regularly with LIAM<sup>28</sup>
  - b. Meet regularly with Forms Filings Personnel
  - c. Prepare bulletins and regulation regarding life insurance issues
  - d. Participate in policy meetings regarding life insurance matters
3. Assist with Financial Transactions
  - a. Assists the Financial Analysis Division in any financial matter
  - b. Reviews Companies’ requests for transactions requiring regulatory approval
  - c. Assists the Working Group in financial matters, as required
  - d. Acts as Hearing Officer for financial matters, as required
4. Act as Confidentiality Liaison
  - a. Review and revise Memorandums (sic) of Understanding between the Division and other state and federal agencies and NAIC
  - b. Review and revise confidentiality agreements between the Division and other state and federal agencies and NAIC
  - c. Advise Division staff on data breach matters and coordinate necessary responses
  - d. Respond to Surveys from other states and NAIC
5. Act as Long-Term Care Liaison as Required
  - a. Meet with Managed Care Bureau regarding long-term care issues
  - b. Participate in meetings with the long-term care insurance industry and the Division
  - c. Research long-term care issues
6. Draft Agency Bulletins, Regulations and Legislation
  - a. Conduct necessary background research in a thorough manner
  - b. Conduct necessary discussions with other Division personnel with expertise in the respective subject matter
  - c. Prepare drafts that are thorough and timely

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<sup>27</sup> EPRS ratings are “Exceeds”, “Meets”, or “Below”.

<sup>28</sup> I take Administrative Notice that “LIAM” is the Life Insurance Association of Massachusetts, a trade association. [www.liam.org](http://www.liam.org)

7. Respond to Internal, Consumer, Industry, Legislative and Administration Inquiries
  - a. Conduct necessary factual and legal research, including a thorough review of proposed legislation and corresponding law, as applicable, in a timely fashion
  - b. Speak with relevant agency personnel regarding appropriate response to inquiry or impact of proposed legislation.
  - c. Speak with industry personnel, as necessary, regarding appropriate response to inquiry or to understand the full impact of proposed legislation
  - d. Provide accurate and coherent responses to inquiries from any source, including drafting all assigned memoranda related to proposed legislation, in a timely fashion
  - e. Attend inter and intra agency meetings and participates as appropriate
  - f. Coordinate with other agencies regarding legislative initiatives, including researching and rendering advice on policy initiatives
  - g. Act as weekly duty attorney on a rotational basis
8. Manage and Coordinate Litigation
  - a. Participate in all assigned internal hearings and external litigation
  - b. Work productively with assistant attorney generals (sic) as necessary
  - c. Work productively with Hearing Officers as necessary
9. Assist the General Counsel and the Deputy General Counsel in Every and All Matters Deemed Necessary
  - a. Respond in a through and timely fashion to all assignments from the General Counsel and Deputy General Counsel as to any pending matters in the Legal Division for which one has an expertise
  - b. Attend meetings with the industry and the public at the request of the General Counsel or the Deputy General Counsel
  - c. Assist in disaster relief preparations and operations as requested (Joint Ex. 7)(emphasis added)

92. At both the progress review and the annual review, the Appellant’s supervisors indicated that the Appellant’s performance “exceeds” the appropriate standards. In addition,

Attorney Joyce added narrative to the annual review stating, in part,

Mindy is a very strong contributor to the Legal Group. She is the Legal Group’s go to person for questions regarding public records, life insurance and confidentiality matters. Mindy is also a valuable resource relative to financial matters and has served as a member on several recent working groups in connection with the Division’s review of proposed transactions involving domestic insurers, including the OneBeacon and Commonwealth Annuity Corporate Reorganizations. She has also worked with the Deputy Commissioner of the Health Access Bureau in regard to drafting the Division’s new Long Term Care Insure regulations and Director of Producer Licensing relative to licensing requirements for Life Settlement Brokers.

Mindy promptly responds to request for legal assistance on certain legal matters as they arise and delivers consistently strong work product. She also maintains good working relationships with other division staff, including, but not limited to, the Acting Director of Financial Surveillance and Company Licensing and the Deputy Commissioner of the Health Access Bureau, which greatly aids her in the performance of her duties. Finally, Mindy's willingness to share her extensive knowledge gained through her many years of state service with her peers is very much appreciated. ...

Mindy provided strong work in regard to the Division's regulation review project.

...

(Joint Ex. 7)(emphasis added)

93. Although DOI/OCABR considered Ms. Merow Rubin's EPRS duties, it did not consider the Appellant's EPRS ratings. (Testimony of Deeney)

94. At the meeting with HRD, the attendees reviewed a number of pending reclassification appeals for the Counsel III position, including that of the Appellant. The group discussed that the Counsel III position was meant to be an expert level position and that Counsel IIIs were to perform at a high level in their field. All at the meeting stated that Ms. Merow Rubin had expertise in long-term care insurance and life insurance and annuities but she did not perform the duties of a Counsel III more than half of her time. (Testimony of McInnis)

95. After the OCABR meeting with HRD, Ms. Deeney informed Ms. Merow Rubin by letter dated June 24, 2014, in part,

On March 11, 2014, an appeal audit was performed by the [OCABR] HR department in response to your classification appeal. A review of all information relating to your appeal has resulted in the preliminary recommendation for the denial of your classification appeal to the position of Counsel III.

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

job specification, the distinguishing characteristics and functions of this title include:

- Possess greater experience and have specialized expertise in a specific area of law or broad knowledge of multiple areas;
- May seek guidance and advice from more senior colleagues on complex issues but will have a thorough knowledge of laws, legal principles and practices and have the ability to handle most cases independently;
- Handle more complex cases and collaborate and interact with others outside of the Agency;
- Provide functional direction to agency personnel through guidance, instruction, and delegation of tasks and participate in the training and mentoring of new employees;
- Communicate with other agencies, including the Legislature, and collaborate with cross-functional and cross-agency teams to resolve issues and develop/implement new programs;
- Draft new policies and regulations or amendments, based on legal research and agency needs;
- Present memoranda supporting or opposing legislation affecting Agency operations;
- Allocate cases and assignments to supervisees most appropriately.

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

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

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

It is evident that you have established yourself as DOI's primary legal liaison in the areas of Long-Term Care Insurance and Life Insurance. However, these duties comprise approximately 20% of your job and do not constitute the majority of the duties that you perform on a regular basis.

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

A copy of the letter was sent to Karen Bratt, OCABR Director of Human Resources,

and Karen Blomquist, DOI Deputy Commissioner of Communications and Operations.

(Id.)

96. Ms. Deeney did not meet with either of Ms. Merow Rubin's supervisors, General Counsel Whitney and Deputy General Counsel Joyce, individually to consult them about the Appellant's request for reclassification and her qualifications, although Deputy General Counsel Joyce and General Counsel Whitney had attended the meeting with senior DOI managers and attended the meeting with the DOI Counsel IIs regarding the new Counsel III Spec. (Testimony of Deeney) Attorney Joyce was not given the opportunity to recommend anyone for the Counsel III position and he was not informed how many Counsel IIs would be reclassified. (Testimony of Joyce)

97. By letter dated July 18, 2014 from Ms. Merow Rubin to Ms. Deeney, the Appellant submitted a rebuttal, which stated, in part,

You stated that the reason for the denial of my request for reclassification from a Counsel II to a Counsel III is that while I have established myself as the [DOI]'s 'primary legal liaison' in the areas of Long-Term Care Insurance and Life Insurance, these duties comprise approximately 20% of my job and the majority of my duties are most appropriately described by the Counsel II job specifications. I find this puzzling, as there is no quantification in the Counsel Series Specifications. ...

The Counsel Series notes that each successive level performs the duties of the lower level position in addition to the responsibilities of the higher level position. It is true that I perform all of the duties of a Counsel II; that is a requirement of a Counsel III. I also perform the additional functions of a Counsel III by providing advanced and specialized expertise in insurance law and multiple sub-specialties of insurance law.

I can only assume that by 'primary legal liaison' you mean expert, as I am the agency expert in these sub-specialties ... However, you neglected to consider and include other sub-specialties of insurance law where I am both an agency and statewide expert and serve as the technical expert. I spend 100% of my time providing my advanced and specialized legal knowledge to colleagues and constituents of [DOI]. I am recognized by [DOI] staff as uniquely knowledgeable and regularly advise those in more senior level positions. ...

- I am expert in the specialized area of insurance law, both inside the agency and statewide. I have more legal experience in insurance regulatory law than almost all attorneys both at [DOI] and across state government, including management. As you note [], more legal experience is one of the primary level-distinguishing characteristics of a Counsel III. Over the more than 23 years that I have been Counsel at [DOI], I have developed a broad and deep expertise in insurance regulatory law, and this expertise is sought regularly by colleagues and management ... as well as other state and federal agencies, representatives of trade associations and counsel for licensees. ... Additionally, I am the agency expert in the specialized area of public records and confidentiality ... developed over more than 20 years.
- I serve as technical expert in multiple sub-specialties of insurance law, including, for example, financial transactions of insurers, life insurance and annuities, long-term care insurance, fraternal benefit societies, mandated benefits and life settlements. I regularly provide advanced and specialized expertise in insurance law and multiple sub-specialties of insurance law to [DOI] staff, consumers, attorneys and industry representatives and licensees. ... I am the only person in the agency with the subject matter expertise on issues of public records and confidentiality and I regularly provide training and legal advice to all staff and management.

The Counsel III Specifications contain a list of functions that incumbents may perform, in addition to the functions listed for Counsel I and II. I am able to provide you with current examples of my work which meet each of these criteria ...: (bold, italicized texts are excerpts from the Counsel III Spec that the Appellant included in her rebuttal) -

- ***Serving as technical experts, providing advanced and specialized expertise in a specific area of law to both internal and external clients, management and colleagues ... to assist agency management decision making and to ensure compliance with agency, state and federal laws and regulations.*** My expertise has allowed me to serve as the legal representative for [DOI] in financial transactions, providing both legal and functional advice and recommendations ... throughout these complex transactions.
- ***Educate and effectively communicate the interpretation of area-specific laws to internal and external clients and subordinates.*** I regularly meet with new and existing [DOI] employees to educate them on the laws relating to public records and confidentiality, and to train them on current divisional processes relating to them. I provide legal interpretation and analysis to external entities seeking public records.
- ***Investigate applied facts and obtain information needed for representation, research and analyze internal and external policies,***

*rules, regulations, new legislation, federal and state case law and case history to frame a position to determine accuracy of claims or to provide information or advice to others.* I research and analyze existing state and federal law to determine to (sic) the accuracy of positions taken by external parties seeking decisions from [DOI]. As an example, I recently determined that an insurance carrier's position under Massachusetts law was inaccurate, resulting in a large payment to aggrieved consumers.

- *Develop resolutions based on investigations, verifications and critical analysis of legal and factual arguments and internal legal opinions, negotiate with opposing parties to reach a quick resolution, avoid litigation, mitigate damages and/or settle cases.* I frequently work with outside counsel and consumers to facilitate dispute resolution while avoiding litigation with the Insurance Carriers participating in the Massachusetts insurance market. I also act as the point of contact for subpoenas served on [DOI] and work with outside counsel to settle disputed issues outside of the courts. These functions may not be readily apparent because conflicts are resolved due to my intervention before becoming high visibility issues.
- *Negotiate and review administrative, court and other legal documents ensure that such documents are complete, accurate, and available for future review and in compliance with law.* My duties include amending all of the intra-agency memorandums of understanding (MoU), to comply with Massachusetts law. These include MoUs with other state agencies, other branches of state government, as well as other states and the federal government.
- *collaborate (sic) and confer with colleagues within [DOI] as well as external resources to get input for decisions or determination of a position, to achieve common goals or to implement new laws or changes to laws; may host public forums to provide interested parties with an opportunity to comment on issues.* I am currently finalizing the promulgation of a new draft of the Division's Long Term Care regulation, having developed the new draft after soliciting internal, external, and public input. This is the process that I use regularly, including the recently promulgated amendments to the state's infertility health insurance regulations.
- *Write, recommend and review legislation; appear at hearings regarding legislation to represent the client; draft and implement internal and external policies and procedures, forms, notices, and other written material for adherence to new legislation; evaluate, research and produce documentation regarding the interpretation of law; draft, circulate for input and issue public written statements to provide guidance to taxpayers.* I draft and promulgate statutorily required regulations and draft bulletins to implement new laws, including Bill 879 currently pending in the house (sic). I was also the primary author of [DOI]'s current Personal Information Privacy and Breach Notification Policy.

... I perform all of these functions, and while I have only provided the most recent example of the ways in which I have performed these functions, I have many more examples available.

The Counsel III Specifications lists (sic) Additional Key Accountabilities for which Counsel IIIs may be granted the decision-making authority. Many of these I perform on a regular basis, including addressing policy questions raised by life insurers as the Commissioner's proxy at regularly scheduled Life Insurance Filing forums, authorizing legal interpretation of statute and regulation, and developing official forms to be used by industry and the public. ...

(Joint Ex. 11)

98. By letter dated August 8, 2014 from Ms. Malone Bratt to Ms. Merow Rubin, OCABR informed Ms. Merow Rubin, in significant part,

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

Personnel Analyst Kimberly Deeney met with you on March 11, 2014 and conducted an appeal audit. Kimberly reviewed the results and made a preliminary recommendation on June 24, 2014 to deny your appeal.

We received your detailed rebuttal letter on July 18, 2014. I, along with Secretariat Human Resources Director Sarah Unsworth, conducted an additional review of your classification. We are in agreement that the duties you perform do not warrant the reallocation of your position. I regret to inform you that we must therefore deny your classification appeal.

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

If you have questions regarding this decision, you may contact Personnel Analyst Kim Deeney ....

(Joint Ex. 12)



99. By an email message dated August 15, 2014 from the Appellant to Ms. Odlum, at HRD, Ms. Merow Rubin appealed OCABR's denial of her request for reclassification to HRD. (Joint Ex. 13)

100. By letter dated August 22, 2014 from Ms. Odlum at HRD to Ms. Bratt at OCABR, HRD requested certain information and a number of documents concerning Ms. Merow Rubin's appeal. OCABR typed responses to the requests on to Ms. Odlum's letter and attached a number of documents thereto. (Joint Ex. 27<sup>29</sup>) OCABR responded, in part,

*... Reason(s) for denying appeal[.]* Ms. Merow Rubin handles a variety of legal duties within DOI. Per the Interview Guide, she handles the public records request process for the Agency (50%), she provides legal advice regarding financial transactions & company licensing (10%), she provides legal analysis regarding long-term care insurance (10%), she provides legal analysis regarding life insurance (10%), she reviews and comments on legislation (10%) and she responds to out of the ordinary questions that agency staff/consumers may have (10%). The majority of Ms. Merow Rubin's duties fall within the Counsel II spec. The Counsel II job spec states that incumbents will have a greater level of experience, that they handle cases independently, that they are sought out to handle more complex issues, and that they provide direction to other employees through mentoring and training. ...

*A copy of the supervisors (sic) statement[.]* Due to the large number<sup>30</sup> of DOI legal staff that have requested class appeals, HR spent several hours meeting with (sic) DOI's First Deputy Commissioner, General Counsel, Deputy General Counsel, and the Chairperson of the DOI Board of Appeals to discuss the duties

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<sup>29</sup> Joint Ex. 15 does not include the attachments, although it appears that many, if not most, of them are also in the record as other exhibits, such as Ms. Merow Rubin's Form 30, Interview Guide, fiscal year 2013 EPRS, and the OCABR preliminary and final reclassifications decisions.

<sup>30</sup> I take Administrative Notice that in Thompson v. HRD and DOI, C-14-287, the Commission noted, "Of the sixteen (16) attorneys in the DOI Legal Department, ten (10) applied for reclassification to Counsel III. (Testimony of Deeney and Bratt) At the time of the Commission hearing, only one (1) was reclassified as a Counsel III by OCABR and HRD and that request was approved without rebuttal; that attorney spends 80% of the time working on health issues and supervises or mentors two (2) full time employees. The health insurance attorney works predominantly on integrating the state health insurance law with the federal Affordable Care Act, working with the state Health Connector program and the Health and Human Services Department, among others. The health insurance attorney had been a DOI employee for four (4) years and had previous industry experience. The other Counsel IIs who requested reclassification received preliminary denials of their requests. One (1) Counsel II in the Banks Division of OCABR requested reclassification to Counsel III; his or her request was denied, she or he submitted a rebuttal but apparently did not appeal the matter further. (Testimony of Deeney)". *Id.* at p. 54.

of all DOI Counsel II's. These managers did not submit a written supervisor's statement regarding Ms. Merow Rubin's specific duties, however, the duties as stated in the Interview Guide do match the duties as presented to HR during that meeting and the EPRS forms. ...

(Joint Ex. 15<sup>31</sup>)(*emphasis* added to distinguish the information requested by HRD and the response by OCABR)(emphasis added)

101. By letter dated September 5, 2014, the Appellant wrote to Ms. Odlum, at HRD

stating, in part,

... I am writing to provide clarification and correction to mistakes and inaccuracies found in the documents related to my request to [OCABR] for reclassification to counsel III. The documents referred to and attached for your review were obtained from OCABR in response to a public record request.

The document titled 'COUNSEL II JOB INFO', marked as Exhibit 1, notes a JOB ENTRY DATE of 5/22/2010. This is incorrect, as I was initially employed by [DOI] as a Counsel I on October 28, 1990, and promoted to a Counsel II position on May 7, 1995. The next entry, YEARS IN POSITION, states that I have been in this position for 3.89 years. As I have been a Counsel II since May 7, 1995, I have been in this position more than 19 years. The denial of my request for reclassification was based on an inaccurate accounting ... With more than 19 years (sic) experience as a Counsel II and almost 24 years (sic) experience providing counsel to [DOI], I certainly meet the requirement found in the counsel III specification of '*the most expert and experienced attorney*'.<sup>32</sup>

The document of handwritten notes marked as Exhibit 2<sup>33</sup> contains a note that states, '*doesn't have to be an attorney*' in reference to Public Records. ... All public record requests made to any state agency require a review and analysis of statutes, case law and regulations, and all denials of access require a written legal

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<sup>31</sup> It is unknown who drafted the responses since they were typed directly onto the HRD letter to Ms. Bratt.

<sup>32</sup> The document with errors cited by the Appellant also contains the following handwritten notes, "-Trains others in division to handle requests on their own[;] – If requests are denied – need an atty involved for appeal/denial[;] – is agency expert in life ins & long term care – people outside will contact here[;] – def division expert in pub records". (Joint Ex. 20 (Ex. 1 therein)(emphasis added)) Ms. Deeney testified that she authored the handwritten notes. Later, OCABR produced additional documents in response to the Appellant's public record request. Included was a document entitled, "Non-Management Classification Appeals". The Appellant sent it to Ms. Odlum on September 19, 2014 stating that this document states that, "'The agency must issue a decision on the appeal within 60 days of conducting the audit.' I point this out because OCABR conducted my audit interview on March 11, 2014, and issued the decision on June 24, 2014; **the 106th day after the interview.**" (Joint Ex. 20)(**emphasis** in original). The Respondents indicated that their response time was effected by the number of Counsel IIs who requested reclassification, the amount of additional information that was needed for each request and that they did not hold applicants to the ten (10)-day deadline for submitting rebuttals. (Testimony of Deeney)

<sup>33</sup> Ms. Bratt testified that she is the author of the handwritten notes in Exhibit 2 within Joint Ex. 16.

analysis of the applicability of the statutory exemption cited. Appeals of these actions require legal memorandum (sic) with arguments supporting the exemption. Statutory interpretation and analysis is a key function performed by government lawyers, as evidenced by the description in the Counsel Series Classification Specifications ... and as set forth in the Form 30 for Counsels. ... I am the attorney with the necessary experience and expertise to perform these duties for the Division, and have done so for many years.

Another document of handwritten notes, marked as Exhibit 3, contains a note made by an unknown individual relating to my public records law responsibilities. The note inaccurately states, '*trains ppl. in division hoping they can handle*'; referring to public records. This is not the statement I made during my interview. I provide the legal analysis of all requests to determine if the responsive documents meet the statutory criteria for exemption, and if purely public I supervise the responses sent by the appropriate section of the agency. I educate and train staff at the division to appropriately and legally respond to requests for purely public documents held by their particular section ... I do not 'hope they can handle', I provide in-depth training and constant monitoring and supervision of their responses to public record request for purely public documents ... Additionally, I draft all denials of access ... which are required by law ... and handle all appeals.

Also enclosed for your review, marked as Exhibit 4, is a document I received from OCABR that appears to be a 'script' for the meeting held this past January with all lawyers at [DOI] regarding the newly created Counsel III positions. As you can see, even before anyone applied for a reclassification the decision had been made that no one was eligible. ...

(Joint Ex. 16)(emphasis in original)

102. By letter dated October 28, 2014, George Bibilos, HRD Director of the Organizational Development Group, informed the Appellant that HRD would conduct a hearing on November 5 regarding her appeal of OCABR's denial of her reclassification request. (Joint Ex. 17)
103. On November 5, 2014, HRD conducted a hearing on the Appellant's reclassification appeal. The hearing was conducted by Mr. Bibilos with Anita Holbrook. Ms. Holbrook is an HRD Personnel Analyst III who works on classification, compensation matters and hiring guidelines and she supports three (3) Secretariats,

including the DOI Secretariat. Also in attendance at the HRD hearing were the Appellant, DOI Deputy General Counsel Joyce, Bobbi Kaplan of NAGE, and Ms. Deeney. (Testimony of Holbrook; Joint Ex. 19)

104. Ms. Holbrook began working for HRD approximately eight (8) months prior to the HRD appeal hearing for the Appellant. This was the second hearing on a Counsel reclassification request in which Ms. Holbrook has participated. Prior to working at HRD, Ms. Holbrook worked for the state for approximately twelve (12) years, beginning at the Unemployment Insurance office, where she worked in human resources; at the State Police Department, where she worked in compensation and classification as a Personnel Analyst I; and at the Department of Correction. Her experience with classifications at the State Police involved responding to requests for reclassifications and issuing decisions thereon. When an employee appeals an agency's denial of reclassification, HRD reviews the employee's Interview Guide and any information that the employee and the agency want to submit. (Testimony of Holbrook)

105. At the HRD hearing, Ms. Holbrook took notes on a blank form of the Interview Guide. Regarding the section for "Relationships with Others", Ms. Holbrook wrote, in part,

work is assigned by 1<sup>st</sup> Deputy, Commissioner etc. Consumer service section employer. Outside & inside counsel, trade associations. Other state Agencies. (Joint Ex. 18)

In the section titled "Basic Purpose of Position", Ms. Holbrook wrote,

almost most senior person. Provide legal advise (sic) to commr. thru Dept. Counsel & General Spec in insurance law, issues of public records LT care, life insurance, financial actions (regulate them); mandated. (Joint Ex. 18)

Under the section titled "Specific Duties" Ms. Holbrook wrote,

Public records law – you have to be a lawyer – legal review[;] information request[;] providing expert advise (sic) & analysis to commissioner. Provide training for management, division of banks. Advise parent agency – OCA on public records. Provide training public records law & confidentiality. Refresher training every 12-24 months. To all new employees 1 hour training (i.e.6 employees since Sept.) provided training w/in OCA. Expert in life insurance & long term care (but % fluctuates depends on day/week). All of my time providing expert advice[;] bulk of time on things relative to sub specialties that I am the only expert on that. Public records isn't specific to Insurance – this piece is administrative = Counsel II  
(Joint Ex. 18)<sup>34</sup>

In the section for “Supervisory responsibility”, Ms. Holbrook wrote,

- Interns when ever an intern helps me do something
  - Clerical processing of public requests – functional supervision
  - Agreements w/ other agencies (confidentiality; information agreements)
- (Joint Ex. 28)

Under “Special Requirements”, Ms. Holbrook wrote,

- JD, member of the bar
  - Ability to understand 3<sup>rd</sup> rail of public law ...
- (Joint Ex. 28)

106. Ms. Holbrook found that the Appellant is not a Counsel III because that is the highest level expert in the Counsel series who is performing their expertise a preponderance of the time, whose actions have an impact across the state. She found further that the Appellant spends only 20% of her time on her specialties in long-term care insurance and life insurance and annuities and that most of the Appellant’s time is spent on public records law, which is administrative and interchangeable across state agencies. (Testimony of Ms. Holbrook)

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<sup>34</sup> Ms. Deeney wrote two (2) brief notes on the Appellant’s completed Interview Guide (or a copy of it) regarding the Appellant’s public records work, which notes are similar to the notes she wrote on Joint Ex. 18. *See* Joint Ex. 16 (Exhibit 5 thereof).

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

The Human Resources Division received your formal request to appeal the classification of your position on September 5, 2014. You requested the reallocation of you (sic) position from the classification of Counsel II to Counsel III.

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

You may appeal this decision to the Civil Service Commission as provided in Massachusetts General Laws, Chapter 30, Section 49. Appeals should be directed in writing to the Civil Service Commission, One Ashburton Place, Room 503, Boston, Massachusetts 02108-1517.  
(Joint Ex. 19)

108. On December 17, 2014, the Appellant appealed HRD's denial of her appeal after hearing to the Commission. (Joint Ex. 20, Administrative Notice)

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

Counsel III Spec: "Distinguishing Characteristics:

This generally is the most expert and experienced attorney in this series, and in some work environments can also be the second-level supervisory classification. Incumbents typically possess greater experience and have specialized expertise in a specific area of the law (e.g., administrative, family, finance, labor and employment, litigation) and general knowledge of other areas or broad knowledge of multiple areas. Incumbents at this level serve as subject matter experts and have advanced knowledge of laws, legal principles and practices. The distinguishing characteristic of the Level III is incumbents at this level are statewide or agency expert with more legal experience and have greater expertise in a specialized area of the law."

(Joint Ex. 5)

The Appellant is the DOI expert and subject matter expert in long-term care insurance and life insurance and annuities. (Testimony of Appellant, Joyce, Deeney, and Bratt).

Specifically, the Appellant:

- is the “go to” person on life insurance and annuities, which effect these portions of the insurance industry and policy holders across the state;
- acts as the DOI Life Insurance Attorney, meeting regularly and/or otherwise maintaining contact with the Life Insurance Association of Massachusetts, the American Council of Life Insurers and the Life Insurance Settlement Association to inform them of DOI statutory interpretations, as well as provide them with regulatory guidance and related information;
- addressing policy questions raised by life insurers as the Commissioner’s proxy at regularly scheduled Life Insurance Filing forums;
- meets regularly with the Policy Form Review section of DOI, advising the Director and staff on life insurance matters;
- advises the Acting Director and staff of the Financial Surveillance and Company Licensing section of DOI regarding life settlement provider/company licensing;
- advises other Counsels in the DOI Legal Department about long-term care and life insurance and annuities;
- prepares bulletins and regulations regarding life insurance issues, and participates in policy meetings regarding life insurance matters;
- as the Long-Term Care Liaison, she is the “go to” person on this part of the insurance industry, meeting with the DOI Bureau of Managed Care;
- participates in meetings with the long-term care insurance industry;
- researches complex and advanced long-term care issues; and
- drafts advanced bulletins, regulations and legislation on complex matters relating to long-term care insurance and life insurance, obtaining appropriate internal and external (industry and consumer) input and conducting detailed and substantive research.

(Joint Exs. 5, 7 – 9, 11, 16, 18, 20, 29, Appellant’s Exs. 3 – 8; Testimony of Appellant and Joyce)

The Appellant also has general knowledge of other areas or broad knowledge of multiple areas within the Division of Insurance pursuant to the Counsel III Spec – “Distinguishing Characteristics”, including, for example, financial transactions, confidentiality matters in public record requests, fraternal benefit societies, mandated benefits and infertility health insurance, acquired over more than two (2) decades working in the DOI Legal

Department. (Joint Exs. Joint Exs. 5, 7 – 9, 11, 16, 18, 20, 29)

110. Under the Counsel III Spec provisions regarding Supervision Received, Incumbents receive general supervision from employees of a higher grade who

provide policy direction, assign work, and review performance through reports, case reviews, and conferences for accuracy and conformance to applicable laws, regulations, policies and agency procedures.

Incumbents may also receive functional direction from the legal executive and executive personnel in other agencies who provide final approval, assignments, guidance and review.

(Joint Ex. 5)(emphasis added)

The Appellant receives the supervision receives the supervision of the DOI General Counsel and Deputy Commissioner who provide the Appellant with policy direction, assign her work and review her performance, directly or indirectly, through her EPRS reports. She does not appear to receive supervision from legal executive and executive personnel in other agencies as authorized, but not required, by the Counsel III and neither authorized nor required in the Counsel II Spec. (Joint Ex. 5; Testimony of Appellant)

111. Under the Counsel III Spec regarding Supervision Exercised,

Incumbents may provide direct supervision over and assign work to interns, professionals, support staff and/or other personnel.

Incumbents may provide functional direction to interns, professional or other personnel through guidance, instruction and delegation of tasks and participate in the training and mentoring of new employees.

Incumbents may also participate in the interviewing process or may make recommendations for new hires.

(Joint Ex. 5)(emphasis added)

The Appellant does not perform the authorized, but not required, functions under the Counsel III Spec regarding Supervision Exercised. Specifically, she functionally supervises interns but only with respect to work assigned to her. She trains, but does not supervise new DOI employees regarding public record requests, and provides occasional in-service training on the same topic. (Joint Ex. 7, 9, 11 and 18; Testimony of Appellant)

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

“Incumbents may perform the following”:



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

(Joint Ex. 5)

The Appellant performs a majority of the Counsel III Additional Functions. Although Counsel IIIs “may” perform “Additional Functions” regarding their area of expertise, the Appellant actually performs as a technical expert, providing advanced and specialized expertise in long-term care insurance and life insurance and annuities to

internal and external staff, management and clients. Internal clients include the Commissioner, General Counsel, Deputy General Counsel, the Policy Form Review section of DOI, the Managed Care Bureau, the Financial Surveillance and Insurance Company Licensing section of DOI, and colleagues in the legal department. External clients include the Legislature, several life insurance trade associations, insurance producers, counsel to insurers and consumers. In addition, the Appellant provides specialized and/or broad consultative advice, insight, and recommendations on long-term care insurance and life insurance and annuities to assist DOI management decision making and ensure compliance with applicable state laws and regulations by analyzing proposed legislation (with any written comments to be submitted to the Legislature being approved by the DOI Commissioner) and drafting appropriate legal documents to so advise and/or recommend action thereon.

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

The Appellant investigates the facts relating to the Memoranda of Understanding that she drafts involving other entities and she obtains information to assess the accuracy of the entities' stated positions and represents DOI in the pursuit of such Memoranda, as well as researches and analyzes applicable policies, rules, regulations, legislation and state caselaw to ensure enforcement of state insurance law. Further, in the course of preparing such Memoranda, the Appellant develops resolutions for any problems that arise, basing her actions on investigation, verification and analysis of the facts and the law in a timely manner.

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

The Appellant writes, recommends and reviews legislation, attends hearings regarding legislation to represent DOI and drafts and implements policies and bulletins and other written material for adherence to new legislation. In addition, she produces documentation regarding interpretation of the law. (Joint Ex. 20; Testimony of Appellant and Joyce)

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

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

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

- Lead and provide direct supervision to others.”  
(Joint Ex. 5)

The Appellant performs a majority of the Additional Key Accountabilities that are authorized but not required, performing at least four (4) of the seven (7) Additional Key Accountabilities. Specifically, the Appellant recommends whether to settle, prosecute or defend cases regarding negotiations with external entities. The Appellant works with the Office of the Attorney General to implement litigation strategy but there is inadequate information in the record to establish that she implements litigation strategy in court cases independently. The Appellant forms legal opinions based on research, analysis and interpretation and addresses policy questions as the authoritative representative regarding long-term care insurance and life insurance and annuities. The Appellant issues legal opinions based on legal interpretation of statutes, policies, regulations and court decisions. The Appellant develops and recommends official forms for approval. She does not recommend resources and budgetary requirements to accomplish objectives but there is no indication that either function is applicable to the DOI legal department. The Appellant does not lead and provide direct supervision to others, although she provides guidance to others regarding public records law and when her work is assigned to interns. (Joint Ex. 20; Testimony of Appellant)

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

“In addition to the key contacts listed for the Counsel Level 1 and II, key contacts and relationships for Counsel III incumbents include court personnel and public officials; federal and state agencies; community-based organizations; and local municipalities.”

The Appellant maintains some of the relationships referenced in the Counsel III Spec regarding Relationships with Others. “Public officials” is not defined but the Appellant

is in contact with the Legislature, the DOI Commissioner and other states agencies, all of which appear to qualify broadly as public officials. There is no indication that the Appellant has direct contact with court personnel but she is in contact with public officials and federal and state agencies. There is inadequate information in the record to indicate that the Appellant has direct contact local municipalities; as insurance is largely a state-regulated industry, municipalities do not appear to play an on-going role in insurance regulation.<sup>35</sup> (Joint Ex. 20; Testimony of Appellant)

115. The Counsel III Spec regarding Knowledge, Education and Experience provides that applicants must have at least six years of experience in the practice of law, in a specialized area that is relevant to the assigned agency. Based on assignment and supervisory responsibilities, three years in a supervisory capacity may be required. ... (Joint Ex. 5)

The Appellant satisfies the general tenure requirement. There is inadequate information in the record to indicate whether that the Appellant's training and advisory of others regarding public records constitutes three (3) years of supervisory experience and if her assignment as a Counsel III would include supervisory responsibilities. (Joint Ex. 20)

116. The Counsel III Spec also provides that,
- [i]ncumbents are required to have the following at the time of hire:  
In addition to the requirements listed for the Counsel Levels I and II, incumbents must have the:
1. Extensive knowledge of the laws specific to assignment (e.g. administrative, finance, family, litigation).
  2. Extensive knowledge of federal and state laws.
  3. Knowledge of advocacy techniques and strategies.
  4. Knowledge of the methods and ability to conduct complex legal research and technical report writing.
  5. Ability to address complicated legal issues.

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<sup>35</sup> DOI may not be in contact with municipalities on a regular, operational basis but it may be in contact with municipalities after a natural disaster, such as coastal flooding and the tornados that struck western Massachusetts a couple of years ago to assist consumers with insurance claims.

6. Ability to analyze and determine the applicability of legal data, draw conclusions and make appropriate recommendations.  
(Joint Ex. 5)(emphasis in original) ...

At the time that she applied for reclassification, the Appellant met these requirements.

She was the “go to” person at DOI or statewide on long-term insurance and life insurance and annuities with extensive knowledge of the applicable laws, she had knowledge of the methods and ability to conduct complex legal research, the ability to address complicated legal issues, she had knowledge of advocacy techniques and strategies, and the ability to analyze and determine the applicability of legal data. (Joint Exs. 11 and 20; Testimony of Appellant)

117. The Appellant spends 50% of her time on public records law, training new DOI staff and management in its application, providing updated training to existing DOI employees, and training personnel in other agencies. Responding to public records requests is largely administrative in nature and interchangeable across state agencies. However, in non-routine public record requests, DOI staff and management regularly seek her review of public record requests to determine if the records requested are public or exempt from disclosure. (Joint Ex. 20; Appellant’s Exs. 3 – 8; Testimony of Appellant) She also responds to any appeals of denials of access to public records, although in the two (2) years prior to the Commission hearing there were no such appeals, and the Appellant works with NAIC and other states’ regulators to comment on proposed public records laws. (Testimony of Joyce) However, the Appellant also drafts legislation and reviews related Confidentiality Agreements and Memoranda of Understanding to which DOI is a party and advises the DOI Commissioner thereon as part of her work concerning public record requests, which is not an administrative

function. (Joint Ex. 20; Appellant's Exs. 3 – 8; Testimony of Appellant) The Appellant's determination may not be final since more senior personnel in DOI, OCABR and the Governor's Office of Chief Legal Counsel may review it and render a different determination. (Testimony of Blomquist) However, the Appellant's determination is usually the same as the more senior personnel. (Testimony of Joyce)

118. The Appellant is the DOI expert in long-term care insurance and life insurance and annuities with general knowledge of other areas of insurance law, performing a majority of the Additional Functions of a Counsel III in that regard and the Additional Key Accountabilities. She meets the general requirement to have had six (6) years of experience in insurance but there is no indication if her possible reclassification would have an assignment requiring three (3) years of supervisory experience. (Joint Ex. 20) In addition, the Appellant has the knowledge and experience that "incumbents are required to have ... at the time of hire." (Joint Exs. 5; *see also* Joint Ex. 20) Further, the Appellant wrote in her Interview Guide that she spends 10% of her time working on long-term care insurance and 10% of her time on life insurance and annuities as a Counsel III. The Appellant also spends 10% of her time on drafting legislation generally, "shepard[ing]" the regulations and legislation from drafting through promulgation, which may also be considered a Counsel III function. The Appellant spends another 10% of her time on Financial Transactions and Company Licensing, including acting as a hearing officer in such matters, which functions she performs as a Counsel III. The Appellant spends another 10% of her time on answering staff questions of a wide variety, which is a function of a Counsel II. Finally, the Appellant wrote that she spends 50% of her time on public record requests. While responding to public record requests is largely

administrative and interchangeable across state agencies, training personnel at DOI and other agencies on public records law and addressing confidentiality issues peculiar to DOI public records requests by drafting related legislation and confidentiality agreements constitute performance as a Counsel III. (Joint Ex. 20; Testimony of Appellant; Administrative Notice)

*Applicable Law*

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

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

(G.L. c. 31, § 1)

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

[i]n pursuance of such responsibility as to the said classification plan, the said administrator shall classify all appointive offices and positions in the government of the commonwealth ... and he may from time to time reclassify any such office or position. In so classifying or reclassifying any such office or position the said administrator (a) shall ascertain and record the duties, responsibilities, organizations relationships, qualification s for, and other significant characteristics of the office or position; (b) shall group into single classes all such offices and positions, regardless of agency or geographical location, which are substantially alike in the duties, responsibilities, organizational relationships, qualifications, and other significant characteristics; (c) for each such class shall establish specifications which shall include (i) an appropriate descriptive title and code number for the class, which shall be the official title of all offices and positions in the class and shall be set forth on all payrolls by name or code, and (ii) the common features of the duties, responsibilities and organizational relationships of, qualifications for, and other significant characteristics of all offices and positions in the class; and (d) may from time to time establish new classes and alter, divide, combine or abolish existing classes....

(Id.)



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

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

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

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

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

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

apprenticeship or from training in the performance of routine mental, manual or physical processes. ...  
(Id.)(emphasis added)

A history of Commission decisions has established that in an appeal of the denial of a request for reclassification, the Appellant must prove, by a preponderance of evidence, that they perform a majority of the functions of the reclassification they seek and that they perform those functions a majority of the time. *See, e.g., Roman v. Department of Revenue*, 14 MCSR 184 (2001)(Counsel II – appeal denied); *Gruber v. Department of Revenue*, 14 MCSR 100 (2001)(Attorney – appeal denied); *Formichella v. Massachusetts Highway Department*, 21 MCSR 261 (2008)(Engineer – appeal denied); *Straub v. Department of Conservation and Recreation*, 22 MCSR 689 (2009)(Environmental Analyst III – appeal denied) *aff'd*, *Straub v. Civil Service Commission & another*, Superior Court C.A. No. SUCV2010-04143 (2013); *Kurker v. Department of Conservation and Recreation*, 22 MCSR 357 (2009)(Ranger II – appeal allowed); *Guidmond v. Department of Correction*, 27 MCSR 327 (2014)(Correction Program Officer – appeal denied); *Messier v. Department of Correction*, 13 MCSR 204 (2000)(Clerk III – appeal denied); *Lefebvre v. Department of Early Education and Care*, 22 MCSR 149 (2009)(Administrative Assistant II – appeal allowed); *McCollum v. Department of Environmental Protection*, 15 MCSR 23 (2002)(Environmental Engineer VI – appeal denied); *Towns v. Department of Mental Retardation*, 21 MCSR 17 (2008)(Vocational Instructor C – appeal denied); *Palmieri v. Department of Revenue*, 26 MCSR 180 (2013)(Management Analyst II – appeal denied); *Skinner v. Department of Revenue*, 21 MCSR 379 (2008)(Systems Analyst II – appeal denied); *O’Neill v. Department of Revenue*, 19 MCSR 149 (2006)(Tax Auditor I – appeal denied); *Erb v. Department of Revenue*, 18 MCSR 202 (2005)(Program Coordinator III – appeal denied); *Cote v. Department of Revenue*, 18 MCSR 189 (2005)(Tax Examiner III –

appeal denied); Velez v. Department of Revenue, 14 MCSR 93 (2001)(Child Support Enforcement Worker – appeal denied); Kasprzak v. Department of Revenue, 13 MCSR 120 (2000)(Child Support Enforcement worker – appeal denied); Guidara v. Department of Transitional Assistance, 24 MCSR 133 (2011)(EDP Systems Analyst III – appeal allowed); Baddeley v. Bristol Community College, 12 MCSR 103 (1999)(Clerk – appeal denied); Guarente v. University of Massachusetts at Lowell, 27 MCSR 102 (2014)(Clerk IV – appeal denied); and Kimball v. Metropolitan District Commission, 12 MCSR 155 (1999)(Park Foreman – appeal allowed). Straub v. Civil Service Commission & another, Superior Court C.A. No. SUCV2010-04143 (2013) is the sole Superior Court decision that directly references an appellant’s burden in a reclassification appeal in detail. In this Superior Court decision, the court wrote, addressing the issuance of a revised decision by the Commission, “The conclusion reached in the [Commission’s] Revised Decision, indicating that Straub did not ‘exercise supervisory functions over permanent professional staff, he has failed to establish that he performed (sic) majority of the level distinguishing functions of an [Environmental Analyst IV] more than 50% of the time,’ was a necessary clarification.” Id., at 9.<sup>36</sup> 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.<sup>37</sup>

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<sup>36</sup> 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.

<sup>37</sup> The subject of “class” reclassifications, as opposed to individual reclassifications like that of Ms. Johnson here, is addressed in Murphy & others v. Administrator of the Division of Personnel Administration & others, 377 Mass. 217 (1979). In Murphy, the Court found that reclassification of a class or other group of certain attorneys purportedly by the Legislature was ineffective since those requesting reclassification did not follow the reclassification request process provided in G.L. c. 30, s. 49 requiring the appointing authority and HRD to consider such requests and, if they approve such requests, for HRD to submit a request for the reclassification and funding thereof to the Legislature. The Superior Court relied on Murphy to uphold the decision of the Commission on remand in DeRosa v. Civil Service Commission, Superior Court C.A. No. 10-4679-H (2012) finding, *inter alia*, that

### *The Parties' Arguments*

The Appellant avers that she is an expert in public records law, long-term care insurance and life insurance and annuities and has a higher level of knowledge of a variety of fields within insurance law. She asserts that the Counsel III Spec does not require applicants to perform a majority of the duties of a Counsel III most of the time. It is wrong, she states, to require Counsel IIIs to perform as experts more than 50% of the time since the work they do is not static and often driven by what is happening in the insurance industry and public requests. In addition, the Appellant argues that the work of Counsels is not susceptible of quantification in that manner. Further, the Appellant notes that Deputy General Counsel Joyce testified that he does not quantify the amount of time that the Appellant works in a particular field of insurance law and does not assess a Counsel's expertise by the amount of time he or she spends on it. While the Appellant notes that in her Interview Guide she assigned various percentages to the fields of law in which she works, she was unclear about what to write in those portions of her Interview Guide, asked Ms. Deeney about what was to be entered, and Ms. Deeney told her to indicate what she was working on that day or around that time. In fact, she asserts, Deputy General Counsel Joyce testified that she performs most, if not all of the Counsel III Additional Functions and that she spends most of her time on public records requests, long-term care insurance and life insurance and annuities and that she is an expert in those fields. In her rebuttal to DOI, the Appellant stated that in fact she works in insurance law 100% of the time and, therefore, she should be reclassified. Moreover, a position "series", such as the revised Counsel Series, that establishes a new title only for "experts" does not provide a career ladder for all Counsels, as

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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.

required by civil service, and unfairly limits the number of Counsel III reclassifications when a union representative testified that it should not be limited.

With respect to the work that the Appellant performs in the field of public records law, the Appellant states that it is a substantive field of law, not administrative, and is unique at DOI because of the many confidentiality agreements between DOI and insurers which can affect DOI's response to a public records request, which agreements she negotiates with the insurers. Further, the Appellant asserts that she is an expert in public records law in that she handles a majority of the public records requests that DOI receives, she trains new employees at DOI, provides training updates for DOI personnel, and has trained people in another agency about public records law.

The Appellant notes that the Respondents agree that she is an expert in long-term care insurance and life insurance and annuities. In addition, The Appellant asserts that she also has "greater experience" in her fields of expertise, as required by the Counsel III Spec, having worked at DOI for more than two (2) decades. Also, the Appellant states that she has "general knowledge of other areas or broad knowledge of multiple areas", as required by the Counsel III Spec, having worked on other parts of insurance law, such as financial transactions, licensing, legislation, fraternal benefit societies, the infertility insurance program, and life settlements.<sup>38</sup>

The Respondents argue that Ms. Merow Rubin failed to establish by a preponderance of the evidence that she performs a majority of the Counsel III functions a majority of the time, as evidenced by the Interview Guide that the Appellant completed indicated that she performs in

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<sup>38</sup> The Appellant also avers that the appeal should be granted because the Respondents failed to respond to her reclassification request within sixty (60) days, pursuant to an HRD memorandum or policy. The Respondents argue that the Counsel III Spec was new, it received a lot of requests for reclassification to Counsel III, and it gave the Appellant additional time in which to submit a rebuttal to OCABR's preliminary denial of her request. While the Respondents' response to the Appellant's request was longer than the sixty (60)-day period, I find that the delay in this instance did not affect the outcome and is not determinative here.

her areas of expertise 20%, or 30% at most, of the time. The Appellant had a number of opportunities in the request for reclassification process, the Respondents argue, and yet she failed to meet her burden. In her response to the preliminary denial of her reclassification request, the Respondents assert the Appellant said she performed in indicated that she performs in her areas of expertise 100% of the time, which they aver is inaccurate and it does not indicate how much time she spends on each area of her expertise.

The Respondents aver that the Counsel III Spec is limited, by its own terms, to those Counsel IIs who are experts in a given area of law pertinent to the employing agency. Further, the Spec requires that the agency's "mission must require a need for a high level of sophisticated legal analysis to be performed on as (sic) sustained basis." (Respondents' Post-Hearing Brief, p. 19) These interpretations are supported, the Respondents state, by the August 23, 2013 HRD memorandum that was issued when the Counsel III Spec was promulgated, indicating, *inter alia*, that agencies would have to obtain HRD approval prior to posting or accepting requests for reclassification to Counsel III and ensure that there were available funds. An added indication of the uniqueness of the Counsel III position, the Respondents state, is that the Counsel III position is four (4) salary grades higher than the Counsel II and that Counsel IIIs are not eligible for overtime, callback or standby pay, unlike Counsel IIs. Moreover, the Respondents argue that the Counsel III position was not intended for the "seasoned generalist who has developed expertise in a minimally utilized area." (*Id.*) In fact, the Respondents assert further, the only change that a union representative requested, when discussing the then-proposed Counsel III Spec, was to change part of the qualifications to say that the Counsel III could be a first- or second-level supervisor (as opposed to a second-level supervisor only), not whether the Counsel III title would be available to only a limited number of candidates. Although the Counsel III Spec is

directed to a limited number of candidates, the Respondents argue that it provides an appropriate step in the Counsel Series career ladder.

The Respondents assert they took numerous actions to ensure an appropriate review of the Appellant's reclassification request, talking to HRD and union representatives to clarify their intent in establishing the Counsel III Spec, talking to senior DOI managers to understand the Appellant's work and how the DOI Legal Department functions, meeting with the Appellant and all interested DOI Counsels to discuss the new Counsel III Spec and affording the Appellant the opportunity to submit a rebuttal in response to OCABR's preliminary denial of the Appellant's request.

The Respondents acknowledge that the Appellant is an expert in long-term care insurance and life insurance and annuities. However, the Respondents argue that the Appellant is not an expert in public records law because public records law is not unique to DOI since other agencies must also respond to public records requests and that an experienced attorney is not required in order to respond to public records requests, relying on G.L. c. 66, s. 10 and 950 CMR 32. In addition, although the Appellant trains new DOI employees and updates current employees regarding public records laws, the Secretary of the Commonwealth also provides guidance and training regarding public records laws in its role as the first arbiter in public record disputes. The Respondents note that the Appellant's Interview Guide indicates that she spends 50% of her time on public record matters, arguing that that precludes her from establishing that she performs in her areas of expertise more than 50% of the time.

The Respondents assert that requests for reclassification are assessed based on the duties being performed by the applicant at the time of his or her application. They state that since the Appellant wrote in her Interview Guide that she spent 50% of her time on public records law

matters and 10% each for financial transactions and company licensing, long-term care insurance, life insurance, legislation and responding to a variety of staff questions, she indicated the work she was performing at that time. That the Appellant may have spent more time on those fields of law at another time, the Respondents aver, is irrelevant.

### *Analysis*

As noted in the Summary at the beginning of this decision, the Commission has established a three-prong test to distinguish the job performed by a Counsel III: (a) the Counsel III must have the “Knowledge Education and Experience” as well as the additional requirements described for a Counsel III in the section of the specification entitled “Incumbents are required to have the following at the time of hire”; (b) a Counsel III must have the “distinguishing characteristic” as THE most expert and experienced attorney in the agency in a specific area of expertise essential to a core mission of the agency; and (c) the Counsel III must perform, in the aggregate, at least a majority of the time, duties listed in the Counsel III Specifications under “Supervision Exercised”, “Additional Functions Performed”, “Additional Key Accountabilities” and “Relationships with Others”, with the “Supervision Received” by a Counsel III. In applying the “distinguishing characteristic” criterion, the Commission will consider the significance of the area of expertise to the core mission of the agency and the degree of specialization involved. The Appellant passes the three-prong test, having established by a preponderance of the evidence that she is the DOI life insurance and annuities and long-term care insurance expert and she performs the duties of a Counsel III in these and other fields of law.

A preponderance of the evidence also establishes that the Appellant also performs functions regarding financial transactions, fraternal benefit societies, the infertility program, life settlements, and confidentiality in public records requests, thereby applying her “general



knowledge of other areas or broad knowledge of multiple areas” pursuant to the Counsel III Spec.

#### Construction of Counsel III Spec Terms

Although the Counsel III Spec is not a statute, certain rules of statutory construction shed light on the meaning of this Spec. In particular, “[a] fundamental maxim of statutory construction is to give clear, unambiguous language its plain meaning.” Daley v. Quincy Fire Department and Human Resources Division, 18 MCSR 363 (2005) citing Bronstein v. Prudential Ins. Co. of America, 390 Mass. 701, 704 (1984). Another rule of statutory construction provides that “statutes should be interpreted as a whole to constitute a harmonious provision”. Bousquet v. Town of Leicester, 18 MCSR 341 (2005) citing Kargman v. Comm’r of Revenue, 389 Mass. 784, 788 (1983). Further, statutory language “is not to be enlarged or limited by construction unless its object and plain meaning require it.” Joudrey v. Human Resources Division, 23 MCSR 289 (2010) citing Rambert v. Commonwealth, 389 Mass. 771, 773 (1983). In addition, “[a] statutory expression of one thing is an implied exclusion of other things omitted from the statute”. James v. Boston Police Department, 28 MCSR 185 (2015) citing Police Comm’r of Boston v. Cecil, 431 Mass. 410, 413 (2000). Yet another provision of statutory construction states that “[i]s axiomatic that the word ‘and’ is not synonymous with the word ‘or’; the word ‘or’ is disjunctive, while the word ‘and’ is conjunctive. Commonwealth v. Aponte, 71 Mass.App.Ct. 758, 761 (2008). ‘The word ‘or’ is not synonymous with the word ‘and,’ is a disjunction particle in its accurate use, and marks an alternative and not a conjunctive.” Coach v. Human Resources Division, 23 MCSR 287 (2010).

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

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

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

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

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

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

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

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

Since the Counsel III Spec Distinguishing Characteristics indicates that being an expert is a “characteristic” and not a duty or function, it is not susceptible of numerical quantification like the amount of time an employee works on a certain function or duty. In fact, G.L. c. 150E, § 1 provides that the work of professionals “cannot be standardized in relation to a given period of time”. Id. Further, it was established here that the priorities of the DOI Legal Department, not unlike other agency legal departments, are subject to change, necessitating changes in attorney assignments. It is inconsistent with civil service merit principles to require legal department Counsels to take on different assignments that may consume a majority of their duties at certain times and in which they may become experts, only to deny their expertise when the department’s priorities change. Moreover, the change in priorities of an agency legal department does not, on its own, indicate that the attorney is no longer an expert. Once a candidate establishes the

required expertise, the candidate does not necessarily lose it with the passage of time or because they spend more time on areas other than the candidate's area of expertise. When an appointing authority asserts that the candidate's expertise is stale, the candidate must show that her or his expertise is current, and that the expertise is relied on by the agency or an ongoing basis, which determination will be made by the Commission on a case by case basis. In addition, the Commission is aware of no precedent that provides that attorneys who are reclassified to the Counsel III title when they spend a majority of their time working in the field of their expertise are returned to the Counsel II title if they are subsequently required to spend most of their time in another field of law. Therefore, Counsel III candidates are not required to prove that they apply their expertise a majority of the time.

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

This generally is the most expert and experienced attorney in this series, and in some work environments can also be the second-level supervisory classification. Incumbents typically possess greater experience and have specialized expertise in a specific area of the law (e.g., administrative, family, finance, labor and employment, litigation) and general knowledge of other areas or broad knowledge of multiple areas. Incumbents at this level serve as subject matter experts and have advanced knowledge of laws, legal principles and practices. The distinguishing characteristic of the Level III is incumbents at this level are statewide or agency expert with more legal experience and have greater expertise in a specialized area of the law.  
Joint Ex. 5 (emphasis added).

The word "generally" conflicts with the words "most expert and experienced", suggesting that candidates who are not the "most expert and experienced" may be eligible for the position. Further, referring to the "most expert" attorney is problematic since an expert would be the person with the most knowledge on a given topic. Also undermining the requirement that a candidate be the "most expert and experienced", is the phrase, "[i]ncumbents typically possess greater experience . . . .", suggesting that candidates need not be the "most expert and

experienced”. Similarly, this part of the Counsel III Spec provides, “The distinguishing characteristic of the Level III incumbents at this level are statewide or agency expert with more legal experience and have greater expertise” in an area of law, which conflicts with the reference to the terms “most expert and experienced”. To give these terms consistent meaning, I interpret the reference to “more legal experience” and “greater expertise” to mean more experience and expertise than in the next lower title (Counsel II) and that a Counsel III must also be an expert in an area of law.

The parties address the meaning of the phrase, “statewide or agency expert” in this section of the Counsel III Spec.<sup>39</sup> However, there is no internal inconsistency in this phrase. The use of the disjunctive “or” clearly indicates that a Counsel III candidate must be either a statewide expert or agency expert; candidates need not be both. Given this understanding of these Spec terms, I conclude that the wording of the Counsel III Spec Distinguishing Characteristics requires successful candidates to be an expert either in their agency or statewide.

The next part of the analysis requires interpreting the field of law in which a Counsel III candidate must be an expert. The Counsel III Spec states that the successful candidate has “specialized expertise in a specific area of the law (e.g., administrative, family, finance, labor and employment, litigation) and general knowledge of other areas or broad knowledge of multiple areas.” Joint Ex. 5 (emphasis added).<sup>40</sup> Clearly, this is not an exclusive and complete list. The term “e.g.” is an abbreviation of the Latin phrase “exempli gratia,” meaning “for example.” ([www.merriam-webster.com/dictionary/](http://www.merriam-webster.com/dictionary/), November 2 and 3, 2016) Given this meaning and the list of areas of law that follow in the Spec parenthesis, the areas of law listed are

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<sup>39</sup> The Counsel III section on Distinguishing Characteristics does not refer to “an” expert or “the” expert, which could have been used to more specifically indicate that the position was intended to apply to a smaller number of candidates but it did not.

<sup>40</sup> A Counsel II is required to have greater experience and may have expertise or have certain general knowledge, among the differences between the Counsel II and Counsel III Specs. Joint Ex. 5 (emphasis added).

simply examples of the type of area of law in which a successful candidate may be an expert. Thus, given that state agencies employ attorneys who work in areas such as real estate, intellectual property, environmental law and tax law, attorneys with expertise in such areas may be considered for the Counsel III position. Since DOI has already approved the appointment of a DOI attorney with expertise in health insurance, it is clear that that subcategory of insurance is among the areas of law in which an attorney may have expertise. Given the remainder of the text of the Counsel III Spec, the history of the Counsel III position and the HRD memorandum regarding its implementation, this does not mean that every Counsel II is an expert in the law of their agency. Rather, as indicated by the appointment of the DOI health insurance Counsel III attorney and the Commission's ruling in *Thompson v. DOI and HRD*, C-14-287, candidates must establish their expertise in a subspecialty within the core mission of their agency or department.

#### Supervision Received

With respect to Supervision Received, both Counsel II and Counsel III provide that “[i]ncumbents receive general supervision from employees of a higher grade” except that the supervisors in a higher grade provide “policy direction” to the Counsel III but provide “guidance” to the Counsel II. This section of the Counsel III Spec also contains a provision not in the Counsel II Spec, that the Counsel III may receive “functional direction” from legal and executive and executive personnel in other agencies “who provide final approval, assignments, guidance and review.” Joint Ex. 5. There is no indication of the difference between “policy direction” and “guidance” and the Appellant appears to receive both. There is no indication in the record that the Appellant receives functional supervision from the listed personnel in other agencies, although such supervision is permitted and not required for a Counsel III.

### Supervision Exercised

This part of the Spec provides that Counsel IIIs may be a second level supervisor. In comparison, a Counsel II may be a first level supervisor. The Appellant functionally supervises Legal Department interns only when they are working on work assigned to her.

### Additional Functions Performed

This part of the Counsel III Spec lists seven (7) Additional Functions, indicating that the functions listed are in addition to the functions performed by a Counsel I and II. However, the Counsel III Spec states that incumbents “may” perform the seven (7) additional functions, not that they are required to perform them. The Additional Functions include “serve as technical experts ... to both internal and external clients, management and colleagues ... provide ... recommendations on specialized legal issues to assist agency management decision making[;]” “ ... effectively communicate the interpretation of area-specific laws to internal and external clients ...[;]” “ ... negotiate with opposing parties to reach a quick resolution, avoid litigation ...[;]” “negotiate and review administrative, court and other legal documents ...[;]” “ ... collaborate and confer with colleagues within ... as well as with external resources to gather input for decisions or determination of a position ...[;]” “ ... write, recommend and review legislation ... [;]” “ ... appear at hearings regarding legislation to represent the client ... [;]” “ ... draft and implement internal and external policies and procedures, forms, notices and other written material...” Joint Ex. 5. The Appellant established by a preponderance of the evidence that she serves as a technical expert on long-term insurance and life insurance and annuities to DOI management and colleagues to assist in decision making, as well as to insurance providers in the private sector; she provides interpretation of these two (2) fields to communicate DOI’s position internally, insurance entities and trade associations; she confers with colleagues to

gather their input for decisions and to determine the agency's position on these two (2) fields of insurance. The Appellant functions similarly regarding insurance company licensing and financial transactions, and confidentiality legal issues in public records matters.

#### Additional Key Accountabilities

The Counsel III Spec for Additional Key Accountabilities states that “[i]ncumbents at this level may be granted the decision-making authority to”; “... recommend whether to settle, prosecute, or defend cases[] ...”; “... work with the Office of the Attorney General and independently to implement litigation strategy ...”; “... form legal opinions ... as the authoritative representative[]”; “... develop and recommend official forms for approval”; “... recommend resources and budgetary requirements ...”. Joint Ex. 5 (emphasis added). By comparison, the Counsel II Spec provides that “[i]ncumbents ... have the decision-making authority to: [] Allocate cases and assignments to supervisees[;] [] Prioritize and manage personal workloads and the workloads of direct reports[; and] Issue recommendations for final decision or resolution of cases, and for some cases, to issue or agree to final resolution without further review.” Id. The Appellant performs most of the Additional Key Accountabilities. She works with the Office of the Attorney General to implement litigation strategy but the record does not establish that she implements litigation strategy in court cases independently as permitted but not required. The Appellant does not recommend resources and budgetary requirements to accomplish objectives but here is no indication that either function is applicable to the DOI Legal Department. Although she provides guidance to staff and managers regarding public records requests and to interns assigned to do her work, the Appellant does not lead and provide direct supervision to others.

### Relationships with Others

The Counsel III Spec regarding Relationships with Others includes relationships or contacts with those listed for counsels I and II. A Counsel I includes “other agency Counsel...; agency management and staff; clients and/or consumers; outside attorneys; contractors/vendors’ and the general public.” Joint Ex. The Counsel II Spec includes “additional external contacts, including stakeholders.” *Id.* The Counsel II Spec adds that “key contacts and relationships” “include court personnel and public officials; federal and state agencies; community-based organizations; and local municipalities.” *Id.* The Appellant maintains most of the relationships in this part of the Spec. The term “public officials” is undefined but the evidence shows that the Appellant is in contact with the DOI Commissioner, other state agencies and the Legislature. However, the Appellant does not appear to have direct contact with court officials. As an employee of the state agency that regulates insurance, the Appellant does not appear to have contact with municipalities.

### Knowledge, Education and Experience

This part of the Counsel III Spec provides that, in addition to being an attorney licensed to practice in Massachusetts, the candidate must have at least six (6) years of professional experience in “a specialized area that is relevant to the assigned agency. “Based on assignment and supervisory responsibilities, three years in a supervisory capacity may be required.” Joint Ex. 5. The Appellant has the requisite insurance experience, having worked at DOI for more than two (2) decades. Since the only supervision that Appellant has exercised is functional supervision of interns who work on matters assigned to the Appellant, this does not constitute the appropriate supervisory experience if the Appellant’s position as a Counsel III were to include an appropriate assignment and supervisory responsibilities.



### Requirements at the Time of Hire

In addition to these Requirements for Counsel I and II, the Counsel III Spec provides that candidates “must have” the “extensive knowledge of the laws specific to assignment (e.g. administrative, finance, family, litigation)[;] extensive knowledge of federal and state laws[;] knowledge of advocacy techniques and strategies[;] knowledge of the methods and ability to conduct complex legal research and technical report writing[;] ability to address complicated legal issues[;] and ability to analyze and determine the applicability of legal data, draw conclusions and make appropriate recommendations.” Joint Ex. 5. At the time that she applied for reclassification, the Appellant met these requirements. She was the “go to” person at DOI or statewide on long-term insurance and life insurance and annuities with extensive knowledge of the applicable laws, she has expertise in legal confidentiality agreements and legislation regarding public records requests; she had knowledge of the methods and had the ability to conduct complex legal research and the ability to address complicated legal issues; she had knowledge of advocacy techniques and strategies and the ability to analyze and determine the applicability of legal data.

### Conclusion

For all of the above stated reasons, the appeal of Ms. Merow Rubin, under Docket No. C-14-294 is *allowed*.

Civil Service Commission

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

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Tivnan, and Stein) on January 19, 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:

Mindy Merow Rubin, Esq. (Appellant)  
Melissa Thomson, Esq. (for Respondents)  
Michele Heffernan, Esq. (for Respondents)  
John Marra, Esq. (HRD)