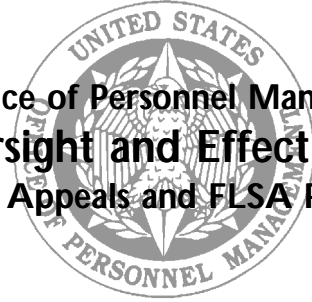


U.S. Office of Personnel Management
Office of Merit Systems Oversight and Effectiveness
Classification Appeals and FLSA Programs



Washington Oversight Division
1900 E Street, N.W.
Washington, DC 20415

Classification Appeal Decision
Under Section 5112 of Title 5, United States Code

Appellant: [name]

Agency classification: Attorney-Adviser (Contract)
GS-905-13

Organization: Administrative Law Branch
Office of the Staff Judge Advocate
Department of the Army
[installation and State]

OPM decision: Attorney-Adviser (Contract)
GS-905-13

OPM decision no.: C-0905-13-05

Richard Quasney
Classification Appeals Officer

June 23, 1999

Date

As provided in section 511.612 of title 5, Code of Federal Regulations, this decision constitutes a classification certificate that is mandatory and binding on all administrative, certifying, payroll, disbursing, and accounting officials of the Government. The agency is responsible for reviewing its classification decisions for identical, similar, or related positions to ensure consistency with this decision. There is no right of further appeal. This decision is subject to discretionary review only under the conditions and time limits specified in title 5, Code of Federal Regulations, sections 511.605, 511.613, and 511.614, as cited in the Introduction to the Position Classification Standards, appendix 4, section G (address provided in appendix 4, section H).

Decision sent to:

[appellant]

[servicing personnel officer]

Ms. Janice W. Cooper
Chief, Classification Branch
(CPMS-ASFP)
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Introduction

On September 10, 1998, the Washington Oversight Division of the U.S. Office of Personnel Management (OPM) accepted a position classification appeal from [appellant], who is employed as an Attorney-Adviser (Contract), GS-905-13, in the Administrative Law Branch of the Office of the Staff Judge Advocate, Department of the Army, at [installation and State]. [Appellant] requested that her position be classified at the GS-14 level. This appeal was accepted and decided under the provisions of section 5112 of title 5, United States Code.

The appellant's position had been previously classified at the GS-14 level by the servicing personnel office at [installation], but it was downgraded to GS-13 in July 1996 following review by [higher organizational level], and supported by an advisory opinion issued by the Department of Defense Civilian Personnel Management Service.

An on-site position audit was conducted by a Washington Oversight Division representative on June 7, 1999, and a telephone interview with the appellant's first-line supervisor, [name], on June 10, 1999. This appeal was decided by considering the audit findings and all information of record furnished by the appellant and her agency, including her official position description, number 95F97, reclassified by the servicing personnel office as Attorney-Adviser (Contract), GS-905-13, on July 26, 1996.

Position Information

The appellant provides legal advice and assistance for acquisitions conducted by the [acquisition center] located at [installation], encompassing [installation] and its tenant activities, [other serviced installations]. As an expert in the procurement law area, she renders legal advice in connection with all aspects of the acquisition process, to include reviewing pre-solicitation, solicitation, and contract administration and termination documents for legal sufficiency and clarity; participating in contract negotiations to provide legal guidance; preparing legal reviews, litigation files, and other related material in connection with protests, appeals, or other contract litigation; and advising on contractual remedies to recover Government losses incurred as a result of procurement fraud.

The appellant's position description and other material of record furnish comprehensive information about her duties and responsibilities which will not be reiterated here. The position description is functionally accurate, although overstated in some respects, with the exceptions that it does not reflect the additional serviced activities accrued with the elevation of [installation] to an acquisition center, and it identifies the appellant as a team leader although that role has never materialized.

Series Determination

The appellant's position is properly assigned to the General Attorney Series, GS-905, which covers professional legal positions. Neither the appellant nor the agency disagrees.

Title Determination

The appellant's position is correctly titled as Attorney-Adviser (Contract), which is the authorized title for nonsupervisory positions involved in drafting, negotiating, or examining contracts or other legal instruments required by the agency's activities. Neither the appellant nor the agency disagrees.

Standard Determination

The position was evaluated by application of the position classification standard for the General Attorney Series, GS-905, dated August 1960. This standard is written in a narrative format, with grade level criteria expressed in terms of two main factors: Nature of Cases or Legal Problems, and Level of Responsibility.

Nature of Cases or Legal Problems

This factor incorporates all those elements in a case or problem indicative of the inherent difficulty of the legal and factual questions involved. There are three levels described under this factor (Types I, II, and III), covering what could be classed as *simple*, *difficult*, and *most difficult* cases or legal problems. Each type is described in terms of the minimum characteristics for the range of difficulty represented. Therefore, if a case or problem does not satisfy the requirements indicated for a particular type, the next lower type must be assigned.

The appellant's position is consistent with Type II legal work. At that level, difficult legal or factual issues are involved because of the absence of clearly applicable precedents due to the newness of the program or the novelty of the issue; or it is highly arguable which precedents are applicable because of the complexity of the facts or the different possible constructions which may be placed on either the facts or the laws and precedents involved. The cases may affect a significant segment of public or private interests, such as a class of Government contractors (i.e., the suppliers of a particular service or product), or an important program of a Government agency. Large sums of money are involved, or the case may be strongly contested in formal hearings or informal negotiations by the parties involved.

Correspondingly, the appellant reviews and advises on contracts for new and complicated procurements where precedents are often not available. Some of the larger acquisitions may have a significant economic impact on the contractors involved, and negotiations involving the contractors' legal representatives may be quite contentious.

The criteria for Type III legal work are not met. At that level, the work is characterized by one or more of the following features:

(1) Extremely complex and difficult legal questions or factual issues are involved in the drafting, interpretation, or application of legislation, regulations, contracts, or other legal instruments. Examples provided in the standard include balancing national security interests with individual liberties, determining the legality of State and local taxation on the use of Federal property by private firms, recommending policy concerning consent decrees in anti-trust litigation, or developing material for Executive orders concerning the use of Federal troops in a domestic emergency. Alternatively, complex factual or policy issues may be involved that require extensive research, analysis, and evaluation of expert testimony or information in controversial areas of scientific, financial, corporate, medical, engineering, or other highly technical areas.

This feature does not apply to the appellant's position. Although some of the contracts she reviews may be technically or legally complex (e.g., high dollar value technical support services, such as information technology systems and software), the above criteria provide examples of the standard's intent with regard to "extreme complexity," and the appellant's assignments clearly do not rise to the level of difficulty, sensitivity, and scope thus depicted. The appellant must review the procurement documents carefully and may have to question contracting personnel on various technical aspects. However, the substance and extent of her contract review work do not require that she perform extensive research and analysis into complex factual or policy issues (to include obtaining and evaluating expert testimony or information), since the procurements do not involve controversial areas of scientific, medical, or engineering advances. Rather, they involve comparatively ordinary, if large-scale, acquisitions for construction, supplies and equipment, and services (such as information processing, custodial services, and health care).

(2) The case may potentially broaden or restrict the activities of an agency, or has an important impact on a major industry whose economic position affects the health and stability of the general economy. Examples include substantial broadening or restriction of veterans benefits or a nationwide retirement system, the development of administrative regulations of such scope as the Armed Forces Procurement Regulation, a substantial question of civil rights involving the due process clause, a merger or reorganization involving a basic industry, or the rates, practices, or competitive position of a major industry (such as the railroads or domestic airlines). Also included under this type are problems of unusual delicacy, such as fraud cases, because of the serious consequence of error and the great burden of proof assumed by the Government.

This feature does not apply to the appellant's position. First, considering the organizational location of her position, it is unlikely that any of her work would have this degree of effect on agency activities or on an overall industry. Although perhaps, theoretically, a case could arise that involved policy issues with broader implications, none of the work samples provided indicated this level of impact, and such would be an extremely unique rather than common occurrence. It is clear from the examples provided above that cases of the magnitude envisioned would normally only be encountered at the highest organizational levels.

Second, although the appellant claims that she is responsible for the resolution of fraud cases, her actual involvement in them is infrequent and limited. The appellant reported that there have been

five fraud cases in the past ten years, with two of them ongoing and the remaining three prior to 1996. A particular kind or level of work may be considered grade-controlling only if that work is officially assigned to the position on a regular and continuing basis, and if it is a significant and substantial part of the overall position (i.e., occupying at least 25 percent of the employee's time), as cited in the Introduction to the Position Classification Standards (dated August 1991). In the appellant's position, fraud cases clearly do not occur with the degree of frequency required to consume at least 25 percent of her time on a regular and continuing basis. Further, the appellant's role as Procurement Fraud Advisor does not encompass the full range of responsibilities that would be expected for crediting at this level, in that she neither investigates nor litigates alleged frauds. Rather, her role is limited to advising the contracting office on contract remedies that may be pursued to recover the Government's losses. This type of peripheral involvement is not envisioned by the standard in its discussion of the "serious consequence of error and the great burden of proof assumed by the Government," which assumes direct responsibility for the investigation and pursuit of the case.

Lastly, it is not the intent of the standard that any fraud case be automatically considered to be at the Type III level of difficulty, but rather that this include only cases of unusual delicacy involving potentially serious consequences, as viewed within the overall context of the criteria provided at that level. The two ongoing fraud cases involve contractors who committed relatively minor infractions (i.e., altering a Government invoice by a few hundred dollars, and overcharging the Government for refuse collection by about \$28,000 over a four-year period). Neither of these cases is of the magnitude, seriousness, and consequence to be considered equivalent to Type III legal work.

(3) Cases frequently involve very large sums of money (e.g., about a million dollars) and/or they are frequently vigorously contested by extremely capable legal talent (e.g., a major antitrust case.) Interest in these cases is generally nationwide.

This feature does not apply to the appellant's position. First, the standard's reference to "about a million dollars" is not a criterion in itself, but instead is merely an example of "very large sums of money." Because a great deal of inflation has occurred since the standard was written in 1959, this dollar amount must be adjusted to the equivalent current dollar value. Using the April 1999 Consumer Price Index (166.2) published by the Bureau of Labor Statistics, \$100 in 1959 is the equivalent of about \$571 today. Thus, the above Type III criteria must be adjusted upward accordingly to approximately the \$6 million range.

The appellant provided information relating to a number of contracts she has reviewed that are either within or exceed this \$6 million range. These high dollar value contracts reflect the consolidated procurement of very large quantities of off-the-shelf software and other information technology services to support agencywide programs, and multi-year contracts for maintenance and custodial services at [installation]. However, when regarding Type III criteria, the key consideration is not the dollar value of the contracts per se, but the dollar amount which is directly at stake in terms of the work performed by the attorney. This would normally apply where an

attorney is conducting litigation and the amount of money awarded in penalties or restitution is directly tied to the case presented by the attorney. The appellant may review and participate in negotiations for high dollar value contracts, but she is concerned only with the legal aspects, not the cost aspects. Her work does not in itself influence how much money is awarded for a particular acquisition. Thus, the reference to very large sums of money is not applicable to this aspect of the appellant's work. However, this is only a portion of the description of cases that meet the criteria in the third feature under Type III, which also refers to cases or problems which are frequently vigorously contested by extremely capable legal talent (for example, a major antitrust case). The appellant reported that only a few protests are filed by contractors each year, usually relating to the terms and conditions of the solicitation that resulted in non-award to the protesting contractor. Only one has actually progressed to litigation in the past two years. Although the appellant was responsible for preparing the entire litigation file, this is clearly not a regular and recurring duty that would satisfy the 25 percent requirement explained above, nor were any of these protests equivalent in magnitude and import to "a major antitrust case" that is "vigorously contested by extremely capable legal talent" and where there is nationwide interest in the outcome.

Level of Responsibility

This factor incorporates all those elements indicative of the level at which the attorney carries out the assignment. It includes the functions performed, the supervision and guidance received, the personal work contacts, and the nature and scope of recommendations and decisions. There are three levels presented under this factor (Levels A, C, and E), covering what may be described as the *beginning*, *intermediate*, and *senior* attorney levels. These levels are described in terms of typical rather than minimum characteristics. Accordingly, if a position includes aspects of, or falls clearly between, two of these levels, the intermediate Levels B and D may be assigned.

Nature of functions

The appellant's position meets Level C. At that level, attorneys conduct legal research in connection with cases pending administrative hearings, or legal questions referred by administrative officials of the employing agency, such as questions concerning the interpretation and application of statutes, rules, and regulations pertaining to contracts, claims, or other legal instruments. This accurately represents the appellant's functional responsibilities.

Level E is not met. At that level, attorneys perform such work as: reviewing cases for agencies responsible for the conduct of litigation in Federal courts and recommending prosecution; drafting or evaluating proposed changes in basic legislation; acting as principal attorney in charge of the preparation and presentation of cases before administrative tribunals, trials, or appellate courts; or acting as legal counsel to the head of a major operating program of the department or agency. The appellant's functional responsibilities are clearly not equivalent to those envisioned at this level.

Supervision and guidance received

The appellant's position meets and in some respects exceeds Level C. At that level, attorneys are expected to independently plan, organize, and conduct studies of the mill run of legal problems, cases, or legislative proposals encountered in their respective programs. They are apprised of any unusual circumstances, background information, and policy considerations, but otherwise work independently in investigating facts, searching legal precedents, defining the legal and factual issues, drafting necessary legal documents, and developing conclusions and recommendations. Completed work is normally assumed to be technically accurate. At this level, all written work is reviewed for soundness of approach and argument, application of legal principles, and consistency with governing policy and regulations. In contrast, the appellant's assignments flow directly to her from the contracting office, and she completes her review of the documents thus received without any supervisory involvement. She releases most of her work from the office without her supervisor's review or signature, although she keeps him informed of the status of significant cases and discusses the more sensitive issues with him before taking action.

Level E, however, is not met. At that level, the attorney is expected to carry out any assignments within the area of responsibility without preliminary instruction, although the supervisor may discuss the significance of the problem and give background information, with the attorney proceeding independently from that point onward. However, the high degree of professional independence depicted at this level also assumes the performance of the more difficult and complex assignments otherwise associated with Level E, such as investigating cases and recommending prosecution, drafting legislation, and preparing and presenting cases at hearings or trials. Given that the appellant does not perform work at this level of difficulty, her position cannot be fully credited at Level E in terms of the relative lack of supervisory controls, since she is not operating with an equivalent level of responsibility.

Since the appellant's position falls between Levels C and E, Level D is assigned.

Personal work contacts

The appellant's position meets and in some respects exceeds Level C. At that level, attorneys advise negotiating officials in legal contractual matters by recommending appropriate clauses, provisions, and general wording, or participate in pretrial or prehearing conferences with industry representatives or private citizen claimants and their attorneys to explain points of law, charges, or qualifications of claimants, and refer suggested settlements or compromise offers to superiors with appropriate recommendations. In contrast, the appellant provides definitive legal advice and interpretations during contract negotiations involving top officials of private firms and their counsel, generally representing a higher level of legal talent than expressed at Level C.

Level E, however, is not met. That level is characterized by the most responsible personal contacts, such as conferring or negotiating with top administrative personnel in the agency on important legal and policy questions, advising and assisting congressional committees in drafting

legislation or giving expert testimony before congressional hearings on legislative proposals, or trying cases before courts or administrative bodies. The appellant has contacts with program and legal staff of various functional offices at Department of Army level on specific cases and issues, but she does not confer with top administrative personnel on important legal and policy questions, i.e., matters that would have an impact beyond her immediate organization or the case at hand. Likewise, she does not have contacts with congressional staff or try cases before courts.

Since the appellant's position falls between Levels C and E, Level D is assigned.

Nature and scope of recommendations and decisions

The appellant's position meets Level C. Recommendations characteristic of that level include the organization, order of presentation, and line of argument to be used in the presentation of cases or hearings delegated to the incumbent as the trial attorney, or whether to approve a contract or other legal document in its proposed form and content. Recommendations to those outside the agency or to administrative officials at higher levels are normally, but not necessarily, made through the supervisor. This accurately represents the recommendations made by the appellant, in that she reviews and approves contracts for legal sufficiency and prepares litigation packages providing the background and Government position on the contract dispute.

Level E is not met. The primary distinction between Levels C and E is that at the latter level, advice on the interpretation of law or proposed changes in legislation, policy, and regulations is given directly to heads of programs, bureau chiefs, cabinet officers, congressmen, or representatives of State and local governments. At this level, the matters dealt with are of such scope and complexity that the attorney must direct, coordinate, and review the work of several other attorneys or specialists. This level would only apply to positions at the highest organizational levels.

Under Level of Responsibility, the appellant's position was found to fully meet Level C in some respects, but to exceed that level and approach Level E in certain others. Thus, Level D is considered more representative of the position's level of responsibility in an overall sense.

Summary

The combination of Type II under Nature of Cases or Legal Problems, and Level D under Level of Responsibility, equates to the GS-13 level on the grade conversion chart provided in the standard.

Decision

The appealed position is properly classified as Attorney-Adviser (Contract), GS-905-13.