

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



San Francisco Oversight Division
120 Howard Street, Room 760
San Francisco, CA 94105

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

Appellant: [appellant's name]

Agency classification: Attorney-Adviser (General)
GS-905-12

Organization: [appellant's installation]
Department of the Army

OPM decision: Attorney-Adviser (General)
GS-905-12

OPM decision number: C-0905-12-01

Signed by Denis J. Whitebook
Denis J. Whitebook
Classification Appeals Officer

March 13, 1998
Date

As provided in section 511.612 of title 5, Code of Federal Regulations, this decision constitutes a 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 conditions and time limits specified in the Introduction to the Position Classification Standards, appendix 4, section G (address provided in appendix 4, section H).

Decision sent to:

[appellant's name and address]

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Introduction

On July 11, 1997, the San Francisco Oversight Division of the U.S. Office of Personnel Management (OPM) received a classification appeal from [the appellant], whose position is currently classified as Attorney-Adviser (General), GS-905-12. However, she believes that the position should be classified at the GS-13 level. The appellant works in [her installation, Department of the Army]. We have accepted and decided this appeal under section 5112 of title 5, United States Code (U.S.C.).

General issues

This appeal decision is based on a careful review of all information submitted by the appellant and her agency, and a telephonic interview with the appellant's immediate supervisor. Both the appellant and her supervisor have certified to the accuracy of the appellant's official position description (number 95409). The appellant believes that the GS-905 classification standard is outdated because it was published in October 1959. However, the adequacy of grade-level criteria in OPM standards is not appealable (section 511.607 of title 5, Code of Federal Regulations). In the appeal file the appellant compares the duties of her position to other Attorney-Adviser positions at other Department of Defense installations which are classified at the GS-13 level. Because she believes the duties performed in those positions are comparable to those she performs, she feels that her position should also be graded at the GS-13 level. She also makes various statements about her agency and its evaluation of her position. In adjudicating this appeal, our only concern is to make our own independent decision on the proper classification of the appellant's position. By law, we must make that decision solely by comparing her current duties and responsibilities to OPM standards and guidelines (5 U.S.C. 5106, 5107, and 5112). Therefore, we have considered the appellant's statements only insofar as they are relevant to making that comparison.

Like OPM, the appellant's agency must classify positions based on comparison to OPM standards and guidelines. However, the agency also has primary responsibility for ensuring that its positions are classified consistently with OPM appeal decisions. If the appellant considers her position so similar to others that they all warrant the same classification, she may pursue the matter by writing to her agency's personnel headquarters. In doing so, she should specify the precise organizational location, classification, duties, and responsibilities of the positions in question. If the positions are found to be basically the same as hers, the agency must correct their classification to be consistent with this appeal decision. Otherwise, the agency should explain to the appellant the differences between her position and the others.

Position information

As an attorney, the appellant provides professional oral and written legal advice, opinions and assistance to [her installation] and staff in interpreting laws, regulations, statutes and directives primarily concerning environmental issues within the geographic area of responsibility. The supervisor indicated during our interview that the appellant spends approximately 95% of her work time dealing with environmental law issues (including those affecting real estate), and acts as the office specialist in that field. Her duties include reviewing environmental assessments and impact statements submitted by various staff directorates of the garrison at [her installation], reviewing

operating permits and plans for environmental restoration, and analyzing regulations and other documents related to environmental decision making for legal sufficiency and compliance with all aspects of Federal, state, and local environmental laws. Based on her legal review, she advises operating program officials of their responsibilities for complying with the requirements of a variety of laws including the National Environmental Policy Act (NEPA), Comprehensive Environmental Response, Liability and Compensation Act (CERCLA), the Clean Air Act and Safe Drinking Water Act, and Resource Conservation and Recovery Act. Her work includes providing guidance and advice on the legal implications of processing solid and hazardous waste within the context of environmental law, issues regarding threatened and endangered species on subinstallations of [her installation], and historical and cultural preservation. She also acts as an advisor to Base Realignment and Closure (BRAC) coordinators at posts under [her installation] jurisdiction for closing purposes, e.g., [various installations]. Her duties encompass researching applicable environmental laws and other guidance to determine new requirements and the latest changes, and whether any conflicts exist between different documents and jurisdictions. She recommends changes to certain documents to meet legal requirements, and may suggest development and inclusion of mitigation plans, performance of biological assessment reviews, etc. She ensures that adequate justification for installation chosen courses of action is documented, particularly when dealing with outside agencies, e.g., Indian tribal authorities, state fish and wildlife entities. The appellant also assists in developing actions responding to environmental violations by [her installation] issued by various state and Federal environmental oversight agencies, e.g., [a local agency].

The results of our interview, work samples in the case file, and the position description of record furnish much more information about the appellant's duties and how they are carried out.

Series, title, and standard determination

The appellant's duties and responsibilities are typical of positions classified in the General Attorney Series, GS-905, and neither the appellant nor the agency disagrees. As stated in the series definition on page 1 of the classification standard for the General Attorney Series, GS-905 (dated October 1959), that series includes professional legal positions involved in rendering legal advice and service with respect to questions, regulations, practices, or other matters falling within the purview of a Federal government agency. The work of this series requires admission to the bar. This position is properly titled Attorney-Adviser (General) since the appellant is involved in rendering legal advice and services with respect to questions, regulations, and practices of the agency. Because there is no specific subject-matter title for environmental law designated in the GS-905 standard, the parenthetical title "General" is added to the basic title of the position. The GS-905 classification standard contains criteria for evaluating the grade level of positions in that series. Therefore we have applied that criteria to the appellant's position in the discussion that follows.

Grade determination

The classification standard for the General Attorney Series, GS-905, considers two main factors for evaluating the grade of positions: (1) Nature of the case or legal problem, and (2) Level of

responsibility. Pages 5-10 of the standard discuss the classification elements considered under each factor.

Factor 1, Nature of the case or legal problem

Three levels of difficulty are described in the standard for this factor: Type I cases or legal problems are simple; Type II cases are difficult; and Type III cases are the most difficult. These levels represent the full span of difficulty or importance of attorney work throughout the Federal government. If a case or problem does not satisfy the requirements indicated for the level of one of the types, it is identified with the next lower type because each type is described in terms of the minimum characteristics of the range of difficulty it represents. Each type is described in terms of several elements including the complexity of the legal or factual issues, impact of the case or problem, importance of the case or legal action as legal or administrative precedent, nature and availability of precedent decisions, delicateness of the problem, public interest, and in some situations the amount of money involved in the legal action. These elements are not independent of one another. For example, the economic, political, or social impact of a case cannot be considered apart from its importance as a legal or administrative precedent.

Type II legal work is described on pages 12-13 of the GS-905 standard. Such work is characterized by one or more of the following features:

- (1) Difficult legal or factual questions 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 to the case at issue 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.
- (2) The impact of the case or legal problem affects, economically, socially, or politically, either directly or as a legal or administrative precedent, a significant segment of private or public interests (e.g., a large corporation, a large labor group, the residents of a large geographical region of the United States as in a large public works project, a large grant-in-aid program, a nationally organized professional group, the producers of a given farm commodity, the manufacturers of a given product, a class of Government contractors, i.e., suppliers of a particular service or product, or an important program of a Government agency). Also included in this type are cases or legal problems which have an impact on relations between the United States and foreign governments and which must be handled with great care.
- (3) Large sums of money are directly or indirectly involved (e.g., about one hundred thousand dollars), or there is considerable interest from a significant segment of the population (see paragraph 2 above), or the case is strongly contested in formal hearings or informal negotiations by the private individuals, corporations, or Government agencies involved.

As described on pages 13-15 of the GS-905 standard, Type III legal 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, orders, decisions, opinions, or other legal instruments and require for their solution a high order of original and creative legal endeavor in order to obtain a reasonable balance of conflicting interests, e.g., legal work involved with balancing the requirements of national security with individual liberties; or complex factual or policy issues are involved requiring extensive research, analysis, and obtaining and evaluating of expert testimony or information in controversial areas of scientific, financial, corporate, medical, engineering, or other highly technical areas.
- (2) The case or problem is such that it can have the effect of substantially broadening or restricting the activities of an agency (e.g., the enforcement of antitrust and trade regulations, tax laws, food and drug laws, or the laws governing securities transactions); or it has an important impact on a major industry whose economic position affects the health and stability of the general economy e.g., a merger or reorganization involving a basic industry. It has an important impact on major private or public interests, e.g., a substantial broadening or restriction of benefits to veterans under the law, amounting to many millions of dollars annually, or a major extension or revision in a State and/or other grant program. Also included in this type are problems of unusual delicacy, such as fraud cases.
- (3) Cases or problems of this type frequently involve, directly or indirectly, 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.

The nature of the legal problems which the appellant encounters meets one of the criteria for assignment of Type II. Similar to Type II, she is faced with difficult legal or factual questions because of the absence of clearly applicable precedents due to the relative newness of the laws and regulations governing protection of the environment. In advising program specialists, BRAC environmental coordinators, and staff of the directorates at [her installation] (e.g., Directorate of Public Works, Environmental and Natural Resources Division), she must interpret and determine the applicability of many of the environmental laws previously listed on page two of this appeal decision, e.g., CERCLA, NEPA, Clean Air Act. Like Type II legal problems, she is particularly concerned with the different possible constructions/interpretations that may be placed on the laws and precedents involved. For example, based on her interpretation of certain environmental laws (e.g., CERCLA, SARA, NCP) she provided a legal interpretation to the BRAC environmental office at [an installation], on whether or not the Department of the Army still retained "lead agency" status after the transfer of the [an installation] to the Department of the Interior. The issue of the applicability of various precedents also is addressed in the appellant's guidance to staff of the Environmental and Natural Resources Division, [her installation], regarding the environmental implications of the proposed transfer/excessing of [an installation], from the active army to the U.S. Army Reserve. In this case she interpreted various laws (e.g., NEPA, National Historic Preservation Act) and discussed

some conflicting precedents that would impact the transfer by placing additional requirements on [her installation] staff, i.e., possible need to develop an Environmental Impact Statement (EIS).

With regard to the appellant's position meeting features (2) and (3) under Type II, we find that her duties do not reach the scope of work described in those elements. Although she points out that she deals with BRAC environmental coordinators outside [a state], based on a review of her work samples in the case file, we did not find that the legal advice provided impacts economically, socially, or politically a significant segment of private or public interests as described under feature number (2) for Type II legal work. Her guidance is limited to the environmental requirements affecting a small geographic area [certain installations], rather than the residents of a large geographical region of the United States as in a large public works project.

Unlike feature number (3) under Type II, we do not find that the legal advice and guidance she provides on environmental matters and documents (EIS, Environmental Assessments) directly or potentially involves large sums of money, or that there is considerable interest from a significant segment of the population (as alluded to under feature number (2) above). For example, the appellant included a work sample in the case file discussing "YMCA Leasing/Indemnification Issue" which she believes meets the large sums of money criterion in feature number (3). Although there are potential liability issues involved (no dollar amounts are mentioned and awards are noted as "indeterminable"), the crux of her guidance appears to be that the Army cannot provide any guarantees to the YMCA that it will indemnify that agency for any losses incurred while leasing portions of the [an installation]. In addition, her work samples do not indicate that her advice on environmental issues is strongly contested in formal hearings, or informal negotiations, by private persons, corporations, or government agencies.

The appellant's legal work does not meet the characteristics typical of Type III activities. Based on our review of work samples in the case file, we found no indication that she deals with *extremely* complex and difficult legal questions/factual issues (feature number 1 under Type III), in interpreting and applying various laws and regulations when furnishing advice and guidance to [her installation] and other installation staff. While her work is challenging in terms of the absence of clearly applicable precedents (Type II), unlike the first feature described under Type III (pages 13-14) we found no requirement to obtain a reasonable balance of conflicting interests in the interpretations, guidance, or solutions she proposes to the extent described under Type III. The appellant contends that like Type III work, she deals with complex factual issues requiring extensive research and analysis in highly scientific and technical areas. Although we recognize that issues surrounding protection of the environment, and environmental law, are dynamic and changing, the appellant's legal work falls short of the controversial aspects typical of Type III assignments. For example, her advice to the Environmental and Natural Resources Division at [her installation] regarding the feasibility of establishing a partnership with [a Native American organization] so the tribe could burn its garbage in [her installation's] incinerator, does not involve a controversial scientific area. Her guidance is limited to a review of the legality and potential liability of such a partnership. Similarly, her document review for legal sufficiency of Subpart B, Permit Application for Unserviceable Munitions Treatment Unit at [a subinstallation], does not involve the review of complex factual or policy issues. We found

no indication of the need to obtain and evaluate expert testimony or information, and the review does not involve controversial scientific issues. Rather, her review involved the correction of “minor discrepancies” (e.g., too much or duplicative information) in a document which she found to be “legally sufficient, substantially satisfying requirements of 40 CFR Part 270.14 and other applicable provisions.”

In reviewing the appellant’s work samples, we found no evidence that her legal advice and review meet either feature number (2) or (3) under Type III (pages 14-15). Her work does not have the effect of substantially broadening or restricting the activities of her agency (Department of the Army), and it does not have an important impact on a major industry, or major private or public interests. In addition, although she mentions that the Army has been faced, at least in one case, with costly lawsuits in other parts of the country, the cases or problems she dealt with did not involve, directly or indirectly, very large sums of money.

Because this position’s legal problems meet one of the criteria for Type II, but fail to meet any of the Type III criteria, Type II is credited for Factor 1, Nature of the case or legal problem.

Factor 2, Level of responsibility

This factor includes the functions performed, supervision and guidance received, personal work contacts, and the nature and scope of recommendations and decisions. Three of the five levels under this factor are defined in the standard (levels A, C, and E). The other two levels (B and D) are not defined in the standard but may be assigned as appropriate. The levels described under Factor 2 are described in terms of typical characteristics. Accordingly, the intervening level (B) is appropriate when, for example, a position compares with level (A) in some respects and level (C) in others. The intervening level is also appropriate when a position falls clearly between two of the levels described with respect to the majority of elements. The evaluation of Factor 2, presented below, is discussed in terms of each subfactor or part.

(1) Nature of functions

The appellant’s position meets Level C as described on pages 17-19 of the GS-905 standard. Similar to the examples listed on page 17 of the standard, she conducts legal research in connection with questions referred by administrative officials of the employing agency, e.g., Directorate of Public Works, [her installation]. These questions concern the interpretation and application of various environmental laws and statutes (e.g., NEPA, CERCLA, 40 CFR) and internal Department of the Army and [her installation] regulations. Like Level C her guidance and review pertain to potential claims against [her installation] in terms of liability for damages and adequacy of environmental clean-up (e.g., [an installation]), the adequacy of environmental assessments prepared by installation staff to mitigate potentially harmful effects to the environment (e.g., damage to [a training area] by tracked vehicles), the relationship of [her installation] with other Federal agencies concerning environmental matters (Department of the Interior, National Park Service), and the post’s position in responding to notices of violations issued to [her installation] by various governmental agencies, e.g., [a local

agency]. Like Level C she also responds to questions concerning the effects of proposed legislation on installation/agency policies. For example, in one of the work samples of record the appellant advised staff of the BRAC environmental office at [an installation] on the potential effect of pending [specific trust] legislation on Army liability at the [installation] should the bill become law.

Like Level C, the appellant personally conducts research and sometimes investigation of facts posed by a legal problem, researching the relevant laws, regulations and precedents. For instance, one of her work samples indicates that she conducted extensive research including an onsite visit to selected housing units on post which were undergoing renovation, to determine whether the liability potential warranted requiring occupants to leave their family housing during the renovation due to the presence of lead-based paint chips. The guidance she provided to the Directorate of Public Works was based on a review of Department of Defense policies, Housing and Urban Development guidelines, and applicable laws (Federal Tort Claims Act). In another work sample, the appellant conducted research of laws, legal opinions, and precedent cases, while doing a legal review of the installation's Environmental Assessment (EA) on tracked vehicles training in [a training area at the installation]. In analyzing the adequacy of the draft EA prepared by the Environmental and Natural Resources Division, she reviewed and discussed in her guidance various court precedents covering the legal issue of mitigation efforts, cited Army regulations mandating habitat protection and NEPA requirements, and recommended adding more information to the EA on proposed mitigation activities to ensure that the EA fully met legal requirements. Like example number six on page 18 of the standard, much of her work involves the preparation of memoranda to installation staff outlining the facts, legal issues, and precedents, and justifying her recommendations or conclusions.

As noted on page 19 of the standard, attorneys at Level C may serve as the assigned legal specialist and adviser on a single program. According to her supervisor, this is true in the appellant's case because she handles all requests for legal guidance on environmental matters received by [her] office.

The appellant's position does not meet Level E for this subfactor as described on pages 21-23 of the standard. In our review we found no evidence that her assignments meet any of the examples discussed under Level E. She is not involved in any aspects of litigation, in the drafting or reviewing of legislation, in reviewing proposed agency decisions at the highest levels, acting as principal attorney in preparing and presenting cases, or acting as legal counsel to the head of a major operating program of the department.

Based on the preceding analysis, we have assigned Level C to the nature of functions performed by the appellant.

(2) Supervision and guidance received

The supervision and guidance received by the appellant fully meet Level C (pages 19-20 of the standard), but fall short of Level E (pages 23-24). Like Level C, the supervisor indicated that the appellant independently plans, organizes and conducts her legal work in her assigned specialized area of environmental law. When making assignments the supervisor apprises her of any unusual

circumstances surrounding a problem, particularly the sensitivity of the issue due to the activities or parties involved. Beyond this, the appellant independently investigates the facts surrounding a legal issue, researches legal precedents, and develops written guidance to the requestor including her conclusions and recommendations. As noted in the appellant's official position description, her completed work is normally assumed to be accurate with regard to technical treatment. All written products (particularly those addressed to the Garrison Commander or Commanding General) are subject to the supervisor's review for soundness of approach and argument, and consistency with governing policies and procedures of the installation.

The appellant's position does not meet the degree of supervision typical of Level E. In contrast to Level E where no preliminary instruction is provided on assignments, the supervisor noted that he does furnish initial guidance on various assignments, especially those of a controversial or sensitive nature, or where they are related to other programs within [her office], e.g., contract law. Unlike Level E where completed work is reviewed only for consistency with agency policy, for possible precedent effect, and for overall effectiveness, the appellant's work is reviewed for soundness of approach and consistency with Department of the Army regulations and installation procedures.

Based on our fact-finding, Level C is assigned to this subfactor.

(3) Personal work contacts

The appellant's work contacts meet Level C (page 20), but are not as significant as those described at Level E (page 24). In providing legal assistance on environmental issues she has regular contact with staff of the directorates at [her installation] and its subinstallations, BRAC coordinators at posts where closures are projected, and with environmental officials from [a state] and local government agencies. She advises installation and BRAC officials on legal questions and interpretations of law, and sometimes suggests wording for inclusion in environmental documents. Similar to Level C, the appellant also participates as part of a team of environmental staff in negotiations between the installation and various environmental regulatory agencies, in responding to notices of violations, as well as negotiating with representatives of [a state office] on appropriate clean-up measures needed for areas at [her installation] and its subinstallations, e.g., [a subinstallation].

The appellant's position does not meet the types of personal contacts described at Level E. Unlike that level, she does not confer or negotiate with top administrative personnel in the agency (i.e., Department of the Army), or state or local governments on important legal and policy questions. She is not involved in advising and assisting congressional committees and their staffs in drafting legislation, and the duties of her position do not require that she try cases before courts or administrative bodies.

Level C is assigned to the appellant's personal work contacts.

(4) Nature and scope of recommendations and decisions

The nature and scope of the appellant's recommendations and decisions favorably compares to Level C (pages 20-21), but fails to meet Level E (pages 24-25). Similar to Level C, any recommendations the appellant makes outside the agency, or to administrative officials at higher levels, are normally reviewed and endorsed by her supervisor prior to being forwarded up the "chain-of-command." Her recommendations are like example number five (page 20) under Level C in that she replies to requests for legal advice and interpretations on a variety of environmental issues arising out of the day-to-day program operations of the installation directorates, and BRAC activities off-post.

Although the recommendations characteristic of Level E are similar to those described at Level C, unlike Level E the legal advice provided by the appellant is not given directly to heads of agency programs, bureau chiefs, cabinet officers, congressional representatives, etc. The appellant primarily deals with operating installation staff at the Division level, which does not equate to the organizational levels described under Level E. If she were to make recommendations to individuals at the levels described under Level E, they would be subject to close supervisory review for soundness of approach, argument, applicability of legal principles, and adherence to policy, rather than being considered as tantamount to final decisions as at Level E.

Level C is assigned to this subfactor for the appellant's position.

Summary

In summary, under Factor 1, Nature of the case or legal problem, we have assigned Type II to the appellant's position. Under Factor 2, Level of responsibility, the position is credited with Level C on all four subfactors. By application of the Grade-Level Conversion Chart on page 25 of the GS-905 standard, a Type II, Level C position is evaluated at grade 12. Therefore this position is classified at the GS-12 level.

Decision

The appellant's position is properly classified as Attorney-Adviser (General), GS-905-12.