



United States  
**Office of  
Personnel Management** <sup>4C22</sup>

Dallas Oversight Division  
1100 Commerce Street, Room  
Dallas, TX 75242-9968

In Reply Refer To:      Your Reference:

**OPM Decision Number:** C-0930-13-02p, October 22, 1996

FOR ADDRESSEE ONLY  
[appellant's name]  
[activity location]

Dear [appellant's name]:

This is in response to your letter of July 1, which requested reconsideration of our May 31, 1996, decision on your position classification appeal. Authority to decide on requests for reconsideration has been delegated to the Director, Dallas Oversight Division.

Your letter offers several reasons for reconsideration. In reviewing these reasons and our decision, we have determined that there are several areas that warrant review. These are: (1) our reliance on a professional standard to grade a non-professional position; (2) our misunderstanding of your agreement to categorizing your cases as "Type II;" and (3) our perspective on the appellate structure in USDA as it relates to the level of responsibility classification criteria. To assist in this reconsideration, we have reviewed your July 1 letter and the entire case file. I also interviewed you by telephone on October 10, 1996, and I received a follow-up fax from you on October 10.

(1) Cross-reference to other standards. OPM classification guidance allows for using professional standards to classify non-professional work, but the guidance indicates that this must be done with great care. Professional standards recognize the worth that society accords professional credentials and the knowledge those credentials represent. While there is no direct grade level correlation, the absence of professional knowledge requirements in your position is problematic for a comparison with the GS-905 Attorney criteria. We note that the agency, in deciding the original classification and in related classification appeals, reviewed other standards, and we believe that is quite appropriate.

In a May 24, 1995, decision, the Department made an "unofficial" reference to the Factor Evaluation System (FES) primary standard. This is generally considered a course of last resort, but we find it to be useful under these circumstances. For one thing, your official position description is in the FES format, facilitating comparison with standards generated under this modern classification scheme. In lieu of primary reliance on the FES primary standard, we have referred to the GS-950 Paralegal

Specialist Series, which provides occupation-specific grading criteria that are derived from the primary standard and are similar to the nonprofessional legal work aspect of your position. The correspondence in your appeal file indicates that you understand the FES classification scheme, and we will not recap each factor and level here.

Your position meets and exceeds the Level 1-7 knowledge requirements under Factor 1 of the GS-950 standard. This is the highest level described in the standard. We agree with the Department's conclusion that there is a requirement for "mastery" of the knowledge requirements of your field. This is analogous to Levels 1-8 in the FES primary standard (1550 points).

Under Factor 2, the GS-950 standard does not describe supervisory controls above Level 2-4, where the supervisor provides guidance that defines the scope and monitors the progress of work. Based on a review of all the information in the file, we believe your situation exceeds Level 2-4. We find that Level 2-5 from the FES primary standard is applicable in that it describes the receipt of administrative direction only, with the incumbent having extensive responsibility for planning and self-direction and for serving as a technical authority. This level of autonomy is inherent in the Department's appellate organization. We agree with the Department that Level 2-5 is appropriate (650 points).

In evaluating Factor 3, Guidelines, we do not find that the Department's favorable comparison with Level 3-5 is supported by the official position description or by the account you provided during our interview or your interview with our appellate classifier. It is clear that there are numerous guidelines available that extend beyond broad policy statements and basic legislation (the position description cites "operating procedures...Office of General Counsel (OGC) opinions, agency policies, statutes, regulations, rules, and manuals"). In a number of the cases you described by telephone, your decision turned on the reading of a very pertinent and obviously applicable rule or regulation. This is comparable to Level 3-4 in the GS-950 standard, where guidelines include "implementing regulations and agency policy" that require extensive interpretation or resolution of conflicting precedents in "nonroutine" situations. While there may be an argument for comparison to the Level 3-5 description of a GS-950 Paralegal Specialist who is "recognized as a technical authority in the ... interpretation of guidelines," the context for that statement involves only general or sparse guidelines. The nature and volume of the available guidelines in your situation are clearly of a lower level. Level 3-4 is appropriate (450 points).

We agree with the Department that, under the Complexity factor, Level 4-5 is not met. While there is some similarity with the variety of work process/method criteria contemplated at that level in the FES primary standard, comparison of your position with Level 4-5 fails with regard to the description of the decision-making requirements, which contemplates "major areas of uncertainty in approach, methodology, or interpretation and evaluation processes." While some of the work examples you provided us are complex in their details, none approach the Level 4-5 criteria. This is confirmed by the contrast with the occupation-specific criteria in the GS-950 standard

at Level 4-5, where “Decisions require expertise in exploring and sorting out subtle or tenuous legal, technical, and or program-related elements...” and “cases are likely to extend over a period of years.....or involve new legal and technical developments or questions on which decisions rendered in different jurisdictions are at variance.” I find none of these elements in the work examples you provided. Comparison with following description from Level 4-4 of the GS-950 standard is generally appropriate:

Factual situations vary significantly from assignment to assignment and are difficult to ascertain because there is a large body of interrelated facts to be analyzed...The employee must devise...factfinding and problem-solving methods to cope with voluminous documentation...The employee must reconcile conflicting policies and facts, identify and elicit additional information, and make a number of decisions at various stages, such as: identifying issues; defining the problem in terms compatible with the laws, policies, and regulations; interpreting considerable data; and weighing facts in order to formulate a legal and factually supportable position. (225 points)

We agree with the Department that, under the Scope and Effect factor, Level 5-4 is appropriate. In the GS-950 standard, this level is characterized as a specialist who advises other specialists, who monitors the consistency of case decisions throughout the agency, or who researches unsettled issues. The work at Level 5-4 is described as providing the “foundation for precedents that have a broad impact (e.g., affect aspects of agency-wide programs)...” This is quite analogous to the function of your position as a national appellate reviewer and the situation you described to me wherein your decisions and those of your counterparts may have a cumulative impact on an agency’s policy when they establish a trend contrary to that policy (225 points).

We agree with the Department that Level 6-3 is appropriate for the Personal Contacts factor. While the majority of the personal contacts involved in your work are structured to an extent contemplated at a lower Level, they cannot be characterized as “routine,” and your role as hearing officer is essential to establish and enforce the structure for the contacts. This makes comparison with Level 6-3 in the GS-950 standard appropriate (60 points).

We disagree with the Department that Level 7-4 is appropriate for the Purpose of Contacts factor. Level 7-3, the highest level in the GS-950 standard, describes contact purposes typical of a hearing setting, e.g, motivating uncooperative witnesses, convincing persons of a particular fact interpretation by using tact, persuasiveness, and diplomacy. In contrast, at Level 7-4 in the FES primary standard, contacts similar to those at Level 7-3 take place , but there is an emphasis on negotiation, compromise, and the corporate development of suitable alternatives. The fact-finding nature of your contacts is more restricted than the purpose contemplated at Level 7-4. Level 7-3 is awarded (120 points).

We agree with the Department that Level 8-1 is appropriate for the Physical Demands of your position (5 points). We do not find that carrying luggage, even

including recording equipment, requires the physical exertion contemplated at higher levels. We also agree with the Department's finding for Level 9-1, recognizing the office environment in which your work takes place (5 points).

The point value resulting from the above analysis is 3290, well within the range for GS-13.

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I also believe it is appropriate to compare your position to related subject-matter specialist standards. The Department did this in evaluating an earlier incarnation of your position and used the GS-1145 Agricultural Program Specialist and GS-1146 Agricultural Marketing series. In both comparisons, the Department found GS-13 to be the appropriate series, drawing analogies with the national scope of program responsibilities, administrative supervisory controls, "expert consultant" role, and broad commitment authority exercised at that grade level. We find these analogies to still be applicable. It appears that, at the time of this earlier Departmental decision, the positions actually exercised national program specialist functions along with appellate review functions, and we do not find that the removal of the former responsibilities has diluted the grade worth of the latter. The appellate function is still national in scope, with similar impact on agency programs. While the scope of the subject matter dealt with may be narrowed somewhat by the nature of the cases presented for appeal (i.e., they are program transactions and determinations made at a less-than-national level), the appellate process is clearly designed to function as a national control and double-check on agency decisions at operating levels. We do not, however, agree with your contention that, in removing operating program responsibility and consolidating agency appellate functions, there was a resultant and inevitable elevation of the scope or responsibility of the work. As the previous comparison to the GS-950 standard demonstrates, GS-13 is still the appropriate grade level for those aspects.

(2) Nature of Cases or Legal Problems under GS-905. We mistook the following statement in your letter as indicating that you agreed with the Department's finding for Type II under this classification factor: "We agree with the classifier that we meet the criteria for Type II..." Therefore, we did not provide a written analysis of our finding for Type II. We will do so now.

Type I cases are characterized by the following features: (1) the legal question or factual situation can be relatively easily resolved in the light of the well-established or easily determinable facts and clearly applicable precedents involved; (2) the impact of cases is local or limited to the parties directly concerned, since penalties are relatively minor and involve no new precedents of wider potential impact; (3) the cases involve limited sums of money have no widespread social or political impact.

Type II cases are characterized by one or more of the following features: (1) legal or factual questions made difficult due to the absence of legal precedent or 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 the facts; (2) the impact of the case affects economically, socially, or politically, either directly or as an administrative precedent, a significant segment of private or public interests (e.g., residents of a large geographical region of the United States, the producers of a given farm commodity); or (3) large sums of money are directly or indirectly involved, or there is considerable interest from a significant section of the population (e.g., a large labor group or residents of large geographical region involved in a public works project).

Type III cases are characterized by one or more of the following features: (1) extremely complex and difficult legal questions involved in the interpretation of regulations, contracts, and other legal instruments; or complex factual or policy issues that require extensive research and the testimony of experts in controversial areas of science or financial management; (2) the case or problem is such that it can have the effect of substantially broadening or restricting the activities of an agency; or it has an important impact on a major industry whose economic position affects the health and stability of the general economy; (3) the cases involve very large sums of money, and/or they are vigorously contested by extremely capable legal talent; interest in these cases is generally nationwide. Examples of Type III cases include: a case that involves balancing the requirements of national security with individual liberties; determining the legality of State and local taxation of Government property used by private contractors; a case involving the position of domestic airlines operating overseas in relation to restrictions on foreign airlines operation in this country; a case involving a substantial broadening or restriction of benefits to veterans under the law, amounting to many millions of dollars annually; and a major antitrust case.

In two telephone audits, you provided this office information on twelve cases that you have handled. In the second interview, you focused on the most complex and demanding of these, contending that some of them were precedent-setting to an extent that they meet the Type III criteria and that all or most of them involved complexity that meets Type III. These examples supported similar contentions in your July 1 letter. In this letter you called particular note to the number and nature of the contesting parties attending your hearings and also [extraneous geographic descriptive information] the sums of money involved in some cases. In particular, you referred to a current case involving a large multi-partner entity that owns and operates 60 rural housing projects with 1800 housing units in a several-state area. This case involves Government claims for repayment of about two million dollars of misappropriated/mismanaged funds.

We do not find that, on an overall basis, your case examples meet the Type III criteria. The multi-family housing loan case is clearly one of most--if not the

most-complex that you have handled, and it does not appear to approach the upper ranges of complexity typical of the legal profession, i.e., Type III cases. You indicated that it took two months to prepare for the case, yet the GS-950 standard discusses case complexity at the upper range that requires a year or more of preparation. This is a tangible measure of extensiveness as it relates to “extensive” research and analysis as contemplated at Type III. Moreover, the controversy cited as typical of Type III contemplates issues of scientific/technical controversy, not merely numbers or intensity of controverting parties. There is no indication of such controversy in the multi-housing loan case. There is certainly a substantial volume of detailed record information in this case (you indicated five boxes at one point) involving the business dealings of the project owners and the subcontractors involved in managing the 1800 rental units in the projects, but this does not compare favorably with the nature of record information that would be involved in litigating the the business dealings of major airlines or railroads, as contemplated in typical Type III work.

The one aspect of the multi-family housing loan case which seems to touch on a tangible Type III indicator is the amount of money involved. However, the GS-905 standard was written in 1959, and we cannot rely solely on the dollar values cited there as examples of the criteria. Your account of multi-family housing loan case included none of the other indicators related to high-dollar case example in the standard, e.g., involvement of extremely capable legal talent and nationwide public interest. We conclude that this case is best evaluated as Type II in recognition of its moderate complexity and its “regional” impact.

The other case examples you provided generally involved fact situations that were substantially less complex than the multi-family housing loan case. A number were resolved based on a careful review of the directly-applicable regulations. One involved review of an agency’s interpretation and application of a new regulation. One involved a challenge to the actions of an agency official who was being “hard-headed” in his application of loan guarantee requirements. Overall, the complexity is appropriately evaluated as Type I.

Notwithstanding the varying levels of case complexity, there is one aspect of case type that appears to warrant a Type II finding, and that is the precedential impact. The GS-905 talks at Type II of cases that have impact on “the producers of a given farm commodity.” You cited the case of an agency that refused, as a matter of policy, to recognize organic produce as a unique commodity, despite a regulation which, under a reasonable interpretation, called for such recognition. While the case involved only one producer and was not complex in and of itself, the agency’s response and attitude created a precedential context. This situation appears to be inherent in the USDA appellate function, and it is appropriately recognized by a Type II finding for the nature of cases.

(3) Level of Responsibility. The GS-905 standard provides four elements relevant to the evaluation of this aspect of professional legal work. Your written

and oral contributions to the appeal file demonstrate that you fully understand these elements, and I will not recap them here. At issue is the impact of the USDA appellate organizational structure, staffing practices, and delegations of authority on the classification of your position as a hearing officer.

*Nature of functions.* Under this element, the standard describes sitting as a “quasi-judicial officer hearing cases involving ...requests for relief from the provisions of agency regulations” as a Level E function. We agree that Level E is an appropriate finding here, but there must be a strong qualification to this finding due to the non-professional nature of your position. It is one thing for an attorney to function as a quasi-judge, and another for a non-attorney to function as an attorney acting like a judge. It is clear that the staffing of the position with a non-professional has a qualifying impact on the nature of the function as it relates to Level of Responsibility.

*Supervision and guidance received.* Our initial decision notes that your position has many Level E characteristics under this element. However, we found that the subsequent level of technical review provided by the Review Branch in adjudicating second-level appeals precluded a finding for Level E. This determination is consistent with previous OPM classification decisions regarding the impact of appellate review on the classification of GS-905 positions. The existence of appeal-based technical review of the work of a position otherwise comparable to Level E warrants a determination for Level D. Our initial determination stands.

*Personal work contacts.* Our initial decision was correct in pointing out that contacts related to trials and administrative hearings are described at Level C as well as Level E. Upon reconsideration, we find that your contacts exceed Level C, which contemplates contacts with officials and attorneys at the operating level. However, a reading of the entire Level E description clearly demonstrates that this Level pertains to contacts with officials at the highest levels of Government, including judicial and administrative bodies (i.e, the *most* responsible). Your personal work contacts related to the hearings you conduct are with important people and involve highly sensitive matters, but they are not with officials at the highest level, as contemplated at Level E. Since your contacts exceed Level C but do not reach Level E, Level D is the appropriate finding.

*Nature and scope of recommendations and decisions.* We find that Level D remains appropriate. This is the element which is most appropriate for giving weight to the impact of a second level of appellate review on the finality of your recommendations. It is clear that your position operates at a very high level in the USDA decision-making process/system, but there are levels which follow yours, and these must be recognized in evaluating the grade worth of your position. Moreover, the standard gives weight at Level E to responsibility for recognizing and “clearing with superiors” advice in precedent-setting situations.

The discussion of ex parte communications in our initial decision was an effort to evaluate the impact of the fact that your position is exempt from the requirement to identify and clear such situations. In other words, you are required by your statutory and organizational charter to act upon the letter of the law or regulation, regardless of impact. Your decisions may be precedential, but--as you and others have indicated--it is the responsibility of the agencies involved to treat them so. This must be considered in evaluating the scope of your decisions, and we find that the appropriate result is a finding for Level D.

Overall, Level D is the appropriate finding for Level of Responsibility in comparison with the GS-905 standard. This would be true, even if the qualification for Degree E under the first element was totally disregarded.

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In reconsidering our decision, we have consulted four classification standards. Each standard provides coverage from a slightly different perspective, but this is sometimes necessary in evaluating a position for which there are no published standards. The nonprofessional standards used all result in a grade of GS-13. Use of the GS-905 professional standard must be approached with great care, but our evaluation, including reconsideration of some elements, indicates that the grade would be no higher than GS-13, even if the position were classified as a professional attorney. Our decision to deny your appeal for a higher grade remains unchanged.

I appreciate the opportunity to reconsider, clarify, and expand upon the issues you have raised. I hope this response is helpful to you.

Sincerely,

/s/ Peter D. Dickson  
Peter D. Dickson  
Director



cc:

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