

U.S. Office of Personnel Management
Division for Human Capital Leadership & Merit System Accountability
Classification Appeals Program

Dallas Field Services Group
Plaza of the Americas, North Tower
700 North Pearl Street, Suite 525
Dallas, TX 75201

Classification Appeal Decision
Under section 5112 of title 5, United States Code

Appellant: [appellant]

Agency classification: Supervisory Attorney-Examiner
(Civil Rights), GS-905-14

Organization: Hearings Staff
[name] District Office
Office of Field Programs
Office of the Chair
Equal Employment Opportunity
Commission
[location]

OPM decision: Supervisory Attorney-Examiner
(Civil Rights), GS-905-14

OPM decision number: C-0905-14-03

Marta Brito Pérez
Associate Director
Division for Human Capital Leadership & Merit
System Accountability

June 15, 2004

Date

As provided in section 511.612 of title 5, Code of Federal Regulations (CFR), 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]

Director, Human Resource
Management Services
Equal Employment Opportunity Commission
1801 L Street, NW, 3rd Floor
Washington, DC 20507

Introduction

On October 10, 2003, the Atlanta Field Services Group, of the U.S. Office of Personnel Management (OPM) accepted a position classification appeal from [appellant]. In December 2003, the appeal was transferred to OPM's Dallas Field Services Group for adjudication. The appellant occupies a position currently classified as Supervisory Attorney-Examiner (Civil Rights), GS-905-14, with the organizational title of Supervisory Administrative Judge (AJ). The appellant requested reclassification to the GS-15 grade level. He is assigned to the Hearings Staff, [name] District Office, Office of Field Programs, Office of the Chair, Equal Employment Opportunity Commission (EEOC) in [city and state location]. On November 7, 2003, OPM received the agency's administrative report and on November 10, 2003, received representative work samples covering the past two years from the appellant. We have accepted and decided this appeal under section 5112(b) of title 5, United States Code (U.S.C.).

Background

In his initial request to OPM, the appellant asked to appeal the classification appeal decision made by his agency. This decision, dated May 13, 2003, concluded that his position was correctly classified at the GS-14 grade level. The agency, using the GS-905 General Attorney standard, credited the appellant's personally performed work as Type II Nature of cases or legal problems. Under Factor 2, Level of responsibility, the agency credited two elements at Level E, and two at Level C. They concluded that it was a borderline situation and credited the factor at Level D. The appellant disagreed with his agency's crediting of his personally performed work at the GS-13 grade level. The appellant stated that his personally performed work should be credited with performing Type III, Level E work and evaluated at the GS-15 grade level.

General issues

The appellant disagrees with his agency's determination of his supervisory duties at the GS-14 level and states that the General Schedule Supervisory Guide (GSSG) is defective, improper, and unfair. The content of OPM published standards and guides is not appealable (section 511.607 of title 5, CFR). By law, we must classify positions solely by comparing their current duties and responsibilities to OPM position classification standards (PCS's) and guidelines (5 U.S.C. 5106, 5107, and 5112).

The appellant added that his position description (PD) of record, written in 1984, is inaccurate and outdated. He stated that due to changes in regulations he no longer makes recommendations, he now functions as a judicial officer with more responsibility than stated in his PD. He provided a copy of a proposed revision to his PD. The agency's administrative report agrees that the appellant's PD is out of date and needs to be revised. The agency report indicates that a management task force is reviewing many positions including the appellant's, and will assign the appellant and others to new PD's as soon as work is completed.

A PD is the official record of the major duties and responsibilities assigned to a position by an official with the authority to assign work. A position is the duties and responsibilities that make up the work performed by an employee. Position classification appeal regulations permit OPM to investigate or audit a position and decide an appeal on the basis of the actual duties and

responsibilities assigned by management and performed by the employee. An OPM appeal decision grades a real operating position and not simply the PD. Therefore, this decision is based on the actual work assigned to and performed by the appellant.

Position information

The appealed position is located in the Hearings Staff of the [name] District Office. The appellant serves as the Staff Supervisor and administers the [name] District Hearings program within EEOC. The primary purpose of the position is to manage the Hearings Staff and perform the same work as his staff, i.e., adjudicate complaints of discrimination filed by Federal employees and applicants for Federal employment. The appellant handles both individual and class complaints. He determines case jurisdiction; reviews cases for procedural compliance; schedules hearings, or determines if a decision without a hearing can be rendered. He conducts pre-hearing and status conferences to explore the possibility of settlement, clarifying the issues, and identifying stipulations. He is responsible for advising the parties about their rights, responsibilities, and burdens of proof; overseeing the discovery process; ruling on motions to compel and sanctions; and ruling on witnesses including authorizing and qualifying expert witnesses.

Presiding over hearings, the appellant makes procedural and evidentiary rulings, maintains decorum by excluding unruly people, administers oaths and affirmation, and assures that the record is fully developed. He may direct the parties to produce written briefs and memoranda of law to present oral arguments. The appellant determines witness credibility, evaluates expert testimony, and conducts research in order to apply evolving case law. He has the authority to impose sanctions and dismiss cases as permitted by regulation.

The appellant provides interpretive guidance to Federal agencies, unions, and employees on equal employment law, executive orders and directives, and Federal personnel laws, rules, and regulations. He provides training to agency staff and managers and Federal and private Bar Associations, including courses for continuing legal education credits. The appellant assists agency representatives in developing programs and procedures and in establishing methods of program evaluation and reporting. He advises program managers on resolving major problems.

According to regulations effective November 9, 1999, the appellant's decisions are final and binding unless they are overturned on appeal. Agencies may no longer modify them. Rather than conduct de novo reviews of AJ decisions, EEOC can reverse the decision only if it is not supported by substantial evidence. AJ's are authorized to award attorney's fees and compensatory damages up to \$300,000 plus out of pocket costs and quantifying traditional equitable relief which is not subject to monetary caps (back pay and injunctive relief).

The appellant reports to the [name] District Director. He works under general supervision and is assigned cases without preliminary instructions. The appellant exercises signatory authority for his assigned cases and independently plans and performs his work. His decisions are seldom reviewed prior to issuance for conformance with EEOC policy, precedential effect, and overall quality. Decisions issued orally after the hearing from the bench, if reviewed, are reviewed after they are rendered. Work is considered technically authoritative.

The appellant provides administrative supervision to a staff of six GS-905 Attorney Examiner (Civil Rights) positions, one GS-13 and five GS-14, and one GS-986-6 Legal Technician. As of November 2003, the appellant supervised an affirmative action specialist position, GS-12; however, the position has since been reassigned to another unit within the District. The appellant assigns caseload, Congressional inquiries, and public inquiries to subordinate AJs as well as to himself. He prepares quarterly and annual reports concerning the Staff's case receipts, processing, and closures. The appellant approves requests for leave, travel, training, use of the government vehicle, alternative work place, and flexible work hours. He conducts performance appraisals and periodic reviews with his subordinates. He conducts monthly meetings with subordinate AJs to discuss pending caseload inventory, monthly closures, and their average case processing time. The appellant does not make changes to subordinate AJs' case decisions, but conducts cursory reviews for consistency in citations of applicable law and typographical errors. He also submits recommendations to the District Director on personnel management issues involving the Hearings Staff, such as new hires, promotions, and reassignments.

In reaching our decision, we carefully reviewed all the information provided by the appellant and his agency, including the PD of record. We conducted a telephone audit with the appellant on January 20, 2004, and a telephone interview with the appellant's supervisor on January 23, 2004.

Series, title, and standard determination

The agency has classified the position in the General Attorney Series, GS-905, and titled it Supervisory Attorney-Examiner (Civil Rights). The appellant does not disagree with the series determination. The GS-905 Position Classification Standard (PCS) contains official titles. It requires Attorney-Examiner as the title for positions not covered by the Administrative Procedures Act involved in hearing cases under contracts or under the regulations of a Federal agency when the regulations have the effect of law and rendering decisions or making recommendation for disposition. The subject-matter parenthetical title (Civil Rights) is added to positions concerned with law employed to protect Federally secured civil rights and liberties of persons. While Administrative Judge is not an approved official title, it may be used for unofficial organizational purposes. Therefore, the appealed position is properly titled as Supervisory Attorney-Examiner (Civil Rights). The published GS-905 PCS must be used to evaluate the grade level of the nonsupervisory work. The supervisory duties and responsibilities are graded by comparison with the GSSG.

Grade determination

Evaluation by comparison with the GS-905 standard

The GS-905 PCS uses two main factors to evaluate the grade of positions: (1) *Nature of the case or legal problem*, and (2) *Level of responsibility*. The GS-905 PCS discusses the classification elements considered under each factor.

Factor 1, Nature of the case or legal problem

Three levels of difficulty are described in the PCS 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. A position must substantially exceed the next lower level before a higher level may be considered. This work must occupy 25 percent or more of the employee's work time to control the crediting of this factor or the grade level of the position as a whole.

Type II 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 (e.g., acts by servicemen or other representatives of the United States stationed abroad, questions such as whether or not to buy foreign or American products, or negotiating and drafting consular conventions) 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.

Type III 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, determining the legality of State and local taxation of the use of Federal government property by private business firms, recommending or making policy concerning consent decrees in antitrust litigation, or legal work involved in developing material for Executive orders concerning the use of Federal troops in a domestic emergency); 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, or on the rates, practices, or competitive position of a major industry, for example, the position of the railroads in relation to the motor carriers based on the "reasonableness" of their respective rates, or the position of domestic airlines operating overseas in relation to restrictions on foreign airlines operation in this country). 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 or a nationwide retirement system, the development of administrative regulations of such scope as the Armed Services Procurement Regulation, or a substantial question of civil rights involving the due process clause). Also included in 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.

(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 classification of the position is based on the work assigned and performed by the appellant, hereafter referred to as the AJ. The case sample discussed includes cases representative of the typical work performed by the appellant. As discussed below, it shows that the appellant devotes significantly more than 25 percent of his time handling Type II cases. We will summarize and discuss some examples.

In *Truell v. Army*, Fort McPherson, GA, the AJ found that the complainant established a prima facie case of race discrimination when he was not afforded the opportunity to compete for an Assistant Inspector General position. The agency articulated a legitimate non-discriminatory reason for its action stating that the position had to be filled by an "excess" employee and thus the complainant, who was not an excess employee, was excluded from consideration. The complainant proved that the agency's articulated reason was a pretext to mask unlawful discrimination.

In reaching this conclusion, the AJ found that the agency officials were not credible. The AJ noted several contradictions and differences in testimonies of the agency's witnesses at the hearing, at the fact-finding conference, and in their affidavits. The AJ questioned whether the selectee was genuinely an excess employee during the subject timeframe. The AJ found that the selectee lacked qualifications for the position and the agency did not seem concerned. Finally, the AJ found that no other position had been filled in a similar manner. Therefore, based on the inconsistencies and lack of credibility on the part of agency witnesses, the AJ concluded that the agency discriminated against the complainant by denying him the opportunity to compete for the

position. The AJ recommended that: 1) the position be announced as vacant and that the complainant be advised so that he may apply and be given genuine consideration by a selecting official unaware of the complaint or the facts surrounding it, 2) the complainant be awarded compensatory damages, 3) the complainant be awarded reasonable attorney's fees, and 4) a notice be posted on all agency employee bulletin boards indicating it has been found in violation of Title VII and the Rehabilitation Act and indicating what steps it will take to assure it does not reoccur.

The agency's final decision rejected the AJ's decision without specific explanation. On appeal, to the Office of Federal Operations (OFO), the complainant contended that the AJ correctly summarized the facts and reached the appropriate conclusions of law. The AJ's decision was upheld by the OFO and the agency's final order was reversed. After a careful review of the record, the EEOC found that the AJ's findings of fact were supported by substantial evidence in the record and that the AJ's decision properly summarized the relevant facts and referenced the appropriate regulations, policies, and laws. The EEOC ordered the agency to offer the complainant the Assistant Inspector General position, or a substantially equal position; to determine appropriate amount of back pay; and to consider taking disciplinary action against agency officials identified as responsible for the discrimination perpetrated against the complainant. The issue of compensatory damages was remanded to the Hearings Unit of the EEOC Atlanta District Office. On November 1, 2002, the AJ ordered the agency to compensate the complainant for his non-pecuniary injuries in the sum of \$95,000. The agency appealed the AJ's order to pay the complainant compensatory damages in the amount of \$95,000. The OFO upheld the AJ's order.

In *Gay v. Navy*, the AJ found that the complainant did not carry his burden of proof to show that he was retaliated against when his request for reassignment was denied, but that the agency did violate the Rehabilitation Act in denying the request. Federal employers have a duty to accommodate qualified individuals with disabilities under the Rehabilitation Act, including reassignment. The AJ determined that the complainant was a qualified individual with a disability and that he was discriminated against. The AJ found that the complainant's major life activities of sleeping, thinking, and concentrating were substantially impaired intermittently during the year 1998 because of his mental condition of depression. The AJ stated that it appeared likely that the Agency delayed processing of the complainant's CA-8 (Claim for Compensation) form as reprisal. He found that the employee established a prima facie case of discrimination and the agency did not rebut the prima facie case. The AJ also noted conflict in testimony by the Agency's officials.

The complainant sought back pay offset by his workers' compensation payments, front pay offset by future workers' compensation payments through the date of his normal retirement, and compensatory damages of \$300,000. The AJ awarded the complainant back pay offset by his workers' compensation. The AJ conducted research on whether front pay was applicable in this case. Following EEOC precedent, the AJ concluded that front pay could not be awarded because the complainant was unable to work. The AJ determined that the complainant's condition had deteriorated during the three-and-a-half years suffering severe emotional harm from which he may never recover. The AJ added that the complainant's Federal career had been ended and he most likely would never be employable; he had lost his self-respect as a hard worker; suffered from panic attacks, sleeplessness as well as physical pain and numbness. The AJ awarded the

complainant the maximum allowable sum of \$300,000 in compensatory damages and \$15,093 in attorney's fees. The agency failed to appeal within the applicable time limits; therefore, the AJ's decision was final.

In *Hammer v. Treasury*, the AJ found that the complainant did not carry her burden of proof to show she was subjected to a hostile working environment, including non-selections because of her age, and/or retaliation. In her first case, the complainant alleged that she was subjected to a hostile work environment from 1996 through 1999 because of her age. The hostile work environment included not being promoted. The complainant did not establish a prima facie case. No testimony was offered showing that she was better qualified than any of the selectees. There were few, if any, age-related comments.

In the second case, she alleged that she was also subject to a hostile work environment from December 2000 through the beginning of 2002 because of her age, race, disability and retaliation. She also alleged in the second case a failure to be accommodated. The complainant withdrew the race and disability claims. The AJ found that the complainant established a prima facie case of age discrimination and of retaliation. The prima facie case was rebutted by the agency that the complainant's age and first complaint had no bearing on their decisions to rate the complainant's performance as "met". The complainant did not show the actions to be a pretext to discrimination. No discrimination or harassment was found. The decision was implemented by the agency.

In *Mobley v. Army*, the AJ found that the agency did not discriminate against the complainant because of her race and did not deny her a reasonable accommodation concerning an accessible break room. However, the AJ found that the agency violated the Rehabilitation Act by failing to engage in the interactive process concerning her request for a parking space in front of the building, or failure to accommodate physical disability. The AJ awarded the complainant \$10,000 in compensatory damages. The agency implemented the AJ's decision.

In *Wade v. Veterans Affairs*, the AJ found that the agency discriminated against the complainant based on race by hiring him at a lower pay grade than his coworker. The AJ found that the complainant established a prima facie case. The complainant showed that over a five-year period, the agency filled police officer positions at the GS-5 level with the majority of those positions being black males. They hired a white male, with less experience, at the GS-6 level. The agency failed to meet its burden of proof of rebutting the prima facie case of why a white male was hired at the GS-6 level following the history of five years of hiring black males at the GS-5 level. Instead, the agency offered different explanations and contradicting testimonies of its witnesses. The AJ awarded the complainant with \$3,311 in back pay for lost income involved in leaving the agency due to discrimination and accepting a lower paying job. After evaluating the impact of agency behavior on the complainant and citing previous court and EEOC decisions, the AJ awarded the complainant \$12,000 in non-pecuniary compensatory damages and \$11,300 in attorney fees.

In *Stengel v. Transportation*, the AJ found that the complainant established a prima facie case in proving that she was subjected to a hostile environment based on her sex and that the agency failed to take immediate and effective action when it learned about the harassment. The complainant addressed management about harassment in the work place and asked to be

transferred to another work location. When management failed to investigate her complaint of harassment, discipline the party involved, or move her to another work area, the complainant requested and was granted a transfer to Seattle. The complainant incurred \$22,941.91 in moving expenses. The agency failed to rebut the complainant's prima facie case and failed to prove that it took effective and prompt action upon learning of the harassment. The AJ also found that testimonies of some of the agency's witnesses lacked credibility. Citing previous court and EEOC decisions, the AJ awarded the complainant \$10,000 in non-pecuniary compensatory damages, \$22,941.91 in pecuniary compensatory damages, and \$11,700 in attorney fees.

In *Maxwell v. Defense Commissary Agency*, the AJ found that the complainant established a prima facie case showing that the agency discriminated against her based on race when she was non-selected for a GS-5/7 Commissary Specialist Trainee position. The complainant, who is a black female, applied and was qualified for the position, and a white female was selected. The agency rebutted the prima facie case based on the rating of the complainant's answers to the interview questions compared to the selectee's answers. The complainant was rated third out of four applicants by agency managers. The complainant carried the burden of proof to show that the agency's action was a pretext to discrimination. The AJ found the complainant to be the most qualified for the position after he examined the interview questions, and compared the applicants' related job experience to their assigned scores. The AJ found that the complainant had been given a low rating because of her race. After hearing conflicting agency testimonies, the AJ also found that the agency had discriminated against the complainant based on race when management denied her request for leave; failed to provide the complainant with in-house cross training; refused to give the complainant adequate work space after management took her desk to use as a coffee table; required her to work on Saturdays; and took away her duty of scheduling the night shift. The AJ awarded the complainant \$20,000 in compensatory damages for the emotional harm that she suffered and \$9,207.50 in attorney fees. The AJ also ordered the agency to reinstate the complainant to the subject position with back pay and other benefits.

In *Villard v. Department of Health and Human Services*, the AJ found that the agency had discriminated against the complainant when he was not selected for two GS-13 positions on the basis of age, race, and sex. The case was settled at the compensatory damages hearing. The complainant received a promotion to the GS-13 grade level and back pay.

In *Harmon v. U.S. Postal Service*, the AJ found that the agency had not discriminated against the complainant. The agency implemented the AJ's decision. The complainant did not establish a prima facie case of disability discrimination, race discrimination, or retaliation. The complainant called no witnesses to corroborate his claims and at times contradicted himself or could not articulate what restriction was violated by the agency.

In *Wheat, et. al., vs. Army, Moore, Waller, Hastings and Wheat* originally alleged that they were denied equal pay for equal work under the Equal Pay Act and Title VII, based on their sex and race. They later withdrew their race allegation. The complainants did not carry their burden of proof in showing that they performed the same work under similar working conditions as their male comparators. The AJ found the agency did not discriminate against the complainants on the basis of their sex. The agency implemented the AJ's decision.

In *McCant vs. U.S. Postal Service*, the AJ found no sex discrimination or reprisal in promotions. The complainant did not carry his burden of proof to show that he was non-selected for an accounting technician position because of his gender and retaliation due to a prior EEO complaint. The agency implemented the AJ's decision.

In *Fort, et. al., v. Health and Human Services*, Ms. Fort was named as the class agent and the class complaint was defined as present and former African American disabled employees adversely affected by racially discriminatory policies and practices. The policies and practices were described as failing to make reasonable accommodations to known or perceived disabilities, requesting unwarranted medical documentation, determining which employees would receive accommodation, selecting Caucasians to receive accommodation, and disparate treatment in performance evaluations. The AJ rejected the class certification of the complaint based on the class agent's failure to show typicality, commonality, or adequate representation; thus, not suited for class action treatment. The AJ's decision was implemented by the agency.

In *Saunders v. U.S. Postal Service*, the complainant failed to establish a prima facie case of retaliation for prior EEO-related activity; he did not establish a causal connection between the prior complaints and the agency's refusal to allow him to work eight-hour days. The AJ found the complainant to be a qualified individual with a disability who was adversely affected by not being allowed to work eight hours. This loss was causally connected to his disability. Thus, he established a prima facie case of disability discrimination. The agency attempted to rebut the claim by stating that work was not available; however, the preponderance of the testimony supported the complainant's claim that work was available when the complainant was sent home. The AJ found that the agency failed to accommodate the complainant's disability and, therefore, violated the Rehabilitation Act. The case was settled at the compensatory damages hearing awarding the complainant \$25,000 compensatory damages and attorney fees.

Darnell v. U.S. Postal Service and *Mack-Hood v. U.S. Postal Service* are two examples of dismissals. In the first, the request for hearing was dismissed as it was identical to a prior case. The second was for failure to respond to an Order to Show Cause. That Order indicated that the complainant had signed a settlement covering all pending EEO complaints. This complaint was pending at the time.

The appellant submitted these 15 cases as a representative sample of his work over the past two year period. While a few of these cases may not exceed Type I, most are typical of Type II, i.e., these cases and their related damages and attorney fees decisions involve difficult legal or factual questions. Unlike single complaint/issue claims, many consolidated cases require reconstructing a series of personnel procedures, evaluating testimony on how those procedures were carried out, and analyzing whether those actions resulted in statutorily prohibited discrimination. For example, *Wheat, et al.*, consolidated four cases that raised equal pay issues based on race and sex. Others involved multiple issues, e.g., age, race, disability and/or retaliation, e.g., *Hammer, Villard*. The one example provided of a case filed as a class action complaint, *Fort, et.al.*, failed to meet the criteria for consideration as a class certification and does not reflect case complexities that exceed those found in Type II cases.

The PCS defines some Type II cases as involving large sums of money directly or indirectly, e.g., about \$100,000. The purchasing power of that amount in 1959, when the standard was

published, equates to about \$618,200 in 2002, according to Bureau of Labor Statistics figures. The cases regularly handled by the appellant do not routinely involve large sums of money (adjusted for inflation) as defined in the PCS for Type II cases. The largest involved \$300,000 while amounts in other cases ranged from \$10,000 to \$95,000. These amounts do not meet the sums typical of Type I cases.

The PCS identifies very large sums of money as about \$1,000,000 for Type III work. The purchasing power of that amount in 1959, when the standard was published, equates to about \$6,182,000 in 2002, according to Bureau of Labor Statistics figures. That aspect does not meet Type III. Extremely capable legal talent is not defined in the PCS. Based on the PCS's emphasis on legal difficulty, it is reasonable to conclude that it refers to the same caliber of attorney typically found in other cases discussed under Type III. Lawyers of this caliber are those whose exceptional legal talents and credentials are sought by the largest corporations for their most important legal undertakings, e.g., defending exposed corporations from major tax and/or securities lawsuits. The record does not show that these cases were contested by extremely capable legal talent and received nationwide interest.

Based on our analysis of the cases presented by the appellant, we find that none of the cases fully meet Type III. Therefore, this factor is credited with Type II.

Factor 2, Level of responsibility

This factor includes the nature of 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 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 agency appeal decision credited the appellant with Level E for *Supervision and guidance received* and *Nature and scope of recommendations and decisions*, in which he agrees. The appellant disagrees with the agency crediting Level C for *Nature of functions* and *Personal work contacts*, which he believes should be credited at Level E.

Nature of functions

Positions at Level C are characterized by functions such as conducting legal research in connection with: (1) Cases pending administrative hearings, trial before courts of original jurisdiction, or argument in appellate courts; (2) Legal questions referred by administrative officials of the employing agency, such as questions concerning the interpretation and application of statutes, rules, and regulations as they pertain to contracts, claims, or other legal instruments involving private business, State, local, national, or foreign governments; (3) Questions regarding the effects of provisions of proposed legislation or proposed changes in agency policies or regulations.

Level E lists several examples of functions including review of records of suits to determine whether to recommend appeal to a higher court, drafting legislation or preparing reports on changes in basic legislation, and acting as principal attorney in charge of recommending the policies and developing the procedures and regulation implementing new or amended legislation for the agency. One example describes sitting as a quasi-judicial officer hearing cases involving claims against the Government, conducting investigative hearings, hearing charges brought by the Government against violators of provisions of law or regulations, or hearing cases arising under the dispute clause of a government contract. The official renders decisions on points of law or constructions of fact and directs corrective action, payment of claim, or discretionary relief depending on the merits of the case and the penalties and remissible relief under law and regulations.

The appellant functions as a quasi-judicial officer and is responsible for assuring that all appropriate issues have been adequately investigated prior to hearing; presiding over hearings, making procedural and evidentiary rulings; determining witness credibility; evaluating expert testimony; conducting research to apply evolving case law; and has the authority to impose sanctions and dismiss cases as permitted by regulation. The nature of function of the appellant's work is comparable to Level E.

Supervision and guidance received

The appellant does not question the agency credit for this element. We agree that Level E is appropriately credited.

Personal work contacts

At Level C, personal work contacts are important. Effectiveness is required in presentation, exposition, and argument in presenting cases to administrative hearings and courts. Attorneys participate in pretrial or prehearing conferences, explain points of law, changes, or qualifications of claimants, and refer suggested settlements or compromise offers to superiors the appropriate recommendations. They advise negotiating officials in contractual matters by recommending clauses, provisions, and general wording; participate in conferences with representative of operating programs, State and local governments, industry or other Government agencies in developing or evaluating proposed changes to legislation or agency policies; participate in negotiations concerning conflicts in State and Federal regulations; and assist staffs of Congressional committees in technical drafting of legislation.

Level E is characterized by the most responsible personal contacts including: (1) conferring or negotiating with top administrative personnel in the agency, private business, or state, local or foreign governments on important legal and policy questions; (2) advising and assisting Congressional committees and their staff in drafting legislation or giving expert testimony before Congressional hearings on legislative proposals; (3) trying cases before courts or administrative bodies.

The appellant's contacts in prehearing conferences, settlement negotiations, and effectively controlling the conduct of hearings, conferences, and related meetings meet Level C. His contacts, however, do not fully meet Level E. He is not required to routinely confer or negotiate

with top administrative personnel in the defendant agencies. Level E cites administrative hearings and appearing before court without specifying the contacts or distinguishing between them from Level C hearing and court contacts. The PCS structure describes increasing levels of difficulty. Level E must be viewed as referring to the most difficult level of contacts found at hearing cases of Level E scope and complexity. Therefore, this relates to the type of work and resulting contacts that senior (Level E) principal attorneys have in hearings that involve issues of considerable consequence or importance to the agency of Government and frequently involve matching professional skills against some of the most distinguished and highly paid legal talent in the country. As discussed previously, such contacts are not a regular and recurring part of the appellant's work.

However, Level C fails to recognize the full nature of the appellant's contacts. The appellant exercises full control over his assigned cases as the adjudicating official, exceeding Level C. He functions in a position of authority in his contacts with attorneys and/or complainants, e.g., compel discovery, rule on motions, and sanction the parties if they fail to carryout instructions. Rather than participating in negotiations found at Level C, the appellant rules on proposed case action settlements. Instead of participating in prehearing conferences on cases, the appellant manages and directs those conferences for cases of substantial difficulty and complexity. Because the position falls between Levels C and E, Level D is assigned.

Nature and scope of recommendations and decisions

At Level C, recommendations to those outside the agency or to administrative officials at higher levels are normally made through the supervisor. Typically, recommendations include whether to initiate criminal or civil suits against alleged violators of Federal laws and regulations; settlement of claims against the Government brought by private citizens; the organization, order of presentation, and line of argument to be used in the presentation of cases or hearings where the employee functions as the trial attorney; settlement of suits brought by the Government against others, e.g., offers in compromise in income tax cases; replies to requests for legal advice or interpretations of law arising out of the day-to-day operations of agency programs; substantive changes in legislation and agency policies or regulations to make them more equitable, responsive to needs, or easier to administer; and whether to approve a contract or other legal document in its proposed form and content.

The major difference at Level E is that advice on the interpretation of law or on proposed changes in legislation, policy, and regulations is often given directly to heads of programs, bureau chiefs, cabinet officers, Congressmen, or representatives of State and local governments. In some instances, recommendations are made through supervisors, but these recommendations are usually tantamount to final decision. This is particularly pertinent to positions concerned with recommending whether to prosecute cases or to appeal adverse decisions in agencies responsible for litigation. The employee is responsible for recognizing when the matter under discussion is of such precedent-setting nature or of such importance or delicacy that the advice must be cleared with superiors before it is given out. Attorneys at Level E often deal with matters of such scope and complexity that they require the concentrated efforts of several attorneys or other specialists. In such circumstances, attorneys at this level are normally responsible for directing, coordinating, and reviewing the work of the team.

The application of this PCS requires that we consider the appellant's organization which varies substantially from illustrations for this element. Rather than performing advisory or litigation work, the appellant functions as an adjudicator. His work substantially exceeds Level C. The appellant exercises the authority typical of Level E since he regularly issues final decisions on cases of substantial complexity that must be implemented in full or appealed by the agency and issue decisions on whether to certify a class action complaint. He exercises similar authority in contentious cases when ruling on motions and discovery issues and issuing sanctions. He reviews and approves or disapproves class action case settlements. Unlike Level E, he does not routinely confer with bureau chiefs, cabinet officers, Congressional representatives, or officials of equivalent stature. The appellant does not regularly, within the meaning of the position classification process, handle precedent-setting work. While some cases may become precedent, they do not achieve that level of importance until the decisions are review and approved by OFO or the EEOC Commissioners on appeal. Because the position falls between Levels C and E, Level D is assigned.

The crediting of two elements at Level D and two elements at Level E results in a borderline situation. The PCS provides for the adjustment of borderline situations for this factor by considering the stature of the employee in their particular area of law. This feature recognized that there are aspects of an attorney's work that cannot always be fully evaluated in terms of the criteria spelled out in the body of the PCS. Stature is usually attained through accomplishments of enduring significance; i.e., the attorney's opinions are generally recognized by other attorneys as especially authoritative and are sought after and given special weight. The PCS provides examples that include writing a treatise on a particular area of law and subsequently becoming recognized as an expert in that area and functioning as the organization's "oracle" on that subject.

The nature of the appellant's work does not lend itself to direct application of this feature. Although we have credited the position with responsibility for issuing final decisions, there are aspects of their work which we have not fully addressed. For example, EEOC regulations give the appellant independent authority to consolidate cases in the hearing process or hold the complaint in the hearing process until the others are ready for hearing. Factual findings rendered by the appellant after a hearing are subject to a substantial evidence standard rather than a de novo review. For the foregoing reasons, we assign Level E for this factor.

Summary

Type II cases with Level E Responsibility equate to the GS-14 grade level.

Evaluation using the GSSG

Factor 1, Program Scope and Effect

This factor assesses the general complexity, breadth, and impact of the program areas and work directed, including its organizational and geographical coverage. It also assesses the impact of the work both within and outside the immediate organization. To credit a particular factor level, the criteria for both scope and effect must be met.

Subfactor 1a: Scope

This element addresses the general complexity and breadth of: (1) the program directed; and (2) the work directed, the products produced, or the services delivered. The geographic and organizational coverage of the program within the agency structure is addressed under this element. In evaluating the population affected under this factor, we may only consider the total population serviced directly and significantly by a program.

At Level 1-3a, the position directs a program segment that performs technical, administrative, protective, investigative, or professional work. The program segment and work directed typically have coverage encompassing a major metropolitan area, a state, or a small region of several states.

The appellant directs a staff of six Attorney Examiner (Civil Rights) and one Legal Technician positions that comprise the Hearings Staff in the [name] District Office. The function of this staff is to conduct hearings and adjudicate complaints of employment discrimination against Federal agencies. The office serves the State of [state name]. Comparable to Level 1-3, the work is professional and serves employees and applicants within a state. While the work of the program is professional, it does not involve the development of aspects of key agency regulatory or policy development as described at Level 1-4.

Level 1-3a is assigned for this element.

Subfactor 1b: Effect

This element addresses the impact of the work on the mission and programs of the customers, the activity, the agency, other agencies, the general public, or others.

At Level 1-3b, the services directly and significantly impact a wide range of agency activities, the work of other agencies, the operations of outside interests, or the general public. At the field activity level (involving large, complex, multi-mission organizations, and/or very large serviced populations), the work directly involves or substantially impacts the provision of essential support operations to numerous, varied, and complex technical, professional, and administrative functions.

The Hearings Unit provides hearings services for complaints against Federal agencies under Title VII of the Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act. Rulings may impact Federal agencies, primarily at the local installation level but may have impact at higher levels within agencies. This would not exceed Level 1-3b. Work at Level 1-4 impacts on agency headquarters operations, several bureauwide or most of an agency's entire field establishments.

Level 1-3 is credited for both aspects of this factor and 550 points are assigned.

Factor 2, Organizational setting

This factor considers the organizational situation of the supervisory position in relation to higher levels of management. The appellant does not question the credit given for Factor 2. Comparable to Level 2-3, the appellant reports to the District Director, an SES position. Level 2-3 is credited for 250 points

Factor 3, Supervisory and managerial authority exercised

This factor considers the delegated supervisory and managerial authorities that are exercised on a recurring basis. To be credited with a level under this factor, a position must meet the authorities and responsibilities to the extent described for the specific level.

To meet Level 3-2c, the position must carry out at least three of the first four, with a total of six or more, of the 10 authorities and responsibilities described for this level in the guide.

The PD credits the position with supervisory functions such as interviewing applicants and providing recommendations for new hires, promotions, reassignments, and details; and identifying training needs of employees. The appellant assigns cases to his staff, reviews performance, approves leave, and manages workload and staff assignments. The appellant meets the requirements for Level 3-2c.

The appellant believes he should be credited with Level 3-3c as he exercises 8 of the responsibilities listed for that level. To meet Level 3-3b, the supervisor, in addition to exercising all or nearly all the authorities and responsibilities described at Level 3-2c, must meet at least 8 in a list of 15 additional authorities and responsibilities that establish a level of authority significantly higher than Level 3-2c. These include: (1) uses subordinate supervisors, leaders, or team chiefs to direct, coordinate, or oversee the work; (2) exercises significant responsibilities in dealing with officials of other units or organizations, or in advising management officials of higher rank; (3) assures reasonable equity of performance standards and rating techniques developed by subordinates; (4) directs a program or major program segment with significant resources; (5) makes decisions on work problems presented by subordinate supervisors; (6) evaluates performance of subordinate supervisors and serves as the reviewing official on evaluations of nonsupervisory employees rated by subordinate supervisors; (7) makes or approves selections for subordinate non-supervisory positions; (8) recommends selections for subordinate supervisory positions; (9) hears and resolves group grievances or serious employee complaints; (10) reviews and approves serious disciplinary actions involving nonsupervisory subordinates; (11) makes decisions on nonroutine, costly, or controversial training needs and training requests related to employees of the unit; (12) determines whether contractor performed work meets standards of adequacy for authorization of payment; (13) approves expenses comparable to within-grade increases, extensive overtime, and employee travel; (14) recommends awards or bonuses for nonsupervisory personnel and changes in position classification, subject to approval by higher level officials, supervisors, or others; and (15) finds and implements ways to eliminate or reduce significant bottlenecks and barriers to production, promote team building, or improve business practices.

Responsibilities 1, 3, 5, 6, and 8 refer to situations where work is accomplished through subordinate supervisors, team leaders, or other similar personnel. Further, the supervisor's organizational workload must be so large and its work so complex that it requires using two or more subordinate supervisors, team leaders, or comparable personnel to direct the work. Absent such conditions, the presence of two or more supervisors or comparable personnel, by itself, is not enough to credit the appellant's position with these responsibilities. The appellant serves as the first-level supervisor of a unit of seven employees. There are no subordinate supervisors or team leaders present in the organization nor does the workload of the unit require the use of subordinate supervisors or comparable staff. Credit cannot be given for these responsibilities.

The appellant exercises responsibility 2. Responsibility for approving witnesses, as cited by the appellant, is not a supervisory responsibility but that of the individual judge. However, the appellant is responsible for responding to complaints against his subordinate judges. This may involve sensitive matters with the agencies and/or higher level agency officials.

Responsibility 4 requires direction of a program or major program segment with significant resources, e.g., one at a multimillion dollar level of annual resources. The appellant lacks direct control over annual resources at that level. Responsibility 4 cannot be credited.

Responsibility 7 cannot be credited. The appellant recommends selections for subordinate positions. The standard requires making or approving those selections.

The size of the organization directed precludes the appellant from exercising responsibilities 9, 10, 11, and 15. The authority to carry out supervisory functions that rarely if ever occur, such as hearing and resolving group or serious employee complaints; reviewing and approving serious disciplinary actions; making decisions on nonroutine, costly, or controversial training needs; and finding and implementing ways to eliminate or reduce significant bottlenecks and barriers to production, promote team building, or improve business practices, cannot be credited because the appellant's organization does not require or permit the regular and recurring exercise of that authority.

Under responsibility 12, a supervisor must determine whether contractor-performed work meets standards of adequacy needed to authorize payment. The appellant believes that approving the adequacy of contractor prepared hearing transcripts should provide credit. OPM guidance, however, indicates that this factor is intended to credit supervisors who regularly oversee the work of contract employees in a manner somewhat comparable to the way in which other supervisors direct the work of subordinate employees. These decisions would have to exceed those described under Factor 3-2b, where work is contracted out. Since the appellant does not oversee contractor work of this level, this responsibility cannot be credited.

Responsibilities 13 and 14 cannot be credited. The appellant can approve subordinate's travel but does not have authority for other expenses such as extensive overtime. He may recommend performance awards, however, he may not be credited with recommending changes to position classification of subordinates. The subordinate employees are assigned to standard PD's and any requests for change would not have a reasonable change of adoption.

Since the appellant's position received credit for only 1 of the 15 responsibilities listed under Level 3-3b, it can not be credited at that level. Level 3-2c, the highest level met, is credited for this factor and 450 points are assigned.

Factor 4, Personal contacts

This is a two part factor that assesses the nature and the purpose of personal contacts related to supervisory and managerial responsibilities.

Subfactor 4A, Nature of contacts

The appellant has regular contact within the agency with District Director, hearings coordinators in headquarters, and other supervisory attorney-examiners. There may be outside contacts with attorneys for the complainants and agency, as well as EEO and other officials from the complainant's agency in dealing with problems with subordinate AJs. The appellant's contacts are comparable to Level 4A-3. Although the appellant believes he should be credited at Level 4A-4 because of his frequent contacts with SES personnel, contacts credited at that level describe SES, flag or general officer, or Executive Level heads of bureaus and higher level organizations in other Federal agencies, within the context of performing supervisory duties. The appellant's contacts are not creditable at this level. Level 4A-3 is credited for 75 points.

Subfactor 4B, Purpose of contacts

The appellant does not question the agency's crediting of Level 4B-2. Contacts are to ensure that information provided is accurate and consistent, to plan and coordinate work directed with others outside the organization, and/or to resolve differences of opinion among managers, supervisors, or others. Level 4B-2 is credited for 75 points.

Factor 5, Difficulty of typical work directed

This factor measures the difficulty and complexity of the basic work most typical of the organization directed, as well as other line, staff, or contracted work for which the supervisor has technical or oversight responsibility, either directly or through subordinate supervisors, team leaders, or others. It involves determining the highest grade of basic (mission-oriented) non-supervisory work performed that constitutes 25 percent or more of the workload of the organization. The GSSG provides instructions on how to determine that work and what work should be excluded from consideration. Work of lower level positions that primarily provide support, any work graded based on supervisory or work leader duties, work graded based on an extraordinary degree of independence from supervision, or work for which the supervisor does not have their responsibilities defined under Factor 3 is excluded.

The appellant supervises six GS-905 Attorney-Examiner (Civil Rights) positions, five at the GS-14 level and one GS-13, and one GS-986-6 Legal Technician position. He believes he should receive full credit for supervising the GS-14 staff members. The grade level of those attorneys is based on Type II cases combined with the highest level of responsibility, Level E. The agency has credited the positions with serving in a quasi-judicial function and cases are assigned with no preliminary instruction. The attorneys are independently responsible for processing cases and

retain signature authority for their decisions. The work is considered technically authoritative. While the appellant states that he reviews the subordinate judges' decisions, the record indicates this is primarily after the fact for performance evaluation purposes. The appellant states that he has imposed a requirement that dismissals, except settlements and withdrawals, come through him before release because of recurring errors. The record indicates this is a small percentage of cases, but does lessen the independence of the subordinate judges. Work of the level of independence credited for the subordinate judges, is excluded from determining the highest level of work supervised. The GSSG provides for credit at GS-13 and higher at Level 5-8, the highest level for this factor.

We credit Level 5-8 for 1030 points.

Factor 6, Other Conditions

This factor measures the extent to which various conditions contribute to the difficulty and complexity of carrying out supervisory duties, authorities, and responsibilities. The grade level of work credited under Factor 5 primarily measures the difficulty of work. Complexity is measured by the level of coordination required. Both aspects must be met fully met to credit a level.

At Level 6-5a, first-level supervision requires significant and extensive coordination and integration of a number of professional, scientific, technical, managerial, or administrative work comparable in difficulty to the GS-12 level. Supervision at this level involves major recommendations which have direct and substantial effect on the organization and projects managed. For example, supervisors at this level make major recommendations in at least three of the areas listed below:

1. Significant internal and external program and policy issues affecting the overall organization, such as those involving political, social, technological, and economic conditions.
2. Restructuring, reorienting, recasting immediate and long range goals, objectives, plans, and schedules to meet substantial changes in legislation, program authority, and/or funding.
3. Determinations of projects or program segments to be initiated, dropped, or curtailed.
4. Changes in organization structure.
5. The optimum mix of reduced operating costs and assurance of program effectiveness, including introduction of labor saving devices, automated processes, and similar methods.
6. The resources to devote to particular programs (especially when staff-years and a significant portion of an organization's budget are involved).
7. Policy formulation and long range planning in connection with prospective changes in functions and programs.

The record does not indicate that the appellant has responsibility for recommendations of the level described above.

Factor Level 6-6a describes supervision and oversight requiring exceptional coordination and integration of a number of very important and complex program segments or programs of professional, scientific, technical, managerial, or administrative work comparable in difficulty to the GS-13 or higher level. Supervision and resource management at this level involves major

decisions and actions which have and direct and substantial effect on the organizations and programs managed. Supervisors at this level make recommendations and/or final decisions about many of the management areas listed under Level 6-5a, or comparable areas. Again, the record does not show that the appellant's responsibility for recommendations/decisions found at this level.

Level 6-5b describes supervision of highly technical, professional, or administrative work at the GS-13 or above level involving matters of extreme urgency, unusual controversy, or other comparable demands due to research, development, test and evaluation, design, policy analysis, public safety, public health, medical, regulatory, or comparable implications. The appellant supervises a unit of Attorney-Examiner (Civil Rights) positions at the GS-13 and GS-14 grade levels involved in conducting and adjudicating EEO complaints from Federal employees and applicants, determining if there have been violations of law and regulations. This is comparable to Level 6-5b and is credited for 1225 points.

Summary

<i>Factor</i>	<i>Level</i>	<i>Points</i>
1. Program Scope and Effect	1-3	550
2. Organizational Setting	2-3	350
3. Supervisory & Managerial Authority Exercised	3-2c	450
4. Personal Contacts		
A. Nature of Contacts	4A-3	75
B. Purpose of Contacts	4B-2	75
5. Difficulty of Typical Work Directed	5-8	1030
6. Other Conditions	6-5b	1225
<i>Total</i>		3755

Summary

By comparison with the General Schedule Supervisory Guide, 3755 points converts to the GS-14 point range (3605 – 4050).

Decision

By comparison with both standards, the appealed position is properly classified as Supervisory Attorney-Examiner (Civil Rights), GS-905-14.