

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

Dallas Field Services Group
1100 Commerce Street, Room 441
Dallas, TX 75242

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

Appellant: [appellant]

Agency classification: General Attorney
GS-905-14

Organization: Office of Regional Chief Counsel
Region [number]
Office of the General Counsel
Department of Health and Human Services
[location]

OPM decision: General Attorney (Indian Matters)
GS-905-14

OPM decision number: C-0905-14-02

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

May 7, 2004

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).

Since this decision changes the classification of the appealed position, it is to be effective no later than the beginning of the fourth pay period after the date of this decision, as permitted by 5 CFR 511.702. The servicing human resources office must submit a compliance report containing the corrected position description and a Standard Form 50 showing the personnel action taken. The report must be submitted within 30 days from the effective date of the personnel action.

Decision sent to:

[appellant's name and address }

Director, Personnel Operations Division
Department of Health and Human Services
330 C Street, SW., Room 1100
Washington, DC 20201

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Introduction

The Dallas Oversight Division, now the Dallas Field Services Group, of the U.S. Office of Personnel Management (OPM) accepted a classification appeal from [appellant] on October 3, 2002. We received the agency's administrative report on November 19, 2002. The appellant's position is currently classified as General Attorney, GS-905-14. She believes the position should be classified at the GS-15 grade level. The position is assigned to the Office of Regional Chief Counsel, Region [number], Office of the General Counsel (OGC), Department of Health and Human Services (HHS), in [city and state]. We have accepted and decided this appeal under section 5112 of title 5, United States Code (U.S.C.).

Background information

After receiving the agency's administrative report, we granted the appellant's request for additional time to submit her response to the agency's report. Because of scheduled leave and involvement with trial work, the appellant did not provide her response until June 30, 2003. Upon a thorough review of the agency's administrative report and the appellant's response of June 30, we discovered that nearly all of the work assignments cited in those documents were completed in 1998 and 1999. When adjudicating appeals where work assignments may be protracted (for example, requiring more than a year for completion), we look at a representative cycle of work. For this appeal, we asked the appellant to provide additional information regarding cases and other assignments completed within the most recent two to two-and-a-half years. We also requested the agency to provide clarifying information regarding the appellant's official position description (PD) and to provide copies of policies and regulations mentioned in its administrative report. We received additional information from the appellant on September 26 and from the agency on November 7 and 19, 2003.

In her original appeal letter, the appellant stated that her official PD, Number [number], is "fairly accurate." She did not specify any areas where she believes the PD is not accurate. In its administrative report, the agency provided an Optional Form 8, dated November 13, 2002, and signed by the appellant's first- and second-level supervisors certifying that the PD accurately states the major duties and responsibilities of the appealed position. In the additional material the appellant submitted in response to our request, she addressed the accuracy of her PD. A PD is the official record of the major duties and responsibilities assigned to a position by a responsible management official; i.e., a person with authority to assign work to a position. A position is the duties and responsibilities that make up the work performed by an employee. Classification appeal regulations permit OPM to investigate or audit a position and decide an appeal based on the duties assigned by management and performed by the employee. We classify a real operating position, and not simply the PD. We have considered the appellant's comments within that context.

We find that the appellant's PD generally describes the major duties and responsibilities for classification purposes with the exception that it does not include representing the agency before the Equal Employment Opportunity Commission (EEOC) and stating the position serves both the [two names] Area Offices. The agency should revise the PD to more accurately reflect the duties assigned and being performed.

On November 17, 2003, we met with the appellant to discuss the work that she performs. This was followed by telephone interviews on January 12 and February 11 and 12, 2004. We interviewed the appellant's immediate supervisor on February 3, 2003. We also interviewed the former head of the Public Health Service (PHS) Branch of the HHS OGC on December 29, 2003, the acting PHS Branch Chief on January 30, 2004, and the Acting Director of the (client organization) on January 22, 2004. These individuals have first-hand knowledge of aspects of the appellant's work.

In reaching our classification decision, we have carefully considered all of the information obtained in the interviews and the written record information provided by the appellant and her agency, including the appellant's official PD.

General issues

In her letter of appeal, the appellant states that reclassification to the GS-15 grade level should be retroactive to February 28, 1999, the date she says she was first informed by an HHS official that an attorney "could not have a classification appeal." That letter stated that she learned only recently that attorneys could file classification appeals. Section 511.702 of title 5, Code of Federal Regulations, states "... the effective date of a change in the classification of a position resulting from a classification appeal decision by either an agency or OPM is not earlier than the date of the decision...." Therefore, the effective date for this OPM classification appeal decision is the date of the decision as shown on the first page of the face sheet.

The appellant stated in her appeal letter that her position is the only position in the [city] Regional Counsel's office that is funded by the [client organization]. She states that the [client organization] supports her classification appeal and that the classification specialist for that office provided an advisory opinion that the appellant's work meets the GS-15 grade level. The source of funding for a position, endorsements to support an appeal, and advisory opinions are matters that cannot be considered in determining the classification of a position. In adjudicating this appeal, our only concern is to make our own independent decision on the proper classification of the appellant's position. Therefore, we have considered the appellant's statements only insofar as they are relevant in comparing the appellant's current duties and responsibilities to OPM classification standards and guidelines. The appellant also discusses the outstanding manner in which she performs her duties. However, quality of work cannot be considered in determining the grade of a position (*The Classifier's Handbook, chapter 5*).

The appellant stated in her letter that her work meets the Case Type III and Level of Responsibility E in accordance with the procedures established in Department of Health and Human Services Circular 511-3, dated March 12, 1990. This Circular states that for classification of attorney positions at the GS-14 and 15 grade levels, in addition to the personnel office certification, a representative authorized by the General Counsel would analyze and certify, as a subject-matter expert, the case type, the level of responsibility, and that at least 25 percent of the work of the position is at that level. This circular was superceded by HHS Personnel Instruction 511-1, dated May 16, 1996. The new instruction states that "Officials with classification authority will accept a certification from OGC concerning the type of cases and the

level of independence at which the attorney is operating, and classification will be based on this certification.” The agency has certified the work of the position as Case Type II with Level of Responsibility E. However, by law, we must classify positions solely by comparing their current duties and responsibilities to OPM standards and guidelines (5 U.S.C. 5106, 5107, and 5112).

Position information

The appealed position is assigned to Region [number], one of ten HHS regional offices. The Regional OGC is headed by the Chief Counsel, an SES position. The staff of 22 Assistant Regional Counsel positions is supervised by the Principal Regional Counsel, a GS-15. According to the PD, the primary purpose of the appellant’s position is to provide full legal services to all IHS components in the [names of two areas], which include [names of four states]. There is now another attorney position assigned to the office to provide service to the [name] IHS Area. Prior to the assignment of that attorney, the appellant did provide service to both areas. The appellant serves as the legal advisor to the Director of the [client organization], the largest of 12 nationwide area offices. As the principal attorney in litigation where IHS or IHS employees are parties, the appellant reviews complaints filed against the agency and/or its employees in Federal courts, prepares memorandum of fact and law, and recommends to the U.S. Attorney whether defensive litigation should be undertaken. If litigation is undertaken, the appellant prepares briefs, opinions, affidavits, and other documents to be used by the U.S. Attorney in court. The appellant confers with or advises the U.S. Attorney’s Office on interpretations of statutes, regulations, or current case law affecting IHS programs.

The appellant represents IHS before the Merit Systems Protection Board (MSPB), answering complaints filed by IHS employees before the MSPB, preparing briefs and motions, conducting necessary discovery, and preparing witnesses for hearings before the MSPB. Although not specifically listed in the PD, she also represents IHS before the EEOC, answering complaints filed by employees, preparing briefs and motions for submission, conducting discovery and preparing witnesses, and is responsible for conduct of the hearing. In representing IHS before the Armed Services Board of Contract Appeals, the appellant answers complaints filed by contractors against IHS, prepares briefs and motions for submittal to the Board, and conducts necessary discovery. The appellant may also represent the IHS before the Interior Board of Indian Appeals, responding to complaints filed by tribal nations against IHS.

The appellant provides advisory services to the [client organization] Director, its 12 Service Unit Directors, and others in the areas of personnel law and IHS programs. This includes advising on questions involving complicated factual issues arising in the administration and operation of a broad range of IHS programs (for example, interpreting relevant Federal statutes and regulations in relation to fluid situations involving multiple parties and complex documents); reviewing or assisting in drafting correspondence for IHS managers to assure legal accuracy (for example, reviewing correspondence for the signature of the Area Director); and giving oral and written advice on proposed actions by program personnel. More specific assignments include reviewing and negotiating revisions of the funding agreements with the various tribes; providing advice and leadership for provisions of the Indian Health Care Improvement Act; attempting to resolve security issues for IHS operated sites and facilities; and providing input to amendments to the Indian Child Protection and Family Violence Prevention Act.

The position requires specialized knowledge of the Indian Self-Determination Act; Indian Health Care Improvement Act; Federal Tort Claims Act; Federal court rules; and the rules of the MSPB, EEOC, and the Armed Services Board of Contract Appeals. The appellant works under general supervision and assignments are made without preliminary instructions. She is responsible for recognizing when to discuss precedent-setting, sensitive, highly-important, or delicate matters with her supervisor.

Series, title, and standard determination

The appellant does not dispute the series and title of her position. We agree that the position is properly assigned to the GS-905 General Attorney Series. The functional title of General Attorney is appropriately assigned in light of the advisory nature of the work and the fact that it involves the preparation of cases for trial or providing technical guidance to other persons preparing cases for trial before a court or administrative body. Although the SF-50 does not assign a subject-matter title, the PD uses a title of Indian Affairs. The appropriate title listed in the GS-905 standard is Indian Matters which is to be used for positions that pertain to Indian tribal claims and related matters. Therefore, the title for the appellant's position is General Attorney (Indian Matters). The agency must correct the title of the position. The published GS-905 classification standard must be used to evaluate the grade level of the appealed position.

Grade determination

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

Factor 1, Nature of the case or legal problem

Three levels of difficulty for this factor are described in the standard: 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 service members 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 feature 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 appellant's position is based on the work assigned to and performed by the appellant. When discussing the nature of the case or legal problem, the standard points out that many, if not most, attorneys are engaged in the business of preventing litigation or other legal problems from developing, rather than resolving them once they have developed. Positions involved in preventive legal work are credited similarly to those positions involved in resolving the problems. This is the appellant's work situation. She estimates that approximately one third of her time in the past three years has involved litigation work. The remainder has primarily involved review of annual funding agreements and contracts and providing advice and support to the [client organization] Director, Service Unit Directors, and other staff. The following cases and issues represent the assignments provided by the appellant and the agency that have occurred within the past two to two-and-a-half year period.

Patterson, Mendez, and Bellonger were MSPB cases. These three employees, who made up 25 percent of the staff at the small facility, were terminated within a year. Each filed an appeal. One case was dismissed for lack of timeliness, a second employee withdrew the case, and the third employee agreed to retire in lieu of termination. The terminations resulted in protests, local media coverage, questions raised related to the management of the facility, questions raised with the State Board of Nursing, and tribal requests to remove the Chief Executive Officer (CEO) of the facility. The tribe has since filed to take over operation of the facility. *Bruno*, an MSPB case, involved a doctor hired as a general practitioner. While verifying credentials, the [client organization] found that he has a restriction on his license preventing practice as an anesthesiologist. The [client organization] terminated him stating their policy was that any license restriction prevents hiring or retention. The IHS policy was that a restriction was permissible as long as the person was not hired for or worked in the restricted area. The employee is working, pending resolution of the IHS credentialing policy. *Shelton*, an MSPB case, involved an employee who was terminated. The employee spoke out to the media, tribes, and Congressmen concerning alleged mismanagement and under-funding in the operation of the hospital. She organized people to protest at both the hospital and the Area Office. Due to procedural error, the termination was changed to a suspension. The Intertribal Health Board called for a response to the issues that Ms. Shelton had raised and called for removal of hospital management and members of the [client organization] staff for providing unsatisfactory service to the tribes. The appellant provided responses to the issues raised by the Intertribal Health Board.

Gumbs, an EEOC case, involved a physician who alleged discrimination against the CEO of the service unit for not granting him the highest amount of the Physicians Comparability Allowance. The administrative judge found no discrimination. *Shahan* involved hiring of a dental officer who did not present his credentials until his entrance-on-duty date. His application for medical staff membership and privileges were denied by the Medical Staff Executive Committee as current competency could not be established. That decision was upheld by the [client organization] Governing Body. When terminated from employment, he filed complaints with the EEOC and U.S. District Court. The EEOC dismissed the case but the court case is still pending. Because of this case, the [client organization] developed a new policy and procedures to allow for screening of credentials prior to making an offer of employment.

The appellant estimates that she has spent approximately a third of her time (up to 40 percent in 2003) reviewing annual funding agreements, reimbursement agreements, negotiations, and issues with tribes and guidance to agency officials on these issues.

Annual Funding Agreements. These are agreements between the tribal governments and the IHS under title 1, Indian Self-Determination Act contracts, or title 5, Tribal Self-Governance compacts, which provide funding for the tribes to operate the health care facility instead of the agency. These are considered contracts between the tribal government and the U.S Government and are signed by the Director of the IHS. The appellant is involved in negotiation of these documents along with Area and tribal officials. She has responsibility for legal review and the OGC approval for the 12 agreements from the [client organization] prior to signature. An agreement for one nation was rejected for failure to agree to prepayment for pharmaceuticals purchased through the IHS-operated National Services and Supply Center (NSSC). The appellant researched the laws that supported the denial. That legal opinion was also provided by the IHS Director to more than 170 other tribes that use NSSC services.

Reimbursement Agreements. The Indian Health Care Improvement Act allows for the reimbursement to IHS by private insurance companies that cover Native American workers. The appellant has been involved in working with insurance companies and pharmacies to include the IHS facilities as part of their provider networks. These agreements may be local, regional, or nationwide in scope, depending on the company. An example provided by the appellant was for the participating pharmacy agreement with the First Health Group Corporation, a national agreement.

Delaware vs. Cherokee issue. The Delaware were provided health services by the Cherokee Nation. However, the Delaware wanted to be recognized as an independent tribe by the Federal Government. They wanted to contract separately from the Cherokee for IHS funding for a diabetes program as well as receiving the funding available for newly recognized tribes. The Department of the Interior's Bureau of Indian Affairs (BIA) controls that determination, and there was a case currently in the courts. Through research, the appellant determined the Delaware had previously been recognized as a separate tribe and IHS had granted them funding for health projects. The attorney for the Cherokee attempted to involve IHS into the conflict with BIA. However, the appellant convinced him to abandon that attempt. The District Court decision recognized the Delaware, and IHS funding was approved.

Seminole issue. Through General Council action, the Seminole tribe tried to end the recognition of several bands of Freedmen (former tribal slaves) as tribal members. They amended the tribal constitution and held a subsequent election. The BIA, however, must approve tribal constitutional amendments. Because BIA had not approved the amendments, it voided the election and continued to recognize the prior chief. The tribe entered into litigation with the Federal Government. Funding made under Indian Self-Determination contracts can be granted only to the recognized tribal chief. The appellant determined that the health services contracts should be resumed by IHS at their expiration. This would avoid the hearing processes required for retrocession/re-assumption which would contribute to further discord and disruption to tribal members served. The BIA decision was upheld in U.S. District Court and tribal officials are still trying to resolve their internal disputes.

The appellant groups her remaining work into the area of legislation, policies, and other matters. The Indian Child Protection and Family Violence Prevention Act was passed several years ago, primarily as a result of situations within BIA schools. The intent was to assure that persons convicted of crimes of a violent nature would not be employed where they worked with Indian children. The law required background checks for employees and required the agencies to remove employees with such convictions if they could not be placed in other jobs. Even one misdemeanor charge from many years ago would require removal. The appellant had tried the first two of five cases from three different IHS Areas that were appealed to MSPB and subsequently to the Federal Circuit Court of Appeals. Because of this involvement, she participated with a group of attorneys to amend the law to enable the agency to consider the circumstances in individual cases with one misdemeanor offense.

The Health Insurance Portability and Accountability Act (HIPAA) includes provisions for the establishment of standards for the protection of personal medical records. The appellant is part of a Headquarters-level committee to implement HIPAA compliance, developing policies and forms for use by IHS facilities nationwide.

The appellant is also involved in recovery of costs resulting from treatment of individuals when a third-party is responsible. This aspect of the Federal Medical Care Recovery Act work now occupies less of her time since the establishment of a computer program and the hiring of an OCAIHS employee to assist her.

The appellant has developed policies for the [client organization] that have been adopted by other IHS Areas. One involves the policy and procedures for the advanced screening of credentials of health care providers in advance of an offer of employment, as discussed earlier. Another related to dealing with violent behavior or conduct by patients or visitors to their facilities. This required the appellant to research the local service unit director's authorities pertaining to suspension of a patient's medical privileges. The disclosure of outcome of care to the patient resulted from a Joint Commission of Accreditation of Hospital Organizations (JCAHO) requirement. The PHS Branch staff requested the appellant prepare a circular explaining the policy and procedures. The appellant indicated these have been adopted by other IHS Areas.

Security issues. The [client organization] system operates a mixture of IHS and contracted facilities located on tribal, Federal, or State lands. When such facilities are under exclusive Federal jurisdiction, only the FBI or U.S. Marshals Service has authority to respond to calls for assistance. They are often not available in a timely manner for the safety and security of the facilities, patients, and staff. The appellant has worked with the Congressmen to get concurrent jurisdiction so local law enforcement can provide assistance in emergency situations. She is also exploring ways to obtain security through the Federal Protective Service.

The assignments described are most comparable to Type II; i.e., difficult legal issues, problems affect economically, socially, or politically a significant segment of private or public interest, or large sums of money are involved. While the personnel cases involving issues between the tribes, the facility, and allegations against agency officials are sensitive, they do not reach the level of Type III in impact, e.g., substantially broadening or restricting the activities of an agency. The issues surrounding the Delaware vs. Cherokee and the Seminole cases were disputes within the tribes. Because of the tribal suits against the Department of the Interior in both cases, there was some level of involvement and coordination with the OGC PHS Headquarters staff. However, the appellant, as the local attorney, had primary responsibility. The IHS was not involved in the law suit. Although of concern beyond the Area Office, the issues do not fully meet the intent of Type III in terms of nationwide impact, e.g., substantially affecting the development of a major body of administrative regulations such as Department of Defense procurement regulations. While funding agreements may tend to contain similar wording and the PHS attorneys may provide some guidance as to new issues to watch for, great care must be taken to assure they do not commit the agency beyond the scope of its authority and that funds are awarded appropriately. These funding amounts are large; the largest is approximately \$41 million. Adjusted for inflation, the purchasing power of the \$1,000,000 in 1959 equates to about \$6,182,000 in 2002, according to Bureau of Labor Statistics figures. However, these are not amounts that are considered at risk, as in litigation cases. They are a transfer of funding from the agency to the tribal government. The agreements are not as vigorously contested or of the nationwide interest as the intent of Type III, e.g., a major antitrust case. We do not find this work meets Level III as described in the standard.

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 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.

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 reviewing 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 regulations implementing new or amended legislation for the agency. One example includes acting as principal attorney in charge of the preparation and presentation of cases before administrative tribunals or before trial or appellate courts where the cases are of such scope that they may warrant the assistance of one or more attorneys and are of such importance that they frequently involve matching professional skills against some of the most distinguished and highly paid legal talent in the country. Another describes acting as legal counsel to the head of a major operating program of the department or agency, responsible for advising on questions of law or administrative policy on the operations of the organization and its contacts with industry, private and professional associations, State, local, or foreign government, or the general public.

The appellant serves as the legal counsel for the Director of the [client organization], the largest of the 12 area offices within the IHS, serving a population of 281,000 American Indians from 37 different tribes in [two states], and portions of [a third state]. The [client organization] is organized into 12 Service Units that operate 7 hospitals and 40 outpatient health centers. Four of the 7 hospitals are operated by the agency as are 14 of the health centers. The remainder are contracted or compacted by the tribes under the Indian Self-Determination Act. The Area employs approximately 1,500 employees in medical and support occupations plus additional PHS Commissioned Corps positions. The Area serves 25 to 30 percent of the whole IHS patient population with a total funding of \$375 - \$385 million dollars, with approximately an even split between the agency and the tribes. This office is considered a major operating program of the IHS. The appellant is responsible for advising on questions of law or administrative policy for the operations of the [client organization] and its contacts with the various tribal governments, other health care providers, insurance companies, and other Federal and State agencies. She prepares cases and conducts litigation before administrative tribunals and presents information to the U.S. Attorney when appropriate on behalf of the [client organization]. The agency has credited Level E and we concur in that determination.

Supervision and guidance received

Level E states that attorneys at this level are expected to carry out assignments within their area of responsibility without preliminary instruction. At the time of assignment, the supervisor *may* discuss the significance of a problem and give background information. From this point, the incumbent independently conducts the investigation or negotiation, plans the approach, and develops the completed product; or represents the Government in the hearing or trial. When a hearing or trial is involved, the supervisor may be briefed on the approach to be taken or line of

argument to be pursued, especially where precedent effect is anticipated or there is widespread public interest in the outcome. Completed work in the advisory or legislative and regulatory areas is reviewed before it is signed out for consistency with agency policy, possible precedent effect, and for overall effectiveness.

The appellant operates with the level of independence typical of Level E. She works directly with the [client organization] Director to provide advice and assistance on problems or potential problems, negotiates with tribes concerning funding agreement contracts, prepares cases and conducts hearings before the MSPB and EEOC, and prepares cases for presentation to the U.S. Attorney's Office for those cases within the Federal court system. She does determine whether to appeal cases where unfavorable decisions were made. The agency has credited Level E and we concur.

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 with appropriate recommendations. They advise negotiating officials in contractual matters by recommending clauses, provisions, and general wording; participate in conferences with representatives 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 staffs in drafting legislation or giving expert testimony before Congressional hearings on legislative proposals; (3) trying cases before courts or administrative bodies.

The appellant, in her role as the legal advisor to the Area Director, has regular contact with the Director and his senior leadership staff, including the Area's Chief Medical Officer, Service Unit Directors, and administrative and program officers. She is involved in negotiations with tribal government officials and their attorneys. She consults and coordinates with the PHS Headquarters attorney on questions regarding policy and new or proposed legislation, providing input and/or comments and assistance, as requested. The appellant maintains contact with the other IHS Regional attorneys to share information to assure consistency among Areas. The appellant's regular contacts exceed Level C; however, they do not fully meet Level E. Level E cites administrative hearings and appearing before court without specifying the contacts or distinguishing them from Level C hearings and court contacts. The standard describes increasing levels of difficulty, and Level E must be viewed as referring to the most difficult level of contacts found at hearings for cases of Level E scope and complexity. Although the appellant represents the Area at all stages of litigation, either through administrative bodies or courts, those

cases are not of the most difficult level as defined at Level E. Her regular contacts do not meet the level of the second example, e.g., advising Congressional committees in drafting legislation or giving expert testimony before Congressional hearings. Because her contacts with the agency and tribal governments do not fully meet the intent of Level E, we credit Level D.

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 appellant's legal advice is given directly to the Area Director and tribal officials. She negotiates and reviews funding agreements between the agency and the tribes. The appellant performs the final legal review before they are sent forward for signature by the Director of the Indian Health Service. She is responsible for recognizing when matters may be precedent setting or have such importance as to require clearance with the PHS attorney's staff. The appellant's recommendations are comparable to those described at Level C; however, she provides them directly to the Area Director or the PHS attorney for those assigned projects. While the appellant is responsible for recognizing precedent-setting matters, the record does not show assignments of the scope and complexity fully comparable to those described in Level E. Because this element does not fully meet the intent of Level E, we credit Level D.

Summary of Factor II

Our crediting of two elements at Level D and two elements at Level E for this factor results in a borderline situation. The standard 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 recognizes 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 standard. 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.

In her appeal letter, the appellant raised the issue of the effect of her individual stature in the legal profession on the classification of her position. She believes that her expertise in employment law and the provisions of the Federal Medical Care Recovery Act (FMCRA) has resulted in achieving outstanding stature in these two areas. She indicates that other attorneys within the agency often seek her advice on employment law and recognize her opinion as authoritative and that the Department of Justice has requested her as an instructor for its Employment Law and Advanced Employment Law Seminars. The appellant states that she oversaw the design and implementation of a computerized system for FMCRA reimbursement that is being offered nationally to all IHS facilities. She also states that she has become known as an expert on FMCRA and is frequently consulted by IHS attorneys and tribal attorneys and is called upon to provide seminars and speeches nationwide regarding FMCRA reimbursement.

The agency's evaluation acknowledges the appellant is a talented litigator and recognizes her expertise in employment law and FMCRA recoveries. It also states that she provides expert legal assistance to IHS officials in the Area and at the headquarters level on issues related to Indian law, contract law, health law, and other issues. We find these areas of responsibility combined with the nature of the appellant's work in dealing with sovereign tribal entities and their sometimes difficult relationship with the Federal Government are aspects that have not been fully addressed in our evaluation of this factor of the standard. For these reasons, we assign Level E for this factor.

Summary

By application of the Grade-Level Conversion Chart in the GS-905 PCS, a Type II Level E position converts to grade GS-14.

Decision

The appealed position is properly classified as General Attorney (Indian Matters), GS-905-14.