

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

Appellant: [Names of Appellants]

Agency classification: Diversion Investigator
GS-1801-13

Organization: Drug Taskforce/ Field Division
Office of Diversion Control
Drug Enforcement Agency
U.S. Department of Justice
[Location]
[Location]

OPM decision: GS-1801-13
Title at agency discretion

OPM decision number: C-1801-13-03

/s/ Ana A. Mazzi

Ana A. Mazzi
Deputy Associate Director
Merit System Audit and Compliance

7/19/2010

Date

As provided in section 511.612 of title 5, Code of Federal Regulations (CFR), this decision constitutes a certificate which 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 (Introduction)*, appendix 4, Section G (address provided in appendix 4, section H).

Decision sent to:

[Appellant 1]

[Appellant 2]

[Appellant 3]

[Appellant 4]

[Appellant 5]

Department of Justice

Drug Enforcement Administration

[City] Division Office

[Address]

[Location]

Department of Justice

Drug Enforcement Administration

[City] Division Office

[Address]

[Location]

[Name], HR POC

Chief, Classification and Support Staff

Department of Justice

Drug Enforcement Administration

[Address]

[Location]

[Name]

Director, Human Resources

U.S. Department of Justice

Drug Enforcement Administration

700 Army Navy Drive

W-12020

Arlington, VA 22202

Director, Human Resources

U.S. Department of Justice

JMD Personnel Staff, Room 1110, NPB

1331 Pennsylvania Avenue, NW

Washington, DC 20530

Introduction

On June 30, 2008, Chicago Oversight of the U.S. Office of Personnel Management (OPM) accepted a group classification appeal from, [Names of Appellants]. The appellants occupy identical additional positions (hereinafter referred to as position) currently classified as Diversion Investigator (DI), GS-1801-13. The appellants believe it should be classified as Criminal Investigator, GS-1811-13. The appellants' position is located in the Field Division, Office of Diversion Control, with the Drug Enforcement Administration (DEA), in the U.S. Department of Justice. [Names of Appellants], are employees with the [City] Division Office in [Location], while [Appellant 4] is with the [City] Resident Office in [Location]. [Appellant 1] and [Appellant 2] are presently assigned to the Tactical Diversion Squad (TDS) in [Location]. We have accepted and decided this appeal under section 5112 of title 5, United States Code (U.S.C.).

Background

The appellants perform essentially identical duties and are assigned to the same official standard position description (PD), number [#####]. Four of the appellants originally filed individual appeal requests with OPM on June 18, 2008. The fifth appellant in [Location], subsequently filed a separate claim. The appellants agreed to move forward in the form of a group appeal and [Appellant 1] was designated as the lead appellant for purposes of fact-finding and correspondence.

As a result of the issuance of the 1800 Job Family Standard (JFS) for Administrative Work in the Inspection, Investigation, Enforcement, and Compliance Group, 1800 on March 30, 2009, we asked the agency for a comprehensive evaluation using the new JFS on April 21, 2009. We received the PD (number [#####]) and new evaluation statement from the agency on July 30, 2009. The agency applied the new JFS without any change except for adding a policy statement restricting DIs from performing criminal investigation work.

On September 21, 2009, the lead appellant notified OPM that neither she nor any of the other appellants had received a copy of the new PD. Our September 29, 2009, letter to the agency asked for clarification concerning new agency policy language stating the DIs were not to perform criminal investigative work. We subsequently requested a representative case summary list from the lead appellant to support her classification request which we received on April 6, 2010.

General issues

The appellants do not agree that their PD is accurate. A PD is the official record of the major duties and responsibilities assigned to a position or job by an official with the authority to assign work. The duties and responsibilities of a position make up the work performed by the employee. Classification appeal regulations permit OPM to investigate or audit a position and decide an appeal based on the actual duties and responsibilities currently assigned by management and performed by the employee. An OPM appeal decision classifies a real operating position and not simply the PD. Therefore, this decision is based on the work currently assigned to and performed by the appellants.

Based on our fact-finding, we find the appellants' PD, which covers the major duties and responsibilities performed by the appellants, is adequate for purposes of classification, and incorporate it by reference into this decision.

The appellants asked us to conduct a desk audit of their position. There is no right to a hearing or audit in the classification appeal process. We give the agency and appellants a full opportunity to send us any pertinent written material. We typically conduct desk audits when we determine that the development of facts sufficient to allow us to make a sound classification decision require an on-site desk audit. In this case, we found the record furnished sufficient information when augmented by telephone audits and interviews to clarify the major duties assigned to and performed by the appellants.

The appellants also mention that they were never officially assigned to the new PD when it was reclassified by the agency to apply the new 1800 JFS which had been issued by OPM in March 2009. The agency states it did not notify the appellants or the supervisors of the new PD and the evaluation applying the new 1800 JFS because they said they did not change the PD number or the major duties of the position. The appellants make various other statements about their working conditions, their agency, and its evaluation of their position. In adjudicating this appeal, our responsibility is to make our own independent decision on the proper classification of their position. By law, we must make that decision solely by comparing their current duties and responsibilities to OPM standards and guidelines (5 U.S.C. 5106, 5107, and 5112). Therefore, we have considered the appellant's statements only insofar as they are relevant to making that comparison. Because our decision sets aside all previous agency decisions, the appellants' concerns regarding their agency's classification review process are not germane to this decision.

The lead appellant states she knows of other DIs who have been approved for law enforcement retirement based on criminal investigations they have conducted. The appellants believe their past and current performance of criminal investigative work entitles them to the special retirement advantages under the Federal Employees Retirement System (FERS) for Federal "law enforcement officers" (LEO). However, retirement eligibility is not covered by OPM's classification appeal regulations under section 5112 of title 5, United States Code (U.S.C.). This is directly addressed on page 8 of the 1800 JFS:

Position classification and law enforcement officer (LEO) retirement coverage decisions are entirely separate from one another. While LEO retirement coverage eligibility determinations may involve some of the same factual matters considered in position classification determinations, the two matters have entirely separate criteria under which a determination is made. LEO retirement coverage determinations are made under regulations found at 5 CFR Part 831, Subpart I, and Part 842, Subpart H. LEO retirement coverage eligibility allowances generally may be made only by the agency head, and staff actually involved in the decision making process who are aware of the eligibility criteria.

Position information

Under the authority of the Controlled Substance Act of 1970, as amended, DEA, through the Office of Diversion Control (OD) regulates the manufacture and distribution of controlled substances in the United States. By law, DIs investigate DEA registrants for criminal violation of Federal law for prosecution and criminal conviction. DEA is funded by the fees paid by the registrants who are pharmaceutical firms and supplier, doctors, pharmacies, and other healthcare related organization.

Under title 21 of the Code of Federal Regulations (CFR), regulatory control is designed to prevent the diversion of legitimate pharmaceutical drugs to illegal channels and also to ensure that there is a sufficient supply for legitimate medical uses. This includes preventing the diversion of pharmaceutical drugs and disrupting the illegal production of controlled substances by preventing the diversion of chemicals used to make illegal drugs such as cocaine, heroin, methamphetamine, and MDMA (Ecstasy), etc.

All duties performed by the appellant's are reviewed and authorized by DEA management, from the Group Supervisor to the Special Agent in Charge. This includes the review and approval of operation plans necessary to execute search warrants, seizures, arrests, and criminal convictions. The appellants serve as lead or senior investigators. They plan, conduct, and coordinate investigations resulting in administrative, civil, or criminal judgments, sanctions, and penalties, and perform the full range of case development duties. They concentrate on criminal diversion by DEA registrants. They must possess an in-depth, current knowledge of trends in the registrant community that may develop in reaction to social or economic conditions, or pressure exerted by the diversion program. The appellants conduct investigations of manufacturers and distributors, importers and exporters, researchers, narcotic treatment programs, medical practitioners, mid-level practitioners, and pharmacies. They are required to exercise resourcefulness, versatility, ingenuity, and originality in planning and organizing major investigations of violations of Federal drugs laws.

The appellants also plan and conduct investigations of potential diversion of controlled pharmaceuticals and controlled chemicals. Investigations are conducted within the scope of Federal drug laws and in accordance with agency rules, policies, and regulations. Investigations are directed toward ensuring the registrant community understands, is in compliance with, and/or takes corrective action to become compliant with governing laws and regulations. This investigator is charged with preventing, identifying, and taking corrective action on the diversion of controlled substances and listed chemicals for public health and safety. Their subjects are typically registrants who are doctors, pharmacists, nurses, and family members.

Their work cycle is usually 18 months to three years to bring a case to prosecution. The appellants have jurisdiction over [State] and parts of [State], and may travel anywhere suspects, suppliers, and witnesses may reside whose depositions are related to a case. They keep their immediate supervisor informed of progress and significant developments.

Series, title, and standard determination

The appellants believe their position should be classified in the 1811 series because of their work performing criminal investigative work related to the diversion program.

The GS-1811 series covers positions which supervise, lead, or perform work involving planning, conducting, or managing investigations related to alleged or suspected criminal violations of Federal laws. The work involves (1) recognizing, developing, and presenting evidence to reconstruct events, sequences, time elements, relationships, responsibilities, legal liabilities, and conflicts of interest; (2) conducting investigations in a manner meeting legal and procedural requirements; and (3) providing advice and assistance both in and out of court to the U.S. Attorney's Office during investigations and prosecutions. Work in this series primarily requires knowledge of criminal investigative techniques, rules of criminal procedures, laws, and precedent court decisions concerning the admissibility of evidence, constitutional rights, search and seizure, and related issues in the conduct of investigations. This includes knowledge of criminal investigative techniques, such as protective surveys and assignments, surveillance, and undercover work; the evidence required to prove a crime was committed; the jurisdiction of various agencies; sources of information and how to develop them (e.g., informants, surveillance, and undercover work); electronic countermeasures and the latest technological advances used by criminals and investigators; and decisions and precedent cases involving, but not limited to, rules of evidence, search and seizure, and detention and arrest. As discussed in the GS-1811 qualification standard which must be met for placement in a GS-1811 position:

The duties of positions in this series require moderate to arduous physical exertion involving walking and standing, use of firearms, and exposure to inclement weather. Manual dexterity with comparatively free motion of finger, wrist, elbow, shoulder, hip, and knee joints is required. Arms, hands, legs, and feet must be sufficiently intact and functioning in order that applicants may perform the duties satisfactorily. Sufficiently good vision in each eye, with or without correction, is required to perform the duties satisfactorily. Near vision, corrective lenses permitted, must be sufficient to read printed material the size of typewritten characters. Hearing loss, as measured by an audiometer, must not exceed 35 decibels at 1000, 2000, and 3000 Hz levels. Since the duties of these positions are exacting and responsible, and involve activities under trying conditions, applicants must possess emotional and mental stability. Any physical condition that would cause the applicant to be a hazard to himself/herself, or others is disqualifying.

It is DEA's position that DIs are not "front-line" law enforcement officers or criminal investigators. While the agency acknowledges the DIs' important role in the agency mission, it notes that the DIs do not place themselves in harm's way as Criminal Investigators do. In addition, through its policy and procedures, the agency seeks to prevent the DIs from being directly in harm's way. Furthermore, when they are in a crime area or in a difficult situation, they should be covered by an agent or officer who can handle a weapon.

The agency states that written DEA policy since as early as 1977 has specifically prohibited the DI workforce from undercover activities of any kind, execution of arrest or search warrants, conducting surveillance (moving or stationary), and developing or paying informants. DIs typically concentrate their investigative efforts on DEA registrants rather than the traditional

realm of criminal activity. DIs must obtain the support of DEA Criminal Investigators/Special Agents or state/local police officers to perform law enforcement functions needed to develop evidence of criminal violations identified during compliance investigations.

On October 1, 2009, local Diversion Program (DP) management issued guidelines that restated the primary emphasis of the DP will be on regulatory investigations. Workplan assignments will now conform with national policy to refer all active criminal cases not in judicial status to the TDS groups. In offices that do not have TDS group coverage, all criminal cases, except for those cleared by DPM, will be referred to the appropriate Federal, State, or local agency. DI's were permitted to provide assistance in a criminal investigation if requested by a DEA enforcement group or other agency, but that assistance must be clearly defined in both scope and length of commitment to minimize the negative effect on regulatory assignments.

The record shows that the appellants perform much work typically covered by the Criminal Investigation Series, GS-1811. Many of the appellants' cases clearly involve felonies, violations of Federal law, extend over other Federal and civil jurisdictions, involve large monetary values, and extend for periods of weeks, months, or even years. The appellants' primary duties flow from DEA's mission and the function of the field organization to which they are assigned. Specifically, the appellants' primary duties involve planning and overseeing stationary surveillance operations. This entails conducting initial research on the assigned target; analyzing information for its relevance, significance, and applicability to the assignment; and preparing reports on surveillance findings. To perform these duties, the work requires knowledge and skills pertaining to investigative fact-finding and reporting clearly aligned with the 1800 group. DI case management responsibilities cover the full range of case development, including organizing a case, deciding which leads to follow, developing facts or evidence, conducting interviews and interrogations, filing warrants, keeping adequate records, preparing and presenting a case to the prosecutor, testifying in court, etc.. These functions typically are assigned to and performed by positions assigned to the 1811 occupation.

However, as the GS-1800 JFS states, employees in other occupations, both in this job family and in other families and occupational groups, may use some of the tools and techniques used in criminal investigations work. For example, GS-083 police officers and detectives serve warrants, travel across state lines, and contact local and State authorities to obtain and/or provide background information on suspects. GS-1896 border patrol agents may develop, evaluate, use, and control informants. Border patrol agents use standard investigative techniques, such as interviewing witnesses, searching records and databases, conducting surveillance, and analyzing intelligence information. Border patrol agents conduct interviews, interrogations, searches, seizures, and arrests in compliance with laws and precedents regarding the rights of citizens and aliens. Border patrol agents are authorized to execute warrants and other processes issued under laws regulating the admission, exclusion, or expulsion of aliens; administer oaths; take statements; and take and consider evidence.

In her original appeal request, the lead appellant states that although her duties as a DI do not authorize her to carry a firearm, execute arrest or search warrants, or perform undercover activities or moving surveillance, she accompanies GS-1811 special agents performing these

tasks. She says the assistance provided by these agents in these areas account for a minimal amount of time expended in diversion investigations.

Nonetheless, GS-1811 work specifically requires knowledge of investigative techniques such as surveillance and undercover work, information sources and how to develop them, and electronic countermeasures and the latest technological advances. Thus, the appellants' position does not require applying the full scope of knowledge and skills, nor do the appellants carry out all of the required duties typical of positions classified in the GS-1811 series because, as previously stated, agency policy restricts the performance of any or all duties that require full law enforcement authority such as making arrests, executing search warrants, conducting undercover activities, or conducting surveillances. Consequently, the GS-1811 series is not appropriate for the appellants' position.

In conclusion, we find the appellants' position properly placed in the GS-1801 series, which covers all classes of positions supervising, leading, or performing inspection, investigation, enforcement, or compliance work is appropriate when the position (1) is covered by two or more administrative occupations in the GS-1800 group and no one occupation predominates; or (2) is consistent with this group but not covered by an established series in the 1800 group. Since the appellants' position is consistent with the 1800 occupational group, but is not covered by any of the established series, the position is properly classified to the GS-1801 series. This series does not have prescribed titles, so the agency may assign a title following the guidance in Section III H 2 of the *Introduction to the Position Classification Standards*.

Grade determination

The 1800 JFS uses the Factor Evaluation System (FES) format, which requires assigning factor levels and accompanying point values for each of the nine factors, and converting the total to a grade level against the grade-conversion table provided in the standard. For a position to warrant a given point value, it must be fully equivalent to the overall intent of the selected factor-level description. If the position fails in any significant aspect to meet a particular factor-level description, the point value for the next lower factor level must be assigned, unless an equally important aspect that meets a higher level balances the deficiency.

The agency assigned Factor Levels 1-8, 2-4, 3-5, 4-5, 5-4, 6-3, 7-c, 8-1, and 9-1. The appellants agree with all assigned levels except Factors 8 and 9. After careful review, we concur with the agency's evaluation of Factors 1 and 2 and 4 through 7. Our evaluation using the March 2009 JFS follows. We will limit our analysis to Factors 3, 8, and 9.

Factor 3, Guidelines

This factor covers the nature of guidelines and the judgment employees need to apply them.

At Level 3-4, the employee uses administrative policies and precedents which are applicable but stated in general terms. Guidelines for performing the work are scarce or of limited use. The employee uses initiative and resourcefulness in deviating from established methods to address specific issues or problems; identify and research trends and patterns; develop new methods and criteria; or propose new policies and practices.

At Level 3-5, the employee uses as guidance basic legislation, judicial rulings, and broad policy statements which are often ambiguous and require extensive interpretation. There are frequently no comparable precedents to use as a guide. The employee uses considerable judgment and ingenuity to interpret the intent of new or revised guidance and develops policy, guidelines, and practices for specific areas of work.

Like Level 3-4, the appellant's guidelines include general policies and planning objectives from DEA management which provide policy guidance with regard to enabling legislation. This guidance is general and requires interpretation to deal with specific assignments. The position does not fully meet Level 3-5 which relates primarily to positions engaged in policy development. The 1970 CSA and related legislation provide for the investigation of violations of distribution of legal drugs and chemicals by defining prohibited acts and criminal penalties. Implementing regulations were subsequently issued by DOJ and DEA to implement these various laws. At DEA, the Office of Diversion Control is the policy unit responsible for legislation and the subsequent implementing regulations. During our fact-finding, we learned that a committee of senior DIs gets together once or twice a year or so to discuss legislation and to make input to policy changes by the Office of Diversion Control. However, the DIs do not directly write those policy statements. Given the limited amount of the work time the appellants spend on these functions, they cannot be construed as regular and recurring with sufficient frequency to control the evaluation of this factor. Furthermore, proposing new policies and practices is specifically addressed at Level 3-4.

Level 3-4 is credited for 450 points.

Factor 8, Physical demands

At Level 8-1, the work is mainly sedentary, but may require some travel, walking, bending, and carrying lightweight items, such as briefcases, notebooks, and work papers.

The appellants disagree that their work is mainly sedentary, as they say they are regularly required to leave the office to perform duties in support of a criminal investigation. In addition to duties normally performed sitting at a desk, the work involves occasional visits to industrial, commercial, construction, agricultural, and other business establishments.

However, the appellants' role in surveillance does not rise to the recurring physical demands intended at Level 8-2. It also does not meet Level 8-2 where the employee may be required to remain in one location for many hours without relief or where the work can require frequent and recurring surveillance in which there is a considerable amount of walking, stooping, bending, and climbing.

Therefore, Level 8-1 is credited for 5 points.

Factor 9, Work environment

At Level 9-1, the work area is usually an office setting with adequate lighting, heating, and ventilation. The work environment involves everyday risks or discomforts requiring normal safety precautions. The employee may occasionally be exposed to uncomfortable conditions in facilities, such as production facilities and warehouses.

The appellants say their PD fails to address the conditions in which they conduct a majority of their interviews with registrants. The appellants say that in performing their duties, they are regularly put in “harm’s way”, particularly when conducting interviews in a doctor’s office, a pharmacy, chemical company, or pharmaceutical manufacturing plant.

The work does not involve the moderate risks described at Level 9-2, nor require special safety precautions or protective clothing or gear. Work at this level is mostly performed in settings such as: outdoors, on land or at sea, in all types of weather; at dockside on fishing vessels during catch-landing operations; at fish processing houses; on board aerial or surface patrol craft; at ports of entry; or at cold storage facilities and warehouses. The work involves exposure to such conditions as: moderate discomfort, high noise levels, dust, auto and aircraft exhaust, or adverse weather, such as hot, cold, wet, or dry climates; people and animals with contagious diseases, such as tuberculosis, hepatitis, or HIV/AIDS; and hazardous chemicals, herbicides, carcinogens, or pesticides used in packaging and preservatives used for international shipment; potentially dangerous machinery, equipment, and products; or areas with high crime rates.

The work also does not involve a high risk of exposure to potentially dangerous and stressful situations as described, such as high-speed vehicle pursuits or boarding moving trains and vessels; involvement in physical altercations or the use of lethal weapons while attempting to arrest suspects found at Level 9-3. If these situations happen to occur, the appellants would be under the protection of other agency personnel who would be armed. Such situations would not be a regular and recurring part of conducting interviews at a doctor’s office or the other sites listed by the appellants.

Therefore, Level 9-1 is credited for 5 points.

Summary

<i>Factor</i>	<i>Level</i>	<i>Points</i>
1. Knowledge Required by the Position	1-8	1550
2. Supervisory Controls	2-4	450
3. Guidelines	3-4	450
4. Complexity	4-5	325
5. Scope and Effect	5-4	225
6.& 7. Personal Contacts and Purpose of Contacts	3-C	180
8. Physical Demands	8-1	5
9. Work Environment	9-1	<u>5</u>
<i>Total</i>		3190

A total of 3190 points falls within the GS-13 range (3155 to 3600) on the JFS's grade conversion table.

Decision

The appellants' position is properly classified as GS-1801-13. The title is at the agency's discretion.