

OFFICE OF PERSONNEL MANAGEMENT
MERIT SYSTEMS OVERSIGHT AND EFFECTIVENESS
DALLAS OVERSIGHT DIVISION
CLASSIFICATION APPEAL DECISION

Under section 5112(b) of title 5, United States Code

Appellant: [appellant's name]

Position: Hearing Officer, GS-930-13
Position Number: NA0541

Organization: [location] Regional Office
Associate Director for Hearings
National Appeals Division
U.S. Department of Agriculture

Decision: GS-930-13; title at discretion of agency
(Appeal denied)

OPM Decision Number: C-0930-13-01

Prepared by:

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Personnel Management Specialist

Approved by:

/s/ Bonnie J. Brandon
Bonnie J. Brandon
Classification Appeals Officer

5/31/96
Date

Copy of decision sent to:

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INTRODUCTION

The position is presently assigned to the [location] Regional Office of the National Appeals Division (NAD) of the U.S. Department of Agriculture (USDA). The position is currently classified as Hearing Officer, GS-930-13. The appellant requests the position be classified at the GS-14 grade level and entitled "Administrative Hearing Judge."

This appeal is filed with our office under the provisions of chapter 51, title 5 of the United States Code. This is the final administrative decision of the Government, subject to discretionary review only under the conditions and time limits specified in title 5 of the Code of Federal Regulations, sections 511.605 and 511.613.

GENERAL ISSUES

The appellant provides his rationale for requesting an upgrade and title change. Among other things, he compares his current position to two other positions, one at the GS-13 grade level and the other at the GS-14 grade level. In so doing, he fully explains his belief that his position functions at a higher level than the GS-13 Agricultural Program Specialist/Hearing and Appeals Officer position and functions at an equivalent, or higher, level than the current GS-14 Appeal Officer position. While this provided us useful organizational information, we cannot consider the classification of other positions as a basis for deciding the classification of the appellant's position. Classification law (section 5107 of title 5, United States Code) requires that each position be classified in conformance with standards and guides published by the Office of Personnel Management (OPM). This means that positions are classified only by comparison to classification standards and guides and not by comparison to other positions.

POSITION INFORMATION

The position is assigned to the [location] Region of the NAD. The NAD was established by Public Law 103-354 of October 1994. At that time, hearing staff from four different USDA entities were transferred and merged into the NAD. These four entities, or agencies, were the Agricultural Stabilization and Conservation Service, Federal Crop Insurance Corporation, Farmer's Home Administration, and Soil Conservation Service. The NAD was established to adjudicate administrative appeals under various programs managed by the four agencies. Reorganizations since October 1994 have changed the number, names, and functions of these original four agencies. The NAD is still responsible for handling appeals relating to the same basic programs which now may be under differently named agencies or services than before. The NAD is comprised of the national office and three regional offices.

The appellant, along with other hearing staff, adjudicates cases that come before the NAD involving a wide range of decisions made by the agencies. His cases are appeals

initiated by persons contesting adverse decisions made by the agencies. The agencies' decisions concern matters such as crop insurance, servicing of accounts, debt settlement, granting of relief, and conservation issues. The appellant conducts evidentiary hearings involving the two opposing sides, rules on motions and objections, develops and maintains an official appeal record, and issues determinations. His decisions and established record are of the quality to pass the scrutiny of an administrative and judicial review. The appellant's position functions independently under the immediate supervisor, the Regional Director.

SERIES AND TITLE DETERMINATION

The GS-930 Hearings and Appeals Series includes positions that involve the adjudication of cases that typically include the conduct of formal or informal hearings that accord appropriate due process, arising under statute or under the regulations of a Federal agency when the hearings are not subject to the Administrative Procedure Act; or involve the conduct of appellate reviews of prior decisions. The work requires the ability to review and evaluate investigative reports and case records, conduct hearings in an orderly and impartial manner, determine credibility of witnesses, sift and evaluate evidence, analyze complex issues, apply agency rules and regulations and court decisions, prepare clear and concise statements of fact, and exercise sound judgment in arriving at decisions. The work of the appellant's position clearly falls within the GS-930 series. The appellant expresses no disagreement with this series determination, and we agree that the GS-930 series is appropriate for his position.

The appellant disagrees with the current title, Hearing Officer. He believes this title is not as descriptive as it should be. The appellant maintains that Administrative Hearing Judge is a more accurate, descriptive title for the position. He reasons that the work of the position is that of a judge and is very similar to the work of a Federal Administrative Law Judge, without the requirement for a law degree. Since the GS-930 series does not have prescribed titles for covered positions, the agency is authorized to use its discretion in titling its positions within this series. In using such discretion, the agency should designate titles that are short, meaningful, and generally descriptive of the work performed. In this case, we find that the agency's title of Hearing Officer is acceptable.

GRADE LEVEL DETERMINATION

The GS-930 series does not contain grade level criteria. Positions covered by this series are evaluated by reference to other OPM standards that include work similar to the subject position. A nonprofessional position, such as the appellant's, is not usually evaluated against a standard for professional positions, which are positions with a positive education requirement. In this case, however, the GS-905 General Attorney professional standard provides the best source of grade level criteria for evaluating the appellant's position. Among other kinds of work, the GS-905 standard covers work

involved in hearing cases arising under contracts or under the regulations of a Federal agency when such regulations have the effect of law, and rendering decisions or making recommendations for disposition of such cases. This GS-905 work is similar to the work of the appellant's position, involving comparable processes, functions, responsibilities, and difficulties. The knowledge, skills, and abilities required for the appellant's position are similar to those required by GS-905 work, but not the same. The appellant's work does not involve a positive education requirement or admission to the bar, as does the GS-905 work. Nonetheless, the appellant's work is appropriately graded by the criteria provided in the GS-905 standard. The appellant's position description is adequate for classification purposes.

Although the agency supplemented its grade evaluation of the appellant's position by using the Primary Standard, our decision does not apply this standard to the subject position. *The Classifier's Handbook* explains that the Primary Standard, written in the Factor Evaluation System (FES) format, may be used for supplemental guidance and cross comparisons, but only in conjunction with other FES standards. Since the GS-905 standard is written in narrative format and not FES format, it is inappropriate to apply the Primary Standard in connection with this standard.

The GS-905 standard provides a number of elements which together determine the difficulty and responsibility of positions. These elements fall under two main factors: (1) Nature of Cases or Legal Problems and (2) Level of Responsibility. The following is our evaluation of the appealed position through application of the criteria set forth in each factor.

Nature of Cases or Legal Problems

This factor incorporates all those elements in a case or problem that tend to make it more or less difficult to resolve satisfactorily. Among these elements are such things as complexity of legal and factual issues, impact of the case or problem, importance of the case or legal action as a legal or administrative precedent, nature and availability of precedent decisions, delicateness of the problem, public interest, amount of money involved, and nature of the competition. This factor is measured by reference to three broad categories or types of cases or problems. The agency previously determined that the nature of the appellant's cases was equivalent to Type II, and the appellant agrees with this evaluation. Since we also agree with the agency's determination, this factor will not be discussed further.

Level of Responsibility

This factor incorporates all those elements that are indicative of the level at which assignments are performed. The factor includes: (1) the nature of functions performed, (2) the supervision and guidance received, (3) the personal work contacts, and (4) the

nature and scope of recommendations and decisions. Three levels of responsibility are described in the standard: Levels A, C, and E. Intervening levels, B and D, are not described but may be used as appropriate. The levels of this factor are described in terms of typical characteristics. Accordingly, an intervening level is appropriate when a position compares with a lower level in some respects and with the next higher level in others. Also, the intervening level is appropriate when a position falls clearly between two of the levels described with respect to the majority of elements.

Nature of Functions

The appellant adjudicates appellate cases involving adverse decisions made by select USDA agencies, whereby persons have been denied relief, benefits, or payments related to agency programs. These programs are governed by laws and regulations found in title 7 of the United States Code and the Code of Federal Regulations. Often, the agencies supplement these laws and regulations with their own internal policies, guidelines, or handbooks.

The appellant conducts prehearing conferences and formal evidentiary hearings with both parties, which include agency representatives and persons contesting agency decisions. This involves his administering oaths and affirmations; issuing subpoenas, when necessary; hearing, clarifying, and surfacing the evidence, facts, and arguments; ruling on motions and objections; and developing and maintaining the formal record. In deciding his determination on a case, the appellant identifies the material issues, evidence, and facts; weighs conflicting, relevant evidence; makes credibility judgments; conducts research of administrative, program, and legal issues; decides if applicable agency internal policy and guidance is in accordance with established laws and regulations of title 7; applies the laws and regulations to arrive at appropriate conclusions; and renders his final decision on the case through a written notice of determination. This work is performed without the appellant participating in prohibited *ex parte* communications. His determinations uphold, modify, or reverse agency decisions. These determinations are considered administratively final determinations unless they are appealed to the Director of the NAD for review. Determinations made by the appellant are subject to a request for review by either, or both, of the involved parties.

The appellant's work is consistent with Level E. This level is illustrated in the standard by one who sits as a quasi-judicial officer hearing cases involving claims against the Government, complaints, or requests for relief from the provisions of agency regulations which have the effect of law; conducting investigative hearings pursuant to statutory provisions to establish a formal written record; hearing charges brought by the Government against violators of provisions of law or regulations; or hearing cases arising under the disputes clause of a Government contract. The officer renders decisions on the points of law or constructions of facts in dispute and directs corrective action, payment of claim, or discretionary relief depending on the merits of the case and

the penalties and permissible relief under law and regulations. The work of the appellant's position is a clear match with the work described at this level.

Supervision and Guidance Received

The appellant works under the broad, general supervision of the Regional Director. Upon receiving written delegation for assigned cases, he has full signatory authority to sign and issue notices of determination. The appellant's determinations do not receive any kind of review before they are released, since such a review is prohibited by laws relating to the work of his position. The supervisor periodically reviews the appellant's issued determinations for overall effectiveness and for consistency with agency laws, policies, and operating procedures.

The level of supervision and guidance received by the appellant has some characteristics of Level E. As at this level, he is expected to carry out assignments without preliminary instruction; independently conduct the activities associated with the work of his position; and complete and issue notices of determination. The appellant does not typically brief his supervisor on issues related to his work.

Where the appellant's position falls short of fully meeting Level E is in the technical review of his adjudication efforts upon timely requests for such reviews. This review may be requested by either party involved in a case receiving his determination. Such a request is made to the Director of NAD, and if the request is granted, a Review Officer reviews the appellant's first level adjudication of the appeal and prepares a review determination for the NAD Director's signature. The appellant and supervisor estimate that 15-20 percent of his cases receive requests for review by the Director. In reviewing a first level determination made by the appellant, a Review Officer evaluates the hearing record to see if the hearing was conducted in an appropriate manner; examines the adequacy of the evidence supporting the findings of fact in the appellant's determination; determines if the appellant's conclusions were based on appropriate findings of fact and consistent with applicable laws and regulations; remands the determination for further proceedings if deemed necessary; and decides if the appellant's determination contained material errors of fact or misapplication of laws and regulations. The NAD Director issues a final determination notice that upholds, modifies, or reverses the determination made by the appellant. This determination is final and may not be reviewed except by the courts on appeal. The Review Officer positions are located in the Review Branch of NAD's national office, and this review process serves as the highest level of administrative review within the USDA.

At Level E, completed work in the advisory or regulatory areas is reviewed before it is signed out for consistency with agency policy, for possible precedent effect, and for overall effectiveness. Although the appellant's supervisor periodically reviews his completed work, after it has been released, for overall effectiveness and for consistency

with agency laws, policies, and operating procedures, some of his work is subject to a close, technical review by the Review Branch of the NAD national office. Because of the level of technical review conducted by a higher echelon of the organization in connection with requests for review, the appellant's position does not fully meet Level E. However, the position exceeds Level C, where all written work is subject to review for soundness of approach and argument; application of legal principles; and consistency with governing policies, procedures, and regulations of the employing agency. Thus, the supervision and guidance factor falls between Levels C and E, at Level D.

Personal Work Contacts

The appellant's contacts primarily include members of the public, USDA customers, attorneys, agency and employee representatives, advocates, and various levels of agency decision-makers. For the most part, these contacts are within the context of prehearing conferences and formal evidentiary hearing proceedings. When appropriate, the appellant conducts a prehearing conference with both parties to clarify the agency's decision, the agency's basis for the decision, the contesting party's position, and the applicable regulations; to rule on witnesses and motions; and to establish the date for the hearing. The formal hearing provides an opportunity for both sides to present evidence and oral arguments. These hearings usually involve adversaries who have conflicting viewpoints and significant self-interest in the matters in question. During the formal hearing, the appellant presides in such a way to maintain an orderly procession, ensure that all the facts are surfaced, question both sides in bringing out the facts, listen to and observe both parties, and facilitate the presentation of facts from both sides. In many cases, one or both parties are not skilled at questioning the other to elicit information or facts that could be important to fully understanding the true nature or events of the case. In these instances, the appellant has to function skillfully in this capacity. The appellant also is skilled at presenting and explaining the findings of fact, the analysis, and the conclusions of a case in his written determinations.

These kinds of contacts are typically found at Level C. The standard states that personal contacts are an important characteristic of Level C, emphasizing effectiveness in the presentation, exposition, and argument of cases. Employees at this level participate in pretrial or prehearing conferences with industry representatives or private citizen claimants, defendants, or petitioners and their attorneys; and explain points of law, charges, or qualifications of claimants. They advise negotiating officials in legal contractual matters; participate in conferences with representatives of operating programs, State and local governments, industry, or private organizations in developing or evaluating proposed changes in legislation or agency regulations; participate with State officials in negotiations concerning conflicts in State and Federal regulations; and assist congressional committee staff in technical drafting of legislation.

The appellant's contacts do not match those at Level E, which involve the most responsible contacts such as the following: conferring or negotiating with top administrative personnel in the agency, business, or State and local governments on important legal and policy questions; advising and assisting congressional committees in drafting legislation or giving expert testimony before congressional hearings; and trying cases before courts or administrative bodies. These kinds of contacts are not found in the appellant's position.

Nature and Scope of Recommendations and Decisions

The appellant's determinations ultimately judge the legal and regulatory appropriateness of the agencies' contested decisions and the processes utilized to reach these decisions. His determinations uphold, modify, or reverse agency decisions. If an agency's decision is reversed, the appellant's determination is sent directly to the head of the agency and to various others within the agency, such as the appeals coordinator and the authorizing official. Since the head of an agency has only 15 business days to request a review of the appellant's determination, it is important that he or she, along with other key officials, receives the determination as soon as it is rendered.

The appellant's determination directly affects the party contesting the agency decision. If the determination is in favor of the contesting party, they are granted part or all of their requested relief. If the determination upholds the agency decision, the contesting party is obligated to accept this decision, unless they choose to request a review of the appellant's determination. If the determination reverses or modifies an agency's decision, the agency is affected because it is to correct or modify those issues specified in the determination, unless the agency chooses to request a review of the appellant's determination. Such a reversal affects the way the agency operates in that particular case and may affect the way the agency operates in the future. The determination may also influence those persons who are similarly situated as the contesting party to appeal or not to appeal their situation.

The nature and scope of the appellant's decisions meet some aspects of Level E. At Level E, recommendations and decisions are similar to those characteristic of Level C, where one recommends settlement of claims against the Government brought by private citizens, replies to legal requests for legal advice or interpretations of law arising out of the day-to-day operations of agency programs, or decides whether to initiate criminal or civil suits against alleged violators of Federal laws and regulations. Level E goes beyond Level C in that legal advice on the interpretation of law is often given directly to heads of programs, bureau chiefs, cabinet officers, members of congress, or representatives of State and local governments. In some instances, recommendations are made through supervisors, but these recommendations are usually tantamount to final decisions. The nature and scope of the appellant's decisions are comparable to the decisions and recommendations listed for both Levels C and E. As at Level E, the

appellant's decisions, or determinations, are given directly to the heads of selected agencies, or entities, within USDA. These determinations deal with a wide range of programs managed by the agencies.

Where the nature and scope of the appellant's decisions fall short of fully meeting Level E is in the precedent-setting nature of the decisions, the delicacy of the issues, and the vast scope and complexity of the matters in question. At Level E, the employee is responsible for recognizing when the matter under discussion is of such precedent-setting nature or of such importance or delicacy that his or her advice must be cleared with superiors before it is given out. Matters at this level are often of such scope and complexity that they require the concentrated efforts of several specialists. An employee at this level would be responsible for directing, coordinating, and reviewing the work of such a team.

Some of the appellant's determinations may be distributed among NAD Hearing Officers, serving as an internal precedent or example for certain kinds of matters or situations. A determination by the appellant that reverses or modifies an agency's decision may become precedential within a program area of the agency, so that future operations are conducted in accordance with his determination. An agency may incorporate aspects of the determination within their own internal policies and guidelines. However, the agency is not obligated to view the determination as a precedent that must be implemented within their program. The agency is to apply the determination to the case at hand. Regarding this, the NAD does not have the authority to enforce the implementation of the determinations issued by its Hearing Officers. In most cases, though, agencies do implement the determination by making corrections or modifications to their initial decision on the case. The nature and impact of the appellant's decisions are lessened since agencies are not required to establish his determinations as precedents affecting their future program actions and since his determinations do not carry the weight of being mandatory and binding on agencies. This aspect does not fully meet the intent of Level E.

The laws surrounding the work of the appellant's position dictate that he not be involved in *ex parte* communications. Therefore, he is prohibited from discussing controversial issues with his supervisor before releasing the determination. The standard implies that at Level E, the matters involved in cases are so controversial, delicate, or far-reaching that decisions could not be made without input from and negotiations with higher level officials. This implies that many concerns, opinions, and warnings are brought into the decision process and considered before reaching decisions. Although the appellant is not allowed to participate in such a process, the added scope and complexity inherent to decisions characteristic of Level E are absent from the kind of decisions typically made by the appellant. Therefore, this aspect does not fully meet the intent of Level E.

Consistent with the principle of prohibited *ex parte* communications mentioned above, the appellant does not work with other Hearing Officers or specialists in dealing with matters and making determinations. The standard states that at Level E, the matters are often of such scope and complexity that they require the concentrated efforts of several specialists. This implies that the cases are characterized by so many broad, substantial, and complex matters that one person could not handle them alone. The complexity and scope of the matters under decision require the expertise of several specialists to have full command of the case. Although the appellant is not allowed assistance from other Hearing Officers, his decisions do not involve matters of such broad scope and complexity as to necessitate the expertise, time, and attention of several specialists, as is characteristic of Level E. This aspect does not fully meet the intent of Level E.

The nature and scope of the appellant's decisions do not fully meet the intent of Level E. However, the position exceeds Level C, where recommendations are made through the supervisor to those outside the agency or to administrative officials at higher levels. Thus, this factor falls between Levels C and E, at Level D.

Conclusion

The four elements of the Level of Responsibility factor were evaluated at Levels E, D, C, and D. This results in the overall level of D for this factor. According to the grade conversion chart on page 25 of the standard, the combination of the Nature of Cases or Legal Problems at Type II and the Level of Responsibility at Level D is assigned the GS-13 grade level.

DECISION

The appellant's position is correctly classified in the GS-930 Hearings and Appeals Series at the GS-13 grade level. The title of the position is at the discretion of the agency.