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

Appellant: [appellant's name]

Agency classification: Attorney-Advisor (General)
GS-905-12

Organization: Staff Judge Advocate's Office
[number] Air Mobility Wing
Air Mobility Command
Department of the Air Force
[name] Air Force Base, [state]

OPM decision: Attorney-Advisor (General)
GS-905-13

OPM decision number: C-0905-13-06

/s/

Robert D. Hendler
Classification Appeals Officer

11/17/00

Date

As provided in section 511.612 of title 5, Code of Federal Regulations (CFR), this decision constitutes a certificate that is mandatory and binding on all administrative, certifying, payroll, disbursing, and accounting officials of the government. The agency is responsible for reviewing its classification decisions for identical, similar, or related positions to ensure consistency with this decision. There is no right of further appeal. This decision is subject to discretionary review only under conditions and time limits specified in the *Introduction to the Position Classification Standards* (PCS's), 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 (5 CFR 511.702). The servicing personnel 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]
[address]

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Introduction

On July 7, 2000, the Philadelphia Oversight Division of the U.S. Office of Personnel Management (OPM) accepted a position classification appeal from [appellant's name]. Her position is currently classified as Attorney-Advisor (General), GS-905-12. She believes the classification should be Attorney-Advisor (General), GS-905-13. The appellant works in the Staff Judge Advocate's Office (SJAO), [number] Air Mobility Wing (AMW), Air Mobility Command (AMC), Department of the Air Force, [name] Air Force Base (AFB), [state]. We accepted and decided this appeal under section 5112(b) of title 5, United States Code (U.S.C.).

General issues

In her June 29, 2000, appeal letter, the appellant takes issue with the quality of AMC's response to [name] AFB's September 3, 1999, rationale to upgrade her position. She states that her position should be upgraded based on her abilities, experience and the complex demands of her assignments. She includes statements from people knowledgeable of her work supporting this rationale. She implies that similar attorney positions occupied by others are classified at higher grade levels.

These statements raise procedural issues that must be addressed. By law, we must classify positions solely by comparing their current duties and responsibilities to OPM PCS's and guidelines (5 U.S.C. 5106, 5107, and 5112). Other methods or factors of evaluation are not authorized for use in determining the classification of a position, e.g., comparisons to the duties and responsibilities of other Air Force attorney positions that may or may not be classified correctly. Our decision sets aside all previous agency decisions regarding the classification of the position in question. Information contained in those decisions and comments by people knowledgeable of the appellant's work are relevant only insofar as they clarify the duties and responsibilities assigned to and performed by the appellant. The appellant's abilities and experience may only be considered to the extent they are used to perform the work assigned by management and performed by her.

Position information

On July 19, 2000, the appellant declined to certify the accuracy of her position description (PD) of record as requested by her activity in response to our request for the appeal administrative report. AMC classified the revised PD (#8/10264/0), submitted by the appellant and her immediate supervisor, as Attorney-Advisor (General), GS-905-12, on August 8, 2000.

The PD of record states that the appellant devotes 90 percent of her time to environmental legal issues, including compliance, assessment and remediation, pollution prevention, and the management of natural, historical and archeological resources. She researches and develops legal opinions on managing hazardous materials, minimizing hazardous materials in Air Force transportation systems, disposing of solid hazardous waste, air and water permitting, assessing the environmental impact of Air Force actions, remediating hazardous waste sites, and protecting natural, historical and archeological resources. The appellant advises and counsels base engineering and contracting organizations on construction and privatization projects, and ensures

that privatization agreements and contract specifications comply with environmental laws and protect the base from potential liability and penalty assessment. She provides similar advice and counsel on safe drinking water matters.

As the office specialist in that field, she reviews environmental assessments and impact statements submitted by base staff, and analyzes regulations and other documents related to environmental decision making for legal sufficiency and compliance with all aspects of Federal, state, and local environmental laws. Based on her legal review, she advises operating program officials of their responsibilities for complying with the requirements of a variety of laws including the National Environmental Policy Act (NEPA), Comprehensive Environmental Response, Liability and Compensation Act (CERCLA), the Clean Air Act and Safe Drinking Water Act (SDWA), and Resource Conservation and Recovery Act (RCRA).

In reaching our decision, we carefully reviewed the information provided by the appellant and her agency, including the appellant's PD of record. The PD contains the major duties and responsibilities performed by her and we incorporate it by reference into this decision. In addition, we conducted on-site audits with the appellant and her supervisor, Lt. Colonel [name], Staff Judge Advocate (SJA), on October 11, 2000. To clarify information provided during those audits, we interviewed members of the AMC legal and U.S. Environmental Protection Agency (EPA), Region [number], Federal Facilities Sections staffs. We carefully considered all information submitted by the appellant, the agency appeal administrative report, and additional information provided by the appellant at our request.

Series, title, and standard determination

The agency has placed the appellant's position in the General Attorney Series, GS-905, and titled it Attorney-Adviser (General) since the appellant is involved in rendering legal advice and services with respect to questions, regulations, and practices of the agency. Because there is no specific subject-matter title for environmental law designated in the GS-905 PCS, the parenthetical title (General) is added to the basic title of the position. The appellant has not disagreed, and we concur with these determinations.

The GS-905 PCS grade level criteria must be used to evaluate positions in that series (5 U.S.C. 5107). OPM's Classifier's Handbook instructs why the Primary Standard may not be used to evaluate the appellant's position as proposed by the appellant's supervisor in his September 3, 1999, memorandum requesting to upgrade her position. The Point Paper on Career Program for Air Force Civilian Attorneys, suggesting the GS-13 and GS-14 grade levels as attorney full performance levels, provided by the appellant as part of her rationale, similarly is not germane to our evaluation of her position.

Grade determination

The GS-905 PCS uses two main factors to evaluate the grade of positions: (1) *Nature of the case or legal problem*, and (2) *Level of responsibility*. Pages 5-10 of the GS-905 PCS discuss the classification elements considered under each factor.

Factor 1, Nature of the case or legal problem

Three levels of difficulty are described in the PCS for this factor: Type I cases or legal problems are simple; Type II cases are difficult; and Type III cases are the most difficult. These levels represent the full span of difficulty or importance of attorney work throughout the Federal government. If a case or problem does not satisfy the requirements indicated for the level of one of the types, it is identified with the next lower type because each type is described in terms of the minimum characteristics of the range of difficulty it represents.

The agency has credited the position with Type II, with which the appellant agrees. Based on our review of the record, we find the appellant deals with both Type I and Type II cases and problems. Type II cases, e.g., [name]'s inclusion on the National Priorities List (NPL), commonly referred to as the Superfund List, occupy a sufficient portion of her work time to warrant crediting Type II for this factor.

Factor 2, Level of responsibility

This factor includes the functions performed, supervision and guidance received, personal work contacts, and the nature and scope of recommendations and decisions. Three of the five Levels under this factor are defined in the standard (Levels A, C, and E). The other two Levels (B and D) are not defined in the standard but may be assigned as appropriate. The levels under Factor 2 are described in terms of typical characteristics. Accordingly, the intervening Level (B) is appropriate when, for example, a position compares with Level (A) in some respects and Level (C) in others. The intervening level is also appropriate when a position falls clearly between two of the levels described with respect to the majority of elements.

The agency has credited the position at Levels C, C, E and C. The appellant believes her position should be credited at Levels D, D, E and D.

(1) Nature of functions

The appellant's position meets and, in some respects, exceeds Level C. Similar to the Level C examples listed in the PCS, she conducts legal research in connection with questions referred by administrative officials of the employing activity, e.g., Environmental Flight, [name] AFB. These questions concern the interpretation and application of various environmental laws and statutes (e.g., NEPA, CERCLA, SDWA, and RCRA) and internal Air Force regulations. Her guidance and reviews pertain to potential claims against [name] AFB in terms of liability for damages and adequacy of environmental clean-up. She reviews the adequacy of environmental assessments prepared for or by base staff to mitigate potentially harmful effects to the environment. The appellant deals with other Federal agencies concerning base environmental matters, e.g., EPA, and the base's position in responding to notices of violations issued by various governmental agencies, e.g., [name] Commission and [state] Department of Environmental Protection. Typical of Level C is her dealing with demolition issues within the confines of an established restoration plan at the [name] site, a cold war nuclear missile site where a fire destroyed a nuclear missile and contaminated the soil.

As at Level C, the appellant personally conducts research and sometimes investigation of facts posed by a legal problem, researching the relevant laws, regulations and precedents. For instance, she conducted research on soil conservation plans and fees, advising base management that there is no waiver of sovereign immunity in State and Federal soil conservation laws. She concluded that the County and State lacked statutory assess fees for base construction projects. As discussed in the PCS, much of her work involves the preparation of memoranda to installation staff outlining the facts, legal issues, and precedents, and justifying her recommendations or conclusions. Typical of Level C, she serves as the assigned legal specialist and adviser on her assigned program, environmental law, for the SJAO.

We found no evidence that her assignments meet any of the examples discussed under Level E. She is not involved in any aspects of litigation, in the drafting or reviewing of legislation, in reviewing proposed agency decisions at the highest levels, acting as principal attorney in preparing and presenting cases, or acting as legal counsel to the head of a major operating program of the department. The common theme of Level E is the broad scope of legal action taken at or near agency level. The base performs typical field activity functions so that the base commander is not the head of a major operating program of the Air Force within the meaning of the PCS. The appellant typically functions as the sole attorney rather than the principal attorney. Her assignments are not so complex and competitive that she requires the assistance of other attorneys or specialists.

However, Level C fails to recognize the full nature of the appellant's functions that exceed those typical of an intermediate attorney but fall short of a senior attorney. The record shows that because of the appellant's extensive environmental law experience, the AMC environmental legal staff has limited its involvement in negotiations on major environmental projects of high local and regional political and social visibility. For example, while AMC typically is heavily involved in NPL listing matters, the appellant was at most times the only Air Force legal representative during the process that led to [name]'s entry on the NPL. Unlike Level C, she was involved in developing factual information necessary to craft legal approaches and negotiating positions to deal with this high visibility issue. This process began several years ago, and negotiations on the development and implementation of the remediation agreement are ongoing. AMC's legal staff participated in an initial meeting in developing a Voluntary Cleanup Agreement (VCA) with the State of [state]. Rather than functioning as a member of the negotiating team typical of Level C, the appellant subsequently became the sole Air Force legal representative. The VCA, negotiated among the [state] Department of Environmental Protection, Department of the Army, Department of the Navy, Department of the Air Force, and Defense Logistics Agency, covers the assessment and remediation of sites in the State that are or were owned or operated by those agencies in [state].

At Level C, attorneys conduct legal research regarding the effects of proposed changes in policies or regulations. In contrast, the appellant conducted research of laws, legal opinions, and precedent cases on whether State water allocation controls on the base are prevented by sovereign immunity. In analyzing previously issued AMC guidance, she reviewed and discussed various court precedents covering interpretation of the SDWA. She concluded that compliance with [state] water allocation requirements might be compelled based on recent precedent

decisions and could change AMC policy. Because the position falls between Levels C and E, Level D is assigned.

(2) Supervision and guidance received

The appellant's position meets and, in some respects, exceeds Level C. At that level, attorneys are expected to independently plan, organize, and conduct studies of the mill run of legal problems, cases, or legislative proposals encountered in their respective programs. They are apprised of any unusual circumstances, background information, and policy considerations, but otherwise work independently in investigating facts, searching legal precedents, defining the legal and factual issues, drafting necessary legal documents, and developing conclusions and recommendations. Completed work is normally assumed to be technically accurate. All written work is reviewed for soundness of approach and argument, application of legal principles, and consistency with governing policy and regulations. In contrast, the appellant's assignments flow directly to her as the office expert in environmental law, and she completes her review of the documents thus received without any supervisory involvement. The SJA reviews her work primarily for information to remain aware of program issues. He expects her to deal directly with base managers and AMC staff on environmental program issues; e.g., sovereign immunity. The appellant keeps the SJA informed of the status of significant issues and discusses the more sensitive ones with him before taking action.

Level E, however, is not met. At that level, the attorney is expected to carry out any assignments within the area of responsibility without preliminary instruction, although the supervisor may discuss the significance of the problem and give background information, with the attorney proceeding independently from that point onward. However, the high degree of professional independence depicted at this level also assumes the performance of the more difficult and complex assignments otherwise associated with Level E, such as investigating cases and recommending prosecution, drafting legislation, and preparing and presenting cases at hearings or trials. Since the appellant does not perform work at this level of difficulty, her position cannot be fully credited at Level E in terms of the relative lack of supervisory controls, since she is not operating with an equivalent level of responsibility. Since the appellant's position falls between Levels C and E, Level D is assigned.

(3) Personal work contacts

The appellant's work contacts meet and, in some respects, exceed Level C. In providing legal assistance on environmental issues, she has regular contact with base civil engineer, environmental, and contracting staffs. She advises installation officials on legal questions and interpretations of law, and sometimes suggests wording for inclusion in environmental documents. The appellant has contacts with environmental officials at [state] State and local agencies. Similar to Level C, the appellant also participates as part of a team of base environmental staff in negotiations between the installation and various environmental regulatory agencies on regulatory issues. She meets with the State Historic Preservation Office (SHPO) on historic preservation issues. For example, she is dealing with SHPO on demolition issues at the [name] site.

The appellant's position does not meet the types of personal contacts described at Level E. Unlike that level, she does not routinely confer or negotiate with top administrative personnel in the agency (i.e., Department of the Air Force), or State or local governments on important legal and policy questions. She is not involved in advising and assisting congressional committees and their staffs in drafting legislation, and the duties of her position do not require that she try cases before courts or administrative bodies.

However, Level C does not adequately recognize the more difficult contacts presented in the appellant's work. The appellant's previous employment as a [state] State Deputy Attorney General has enabled her to deal directly with the highest levels of the [state] Department of Environmental Protection and other State agencies. Rather than referring proposed settlements or compromise offers to the SJA with recommendations on how to deal with notices of violation (NOV) typical of Level C, she was able to have two NOV's rescinded by contacting high level State officials. [state], with a dense and growing population, has more NPL sites than any other state. [name] AFB also is located in the ecologically sensitive [name] area for which a special State commission oversees land use. Soil, water, and air quality, construction and other ecological issues receive intense public and press scrutiny. The aquifer below the base provides potable water to the surrounding communities. Extensive local development has strained the water supply. As legal representative on major [name] NPL issues that include potential threats to ground water safety and purity, the appellant is dealing with these sensitive and highly visible public issues that exceed those typical of Level C. Since the appellant's position falls between Levels C and E, Level D is assigned.

(4) Nature and scope of recommendations and decisions

The nature and scope of the appellant's recommendations and decisions meet Level C, but fail to meet Level E. Similar to Level C, any recommendations the appellant makes outside the agency, or to administrative officials at higher levels, are normally reviewed and endorsed by her supervisor prior to being forwarded up the chain-of-command. Typical of Level C, she replies to requests for legal advice and interpretations on a variety of environmental issues arising out of the day-to-day program operations of the base.

Although the recommendations characteristic of Level E are similar to those described at Level C, unlike Level E the legal advice provided by the appellant is not given directly to heads of agency programs, bureau chiefs, cabinet officers, congressional representatives, etc. The appellant primarily deals with operating installation staff. Her dealing with the [name] AFB Commander also does not equate to the organizational levels described under Level E. If she were to make recommendations to individuals at the levels described under Level E, they would be subject to close supervisory review both at the base and AMC level for soundness of approach, argument, applicability of legal principles, and adherence to policy, rather than being considered as tantamount to final decisions as at Level E. Therefore, Level C is assigned.

Effect of individual stature

The appellant's rationale states that "impact of the person on the job" should be considered if this appeal does not result in a higher grade for his position. Section III.K. of the *Introduction to the*

Position Classification Standards indicates that the unique capabilities, experience, or knowledge that a particular employee brings to the job can also have an effect on the work performed and therefore on the classification of the position. The “impact of the person on the job” is reflected in the classification when the performance of a particular individual actually makes the job materially different from what it otherwise would be. On the other hand, the mere fact that an individual in a position possesses higher qualifications or stands out from other individuals in comparable positions is not sufficient reason by itself to classify the position to a higher grade. When determining grade level based on this concept, it is essential that management recognizes and endorses the duties and that the work environment allows continuing performance at a different level.

The GS-905 PCS contains criteria for applying this classification concept. It states that individuals who have achieved outstanding stature bring a plus element to the performance of their assigned duties that cannot always be fully evaluated in terms of the criteria spelled out in the body of the PCS. In such cases, it is appropriate to identify the nature of the peculiar stature and to provide some credit for it in evaluating the position. This extra credit will not normally, in itself, be worth an additional bonus grade. However, in evaluating positions that meet the requirements of a *Level of responsibility* with respect to some elements of evaluation and fall short with respects to other elements, the effect of the individual on the position is recognized in evaluating the position to the higher level of responsibility, i.e., when a borderline situation exists. In some cases, this will make a difference of one grade in the conversion to grade level.

Our crediting of three elements of *Level of responsibility* at Level D fully considered the extensive environmental law experience that the appellant brings to the position and the functions that she performs in lieu of the AMC legal staff. Therefore, this experience has been fully considered and cannot be credited again. As discussed below, *Level of responsibility* is not borderline. Therefore, *Effect of individual stature* does not impact evaluation of the appellant's position.

Summary

Level D is credited for *Level of responsibility* since three elements are evaluated at Level D, one at Level C. By application of the Grade-Level Conversion Chart in the GS-905 PCS, a Type II, Level D position converts to grade GS-13.

Decision

The appellant's position is properly classified as Attorney-Adviser (General), GS-905-13.