

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

Chicago Field Services Group
230 South Dearborn Street, Room 3060
Chicago, IL 60604-1687

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

Appellant: [appellant]

Agency classification: Investigator
GS-1810-12

Organization: Civil Division
Headquarters Office
[name] District of [state]
Office of the United States Attorney
Department of Justice
[location]

OPM decision: Investigator
GS-1810-12

OPM decision number: C-1810-12-02

Michael J. Wilkin
Deputy Associate Director
Center for Merit System Compliance

July 1, 2005
Date

As provided in section 511.612 of title 5, Code of Federal Regulations (CFR), this decision constitutes a certificate that is mandatory and binding on all administrative, certifying, payroll, disbursing, and accounting officials of the government. The agency is responsible for reviewing its classification decisions for identical, similar, or related positions to ensure consistency with this decision. There is no right of further appeal. This decision is subject to discretionary review only under conditions and time limits specified in the Introduction to the Position Classification Standards, appendix 4, section G (address provided in appendix 4, section H).

Decision sent to:

PERSONAL

[appellant]
[address]
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Introduction

On March 5, 2004, the Chicago Field Services Group of the U.S. Office of Personnel Management (OPM) accepted a classification appeal from [appellant]. His position is currently classified as Investigator, GS-1810-12. He believes his position should be classified as Investigator, GS-1810-13. The appellant works in the Civil Division, Headquarters Office, [name] District of [state], United States Attorney's Office, Department of Justice, [location]. We received the complete agency administrative report on April 2, 2004. We accepted and decided this appeal under section 5112 of title 5, United States Code (U.S.C.).

To help decide the appeal, we conducted a telephone audit with the appellant on July 29, 2004, and a telephone interview with his first-line supervisor on July 29, 2004. In reaching our decision, we carefully considered the audit and interview findings and all information of record furnished by the appellant and the agency.

General issues

The appellant occupies PD # [number], classified on February 6, 1997. In his February 20, 2004, appeal letter, the appellant states that he believes his position should be upgraded because his duties exceed those of the GS-12 grade level and meet the factors that are set forth in a standard GS-13 investigator PD established and utilized by the Department of Justice. In their comments concerning the accuracy of the appellant's PD, both the appellant and his supervisor refer to a GS-1810-13 "sample" PD developed by the Personnel Staff, Executive Office for United States Attorneys (EOUSA), for use by the United States Attorneys' Offices (USAOs). This sample PD is among others posted on the EOUSA intranet website for use by supervisors, employees, and human resources (HR) staff in USAO's 94 offices. EOUSA reports that sample PDs are the functional equivalent of benchmark PDs which were formerly included in some OPM position classification standards. Neither the appellant nor his supervisor believe that the official PD is an accurate description of the appellant's work, but rather a PD "invoked from higher authority".

The appellant says that in evaluating the grade level of any investigator, DOJ advises an HR specialist to carefully review and assess the investigator's scope of authority and level of participation in cases to determine the appropriate classification of the position. In using or adapting EOUSA's sample PD's, the local HR specialist, through review of work samples, desk audits, and discussions with supervisors, is responsible for verifying that the sample PD fully and completely describes the actual work assigned and that the work fully meets applicable classification criteria. Since the HR specialist in this case determined that the position did not fully meet the threshold described at the GS-13 level, the appellant remained assigned to the GS-1810-12 PD, rather than the GS-13 sample proposed by him and his supervisor.

A PD is the official record of the major duties and responsibilities assigned to a position by a responsible agency 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. Therefore, this decision is based on the actual work assigned to and performed by the appellant.

The appellant refers to several of his cases that he says involve all six criteria set out by DOJ when distinguishing GS-13 from GS-12. He also makes various other statements about his agency's evaluation of his position. Implicit in the appellant's statements also is a concern that his position is classified inconsistently with other positions. Referring to sample GS-13 PDs used by USAO's to classify other investigators throughout the United States. The appellant believes that he is also doing the same type of work and his position should be classified accordingly. By law, we must classify positions solely by comparing current duties and responsibilities to OPM standards and guidelines (5 U.S.C. 5106, 5107, and 5112). Therefore, we do not use internal DOJ classification assessment guidelines in deciding this appeal. Since the comparison to standards is the exclusive method for classifying positions, we also cannot compare the appellant's position to others, which may or may not be classified correctly, as a basis for deciding the appeal. Because our decision sets aside all previous agency decisions, the appellant's concerns about his agency's classification practices and processes are not germane to this decision.

Like OPM, the appellant's agency must classify positions based on comparison to OPM standards and guidelines. Section 511.612 of 5 CFR requires that agencies review their own classification decisions for identical, similar, or related positions to insure consistency with OPM certificates. Thus, the agency has the primary responsibility for insuring that its positions are classified consistently with OPM appeal decisions. If the appellant considers his position so similar to warrant the same classification, he may pursue the matter by writing to his agency headquarters human resources office. In doing so, he should specify the precise organizational location, classification, duties, and responsibilities of the positions in question. If the positions are found to be basically the same, the agency must correct their classification to be consistent with this appeal decision. Otherwise, the agency should explain to them the differences between their position and the others.

The appellant points out the large amount of work he performs, as well as the very high ratings he has received for the performance elements of his recent performance appraisal. However, volume of work and quality of performance are issues that cannot be considered in determining the grade of a position (*The Classifier's Handbook*, chapter 5). We considered the performance documents only insofar as they contain case information that is relevant to the classification process.

Position information

The appellant works under the general supervision of the Chief, Civil Division, [name] District of [state], USAO. The USAO serves as the nation's principal litigators under the direction of the Attorney General. Each U.S. Attorney is the chief federal law enforcement officer of the United States within his or her particular jurisdiction. The Executive Office for United States Attorneys (EOUSA) was created to provide for close liaison between the USAOs and the Department of Justice (DOJ) in Washington, D.C. EOUSA provides general direction on and supervision of the management and policy activities of the United States Attorneys' financial litigation programs, including the establishment of policy and procedures for debt collection activities.

USAO attorneys conduct most of the trial work in which the United States is a party. They have three statutory responsibilities under Title 28, Section 547 of the United States Code:

- 1) the prosecution of criminal cases brought by the Federal government;
- 2) the prosecution and defense of civil cases in which the United States is a party; and
- 3) the collection of debts owed the Federal government which are administratively uncollectible.

Working under these guidelines, the U.S. Attorney for the [name] District of [state] allows the appellant to independently plan and conduct highly complex and difficult investigations of Medicare and Health Care Fraud (HCF) cases. His cases include investigations of hospitals, nursing homes, medical groups, and other health care facilities. They are frequently concerned with highly sensitive matters involving prominent individuals or corporations, and are often characterized by obscure leads, few visible records, uncooperative witnesses, and conflicting evidence. The investigations may be conducted solely by the USAO, or more typically, in conjunction with other Federal or State agencies responsible for programs supported by Federal funding and/or with the responsibility to administer health care programs or to investigate abuses of these programs. The appellant establishes and verifies relationships among all facts and evidence obtained or presented to confirm authenticity of documents, corroborates witness statements, and otherwise builds proof necessary to support successful HCF case resolution. He uses, performs, and/or oversees a variety of ancillary investigations-related services in direct support of HCF litigation. Support activities include using laboratories and other forensic services; conducting interviews of suspects, witnesses, and informants; planning and conducting surveillance of suspects; compiling documents and physical evidence; advising on selection of witnesses and ensuring their attendance in court; and preparing interim and final reports on progress of investigations.

A representative work cycle must be determined to establish what work is characteristic of a position for classification evaluation. OPM has found that sometimes work cycles beyond one year are appropriate, e.g., long-term criminal investigations. The “cycle of work” representative of the position can vary from agency to agency, or even within a given agency. The representative period for determining the nature of duties and responsibilities for classification purposes is not fixed because some cases are protracted, sometimes requiring more than a year, and many of these require substantially full-time effort. As a result, it is not uncommon for one or two cases to occupy virtually all of an investigator’s work time for several months, a year, or even more. However, a work cycle ending almost two years before this appeal was accepted for adjudication cannot be considered in the appellant’s current duties and responsibilities. The earlier investigations provide useful historical background. Our adjudication, however, must focus on the more current cycle of work performed by the appellant, i.e., within the past two years given the extended period of time over which complex criminal investigations frequently evolve.

As a part of his appeal, the appellant provided case summaries and documents for nine cases he identified as complex investigations. These cases involved investigators, auditors and law enforcement officials from other agencies. He stated that these nine are representative of the

types of cases that have been his primary responsibility for the past two years. This is consistent with the “cycle of work” principle. In our telephone discussion, the appellant stated that he acts as liaison for the Civil Division of the USAO in the [name] District of [state] with a number of state and Federal agencies, such as the Federal Bureau of Investigation (FBI), United States Department of Health and Human Services (HHS), United States Postal Service (USPS), United States Department of Defense (DoD), [state] State Police ([state]SP), [state] Department of Public Aid ([state]DPA), and [state] Department of Public Health ([state]DPH).

The appeal record contains additional descriptive information which we find, along with the official PD, contains the major duties and responsibilities assigned to and performed by the appellant; and we incorporate it by reference into our decision.

The appellant submitted eleven cases for which he was the case agent to support his appeal: [names of cases]. Some are continuing to have spin-off cases. The appellant stated that he has been the lead investigator in all of the cases and has planned and directed each investigation. However, three of the cases, [names] are not included in our analysis because they are still evolving and the record does not contain sufficient information for us to establish their grade level worth at this time. A summary of the remaining eight cases identified by the appellant as complex investigations follows.

Case 1. [case name] (also known as [name])

This case began after the Office of the U.S. Attorney (OUSA) for the [name] District of [state] was asked by their central office to look at nursing homes and elderly care. This case involved the FBI, HHS/OIG, ISP, and spanned a number of states.

This case involved healthcare fraud. As a result of a task force meeting on this topic, the ISP identified [name], doing business as [name], as a target. The investigator’s mission was to look at the quality of care. More specifically, it was to look at the failure to provide a standardized quality of care to elderly or disabled persons living at [name] in [location]. Working with investigators from ISP, the appellant discovered that they were dealing with a network of corporations, rather than a single nursing home.

As the investigation unfolded, they learned that a small group of business people had created a complex network of corporations that along with the 90 nursing homes, owned such things as an oil company and a financial institution designed to provide loans to the health care industry. It was discovered that this group had had sufficient influence to borrow \$226 million dollars from General Motors Acceptance Corporation and that its financial ties reached as far away as Switzerland. To track the money flow and identify its principals, the local USAO office hired an experienced forensic auditor who uncovered an elaborate and complex network of businesses which he felt was designed to disguise the money flow.

To date, they have reviewed approximately 75,000 documents, medical records, and regulatory deficiencies. Working with ISP agents, nearly 4,000 incidents were identified where resident care fell below the accepted standards set out in CFR 42, Section 483. They have subsequently narrowed that list of violations to a select number of egregious acts. Typical of the abuse

involved were hypothermia, neglect, burns to body parts (some so serious, limbs had to be amputated), and in several cases, lack of treatment resulting in death.

The appellant worked closely with agency managers in Washington, D.C. and the [name] District of [state] in preparing this case for court. Currently, [name] has attempted to avoid prosecution by going into bankruptcy; however, the investigation will continue to a point of resolution against the remaining defendants. In spite of the pending bankruptcy, this case is expected to yield additional cases involving nursing homes in [state] and [state].

Case 2. [case name]

This case also began as a result of the national initiative regarding nursing homes and the care of the nation's elderly population. This time the Civil Division of [location]'s OUSA approached the [state]DPH, the [state]DPA, and the [state]SP to request if they had any cases involving the failure of institutions to provide a standard quality of care to patients under Medicare. That request resulted in an investigation concerning the failure of [name] to provide quality care for its residents.

This case involved healthcare fraud. The owners and administrators at [name] had devised a scheme that was complex enough to make the [state]DPH believe that [name] had enough staff to provide care for their residents. In fact, there was insufficient staff. This resulted in a multitude of instances where care was not given or was provided at such a low level that it resulted in the deterioration of the resident's health and, in some instances, the death of a resident. With assistance from [state]SP investigators, the appellant has reviewed nearly 19,000 documents out of an estimated 185,000 documents through subpoena. This is necessary to detail and support the allegation that [name] failed to care for its residents as prescribed by law. The appellant's investigation so far has determined that the [name] facility has billed Medicaid and Medicare for millions of dollars of undelivered service.

This case is still pending, but is expected to recover a substantial amount of money. This case has involved multiple law enforcement agencies, has required trips to Washington to meet with DOJ. The case may set court precedent regarding the care of the nation's elderly by outlining a methodology to detect fraudulent billing for undelivered services.

Case 3. [case name] and Case 4. [case name]

The [name] was a HCF case that evolved from the National Bacterial Pneumonia (NBP) Project. It was worked at the local level and involved activity with the FBI, HHS, FBI, and the USAOs in [states]. The NBP project originated in the [name] District of [state] as a result of a qui tam action (qui tam is a provision of the Federal Civil False Claims Act that allows private citizens to file a lawsuit in the name of the U.S. Government charging fraud by government contractors and others who receive or use government funds, and share in any money recovered) and involves multiple jurisdictions including [name] District [state].

Under the Prospective Payment System (PPS) established by Congress, hospitals are paid for services they provide to Medicare patients, based on groups of medical diagnoses called Diagnostic Related Groups (DRG's). When a person enters a hospital, the attending physician

examines and completes a history of the patient to establish an admitting diagnosis. The physician then prescribes a treatment plan for the patient. The hospital follows the physician's orders and assists in the patient's care. At the time of the patient's discharge, the physician completes a discharge summary. This includes a discharge diagnosis and as many supplemental diagnoses as necessary. Medicare is billed after a hospital coder takes the physician's discharge summary, determines what the physician noted as the primary diagnosis, and then assigns a DRG.

[name] had retained the services of a physician consultant to advise hospital coders on coding methods for a rare strain of pneumonia, commonly referred to as mixed bacterial pneumonia (MBP). The advice resulted in charges to Medicare for inflated and false diagnoses. The coders and hospital physicians were told to look for Neisseria and Alpha Streptococcus bacteria in the lab reports, and if found, the coders were told to code as though the patient had been treated for MBP. According to experts, this is not allowable. Neisseria and Alpha Strep are normal flora, commonly found in the mouths of humans, and can not be relied upon as being specific bacteria that cause MBP.

Reviewing individual medical charts, investigators found that the only pathogens identified were normal flora (including Neisseria and Alpha Strep) in a majority of the cases. Since the physician had not been able to identify the specific bacteria, the coders were incorrect in coding the cases as MBP. The correct DRG should have been that of 089 for simple pneumonia. As a result, the hospital had treated many patients for simple pneumonia, but billed CMS for MBP which is reimbursed at about \$2,200 more per case.

The [name] case led the appellant to [name] hospital, located in [location]. By tracking the same physician consultant who had given improper advice at [name], he discovered that the physician consultant had also worked at [name]. The appellant found that [name] had drastically increased their reimbursement rates for simple pneumonia by instructing coders and physicians in the same manner as had occurred at [name]. The settlement for both of these cases was approximately \$1.5 million dollars.

Case 5. [case name] Case

This HCF case was a spin-off from the [names] cases. The case involved the FBI, HHS/OIG, and ISP and spanned multiple states. During the NBP project, the OUSA [location] office had focused solely on MBP, ICD-9-CM Code 482.89. Once the investigative phase of those cases had been completed, the appellant began looking at additional data from DOJ that indicated that ICD-9-CM Code 482.83 for Gram Negative Pneumonia (GNP) may also have been misused by providers.

Based on a geographic study completed by the appellant, there appeared to be no medical reason that this small central [location] town served by [name] would have such a high rate of GNP. Opening an investigation, the appellant contacted a number of medical experts to help review patient charts. These volunteers found that the charts showed no definitive medical evidence of having GNP. Wording published in the national medical coding publication *Coding Clinic* led to their view that this constituted questionable coding practices. Even though some of the experts said that the hospital coders were correct in their billing of GNP, further review of the data

showed that *Shelby Memorial* had billed CMS for this particular strain of pneumonia over 40 percent of the time, a rate that is considerably higher than most hospitals over a normal four-year period.

Through an extensive investigation, dealing with multiple states, multiple agencies, and many experts, the appellant reviewed approximately 400 medical charts. He had those charts reviewed by pulmonary experts to support the Government's findings of incorrect GNP coding. He developed information that has led to the filing of a lawsuit against [name]. The suit may recover a \$1 million dollar over-payment.

The investigation also revealed that [name] had hired its own physician consultant to exploit language found in the coding regulations. This consultant had instructed a small group of physicians at [name] that they "must" use language that he provided in their discharge summaries. In return, the hospital would increase their reimbursement from Medicare. These instructions included requiring admitting physicians to document certain risk factors, such as, age, residency, chronic illnesses, etc., that would then allow the physicians to say the patients "possibly" had GNP. This would allow the hospital to bill as though the patient did have GNP. GNP paid between \$1,400-2,400 more than simple pneumonia.

Tracking the consultant's work through subpoenaed documents led to two other cases in the Central District of Illinois by pursuing an additional DRG code to determine if fraudulent billing extended to other DRGs.

Case 6. [name]

This HCF case began by tracking the physician consultant from [name]. The case involved coordination by OUSA with multiple law enforcement agencies including FBI, HHS/OIG, and the ISP. The investigation led to the discovery that [name] had hired the same physician consultant to instruct physicians admitting patients to the hospital to document certain risk factors in their patient's medical charts.

Unlike [name, location] realized that their physician consultant had given "bad advice." The hospital hired a second consultant to review a "sampling" of pneumonia patients, who had been discharged under DRG 079 in an attempt to mitigate the problem. The consultant determined that a number of patients had been improperly coded with DRG 079 when, in fact, they never had pneumonia. Once [name] administrators learned of these errors, the hospital quickly paid back nearly \$67,000 dollars to the financial intermediary for Medicaid.

Further investigation by the appellant, however, revealed that other patients had been miscoded and that [name] improperly used the sampling data and actually owed the Government in excess of \$1,000,000. The earlier review failed to recognize the complex signs, symptoms, and treatments of gram negative pneumonia to identify the cases where the hospital did in fact bill inappropriately. The medical standards and rules that govern the billing are often confusing even to those in the profession. Calculating damages in this case was an extremely complex task. It involved Case Mix Index, hospital size, patient characteristics, etc.

Case 7. [name]

This HCF case involved multiple law enforcement agencies, FBI, HHS/OIG, USPS, and the ISP, and required contacts throughout the United States. The case originated with a call from an employee of the [name] Medical Group ([name]) to the Springfield OUSA office. The caller explained that she was a [name] employee and had contacted a number of enforcement agencies regarding fraudulent billing practices at [name]. None of the agencies wanted to become involved or listen to her complaint. The appellant agreed to meet with her. The case was opened after two interviews with her and a former co-worker.

The investigation focused on two main issues. The first was that when [name] received a denial on a Medicare claim, management ordered employees to use computers to go back into the patient's medical history and create a diagnosis code that would be payable. The claim was then resubmitted and was paid. Medicare was paying for a treatment of an illness or disease that the patient had received previously, rather than at the time the service was provided.

The second issue involved Medicaid patients who had a primary insurance source. A computer-generated bill was sent to the primary carrier on or about that date of service. At the direction of management, the system sent a second bill to the IDPA 30 days later. In many cases, the primary carrier did not pay the bill within the 30 day period. IDPA computers were set up so that IDPA paid immediately through an electronic transfer. Then, when the primary carrier did pay the bill, [name] would receive a second payment for the same service. After reviewing thousands of documents, the appellant found that [name] reimbursed the Government only occasionally. Furthermore, according to the caller, an internal audit discovered that [name] owed credits to many patients on paper. When hospital management could not resolve the discrepancies, they directed computer personnel to erase the data, further complicating the investigation.

This case involved 2,015 patients. With assistance from three agents from the ISP, the appellant spent 193 hours reviewing documents and charts to find evidence that supported the allegations. He wrote 402 letters that were sent to individual insurance companies throughout the United States. This resulted in contacts with 137 insurance carriers concerning approximately 96,000 claims.

This case led to a civil settlement of more than \$200,000. The settlement also required [name] to install a compliance program to ensure that *Quincy Medical* will not repeat this type of activity

Case 8. [name]

This HCF case resulted from a review of patient services at [name].

The appellant interviewed more than 40 [name] employees who detailed the level of psychiatric services that were being provided. The appellant was able to determine that the facility was not providing the same level of services it was billing the government. The [name] investigation resulted in the recovery of money and assessed penalties in the amount of \$100,000.

Title, series, and standard determination

The agency has placed the appellant's position in the General Investigating Series, GS-1810, and the appellant has not disagreed. The title *Investigator* is authorized for non-supervisory positions covered by the GS-1810 series. The agency applied the Grade Level Guide for Classifying Investigator Positions (the Guide), GS-1810/GS-1811, to evaluate his investigative work. Based on our audit and review of the record, we concur because the appellant's tasks closely match the description of work in the GS-1810 series where investigations result in civil or administrative actions, judgments, sanctions, or decisions. For example, employees in this occupation investigate individuals or organizations seeking or receiving benefits, licenses, loans or employment from the Federal Government or otherwise involved in civil matters of concern to Federal agencies, such as claims, loans or loan guarantees, insurance, malpractice suits, guardianship and custody matters, pensions, etc. This work requires knowledge of the laws, rules, and regulations of the employing agency; skill in interviewing, following leads, searching records, and reconstructing events; and the ability to prepare reports of findings.

Grade determination

The Guide recognizes that besides work individually assigned to investigators at any grade level, from time to time they work on particular investigative tasks associated with cases assigned to other investigators. They may lead or coordinate the work of other investigators who are temporarily assigned to work on cases for which they have primary responsibility. These temporary conditions have no particular impact on the grade level worth of an investigator's position. Similarly, there is no particular relationship between the grade level of the investigator who has primary responsibility for a case and the grade levels of the positions of the other investigators who are temporarily called upon to help with particular investigative tasks. In applying the Guide, the examples of work included at each level are intended only to be illustrative of the concept of the grade level. Therefore, the evaluation of individual positions requires careful attention to both similarities and differences in the nature and scope of work assignments, delegations of authority, and the organizational and program setting of the position under review.

The Guide uses two factors to distinguish between grade levels: *Complexity of assignments* and *Level of responsibility*. It provides for classifying positions based on assignments that are typical and representative of the cases for which the investigator has primary responsibility over a period of time, i.e., only the case agent position may be credited with performing the full grade level of cases. The appellant states that his position should be upgraded because his duties exceed those of the GS-12 grade level. Our evaluation of the appellant's current duties and responsibilities follows.

Factor 1, Complexity of assignments

This factor measures the scope, complexity, and sensitivity of investigative assignments, including such elements as: (1) the levels of difficulty involved in resolving conflicting facts or evidence; (2) the difficulty and complexity imposed by the subjects of investigations; (3) the nature of separate investigative matters that grow from the original assignments; (4) the skill required to establish facts and evidence in assigned cases; (5) the sensitivity of assignments; and, (6) the jurisdictional problems involved in case assignments. The Guide notes that for this factor

to be evaluated at a particular grade level, most or all of the six elements must be at that particular grade level. We will apply the criteria for each element to the entire appeal record.

Element 1 - the levels of difficulty involved in resolving conflicting facts or evidence

At the GS-12 grade level, cases typically involve the difficulty of working with fragmentary or cold evidence and engaging several principals for whom suspicion is initially aroused by circumstantial evidence, e.g., word of mouth, tips, observations, rather than by directly verifiable evidence, e.g., paid or unpaid bills, passports, licenses, or testimony. Improper development of the case could cause significant repercussions, e.g., it could cause public embarrassment for the agency involved or the principals under investigation.

In contrast, assigned cases at GS-13 involve extreme complexity and scope. The assignments entail investigations of legal or illegal organizations that are very complex in structure with a large number of primary and secondary activities, e.g., several principals of organized crime or subversive groups that are officially recognized in law enforcement as national threats to the peace and stability of the nation. Investigations are of major interregional dimensions or are nationwide in origin or coverage with occasional international implications. There are typically actual or potential threats or challenges to major segments of the national welfare or security. The results, effects, or consequences of the investigation, to a major degree, constitute deterrents to crimes or violations, and may often influence changes in laws or future court actions. Investigator typically must piece together evidence that comes from other investigators stationed throughout several states or the nation, and recognize the suspect's pattern of operation to anticipate or even influence events as they unfold by instructing separate investigators or units of investigators working on segments of the case. This complicates the case because the investigator must at the same time avoid entrapment of the suspects, who are prominent and numerous and engage in more complex and serious activities. Similarly, the investigator must be more aware of the implications of precedent court decisions over a broader area, i.e., in more judicial and law enforcement jurisdictions.

Illustrative of the GS-12 grade level, the appellant's work in piecing together facts for evidence from extensive reviews of records that require an in-depth knowledge of medical terminology and practices as well as types of diseases and their treatment to determine fraudulent practices. The appellant frequently deals with fragmentary evidence that requires exhaustive searches of a variety of medical record data bases; public records; business operating records; and billing records and related documentation to identify fraud because treatments have either ceased, or operations reorganized, or relocated. Tips surface that occasionally lead to additional fraud cases whose relationship to the case under study must be investigated and resolved. Improper investigations could bring about public embarrassment for health institutions that are not part of the HCF. The appellant leads teams and his supervisor reviews his reports. The cases are focused on the operations of a hospital or facility at both the local level and in other geographic areas. Some of these cases require investigation of networks in several cities throughout the United States.

The GS-13 grade level is not met. The appellant submitted several cases for which he is the case agent that required the piecing together of evidence from a variety of sources and the cooperation of other agencies and political jurisdictions. However, these cases do not reflect the complexities

of resolving conflicts in facts and evidence typical of an integrated, complex organizational structure found at the GS-13 grade level. Support provided by other public agencies is informational and does not include segments of major, integrated interregional or nationwide cases found at the GS-13 grade level. For the most part, the issues investigated are limited to corporate operations at limited sites, and lack the extreme complexity of the organizations typically investigated at the GS-13 grade level. In the *[name and name]* cases, the subject was a consultant trained in [state] by a coding company nationally known for its improper training of medical consultants. These networked consultants, spread across the United States, have caused serious damage to the Medicare and Medicaid systems. The appellant's office worked with agents from a number of Federal districts throughout the United States, including [state], [state], and [state]. In the *[name]* case, the consultant was from [state] and has been traced to hospitals in other districts. The appellant has given advice to those districts and is likely to continue to assist in their investigations. However, when corporate activities are tracked to other jurisdictions, as in *[name]*, the appellant did not manage investigations at those locations as part of an integrated interregional or nationwide corporate investigation as described at the GS-13 grade level.

Therefore, this element is credited at the GS-12 level.

Element 2 – the difficulty and complexity imposed by the subjects of investigations

At the GS-12 grade level, cases involve difficulties or complexities imposed by the prominence or characteristics of the subject(s) investigated, including: (1) a suspected or known racketeer, gambler, smuggler, etc., who is known through their associates, behavior, or background as a prominent figure in organized crime or subversion; (2) the principal or financial backer in an organization consisting of separate manufacturers, distributors, and transporters of illegal goods, drugs, alcohol, counterfeit money, fraudulent documents, explosives or weapons (normally the separate parties do not know each other or the overall backer); (3) a figure with financial interests overlapping several activities both legal and illegal, e.g., funds from a legal concern are diverted and used to finance illegal activity; and/or (4) the head of an organization involved in legitimate business who is suspected of fraudulent use of invoices, operating fraudulent marriage rings, etc., which are carried out under the cover of the legitimate organization, and the suspected violation requires assistance from several accomplices, e.g., attorneys or accountants who are themselves in positions of public trust.

At the GS-13 grade level, subjects are involved in the range and variety of such interrelated activities as: (1) a suspected foreign agent who, with several associates, is planning acts extremely harmful to national security, e.g., theft of national defense documents for benefit of a foreign government, or compromise of persons who have access to highly classified information concerning national defense; and/or (2) the organization under investigation has an extremely complex structure with diversified interests, e.g., the manufacture, distribution and sale of legal or illegal goods in a national market involving a complex network of widespread distribution and sales outlets.

As described at the GS-12 grade level, the fraudulent practices uncovered in the appellant's cases involve a more limited range of subjects and business activities than at the GS-13 grade level. His cases have a large number of witnesses, experts, and other professionals that must be

interviewed in order to solicit information and to identify and collect evidence. His assignments requires him to make and maintain contacts to gather and develop evidence of statutory violations that account for millions of dollars of lost taxpayer money due to elaborate and fraudulent billing schemes perpetrated by dishonest healthcare providers. Additionally, he makes numerous professional contacts to verify information, to prepare cases for court, and to support findings that enable the cases to proceed in a proper and timely manner. In order to perform his work, the appellant interviews a number of coding experts around the country to better understand coding guidelines and the rules that are applicable to specific issues raised in his cases. This is typical of investigations at the GS-12 level. [name] is illustrative of cases where the appellant uncovered fraudulent practices at one hospital and was able to connect the same practice at another hospital. Both hospitals used the same consultant. Typical of the GS-12 level, the investigation revealed the cases' connection to the common element of the consultant who gave direction on how to miscode pneumonia cases.

In contrast, the appellant's cases are not of the same level of complex interrelated activities and business envisioned at the GS-13 level. In [name], the identification of ownership of the home was difficult, but the cases lacked the prominence of suspects and indications of actual or potential threats or challenges to the national welfare or security typical of GS-13 level cases. The GS-13 investigator must piece together evidence that comes to him/her from other investigators stationed throughout several states or the nation. From this evidence he/she must recognize the suspect's pattern of operation in order to anticipate or even influence events as they unfold by instructing separate investigators or units of investigators working on segments of the case. In another example, subjects use fictitious names or are otherwise clearly separated from each other and from the illegal activities under investigation. These aspects are not present in the appellant's most complex cases. The appellant's work has involved subjects who, though suspected of engaging in major and complex HCF, are separated from the overt violation by a middleman or organization. However, the appellant's work does not require efforts equivalent to establishing relationships involving the complexity of uncovering and distinguishing illegal activities from legal activities occurring in subsidiaries and holding companies throughout several states as described at the GS- 13 level. Although these cases require unraveling complex health and Medicare operations, they do not involve investigating the interrelated diversified national or equivalent networks intended by the GS-13 level.

Therefore, this element is credited at the GS-12 level.

Element 3 – the nature of separate investigative matters that grow from the original assignments

At the GS-12 grade level, a substantial number of separate investigative matters typically grow from the original assignment. For example, an investigation beginning with the pusher or passer of stolen or illegal goods, e.g., drugs, counterfeit money, or fraudulent documents, is expanded by piecing together bits of evidence from interviews, surveillance, documentary examinations, informants, etc., proceeds through the intermediate distributor, and eventually involves the manufacturer, backer, organizer, importer, etc.

In contrast, at the GS-13 grade level, suspected violators are highly organized crime groups whose criminal activities are interwoven with legitimate business activities. For example, seemingly legitimate construction firms may have ostensibly legal contracts with states, and

there is suspicion of bribery of state officials or fraud. The investigator develops leads from known criminal activities and finds that these leads point to legitimate businesses resulting in suspicion of seemingly respected, legitimate political, business, or professional leaders. Cases at the GS-13 grade level also often involve large-scale raids and seizures throughout several states, which normally require the investigator to lead and coordinate several units of investigators from his own and other agencies in tracing leads and gathering information.

Typical of the GS-12 grade level, the appellant pieces together information from a wide variety of sources to establish a medical history, including who provided treatment, the time periods(s), and their relationship to Medicare coding. This requires documenting specific medical chart information and billing for treatment related to the coding. The appellant's case examples involve similar uncovering of information from records and interviews. Many of his cases have resulted from national initiatives. The appellant provides information to other districts that help them with similar cases because he is familiar with the coding industry and the complex regulations that govern health care claims. In *[name]*, the appellant personally reviewed more than 18,000 subpoenaed documents which led the local USAO to investigate six other hospitals that were engaged in similar conduct.

The GS-13 grade level is not met. Occasionally, an investigator or two from another agency will be used by the team that the appellant leads. Also, he coordinates with other agencies such as the FBI, HHS, and ISP to furnish and gather information. Unlike the GS-13 grade level, however, the appellant's work is performed in his home district. The appellant's investigations may lead from one facility to another such as in *[name and name]* where the same consultant was traced to two hospitals within the district. While these inquiries may lead to significant related investigations beyond the immediate case, they do not result in the appellant requesting subpoenas for access to billing records in other jurisdictions, and the appellant is not responsible for coordinating units of investigators in other jurisdictions as is typical of the GS-13 grade level.

Therefore, this element is credited at the GS-12 level.

Element 4- the skill required to establish facts and evidence in assigned cases

At the GS-12 grade level, cases involve a high degree of skill required to establish the interrelationships of fact and evidence. Investigations involve subjects who are suspected of major and complex criminal activity who are separated from the overt violation by an intermediary or organization, requiring the use of such techniques as surveillance, radio communication, toll-call checks, and scientific identification and matching of various specimens to establish a direct link between the suspect and other violators. At this grade level, the development of defensible testimony is dependent upon such techniques as pitting one violator, criminal, or witness against another; extensively checking the word of one against another; or the exercise of great care in establishing facts and evidence because of the prominence of the subject or the importance of the case.

In contrast, at the GS-13 grade level, cases typically impose exceptional difficulty in establishing the interrelationship between fact and evidence. For example, subjects use fictitious names or are otherwise clearly separate from each other and from the illegal activities under investigation. They deal exclusively through subsidiaries and holding companies that engage in geographically

dispersed, diversified mixtures of legal and illegal activities, e.g., businesses throughout wide sections of the country run by Organized Crime families with subsidiaries engaged in a mixture of legal and illegal activities or legitimate enterprises that are multi-state in scope that obtain business through fraud or bribery. The work of other investigators or teams of investigators coordinated at the GS-13 grade level involves segments of cases that fully equate to cases themselves that are valuable at the GS-12 grade level.

Illustrative of the GS-12 grade level, the appellant must piece together and verify facts that create the historic record. For example, the appellant needed to conduct numerous interviews in most cases with personnel in health care facilities such as medical coders, records personnel, nurses, doctors, and others to piece together information about potentially fraudulent practices. As at the GS-12 grade level, [name] required many hours of reviewing IDPA surveys of geriatric residents who had been exposed to such poor care that some died. The appellant and two investigators from the ISP spent nearly 100 hours reviewing billing information, Public Health Surveys, and Federal regulations in order to identify nearly 4,000 Federal deficiencies. *Shelby Memorial*, in particular, reflects the difficulty in relating facts to HCF fraud. The appellant and other investigators examined around 2,500 medical charts in determining what disease existed and the appropriate treatment. By applying the laws, rules, statutes, and regulatory policies to the specific instance where coding violations were identified and false claims were filed, the appellant was able to expose this scheme. The scope of the impropriety was such that the lawsuit filed by his USAO office ultimately resulted in a civil settlement of \$1,750,000. DOJ later designated the bacterial pneumonia cases as a “national project.”

The GS-13 level is not met. The interrelationship of fact and evidence in the appellant’s cases is not of the difficulty described at this level. The case subjects do not use fictitious names, are not clearly separated from each other or from illegal activities, and do not present equivalent GS-13 factual relationship issues. While the appellant coordinated the work of other investigators, the record does not support the conclusion that the subjects involved in these cases deal exclusively through subsidiaries and holding companies that engage in diversified mixtures of legal and illegal activities throughout wide geographic areas as described at the GS-13 level or involve equivalent factual and evidence interrelationship issues. The record shows that the case segments do not equate to cases of GS-12 grade level difficulty, as intended at the GS-13 grade level.

Therefore, this element is credited at the GS-12 level.

Element 5 – the sensitivity of assignments

At the GS-12 grade level, work depends on the high degree of sensitivity of assigned cases. Subjects are so prominent that after the first witness is interviewed, word of the interview precedes the investigator so that subsequent witnesses are evasive because of reluctance to or fear of giving information which witnesses view as exploding into an important Federal case. The subject and their peers are very often the subject of major news media. Therefore, any investigation is likely to result in publicity and would to some degree cast suspicion on the reputation of the subject, prejudice the investigator’s case in court, or implicate subsequent administrative decisions.

In contrast, at the GS-13 grade level investigations: (1) receive sustained and widespread coverage in the major news media because of the prominence of the suspects or victims of the crime or threat if the investigation became public knowledge prematurely. This could severely hamper the speed of the investigator's progress and endanger the lives of victims, e.g., investigation of a major member of an Organized Crime family that must be tightly controlled to prevent the elimination of witnesses, the protection of victims willing to testify, etc.; (2) have suspects whose financial involvements extend to enterprises that have a significant impact on the national economy, e.g., the transportation or banking industry; and/or (3) have suspects who are principals in financial or other enterprises that reach into state and local affairs, e.g., through attempted bribery, fraud, collusion or extortion of public officials.

Typical of investigations at the GS-12 grade level, HCF cases generate a high intensity of public interest because of their perceived impact on public health. These operations frequently generate media attention when such problems are revealed. In both [name and name], the subject was a consultant trained in [state] by a coding company nationally known for its improper training of medical consultants who networked themselves through the United States and caused financial injury to the Medicare systems.

The appellant believes that the information about medical cases can be detrimental to health care providers and their communities and that premature news coverage would be harmful to the investigation. However, the GS-13 grade level is not met. The appellant's investigative activities do not deal with the national impact, scope, and impact of public officials' behavior, or media impact on investigation progress found at the GS-13 level. Furthermore, the record shows that the appellant's investigations do not routinely involve principals who generate the breadth of news coverage or whose activity has the direct and substantial economic impact indicative of the GS-13 grade level issues of sensitivity.

Therefore, this element is credited at the GS-12 level.

Element 6 – the jurisdictional problems involved in case assignments

At the GS-12 grade level, significant jurisdictional problems are characteristic of assigned cases. Jurisdictional problems involve subjects engaged in activities, e.g., drug use, traffic and smuggling; forgery; alleged subversion; that are the concern of several local, county, state, and Federal agencies. Cases involve a web of relationships that require a more extensive knowledge of the laws, rules, and policies of various jurisdictions because the investigator often plans and times raids and surveillance that involve use of these agencies.

In contrast, the GS-13 level cases involve extremely difficult planning and coordination work because of extensive and critical jurisdictional problems involved in completing investigations. Evidence may warn the investigator that their contacts in other jurisdictions are themselves involved in wide-scale criminal conspiracies which require the investigator to use such suspects in double or triple capacities without permitting such suspects to realize how they are being used. Discovery on assignment could not only result in injury or death to the investigator, but could cut off information linking evidence together and jeopardize or destroy a critical case that the Federal Government had been developing for months or years, involving a network of state, local, and other Federal agents and informers.

The appellant makes and maintains contact with a wide variety of civilians, government, and court personnel. Descriptive of problems at the GS-12 level, the appellant in [name] developed, and was the direct source to, an informant who was an employee at a large clinic who reported directly to him about violations that were taking place within the medical group's insurance department. The employee provided evidence which the appellant handled as prescribed by the courts, so that its value would not be lost through suppression hearings. The employee also introduced him to a second informant, a former employee, who had inside information that was valuable to the government's case. As the lead investigator, the appellant directed the investigation with the assistance of subordinate investigators and auditors from HHS/OIG, FBI, USPS, IDPA, and ISP. As a result, the Civil Division recovered \$200,000.

The appellant states that he acts as liaison for the Civil Division in the [location] District of [state]. He also states that he has been the lead investigator in all cases with authority to pursue each case into another district or region, if necessary, under the same level of responsibility as described at the GS-13 benchmark. As the lead investigator, he says he planned and directed each investigation. These cases involved investigators, auditors, and law enforcement officials of other agencies. These several cases involved work in numerous states due to national initiatives and the investigation of large corporations with complex organizational structures that are networked throughout the country. In addition, one case involved Swiss businessmen and, in another, money was shifted offshore to Bermuda.

In [name] and [name], the appellant worked with agents from several Federal districts, including [state, state, and state]. In [name], the physician-consultant from [state] was traced to hospitals in other districts. In those districts the appellant provided advice and continues to assist in on-going investigations. In [name], the subject businessmen operated nursing homes in [state] and [state]. They siphoned Medicare payments away from these facilities, laundering the money through a large network of corporations around the country. The network of businesses was so complex USAO had to hire an experienced forensic auditor to uncover the elaborate scheme designed to disguise the money flow. However, unlike the GS-13 grade level, the appellant's cases do not involve jurisdictional problems resulting from planning or coordinating cases that spread into other jurisdictions. His planning and coordination responsibilities are for cases within his district.

Therefore, this element is credited at the GS-12 level.

Factor I summary

For Factor I to be evaluated at a particular grade level, most or all of the six elements must be at that particular grade level. Therefore, because all six elements have been credited at the GS-12 level, Factor I is evaluated at the GS-12 level.

Factor II - Level of Responsibility

This factor measures the kind and extent of supervision given to investigators and the degree of resourcefulness required in finding and verifying information pertinent to the cases assigned.

At the GS-12 grade level, investigators receive or generate their own assignments. They receive few instructions on the technical aspects of the work, but are given mostly policy guidance, e.g., information on understanding of jurisdictional problems being worked out among agencies, or the fact that this is one of the first of a particular type of case since a new court decision, or authorization to follow a case into another district or region, if necessary. The GS-12 investigator is responsible for planning cases independently, and working out arrangements with other jurisdictions, except in policy areas. For example, in setting up a joint raid involving Federal and local law enforcement, the investigator is responsible for planning and timing. However, they must work through supervisors in coordinating the commitment of resources and staff.

In contrast, at the GS-13 grade level, investigators receive assignments through program discussions, e.g., conferences or written directives that outline broad objectives, e.g., to stop smuggling of a particular commodity at a given port. The GS-13 investigator outlines the objectives and boundaries of the assignment, plans the resources needed, and includes plans for assuring coordination with other jurisdictions. Instructions are more generalized than at the GS-12 grade level. The review of work is typically in the form of discussions at certain critical points, e.g., suggestions on the commitment of resources in other domestic or foreign offices that are normally approved. Recommendations for extension, modification, or adoption of new lines of inquiry are normally accepted, although the sensitivity and importance of the cases must be cleared by the very highest individuals in the agency. GS-13 investigators devise methods, techniques, and approaches to problems that often set patterns for subsequent investigations in similar areas and are often adopted for use by investigators at lower grades.

The PD of record states that the appellant conducts investigations of a highly complex and difficult nature relating to abuses giving rise to HCF. The appellant works directly under and reports to the Chief of the Civil Division of the [location] District of [state]. He receives his assignments through discussions with his supervisor, Assistant United States Attorneys (AUSAs), and members of the HCF task force. Sometimes the appellant suggests pursuing a particular investigation such as in the case of [name]. The appellant states, and his supervisor confirmed, that he receives administrative supervision. His supervisor becomes involved in resource and time-frame issues. However, EOUSA functions in a coordinative role for various USAO programs and services and provides general direction and supervision of the management and policy activities for financial litigation programs, including the establishment of policy and procedures for debt collection activities.

The appellant works with the freedom from supervision approaching the GS-13 grade level in that he makes a preliminary study of the assignment, outlines the objectives and boundaries as he sees them, plans the resources that he needs, and anticipates coordinating requirements. However, the level of responsibility is closely linked to the level of complexity of assignments that we have evaluated at the GS-12 grade level. Increased independence and increased difficulty of assignments are not meaningful unless considered together. The appellant's cases do not meet the GS-13 grade level in scope or complexity. The resources for which he must plan and the lines of inquiry that may flow from his cases fail to meet the GS-13 grade level. The nature and scope of work assignments as described by the appellant are limited by the EOUSA guidelines, and fail to fully meet the threshold of the guide as stated at the GS-13 level. The appellant's authority is limited because the cases and resources needed to work them must be

approved by his supervisor or someone higher in the chain of command. The appellant's position resides in the suborganization in the Central District of a State office thus limiting the level of program work that can be conducted. In addition, at his organizational level, he is not responsible for devising breakthroughs in investigative approaches, techniques, and policies. Cases at the GS-13 level are so much more complex, critical, and sensitive than those at grade GS-12, and unexpected problems indicating new lines of inquiry are much more common at the GS-13 level. His cases are not representative of the examples described at the GS-13 level that requires work of a national or even international scale.

The appellant states that DOJ recognized the [name] as the "first" case of its kind to uncover additional coding violations by health care providers to justify false billing to Medicaid and Medicare for medical services given. But setting a "precedent" by extending analysis to other codes in this area of health care fraud is not equivalent to devising methods, techniques and approaches described at the GS-13 level. Rather, it more closely matches the "first of a particular type of case since a new court decision" or law as described in the Guide at the GS-12 level.

Factor II summary

Based on the above analysis, Factor II is evaluated at the GS-12 level.

Decision

The position is properly classified as Investigator, GS-1810-12.