

**U.S. Office of Personnel Management
Office of Merit Systems Oversight and Effectiveness
Classification Appeals and FLSA Programs**

Chicago Oversight Division
230 South Dearborn Street, DPN 30-6
Chicago, Illinois 60604

**Classification Appeal Decision
Under Section 5112 of Title 5, United States Code**

Appellant: [Appellant's Name]

Agency Classification: General Attorney
GS-905-12

Organization: Department of the Army
U.S. Army Corps of Engineers
[City] District
Office of Counsel
[City, State]

OPM Decision: Trial Attorney (Contract)
GS-905-13

OPM Decision Number: C-0905-13-03

/s/

Frederick J. Boland
Classification Appeals Officer

April 29, 1998

Date

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

The certificate must be implemented no later than the beginning of the fourth pay period following the date of the decision, but not earlier than the date of the decision.

Decision sent to:

[appellant's name and address]

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Introduction

The appellant is assigned to position number 01975, classified as General Attorney, GS-905-12, on December 24, 1996. The position is located in the Office of Counsel, [City] District, Corps of Engineers, Department of the Army. The appellant believes his position description is accurate, but feels the title and grade of his position do not reflect his trial duties, specialization, and the complexity of cases he is expected to handle. These matters are addressed under the Analysis and Findings section of this decision.

In support of his case, the appellant also references work assigned to other positions, a memorandum certifying his qualifications, and Corps of Engineers classification guidance (Supplementary Classification Guide for Attorneys in Offices of Counsel, dated May 9, 1989).

By law, positions are classified based on their duties, responsibilities, and qualification requirements by comparison to the criteria specified in the appropriate Office of Personnel Management (OPM) classification standard or guide. Other methods of evaluation, such as comparisons to other positions, are not permitted. The qualifications required of the position, rather than its incumbent's qualifications, govern the classification. Similarly, the criteria specified in the standard, rather than an agency's internal guidance, govern the classification. Where an agency's internal guidance may conflict with the OPM standard or the rationale given in OPM decisions, it should be corrected. As such is the case with the Corps' guidance regarding large sums of money (see Factor 1 discussion in the Grade Determination section of this decision), we draw the agency's attention to it in our transmittal letter.

Position Information

The appellant is one of seven Attorneys in a 15 person office, which is headed by a GS-15 supervisor, and includes four GS-13 and three GS-12 Attorneys, three Paralegal Specialists, a Contract Industrial Relations Specialist and an Assistant, two Legal Clerks, and a Secretary. His primary duties are to prepare and present cases before the Armed Services Board of Contract Appeals (e.g., M. C. & D. Capital, Korte-Plocher), the Engineer Board of Contract Appeals, and other judicial and administrative bodies. He also prepares and assists in the presentation of cases before the U.S. Court of Federal Claims (e.g., James R. Smith) and may act as Associate Trial Counsel in cases the Justice Department brings to trial. He estimates that he spends about 80 to 90 percent of his time preparing and presenting cases for hearing or trial and in his appeal letter cites three recent cases accounting for this time:

Balfour Beatty

Payment dispute (settled in 1997 for about \$12 million) involving a \$55 million contract awarded in 1993 for removal of hard clay and construction of the cofferdam for the Olmstead Locks and Dam replacement project. The 15 year, billion dollar project is the Corps' largest civil works project.

Barton & Barton

Contractor claim for \$454,301 plus interest fees and unspecified damages, with total damages in excess of \$1 million.

Foley Co.

Case involving exemption of state sales tax on project (dismissed December 1996).

Other duties include resolving contract disputes to avoid litigation (preventative law) and responding to bid protests.

Analysis and Findings

Series and Title Determination

The General Attorney, GS-905, series covers professional positions, like the appellant's, that require admission to the bar and that prepare cases for trial or present cases before a court or an administrative body or persons having quasi-judicial power.

The title of a position in the GS-905 series is constructed by using the appropriate functional designation (trial, advisor, examiner), followed by the appropriate subject-matter designation (contract, labor, tax, etc.). Trial Attorney applies to positions, like the appellant's, that prepare cases for trial or present cases before a court or an administrative body. General Attorney applies to positions involving two or more functional areas. Though the appellant also advises management on legal issues from time to time, most of his time is devoted to trial duties. Positions are usually classified according to their principal duties, i.e., those that demand the majority of time. The purpose of a position title is to communicate an immediate understanding and identification of the job. General Attorney as a title fails in this purpose because it obscures the position's greatest time and skill demands. The parenthetical Contract, however, clarifies which subject matter most concerns the position (even though legal issues in other subject areas may occasionally be addressed). The title that best reflects the nature of the position's work, then, is *Trial Attorney (Contract)*.

Grade Determination

The *OPM General Attorney, GS-905, Series* position classification standard, dated October 1959, groups grading criteria under two factors: Nature of the Case or Legal Problem and Level of Responsibility. The grade of an Attorney position is determined by the combination of the highest factor levels that are representative of the position.

Work demanding less than a substantial (at least 25 percent) amount of time is not considered in classifying a position. Similarly, acting, temporary, and other responsibilities that are not regular and continuing are not considered in classifying positions. (Temporary assignments of sufficient duration, though, are sometimes recognized in accordance with agency discretion by temporary promotion if higher graded duties are involved, by formal detail, or by performance recognition.)

Factor 1: Nature of the Case or Legal Problem

*This factor incorporates all those elements in a case or a problem which tend to make it more or less difficult to resolve satisfactorily. It addresses such things as the complexity of legal and factual issues, the impact of the case or problem, the importance of the case or legal action as precedent, the nature of the competition, the nature and availability of precedent decisions, the delicateness of the problem, public interest, and the money at stake. Three different levels (types of cases) are described. Each level identifies the **minimum** characteristics that must be met for credit. Unlike Factor 2, this factor has no intervening credit levels.*

In his letter of appeal, the appellant states, among other things:

The case record, as submitted at Exhibit No. 2, is accurate and complete through the years reflected therein, however, due to the passage of time, the incumbent's case listing has been updated. (Exhibit No. 4) Approximately, ninety percent of the work presently assigned the incumbent (over \$20,000,000.00) is in litigation. (Exhibit No. 4) The majority of this work relates to Balfour Beam Construction, Inc., v. United States, Ct. of Fed. Cl. No. 95-614C. The above case was referenced in the incumbent's initial February 9, 1994, appeal, however, at that time the parties were attempting to either negotiate or settle their differences through Alternative Disputes Resolution (ADR/Mini-trial) methods.

Subsequent to the filing of the incumbent's appeal, the Balfour Beatty negotiations and an ADR proceeding failed. Thereafter, the Contractor filed suit in the Court of Federal Claims demanding \$36,981,699.00 in compensation for a variety of claims including, defective government specifications, differing site conditions, government delays, and project acceleration. 3

More specifically, the Contractor alleged seventeen separate claims for which he demanded compensation. Shortly after the negotiations/ADR process failed, the Government filed six affirmative claims against the Contractor alleging Government entitlement to approximately \$3,000,000. Following various Government challenges to the actuarial methods used by Balfour Beatty in determining their damages, the Contractor reduced their claim against the Government to approximately \$24,000,000. Thirteen claims (approximately \$20,000,000 of the above aggregate sum of 23 claims totaling \$27,000,000) were assigned the incumbent. (See OPM Standards and Supplementary Guidelines for Attorneys in Offices of Counsel, "Glossary" p. 6, and "Nature of Case or Legal Problem" p. 8, "Litigation," Type III cases involving "very large sums of money.")

Incident to the defense of the above claim, the incumbent prepared six Contracting Officer's Final Decisions setting forth the Government's positions and demands in the various claims. The incumbent also oversaw preparation of a partial litigation report which was forwarded to an attorney for the Department of Justice who, following the contractor's filing of the action in the Court of Federal Claims, became the principal attorney in charge of the case.

³ The Contractor is represented by the firm of O'Brien, O'Rourke and Hogan, who are rated "AV" the highest rating possible by Martindale Hubbell Law Directory. (See Supplementary Guidelines, "Glossary" p. 6, "Extremely capable opposing talent" and "Nature of Case or Legal Problem" p. 8, "Litigation," Type III cases involving "extremely capable legal talent".)

The appellant devoted about 60 to 70 percent of his time during 1995-96 on the case cited above and began his appeal shortly thereafter. He bases his claim to higher credit largely on the dollar value of the case and the opposing legal talent. He is already credited with working Type II cases, which involve difficult legal questions, impact a significant segment of private or public interests, are strongly contested, or involve, directly or indirectly, large sums of money. The standard identifies

large sums of money as about \$100,000. Adjustment of the dollar values given in the standard is necessary to account for inflationary or deflationary effects, since an absolute value would serve no useful purpose. The purchasing power of that amount in 1959, when the standard was published, equates to about \$524,000 in 1995, according to Bureau of Labor Statistics figures.

Type III legal work is the highest level of work the standard recognizes. It involves extremely complex and difficult legal questions, cases having the effect of substantially broadening or restricting the activities of an agency, cases having an important impact on a major industry whose economic position affects the health and stability of the general economy, or work of similar magnitude. Also included at this level are cases generating nationwide interest that are either vigorously contested by extremely capable legal talent or involve very large sums of money, as a major antitrust case might. The standard identifies large sums of money as about \$1,000,000. The purchasing power of that amount in 1959, when the standard was published, equates to about \$5,240,000 in 1995.

Unlike Type III work, the appellant's responsibility for 13 claims in the Balfour Beatty case does not equate to responsibility for a major antitrust case, nor has the appellant's work on the case attracted nationwide interest (versus the billion dollar project itself). His responsibility for the case is unlike any of the examples given in the standard under Type III, such as responsibility for antitrust, tax, food and drug, or securities cases whose outcome would either substantially broaden or restrict an agency's enforcement role. It is not comparable to a case where the rates, practices, or competitive position of a major *industry* are at stake nor does it have the nationwide impact of a case substantially broadening benefits for a large population, as Type III cases do. It does not approach the magnitude of a Type III case considering a substantial civil rights question involving the due process clause.

The dollar value of the 13 claims for which the appellant is responsible is very large, though, even after making the necessary distinction between the amount in contest versus the amount sought, i.e., the difference between the payment the Corps will allow and the payment the contractor demands. The standard, however, does not use money as the sole determinant of Type III nature. The criteria include frequency of assignment *and* nationwide interest coupled with *either* very large sums of money or extremely capable legal talent.

The appellant's other cases frequently involve large sums rather than very large sums. *M. C. & D. Capital*, for example, involved the appellant's defense of contractor claims totaling about \$1 million as Trial Attorney before the Armed Services Board of Contract Appeals and his co-authoring the appeal court brief. In *Korte-Plocher*, as Trial Attorney he defended against contractor claims of about \$940,000. In *James R. Smith* he defended a \$5 million loss of property claim, serving as co-counsel during the trial and preparing a litigation report for the Department of Justice.

Extremely capable legal talent is not defined in the standard, but a sensible interpretation, given the premium the standard places on legal difficulty, is that it refers to the same caliber of Attorney as is typically found in other cases discussed under Type III. For example, lawyers whose exceptional legal talents and credentials are sought by the largest defense contractors and corporations for their most important legal undertakings. However, the appellant relies on the appearance of a firm's name in a law directory to determine this caliber and cites it for his *M. C. & D. Capital*, *Korte-Plocher*, *Barton and Barton*, and *James R. Smith* cases. A firm's listing is no guarantee that a lawyer the

appellant may oppose from the firm is of such high caliber. The lawyer rating system that Martindale-Hubbell employs is based on a survey of legal professionals in the Attorney's community and offers three ability ratings: Fair to High, High to Very High, and Very High to Preeminent. The local nature of the ratings and the ambiguity of their ranges make for doubtful comparisons for classification purposes, though they have other uses to the legal profession. A more direct and meaningful comparison would consider the opposing counsel's credentials and the cases upon which his or her reputation rests. Such an assessment is necessary to support assignment of Type III credit on the basis of opposing counsel's legal talent.

Nationwide interest is also typically lacking in the appellant's legal work. The M. C. & D. Capital case appears the exception, which the appellant indicates was reported as one of the most significant decisions of the year at the 1992 Government Contract Year in Review Conference and published in *The Government Contractor* in 1993. The case established that the Government may be entitled to common law damages even before cost is incurred and is cited by other agencies, like the U.S. Air Force, under contract law lessons learned. His legal work in other cases, however, did not attract such attention.

Work must fully meet all the criteria of a level to be given credit. The appellant's assignments involve difficult legal issues and are strongly contested, but fall short of fully meeting all Type III criteria and typically bear little resemblance to the cases given as examples at that level. Consequently, only Type II credit applies.

We evaluate this factor as Type II.

Factor 2: Level of Responsibility

This level incorporates those characteristics that are indicative of the level at which the work is performed and is expressed in terms of four elements: (1) nature of functions, (2) supervision and guidance received, (3) personal work contacts, and (4) nature and scope of recommendations and decisions. For each of these four elements, three levels of intensity (Levels A, C, and E) are described. Unlike Factor 1, intervening levels (B and D) may be assigned when a position compares with both the higher and lower levels in differing respects or when a position falls clearly between two of the described levels with respect to the majority of elements.

Nature of Functions

The appellant states:

From a review of the incumbent's revised job description, it is undisputed that 75% of the work performed involves the actual trial or preparation for trial of cases.⁹ For those cases which were tried before the Armed Services Board of Contract Appeals and the Engineer Board of Contract Appeals, the work performed by the incumbent was as the principal attorney in charge of the case. As such, these cases are credited at Level E responsibility.¹⁰

⁹ The incumbent previously set forth a thorough analysis of the cases which he tried in his initial appeal. (See Exhibit No. 2 at pages 8 through 11 for a discussion of Levels of Responsibility and cases which were tried.)

10 The cases tried by the incumbent also frequently involved matching skills with distinguished, rated "AV" by Martindale Hubbell Law Directory, highly paid legal talent, a Type III, level D or E, Responsibility.

At Level C, the appellant is already credited with preparing and presenting (or providing technical guidance during) cases in administrative hearings, before courts of original jurisdiction, or appellate courts. He is credited with preparing charges, show cause orders, complaints, briefs, motions, and other documents preparatory or incident to the trial of cases. He is credited with participating in pretrial or prehearing conferences, examining and cross-examining witnesses, arguing motions before courts or hearing officers, and summarizing the cases.

Level E Attorneys act as the *principal* Attorney fully in charge of the preparation and presentation of cases before administrative tribunals or before trial or appellate courts, where the cases (a) are of such scope that they may, in many instances, warrant the assistance of one or more Attorneys of lower grade or other specialists *and* (b) are of such importance that they frequently involve matching professional skills against some of the most distinguished and highly paid legal talent in the country.

The appellant typically functions as the sole Attorney rather than the principal Attorney. His assignments are not so complex and highly competitive that he requires the assistance of other Attorneys or specialists. Regarding opposition of the most distinguished and highly paid legal talent in the country, such talent is typically found in cases having an important impact on a major industry or the largest corporations, where the most highly credentialed lawyers may be used. For the reasons already noted under Factor 1, this assessment cannot be properly made solely with the use of Martindale-Hubbell ratings or books like *The Best Lawyers in America* (which includes about 14,000 Attorneys in the major law specialties based upon the publisher's interviews and which, like Martindale-Hubbell ratings, may be useful in applications other than Federal position classification).

Though Level E is not supported, Level C does not adequately recognize the full nature of the appellant's functions, which significantly exceed that of an intermediate Attorney, even though they fall short of a senior Attorney. The Department of Justice's formal recognition of his contributions and expansive role in the M. C. & D. Capital case, the national significance of the case, his sharing cross-examination with the Department of Justice in Barton & Barton, his broad role in the James R. Smith case, and his repeated handling of cases at the high end of Type II difficulty warrant Level D credit.

We evaluate this subfactor at Level D.

Supervision and Guidance

The appellant notes:

I do receive assignments from the District Counsel and/or a Senior Level Attorney who monitors case progress. However, neither the receipt of assignments from the District Counsel nor the monitoring of case progress, i.e., advising when the case is ready for trial, diminishes the Level of Responsibility associated with the Appellant's primary job duty of trying cases. As set forth in Appellant's appeal at pages 8 and 9, Level E attorneys try the case. Neither the District Counsel nor the Senior attorney who monitors case progress tried or will try the cases set forth at Appellant's Exhibits No. 2 and 4.

At Level C, Attorneys work independently on complex cases, but all written work is reviewed for soundness and the supervisor discusses cases before trial. Before a case is presented in an administrative hearing or before a court, the supervisor discusses the presentation, the line of approach, the possible lines of opposition to be encountered, and other aspects of the case to ensure that proper groundwork has been laid for successful prosecution of the case.

At Level E, no preliminary instructions are given to Attorneys on their extremely complex cases, but the supervisor is typically briefed on the approach to be taken at the trial. Attorneys at this level independently conduct the investigations or negotiations, plan the approach, and develop the completed decision, report, brief, opinion, contract, or other product; or represent the Government at conferences, hearings, or trials.

The appellant works under the supervision of the District Counsel who discusses cases in terms of overall case load, specific issues of importance to the Command, Corps of Engineers policy, and priority of handling. He selects and accomplishes procedures and methods of preparation and trial of cases. During our interview with District Counsel, it was confirmed that the appellant works independently and retains responsibility for assignments. He is further expected to make his own determinations regarding information discovered during development of a case, as well as any pertinent policy considerations. His independence and responsibility significantly exceed Level C. Though he functions with independence similar to Level E, it is without Level E's responsibility for extremely complex cases, as noted under Factor 1. Hence, Level D credit is appropriate.

We evaluate this subfactor at Level D.

Personal Contacts

The appellant states:

Similarly, in cases before the above forums, the incumbent jointly negotiates with construction personnel to either settle or attempt to resolve their outcome. Joint negotiations with construction personnel for settlement purposes is a Level D responsibility. (See Exhibit No. 13, Supplementary Guidelines, at p. 26)

Level C in the standard recognizes the skill required in the presentation, exposition, and argument of cases presented at administrative hearings and at court. It also recognizes participation in pretrial or prehearing conferences with industry representatives or claimants and their Attorneys to explain points of law, charges, etc.

The most responsible personal contacts recognized under the standard are at Level E. These involve conferring with top agency managers on important legal and policy issues, advising Congress on proposed legislation, or trying cases before courts and administrative bodies. While the first two responsibilities belong to higher positions than the appellant's, he does try cases before administrative bodies.

Level E cites administrative hearings without specifying the nature of the contacts or distinguishing them from Level C's administrative hearing contacts. Since the standard credits increasing degrees of difficulty, the necessary implication is that Level E is referring to the most difficult level of contacts found at hearings. This relates to the type of work and resulting contacts that engage senior (Level

E) Attorneys, as distinguished from the work and contacts typical of intermediate (Level C) Attorneys. To be comparable to the first two examples given under Level E, the hearings must involve issues of considerable consequence or importance to the agency and prestigious witnesses (e.g., high ranking officials such as presidents of large national firms) or exceptional opposing counsel (e.g., the country's most distinguished and highly paid lawyers). Such contacts are typically absent from the appellant's work.

However, as with the Nature of Functions subelement, Level C does not adequately recognize the more difficult contacts presented in the appellant's work. His more expansive role in Department of Justice cases in deposing and cross-examining witnesses coupled with many of his cases ranking at the top end of Type II difficulty and his deposition of presidents and vice-presidents of very large firms indicate significantly higher negotiation and defense skills are required, beyond that expected of intermediate Attorneys.

We evaluate this subfactor at Level D.

Nature and Scope of Recommendations and Decisions

At Level C, Attorneys make recommendations through the supervisor on such issues as initiating lawsuits, settling claims, arguments to be made at trial, and settlement agreements to be pursued. At Level E, Attorneys often directly advise such high level management officials as program heads, bureau chiefs, or cabinet officers on matters of the broadest scope and complexity.

Recommendations the appellant makes are consistent with Level C. Recommendations regarding the initiation of litigation or settlement of a claim are normally made through District Counsel.

We evaluate this subfactor at Level C.

The majority of subelements evaluate at Level D. Accordingly, we evaluate Factor 2 at Level D.

FACTOR LEVEL SUMMARY

Factor	Level
1: Nature of Case	Type II
2: Nature of Responsibility:	D
Functions	D
Supervision	D
Contacts	D
Recommendations	C
Grade Conversion	GS-13

The table above summarizes our evaluation of the appellant's work. As shown on page 25 of the standard, Type II, Level D work converts to the GS-13 grade.

Effect of Individual Stature

In evaluating a position that meets the requirements of a level of responsibility with respect to some elements of evaluation, but falls short with respect to other elements, the position is awarded the higher responsibility level, if warranted by the incumbent's outstanding legal stature (i.e., the incumbent's opinions in a particular area of law are generally recognized by other Attorneys as especially authoritative). Except in unusual circumstances, this is applicable only to GS-13 positions and above.

Neither the appellant nor management advance any argument regarding individual stature. No adjustment to the assigned level of responsibility is warranted.

Decision

The proper classification of the appellant's position is Trial Attorney (Contract), GS-905-13.