

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

Philadelphia Field Services Group  
600 Arch Street, Room 3400  
Philadelphia, PA 19106-1596

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

**Appellants:** [appellants' names]

**Agency classification:** Attorney-Examiner (Civil Rights)  
GS-905-14

**Organization:** Hearings Staff  
[name] District Office  
Office of Field Programs  
Equal Employment Opportunity  
Commission  
[location]

**OPM decision:** Attorney-Examiner (Civil Rights)  
GS-905-14

**OPM decision number:** C-0905-14-01

/s/ Robert D. Hendler

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Robert D. Hendler  
Classification Appeals Officer

March 18, 2003

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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).

## **Decision sent to:**

PERSONAL

[appellants' names]

Hearings Staff

[name] District Office

Equal Employment Opportunity Commission

[address]

[location]

Director, Human Resource

Management Services

Equal Employment Opportunity Commission

1801 L Street, N.W.

Washington, DC 20507

## Introduction

On July 2, 2002, the Philadelphia Oversight Division, now the Philadelphia Field Services Group, of the U.S. Office of Personnel Management (OPM) accepted a position classification appeal from [appellants' names]. They occupy identical additional positions currently classified as Attorney-Examiner (Civil Rights), GS-905-14, with the organizational title of Administrative Judge (AJ). The appellants requested reclassification as Attorney-Examiner (Civil Rights)-Administrative Judge, GS-905-15. They work in the Hearings Staff, [name] District Office, Office of Field Programs, Equal Employment Opportunity Commission (EEOC), [location]. We have accepted and decided this appeal under section 5112(b) of title 5, United States Code (U.S.C.). OPM received an initial agency appeal administrative report on July 23, 2002, a revised official position description (No. [number]) on July 29, requested work samples covering the past two years from the appellants on November 8, and additional work samples from two appellants sent to us on January 29, 2003, and February 2.

## General issues

In their June 27, 2002, appeal letter, the appellants stated that they had filed an appeal with EEOC on March 1, 2001. The agency's February 2, 2002, decision concluded that their position was correctly classified at the GS-14 grade level. The appellants said that their position should be credited with performing Type III, Level E work and evaluated at the GS-15 grade level. They disagreed with their agency's determination that they performed Type II work, citing an earlier agency evaluation in 1995-1996 that credited Type III work for Factor 1, *Nature of the case or legal problem*. The appellants stated that the November 1999 changes in EEOC regulations made their work more complex and the impact of their decisions greater with the added functions of awarding up to \$300,000 in compensatory damages and deciding the amount of money allowable for attorney fees.

The appellants commented on the agency's fact-finding process, saying that the audits done in 1995 and in response to their 2001 request show that the majority of their work is Type III. The agency credited their position with two elements of Factor 2 at Level E, one at Level C, and one at Level D, concluding that it was borderline D/E, and credited Level E. The appellants agreed with their agency's crediting of Degree E, but said that all four elements should be credited at Degree E.

In a November 6 cover letter for their work samples, the appellants stated that the listings of the cases closed during the past two years and copies of some of the orders and decisions issued demonstrated that the *Nature of case or legal problem* was Type III and *Level of responsibility* was Level E. They provided additional reasoning for evaluation of their position at the GS-15 grade level.

We conducted an on-site group audit on January 27, 2003, with all of the appellants. During the audit, some appellants pointed to the classification of positions in other agencies in support of their appeal rationale. 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). Since comparison to published standards is the exclusive method for classifying positions, we cannot compare the appellants' current duties to previous duties, their agency's evaluation of their

previous work, the classification of AJ positions in other agencies, or the compensation of positions that perform similar work covered by other compensation systems; i.e., Administrative Law Judges and U.S. District Court Judges. Our decision sets aside all previous agency decisions regarding the classification of the position in question.

### **Position information**

The appealed position is located in one of the agency's 50 District Offices. The primary purpose of the position is to adjudicate complaints of discrimination filed by Federal employees and applicants for Federal employment. The appellants handle both individual and class complaints performing such functions as determining case jurisdiction; reviewing cases for procedural compliance; scheduling hearings or determining if a decision without a hearing can be rendered; and conducting pre-hearing and status conferences to explore the possibility of settlement, clarifying the issues, and identifying stipulations. They are responsible for advising the parties about their rights, responsibilities, and burdens of proof; overseeing the discovery process; ruling on motions to compel and sanctions; and ruling on witnesses including authorizing and qualifying expert witnesses.

Presiding over hearings, the appellants make procedural and evidentiary rulings, maintain decorum by excluding unruly people, administer oaths and affirmation, and assure that the record is fully developed. They may direct the parties to produce written briefs and memoranda of law to present oral arguments. The appellants determine witness credibility, evaluate expert testimony, and conduct research in order to apply evolving case law. They have the authority to impose sanctions and dismiss cases as permitted by regulation. The appellants may conduct settlement discussions and other types of alternative dispute resolution (ADR) for cases where they are not assigned as the adjudicating AJ.

The appellants provide advisory and interpretive assistance to Federal agencies, unions, and employees on equal employment law, executive orders and directives, and Federal personnel laws, rules, and regulations. They provide training to agency staff and managers and Federal and private Bar Associations including courses for continuing legal education credits. The appellants assist agency representatives in developing programs and procedures and in establishing methods of program evaluation and reporting. They advise program managers on resolving major problems.

According to regulations effective November 9, 1999, the appellants' decisions are final and binding unless they are overturned on appeal. Agencies may no longer modify them. Rather than conduct de novo reviews of AJ decisions, EEOC can reverse the decision only if it is not supported by substantial evidence. AJ's are authorized to award attorney's fees and compensatory damages up to \$300,000 plus out of pocket costs and quantifying traditional equitable relief which is not subject to monetary caps (backpay and injunctive relief).

The appellants currently report to an acting supervisor. They work under general supervision and are assigned cases without preliminary instructions. The appellants exercise signatory authority for and independently plan and perform their work. Their decisions are seldom reviewed prior to issuance for conformance with EEOC policy, precedential effect, and overall

quality. Decisions issued orally after the hearing from the bench, if reviewed, are reviewed after they are rendered. Work is considered technically authoritative.

In reaching our decision, we carefully reviewed the information provided by the appellants and their agency, including the PD of record. The PD contains the major duties and responsibilities performed by them and we incorporate it by reference into this decision. In addition to the on-site audit with the appellants, we conducted a telephone interview with the appellants' former supervisor, [name], on February 6. To clarify information in the record, we conducted a telephone interview on February 11 with [name], Director, Office of Federal Operations (OFO), and [name] and [name] who are on his staff.

### **Series, title, and standard determination**

The agency has placed the appellants' position in the General Attorney Series, GS-905, and titled it Attorney-Examiner (Civil Rights). The appellants did not disagree with the series determination but requested a change in title to Attorney-Examiner (Civil Rights)-Administrative Judge. The GS-905 PCS contains official titles. It requires that positions not covered by the Administrative Procedures Act involved in hearing cases under contracts or under the regulations of a Federal agency when the regulations have the effect of law and rendering decisions or making recommendation for disposition are to be titled Attorney-Examiner. The subject-matter parenthetical title (Civil Rights) is added to positions concerned with law employed to protect Federally secured civil rights and liberties of persons. While Administrative Judge is not an approved official title, it may be used for unofficial organizational purposes. Therefore, the appealed position is properly allocated as Attorney-Examiner (Civil Rights). The published GS-905 PCS must be used to evaluate the grade level of the appealed 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*. The GS-905 PCS discusses the classification elements considered under each factor. The appellants agree with their agency's crediting Factor 2, Elements 1 and 2 at Level E. Based on our review of the appeal record, we agree. Therefore, we will not address those portions of the PCS in detail in our analysis of the position.

#### *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. A position must substantially exceed the next lower level before a higher level may be considered. This work must occupy 25 percent or more of the employee's work time to control the crediting of this factor or the grade level of the position as a whole.

In their June 27, 2002, appeal letter, the appellants say that their position should be credited as Type III because the subject-matter of their individual and class discrimination complaints involves complex fact patterns and requires legal analysis of a body of law, such as sexual harassment, disability discrimination, and hostile work environment, which changes with each term of the Supreme Court. Their decisions have nationwide effect in modifying personnel policies, techniques for dispute resolution, and evaluation systems in Federal agencies. They say that these changes in the manpower, safety, and human resources areas impact the accomplishment of the affected agencies' missions.

The appellants' November 6, 2002, letter expands the appeal rationale, stating that extremely complex legal questions arise at the outset of a case, e.g., determining if the complainant is a Federal employee who works for an entity that comes under the jurisdiction of the EEOC. They say that they must analyze difficult fact patterns particularly in cases of harassment and hostile work environment, must evaluate whether an individual has a disability and whether reasonable accommodation has been provided, determine if the evidence supports a claim for compensatory damages, and scrutinize attorney fee petitions. The appellants state that cases in agencies with scientific missions require expert witnesses for technical evidence as do cases where economic indicators and statistics must be weighed. They say that in cases from employees in the Armed Services or National Security Agency (NSA), questions of national security must be balanced against the rights of individual employees. The appellants reiterate their initial rationale and say that complainants have received millions of dollars as a result of their efforts.

In their November 6 letter, the appellants point to several class cases that have occupied extensive time. They say that to evaluate case complexity, one must look at the AJ's responsibility for assuring that the employee and the agency develop a complete record, have the opportunity for a full and complete hearing, and receive a thorough legal analysis and a decision showing that the conclusion drawn was justified by the complete record. The appellants state that one cannot fully comprehend the complexity of the case merely by assessing the time spent or the amount of money produced in the processing of the case. While agreeing that hours expended and dollars awarded are indicators to be used in the analysis of case type, the appellants stated that cases which do not have large monetary awards or hearings of a week or more also involve complex legal issues.

Type II work is characterized by one or more of the following features:

- (1) Difficult legal or factual questions are involved because of the absence of clearly applicable precedents due to the newness of the program or the novelty of the issue; or it is highly arguable which precedents are applicable to the case at issue because of the complexity of the facts or the different possible constructions which may be placed on either the facts or the laws and precedents involved.
- (2) The impact of the case or legal problem affects, economically, socially, or politically, either directly or as a legal or administrative precedent, a significant segment of private or public interests (e.g., a large corporation, a large labor group, the residents of a large geographical region of the United States as in a large public works project, a large grant-in-aid program, a nationally organized professional group, the producers of a given farm commodity, the manufacturers of a given product, a class of Government contractors, i.e.,

suppliers of a particular service or product, or an important program of a Government agency). Also included in this type are cases or legal problems which have an impact on relations between the United States and foreign governments (e.g., acts by servicemen or other representatives of the United States stationed abroad, questions such as whether or not to buy foreign or American products, or negotiating and drafting consular conventions) and which must be handled with great care.

(3) Large sums of money are directly or indirectly involved (e.g., about one hundred thousand dollars), or there is considerable interest from a significant segment of the population (see feature 2 above), or the case is strongly contested in formal hearings or informal negotiations by the private individuals, corporations, or Government agencies involved.

Type III work is characterized by one or more of the following features:

(1) Extremely complex and difficult legal questions or factual issues are involved in the drafting, interpretation, or application of legislation, regulations, contracts, orders, decisions, opinions, or other legal instruments and require for their solution a high order of original and creative legal endeavor in order to obtain a reasonable balance of conflicting interests (e.g., legal work involved with balancing the requirements of national security with individual liberties, determining the legality of State and local taxation of the use of Federal government property by private business firms, recommending or making policy concerning consent decrees in antitrust litigation, or legal work involved in developing material for Executive orders concerning the use of Federal troops in a domestic emergency); or complex factual or policy issues are involved requiring extensive research, analysis, and obtaining and evaluating of expert testimony or information in controversial areas of scientific, financial, corporate, medical, engineering, or other highly technical areas.

(2) The case or problem is such that it can have the effect of substantially broadening or restricting the activities of an agency (e.g., the enforcement of antitrust and trade regulations, tax laws, food and drug laws, or the laws governing securities transactions); or it has an important impact on a major industry whose economic position affects the health and stability of the general economy (e.g., a merger or reorganization involving a basic industry, or on the rates, practices, or competitive position of a major industry, for example, the position of the railroads in relation to the motor carriers based on the "reasonableness" of their respective rates, or the position of domestic airlines operating overseas in relation to restrictions on foreign airlines operation in this country). It has an important impact on major private or public interests (e.g., a substantial broadening or restriction of benefits to veterans under the law, amounting to many millions of dollars annually, or a major extension or revision in a State and/or other grant program or a nationwide retirement system, the development of administrative regulations of such scope as the Armed Services Procurement Regulation, or a substantial question of civil rights involving the due process clause). Also included in this type are problems of unusual delicacy, such as fraud cases, because of the serious consequence of error and the great burden of proof assumed by the Government.

(3) Cases or problems of this type frequently involve, directly or indirectly, very large sums of money (e.g., about a million dollars ) and/or they are frequently vigorously contested by

extremely capable legal talent (e.g., a major antitrust case). Interest in these cases is generally nationwide.

The classification of each appellant's position is based on the work assigned and performed by the individual. The sample discussed in our analysis includes cases representative of the typical work performed by each appellant and shows that each of the appellants devotes significantly more than 25 percent of their time handling Type II cases. We will synopsise and discuss some examples. *Lewis v. Agriculture* involved dealing with both difficult legal and factual questions requiring an intensive analysis of a series of personnel processes and actions, evaluating witness credibility with regard to those actions, and determining whether the series of actions could be construed as a continuing pattern and practice of discrimination. *Castillo v. Commerce* involved similarly difficult factual and legal questions involving the complainant's qualifications for highly technical positions, the credibility of witnesses, and determination that the complainant was discriminated against for one of three issues. *Colden v. Navy* reflects equivalent factual and credibility issues based on piecing together a series of actions that resulted in a complainant's improper termination.

In *Grove v. Army*, the AJ dealt with complex factual issues to determine whether the complainant was perceived as having a disability and found that the agency failed to meet its burden of proof that there was a significant risk of substantial harm if the complainant returned to work as a tractor operator. *Groom v. Air Force* involved the analysis of complex facts and legal issues resulting in the finding that the appellant was discriminated against on the basis of his disability for one of three issues. The case required piecing together a series of events over an extended period of time, evaluating the credibility of witnesses including the influence of senior military leadership on agency actions affecting the complainant, and applying complex Americans with Disabilities Act (ADA) legal requirements. The case involved a similarly complex analysis to determine damages and a reduction in attorney's fees based, in part, on the attorney's incompetence. In *Waterman v. U.S. Postal Service* (USPS), the AJ found that the promotion review committee process was a sham, that the agency witnesses' testimonies were incredible, and reduced the complainant's attorney's fees for an excessive number of claimed hours.

*Hernandez v. Army* reflects the multiple complex decision points typical of Type II work. The agency requested summary judgment which was opposed by the complainant. The AJ granted the request in part and denied it in part. After a hearing and review of the record, the AJ found discrimination in reprisal for engaging in protected EEO activity for one issue based on reconstruction of Federal merit promotion processes and the credibility of agency officials in explaining why they took certain action. *Mack v. Department of Veterans Affairs* found that the complainant was unlawfully discriminated against when his employment was terminated. Reconstructing the chain of events following the claimant's termination, the AJ determined that the nature and severity of the harm was sufficiently severe to award \$185,000 in nonpecuniary compensatory damages. Reduced by the agency, the AJ's damage award was reviewed and sustained by OFO on appeal. It was one of two cases cited in EEOC's Digest of Equal Employment Opportunity Law, Volume XIII, No. 1, Winter Quarter 2002, illustrating the level of harm that would warrant damages in excess of \$100,000.

*Fritz v. Department of Health and Human Services* (HHS) reflects the handling of complex legal questions. The AJ dismissed the issues based on the complainant having used an alternative



forum (negotiated grievance procedure) and settled through a Memorandum of Agreement and for failure to state a claim. In *Hall v. Navy*, the AJ found the complainant was not a qualified person with a disability because she could not perform the essential functions of the position without endangering her health and safety. Because the complainant had not successfully completed Apprentice program training requirements, she could not be transferred to another excepted service position and no authority existed that would allow her to be placed in a competitive service position.

In *Chawla v. HHS*, the AJ found that the agency unlawfully discriminated by subjecting the complainant to a hostile environment based on race and religion and failing to promote him. Based on the reconstruction of events, the AJ found that the agency's reasoning for denying the complainant appropriate office space and furniture, undermining his managerial authority, and denying promotion to GS-15 was pretext and lacked credence. The AJ found that the agency promoted a hostile work environment, including denial of leave for the complainant to see his dying mother. *Stewart v. USPS* involved analyzing a chain of events showing that the agency retaliated against the complainant because of her prior EEO activity when she was subjected to numerous occasions of harassment and was issued a Notice of Removal. Citing previous court and EEOC decisions, the AJ awarded \$50,000 in nonpecuniary compensatory damages.

*Sweasy v. HHS* involved finding in favor of the agency on all but one issue; i.e., the failure to give the complainant meaningful work after reassigning her from a supervisory GS-15 position. Based on an intensive review of leave records, physician visits, and attorney visits, the AJ determined the amount of appropriate leave to be restored. Evaluating the career harm caused by the agency's failure to assign work for which the complainant was qualified, the AJ ordered the agency to place her in the next available vacant nonsupervisory GS-15 acquisition position in the commuting area and prohibited the agency from placing the complainant in the chain of command under the manager who had assigned her to unclassified duties. Evaluating extensive information in the record on the impact of agency behavior on the complainant's mental state and relevant case law, the AJ awarded \$80,000 in nonpecuniary compensatory damages. The AJ's damages assessment included determining allowable medical and related expenses and future medical expenses and responding to claims for lost employment opportunities. The complainant's attorney fee request was contested by the agency. Dealing with multiple fee and related issues, the AJ applied case law and policy that resulted in such actions as agreeing with the agency's proposed across-the-board reduction of 30 percent in attorney fees and a reduction in the complainant's claimed costs.

In *Bermea v. HHS*, the AJ found that the agency had discriminated against the complainant based on age but not for any other bases or issues in the case. Evaluating the complainant's efforts to seek employment and the agency's failure to carry its burden to mitigate damages, the AJ determined a backpay award in excess of \$115,000, placement in an equivalent position, and front pay until such placement is possible. Because the complainant prevailed under the Age Discrimination in Employment Act, compensatory damages and attorney's fees could not be awarded. *Pulcini v. Social Security Administration (SSA)* involved a decision that the agency had discriminated against the complainant on the basis of his disabilities in 1994 when he was removed from his Hearing Office Chief Administrative Law Judge (HOCALJ) position and reassigned. The complainant resigned in 2000 and filed another complaint that the resignation was a constructive discharge. While not adjudicating the constructive discharge claim, the AJ

decided in his relief and damage decision whether the complainant was entitled to reinstatement to the HOCALJ position assuming he later prevailed in the constructive discharge claim. The agency argued that the complainant should be denied reinstatement due to after-acquired evidence which would have caused the agency to demote the complainant at a date after the discrimination occurred. The AJ found that the agency did not provide credible evidence that it would have removed the complainant in 1994 but found that it would have in February 1997. Reconstructing a complex chain of events, the AJ found that most of the conditions exacerbating the complainant's medical problems were unrelated to the agency's discriminatory action. The case was further complicated by the agency motion for protective order and sanctions because of the complainant's direct contacts with several agency employees. Referring to Federal, Maryland, and Massachusetts rules of professional conduct, the AJ admonished the complainant for one improper contact, held the others to be proper, and provided guidance on future contacts.

In *Ambrose v. Navy*, the AJ found for the agency that the complainant was not discriminated against on the basis of race/color/national origin and age when he was not selected for promotion. Based on an intensive review of the selection process, the AJ found that the complainant's allegations were not supported by the evidence. The AJ concluded that the complainant did not demonstrate that his qualifications were so plainly superior to the selectee's to require a finding of pretext, that members of his class were treated more harshly than whites in the selection process, or that anyone considered the complainant's age in the selection process. *Holt v. Department of the Interior* consolidated four agency cases involving multiple issues. The complainant alleged disparate treatment based on sex including, but not limited to, a delay in promotion, and in reprisal for her EEO activity for six incidents. Evaluating the evidence and the credibility of testimony, the AJ concluded that it failed to show that the nondiscriminatory reasons articulated by the agency for its actions were pretext. *Lockamy v. Navy* consolidated two agency cases involving 11 issues. Based on the evidence presented concerning the complainant's interactions with her superiors and coworkers, the AJ found for the agency observing, in part, that "although some of the Complainant's coworkers did not always act in a calm and professional manner with Complainant, Complainant was often more abusive and rude and frequently initiated confrontational behavior." *Eley v. Navy* consolidated 4 agency cases with 12 issues. Evaluating the complainant's allegations and evidence of interactions with coworkers and supervisors, the AJ found for the agency on all issues.

*Smith v. Army* reflects the handling of a complex and contentious case involving competition for a Senior Executive Service (SES) position. The case involved intensive and extensive motion activity over discovery and related matters. Evaluating the credibility of witnesses, the series of events, and the documentary record, the AJ concluded that the agency's actions were an effort to delay the selection process in anticipation of a reorganization that would ultimately eliminate the position for which the complainant had applied and was selected but found that the complainant was not discriminated against on the basis of reprisal. The AJ directed that the complainant be placed in an equivalent SES position and be given backpay with interest along with intervening step increases from May 1996 forward. The complainant was awarded \$10,000 in nonpecuniary compensatory damages for nature and severity of harm and the length of time that she suffered humiliation.

In *Flanagan v. HHS*, the AJ found that the agency had violated the Rehabilitation Act by imposing a 50 pound lifting requirement on the complainant and preventing her from returning to

her duties as a Nurse Consultant when “she was ably performing the essential functions of her position” and retaliated against her for her EEO complaints. The AJ concluded that her detail to the Food and Drug Administration was a manifestation of the agency’s reprisal but found for the agency regarding other issues. The complainant had filed previous complaints against the agency for a series of actions based on disability in which the complainant prevailed. The case required careful analysis of multiple interrelated events and the credibility of witness testimony. Although the EEOC decision was issued in October 1997, the record shows that a settlement was reached in August 2002.

Typical of Type II, these cases and their related damages and attorney fees decisions involve difficult legal or factual questions. Unlike single complaint/issue claims, many consolidated cases require reconstructing a series of personnel procedures, evaluating testimony on how those procedures were carried out, and analyzing whether those actions resulted in statutorily prohibited discrimination. For example, *Holt* consolidated four agency cases involving multiple issues. *Smith* involved unraveling a chain of events that led to the conclusion that discriminatory animus was at the core of why action was delayed in promoting the complainant in anticipation of a reorganization that was scheduled to occur. It was complicated by extensive motion and discovery activity. *Pulcini* also required untangling events over an extended time frame and involved similarly contentious motion activity on the part of competing counsels. Although compensatory damages and attorney fee case law exists, *Pulcini* and equally difficult cases require careful analysis of voluminous documents including claimed expenses and hours of legal work.

The appellants emphasized their authority to award up to \$300,000 in nonpecuniary compensatory damages and to authorize attorney fees and other costs, backpay, and other monies to make complainants whole. The PCS defines Type II cases as involving large sums of money directly or indirectly, e.g., about \$100,000. The purchasing power of that amount in 1959, when the standard was published, equates to about \$618,200 in 2002, according to Bureau of Labor Statistics figures. The cases regularly handled by the appellants, including settlements and review of settlements facilitated by other AJ’s, do not routinely involve large sums of money (adjusted for inflation) as defined in the PCS for Type II cases. However, typical of Type II cases, prehearing motions, orders, and sanction activity and analysis of case documentation show that many complaints are strongly contested by the agencies involved and complainants are frequently represented by legal talent specializing in personnel law. Many of the appellants’ cases reflect the impact of and level of interest typical of Type II work as discussed later with regard to *Gonzalez*. Also illustrative of such impact was the USPS forming a task force to deal with accommodating disabled employees as a result of multiple cases involving the underlying issue of accommodation.

The appellants cited specific cases in support of their rationale that they perform Type III work. They pointed to two class cases. *Burden v. SSA* resulted in an approximately \$7,750,000 settlement and *Flourney v. The Administrator, National Aeronautics and Space Administration* (NASA) resulted in an approximately \$3,750,000 settlement. The appellants stated that both cases required the agencies to review and revise personnel, award, and evaluation systems and implement new ADR techniques. They said that these nationwide system changes will be noted by other agencies, some of which face similar class actions, to avoid similar substantial awards. The assigned AJ’s will monitor and approve the awards for the next three or four years. The

appellants cited two recent decisions (*Mortensen* and *Gonzalez*) as affecting the safety of agency personnel and even military aircraft and merchant marine equipment. They stated that class action and other cases involve evaluating expert testimony on economic, statistical, and similarly complex bodies of information, e.g., understanding areas of scientific research at issue in National Institutes of Health cases involving denial of funding, equipment, and other resources. During the on-site audit, the appellants pointed to work sample cases provided to OPM in support their rationale that they perform Type III work.

AJ *in camera* review of sensitive material concerning allegations of discrimination in NSA cases does not approach the magnitude of a Type III case balancing the requirements of national security with individual liberties, e.g., balancing the release of the information in criminal cases with the national security need to protect technical information gathering methods and techniques and sources from public exposure and scrutiny. *Mortensen* (finding that he was not an individual with a disability as defined by the ADA, did not establish that he had a record of impairment, and did not establish that he was regarded as having an impairment that substantially limited a major life activity) and *Gonzalez* (pre-employment medical examinations and inquiries are prohibited under the ADA) address significant health and safety issues. However, they do not reflect the nationwide impact defined in Type III work, e.g., substantially affecting the development of a major body of administrative regulations such as the Department of Defense (DoD) procurement regulations.

*Mortensen* reflects the application of rapidly evolving Supreme Court and related case law on the ADA. *Gonzalez's* per se violation of the ADA, while of interest to Department of the Navy and DoD, applies to the practices of a relatively small Navy command with approximately 5,000 civilian employees and is contrary to normal Federal practice. The settlement reached between the complainant and the Navy command cannot be construed as directly and significantly affecting the safety of DoD personnel and military hardware or overall DoD military operations. Evaluating expert testimony on economic, statistical, and similarly complex bodies of information to determine whether a researcher was discriminated against does not exceed the analytical demands typical of Type II work. It is not equivalent to obtaining and evaluating expert testimony on controversial medical or scientific areas typical of Type III work, e.g., dealing with conflicting opinions and schools of thought on acceptable limits for releases of carcinogenic compounds into the environment.

The PCS identifies very large sums of money as about \$1,000,000 for Type III work. 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 \$6,182,000 in 2002, according to Bureau of Labor Statistics figures. *Burden* does involve the nationwide interest and very large sums of money in contention typical of a Type III case; i.e., approximately \$7,750,000 settlement, including approximately \$1,400,000 in attorney fees and costs. Readily available public information shows that *Burden* received publicity throughout the country, e.g., articles in the *New York Times*, *Washington Post*, and *Boston Globe*. The 2002 settlement for *Flourney* falls short of the Type III monetary threshold and other Type III required aspects. Interest in the case was regional, e.g., articles in the *Baltimore Sun* and *Washington Post*.

Both cases were contentious as evidenced by the extended period of litigation, voluminous discovery, and similar complications. Extremely capable legal talent is not defined in the PCS. Based on the PCS's emphasis on legal difficulty, it is reasonable to conclude that it refers to the same caliber of Attorney typically found in other cases discussed under Type III. Lawyers of this caliber are those whose exceptional legal talents and credentials are sought by the largest corporations for their most important legal undertakings, e.g., defending exposed corporations from major tax and/or securities lawsuits. The appellants emphasized that a majority of their complainants are represented by able legal talent implying that this was particularly true of class action cases. Such an assessment is necessary to support assignment of Type III credit on the basis of opposing counsel's legal talent. However, they did not provide any specific evidence nor does the record contain information to support this implication.

Based on the previous analysis, we find that only one of the cases (*Burden*) presented by the appellants fully meets Type III. Although the appellants point to increasing class action case activity, this work occupies too small a portion of the appellants' time to impact the crediting of this factor. Therefore, this factor is credited with Type II.

#### *Factor 2, Level of responsibility*

This factor includes the nature of 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 credited Level E for *Nature of functions* and *Supervision and guidance received* with which the appellants agree. Based on our review of the record, we agree and have so credited the position.

#### *Personal work contacts*

The appellants' work contacts meet Level C. In prehearing conferences, the appellants explain procedural and other case processing requirements. When functioning as settlement AJ's, the appellants refer suggested settlements to the presiding case AJ for review, as appropriate, e.g., class action settlements. Similar to Level C, the appellants must effectively control attorney and/or pro se presentations in administrative hearings, conferences, and related meetings.

The appellants' position does not fully meet Level E. Unlike that level, they do not routinely confer or negotiate with top administrative personnel in the defendant agencies. The case contacts cited by the appellants in their rationale are infrequent, e.g., with SSA and NASA, and may not control the crediting of this element. Level E cites administrative hearings and appearing before court without specifying the contacts or distinguishing between them from Level C hearings and court contacts. The PCS structure describes increasing levels of difficulty. Level E must be viewed as referring to the most difficult level of contacts found at hearings for cases of Level E scope and complexity. Therefore, this relates to the type of work and resulting contacts that senior (Level E) principal attorneys have in hearings that involve issues of

considerable consequence or importance to the agency or Government and frequently involve matching professional skills against some of the most distinguished and highly paid legal talent in the country. As discussed previously, such contacts are not a regular and recurring part of the appellants' work.

However, Level C fails to recognize the full nature of the appellants' contacts. Exceeding Level C, the appellants exercise full control over their assigned cases as the adjudicating official. They function in a position of authority in their contacts with attorneys and/or complainants, e.g., compel discovery, rule on motions, and sanction the parties if they fail to carry out instructions. Rather than participating in negotiations found at Level C, the appellants rule on proposed case action settlements. Instead of participating in prehearing conferences on cases, the appellants manage and direct those conferences for cases of substantial difficulty and complexity. Because the position falls between Levels C and E, Level D is assigned.

#### *Nature and scope of recommendations and decisions*

At Level C, recommendations to those outside the agency or to administrative officials at higher levels are normally made through the supervisor. Typically recommendations include whether to initiate criminal or civil suits against alleged violators of Federal laws and regulations; settlement of claims against the Government brought by private citizens; the organization, order of presentation, and line of argument to be used in the presentation of cases or hearings where the employee functions as the trial attorney; settlement of suits brought by the Government against others, e.g., offers in compromise in income tax cases; replies to requests for legal advice or interpretations of law arising out of the day-to-day operations of agency programs; substantive changes in legislation and agency policies or regulations to make them more equitable, responsive to needs, or easier to administer; and whether to approve a contract or other legal document in its proposed form and content.

The major difference at Level E is that advice on the interpretation of law or on proposed changes in legislation, policy, and regulations is often given directly to heads of programs, bureau chiefs, cabinet officers, congressmen, or representatives of State and local governments. In some instances recommendations are made through supervisors, but these recommendations are usually tantamount to final decision. This is particularly pertinent to positions concerned with recommending whether to prosecute cases or to appeal adverse decisions in agencies responsible for litigation. The employee is responsible for recognizing when the matter under discussion is of such precedent-setting nature or of such importance or delicacy that the advice must be cleared with superiors before it is given out. Attorneys at Level E often deal with matters of such scope and complexity that they require the concentrated efforts of several attorneys or other specialists. In such circumstances attorneys at this level are normally responsible for directing, coordinating, and reviewing the work of the team.

The application of this PCS requires that we consider the appellants' organization which varies substantially from illustrations for this element. Rather than performing advisory or litigation work, the appellants function as adjudicators. Their work substantially exceeds Level C. The appellants exercise the authority typical of Level E since they regularly issue final decisions on cases of substantial complexity that must be implemented in full or appealed by the agency and issue decisions on whether to certify a class action complaint. They exercise similar authority in

contentious cases when ruling on motions and discovery issues and issuing sanctions. They review and approve or disapprove class action case settlements. Unlike Level E, they do not routinely confer with bureau chiefs, cabinet officers, congressional representatives, or officials of equivalent stature. As discussed previously, the case contacts cited by the appellants in their rationale are infrequent, e.g., with SSA and NASA, and may not control the crediting of this element. The appellants also do not regularly, within the meaning of the position classification process, handle precedent-setting work. While some of their cases may become precedents, they do not achieve that level of import until the case decisions are reviewed and approved by OFO or the EEOC commissioners on appeal. Because the position falls between Levels C and E, Level D is assigned.

Our crediting of two elements at Level D and two elements at Level E for this factor results in a borderline situation. The PCS provides for the adjustment of borderline situations for this factor by considering the stature of the employee in their particular area of law. This feature recognizes that there are aspects of an attorney's work that cannot always be fully evaluated in terms of the criteria spelled out in the body of the PCS. Stature is usually attained through accomplishments of enduring significance; i.e., the attorney's opinions are generally recognized by other attorneys as especially authoritative and are sought after and given special weight. The PCS provides examples that include writing a treatise on a particular area of law and subsequently becoming recognized as an expert in that area and functioning as the organization's "oracle" on that subject.

The nature of the appellants' work does not lend itself to direct application of this feature. Although we have credited the position with responsibility for issuing final decisions, there are aspects of their work which we have not fully addressed. For example, EEOC regulations give the appellants independent authority to consolidate cases in the hearing process or hold the complaint in the hearing process until the others are ready for hearing. Factual findings rendered by the appellants after a hearing are subject to a substantial evidence standard rather than a de novo review. For the foregoing reasons, we assign Level E for this factor.

### *Summary*

By application of the Grade-Level Conversion Chart in the GS-905 PCS, a Type II, Level E position converts to grade GS-14.

### **Decision**

The appealed position is properly classified as Attorney-Examiner (Civil Rights), GS-905-14.