

ANALYZING A MAJOR DUTY OR TYPICAL WORK EXAMPLES OF REGULAR AND RECURRING WORK AS TO TYPE OF CASE AND LEVEL OF RESPONSIBILITY

Set forth below are three examples of analyzing either a major duty or work examples as to both complexity and level of responsibility.

EXAMPLE NO. 1: LABOR COUNSELOR

The following case is typical of regular and recurring work:

Complainant filed an EEO complaint based upon allegations of discrimination of race and reprisal for past EEO activities. The specific instances were non-selection for one of two engineering GS-13 positions and failure to receive higher than a Success Level 3 TAPES rating. Additionally, because complainant alleged reprisal, multiple issues from Complainant's prior EEO actions were also introduced. The prior complaint was settled by placing Complainant in a GS-12 position.

Complainant was represented by an employment law specialist with over twenty years of experience in that field. The attorney was an honors graduate of a prestigious law school where he was editor of the law review. He has achieved the highest rating of AV by the national attorney's directory, Martindale-Hubbell. An EEOC Administrative Law Judge presided over the hearing. The incumbent attorney was solely responsible for the presentation of the agency's case without any additional legal assistance. During the discovery stage of the case, the incumbent and Complainant's attorney deposed approximately ten Corps employees. Meetings were held with the individuals in preparation for the depositions. In addition, interrogatories and requests for production of documents were involved. The supervisor did not provide any initial instructions but provided some guidance on trial tactics. Review of legal work is done after the fact.

TYPING THE CASE

This case fully meets the criteria for Type II. First, the standards define Type II complexity as those where there is an absence of clearly applicable precedents due to the novelty of the issue, OR where it is highly arguable which precedents apply because of the complexity of the facts or the different possible constructions which can be placed on either the facts or the laws and precedents involved. In this case, there was conflicting testimony regarding complainant's work performance and whether his TAPES rating correctly reflected that level. In addition, there was conflicting testimony regarding whether the matrix which was created by the selection panel accurately reflected Complainant's level of expertise and experience as compared to the other candidates. Thus, there were different possible constructions which could be placed on the facts at hand which made it difficult to apply applicable legal precedents.

Second, as to the nature of the competition, the standards define Type II as those cases which are strongly contested in formal hearings or informal negotiations by the individuals involved. EEO cases are inherently strongly contested by the complainants. In this case, Complainant strongly contested the case and thus fully met Type II. In addition, Complainant hired extremely capable legal talent to represent him. While this exceeded Type II it did not fully meet Type III due to a lack of nationwide interest. Note that either of the above (complexity or nature of competition) is sufficient to establish Type II. The Standards state that Type II is characterized by one OR more of the following features. Thus, either the example for complexity and the nature and availability of precedents OR the nature of the competition is sufficient.

LEVEL OF RESPONSIBILITY

Nature of Functions:

Legal and Factual Research - The incumbent personally performs legal research in connection with Labor Counselor cases pending hearing or on appeal. Sometimes questions presented by management are referred back for further development of the facts; but the incumbent often performs both the factual and legal research required. This fully meets and exceeds Level C which only requires that both factual and legal research is performed some of the time. Accordingly, the intervening Level D is credited.

Litigation - As to litigation, the incumbent is the principal attorney in charge of the litigation. She does not assist another attorney. This is an element of Level E, but does not fully meet this level because the cases are not of such importance that they often require the use of one or two lower graded attorneys or specialists in engineering, financial or scientific or other highly technical areas and, while Complainant's attorney was distinguished, he was not one of the most distinguished and highly paid talent in the country. Accordingly, the intervening Level D is credited. (Note: If psychiatrists are routinely used due to regular and recurring cases on compensatory damages and if AV rated attorneys are routinely involved, Level D with strengthening characteristics could be credited since the responsibility approaches, but does not fully meet, Level E.)

Legal Advice and Counsel - The incumbent acts regularly as the legal advisor and the assigned specialist for a single program, i.e. the Labor Relations Program. This fully meets Level C.

The above analysis concludes that this position is credited with Level D for Legal and Factual Research; Level D for Litigation; and, Level C for Legal Advice and Counsel. Accordingly, the overall determination of Level D is credited for Nature of Functions. (Note that a D+ for Litigation would not have changed the overall rating of Level D in this instance.)

Supervision and Guidance Received

Research/Instructions - The incumbent is responsible for all cases arising within the Labor Relations Program. This exceeds Level C attorneys which handle only the "mill run" of cases. Preliminary Instructions - Unlike Level C attorneys, the supervisor does not apprise the incumbent of any unusual circumstances, background information, or important policy considerations. This exceeds Level C attorneys who receive preliminary instructions. Accordingly, Level D is credited.

Litigation - The supervisor provides SOME tactical guidance, but not to the degree that Level C attorneys receive. Level D is credited.

Work Product Review - Unlike Level C attorneys, legal work is subject to review after-the-fact for soundness of approach and argument, application of legal principals, and consistency with policy, procedures, and regulations. This exceeds Level C attorneys whose work product is subject to review. Accordingly, Level D is credited.

The overall determination of Level D is credited for Supervision and Guidance Received.

Personal Work Contacts

Litigation - Level E is credited where, as here, the incumbent tries cases before administrative bodies, i.e. EEOC, MSPB, FLRA, etc.

Legal Advice and Participation - Unlike Level C attorneys, the incumbent does not merely advise negotiating officials; the incumbent is the negotiating official for settlement of claims arising out of the Labor Relations Program. Accordingly, Level D is credited.

The above analysis concludes that this position is credited with Level E for litigation and Level D for Legal Advice and Participation. Accordingly, the overall determination of Level D with strengthening characteristics (D+) is credited for Personal Work Contacts.

Nature and Scope of Recommendations and Decisions

Litigation and Legal Advice and Counsel - The advice and counsel given by the incumbent dealing with pending cases and settlement of litigation is given directly to the Commander or Deputy Commander, not through the supervisor. The Commander is the head of a major operating program in the Corps of Engineers. However, this advice is limited to the Labor Relations Program and not all matters pertaining to the District. Thus, it exceeds Level C, but does not meet Level E. Accordingly, Level D is credited.

GRADE CLASSIFICATION

Factor 1, Nature of the Case or Legal Problem, is evaluated as Type II. Factor 2, Level of Responsibility, consists of Level D for Nature of Functions; Level D for Supervision and Guidance Received; Level D+ for Personal Work Contacts; and Level D for Nature and Scope of Recommendations and Decisions. Thus, Factor 2 is evaluated as Level D. By reference to the grade-level conversion chart on page 25 of the OPM 905 Standards, these duties are classified at the GS-13 level.

Note that more supervision could have reduced Level D to Level C for Supervision and Guidance Received and Nature and Scope of Recommendations and Decisions. However, there was a Level D for Nature of Functions and Level D+ for Personal Work Contacts. The overall Level of Responsibility would still remain Level D.

EXAMPLE NO. 2: CONTRACT CLAIMS

The following case is typical of regular and recurring work:

MX Missile Assembly Building - The total exposure to the Government for this Contract Claim was approximately \$8 million. The claim involved numerous technical design issues requiring the review of thousands of documents and the hiring of outside expert engineering assistance to help determine which parts of the claim were valid. The work involved was somewhat unique to the Corps due to the large bridge cranes specified for handling the MX missiles. Bridge cranes of this size are normally used in smelting plants to carry molten metals. The claim was vigorously defended by a senior partner in an AV rated law firm specializing in Government Contract law. The incumbent wrote the final decision for the Contracting Officer and represented the Government in settlement negotiations which were ultimately successful. The incumbent handles all claims arising from an Area Office without prior instructions. Supervisor review is performed after the fact.

TYPING THE CASE

This case fully meets the criteria of Type III. While this case involved very large sums of money and was vigorously contested by extremely capable opposing legal talent, it does not rise to meet the additional requirement in Type III cases of having nationwide interest. While Government Contractors nationwide may be generally interested, such interest by a single group is stated to be Type II (See OPM Stds., page 13) However, it does meet the alternate criteria of Type III complex factual issues. Extensive research and analysis of factual material was required as well as the use and analysis of expert bridge crane design engineering testimony or information. (OPM 905 Stds., pages 14 and 15)

LEVEL OF RESPONSIBILITY

Nature of Functions

Research and Preparation of Documents - With respect to contract claims, the incumbent has the responsibility to prepare, in final form, the final decision of the Contracting Officer. Once issued, it becomes the final decision of the agency subject to appeal by the contractor to the U.S. Court of Federal Claims or to the Armed Services Board of Contract Appeals (for military contracts) or the Corps of

Engineers Board of Contract Appeals (for civil works contracts). All three tribunals are creatures of statute and exercise judicial or quasi-judicial responsibilities. If claims have merit, the incumbent negotiates a settlement and provides the written basis for the Contracting Officer's approval and issuance of a contract modification. In both instances, the actions of the Contracting Officer are final decisions of the agency. Level E is appropriate in these circumstances. (See OPM 905 Stds., page 22)

Litigation - There are no litigation aspects for this typical work example.

Legal Advice and Counsel - The incumbent is responsible for negotiating the settlement of claims with recommendations to the Contracting Officer for approval and execution. This exceeds Level C attorneys who merely participate in negotiations. Level D is credited.

Since we have a Level E for Research and Preparation of Documents and Level D for Legal Advice and Counsel, the overall rating for Nature of Functions is Level D with strengthening characteristics, i.e. D+.

Supervision and Guidance Received

Note that the incumbent handles all cases arising from an Area Office without instructions. Work is reviewed after the fact. This exceeds Level C attorneys who handle only routine cases and receive instructions with work subject to review. Thus, Level D is credited.

Personal Work Contacts

Since there is no litigation involved in this typical work example we only look at Legal Advice and Participation. This again exceeds Level C because the attorney is actually performing negotiation settlements. (If the attorney merely advised other negotiating officials, it would be Level C.) While negotiations may be with top administrative personnel in the company, it may not rise to Level E unless important legal AND policy questions were involved. Level D is credited.

Nature and Scope of Recommendations and Decisions

If the settlement recommendations are given through their supervisor to the Contracting Officer, who is other than the Chief of Contracting, Level B would be credited since the Contracting Officer is not at a higher level in the organization. For the same reason, Level B is credited even if given directly to the Contracting Officer. If given through the supervisor to the Commander, Deputy Commander, the Chief of contracting, or any division or staff office chief exercising management oversight, Level C is credited since these qualify as higher levels. If given directly to these individuals, Level D is credited. For this example it is presumed that settlement recommendations are given directly to the Contracting Officer who is not the Chief of Contracting. Level B is credited.

GRADE CLASSIFICATION

Factor 1, Nature of the Case or Legal Problem, is evaluated as Type III. Factor 2, Level of Responsibility, consists of Level D+ for Nature of Functions; Level D for Supervision and Guidance Received; Level D for Personal Work Contacts; and Level B for Nature and Scope of Recommendations and Decisions. Thus, Factor 2 is evaluated as Level D. By reference to the grade-level conversion chart on page 25 of the OPM 905 Standards, these duties are classified at the GS-14 level.

Note that more supervision could result in Level C for Supervision and Guidance Received. In addition, Personal Work Contacts would be Level C if the attorney merely participated in negotiations. And, the worst case for Nature and Scope of Recommendations and Decisions could be Level B if there is no higher level involvement. Thus, the worst case could be D+, C, C, and B or an overall Level C or GS-13.

EXAMPLE 3: REAL ESTATE ATTORNEY

The following major duty is typical of regular and recurring work:

Large Civil Works Projects each covering several counties- Researches and determines the proper estates necessary to be acquired by the project sponsor for project purposes. Assists in tailoring the HQUSACE recommended format of a Project Cooperation Agreement for flood control and navigation projects to meet the specific real estate needs of the project sponsor and the particular project in question. When required, extrapolates from said formats and drafts specific project cooperation real estate clauses for projects requiring deviations from the standard HQUSACE PCA format. As a team member, negotiates such agreements with the project sponsor. Reviews for sufficiency all aspects of acquisition performed by the project sponsor to include quotation letters to landowners, relocation assistance to landowners, title evidence and instruments, etc. Thus, this Major Duty involves three aspects: ascertaining requisite Real Estate interests; drafting and negotiating Real Estate aspects of Project Cooperation Agreements; and, reviewing all acquisitions by project sponsors for legal sufficiency. Incumbent only handles routine issues, but receives no preliminary instructions. Work is reviewed by a non-attorney supervisor.

TYPING THE CASE

Some of the work is probably Type I since determining the nature of estates to be acquired are provided by regulation and the legal sufficiency of the acquired estates is a matter of performing a check for any provisions inconsistent with regulations. However, by assisting in preparing the draft Project Cooperation Agreement, there is a need to tailor specific real estate clauses due to deviations from the standard USACE format. This is indicative of Type II. Large regional public works projects generally give rise to Type II work. The construction value at stake will far exceed Type II, but will not amount to Type III unless there is nationwide interest which is not probable on a regular and recurring basis. Type II is credited.

LEVEL OF RESPONSIBILITY

Nature of Functions

Research and Preparation of Documents - The incumbent researches the necessary real estate interests and the adequacy of the standard Project Cooperation Agreement real estate provisions and real estate interests acquired based on factual matters produced by others. These are returned for further development when required. This is indicative of Level C.

There is no Litigation involved in this major duty.

Legal Advice and Counsel - As a member of a team, negotiates and then drafts certain real estate clauses for Project Cooperation Agreements. The incumbent is also assigned to the Civil Works Program to provide advice on required acquisitions and their sufficiency. This amounts to Level C for Nature of Functions.

Supervision and Guidance Received

Handling routine cases without preliminary instructions exceeds Level C, i.e., Level D is credited. No litigation is present. But, in this case all work is reviewed by the non-attorney supervisor for soundness of approach and argument, application of legal principals and consistency with agency policies, procedures, and regulations. If the supervisor is an attorney, this does not fully meet Level C since Level C attorneys are only subject to review. Here the supervisor is a non-attorney. Level B is credited. A Level D and a Level B yields an overall Level C.

Personal Work Contacts

Litigation is not present.

Legal Advice and Participation - The incumbent advises as a member of a negotiating team for Project Cooperation Agreements and participates in conference with Project Sponsors on issues relating to the need for certain Real Estate interests and the sufficiency of same after acquisition. Thus, Level C is credited for Personal Work Contacts.

Nature and Scope of Recommendations and Decisions

Litigation is not present. As to Legal Advice and Counsel, all such advice and counsel to Project Sponsors outside the agency goes through the supervisor and signed by the supervisor. Thus, Level C is credited.

GRADE CLASSIFICATION

Factor 1, Nature of the Case or Legal Problem, is evaluated as Type II. Factor 2, Level of Responsibility, consists of Level C for Nature of Functions; Level C for Supervision and Guidance Received; Level C for Personal Work Contacts; and Level C for Nature and Scope of Recommendations and Decisions. Thus, Factor 2 is evaluated as Level C. By reference to the grade-level conversion chart on page 25 of the OPM 905 Standards, these duties are classified at the GS-12 level.