

## EXAMPLES OF POSITION CLASSIFICATION

EXAMPLE NO. 1 - Office of Counsel Position including major duties involving Labor Counselling, Contract Claims, and General Law.

### EVALUATION STATEMENT

**Position Number:** xxxx

**Classification:** General Attorney, GS-0905-14

**Organization:** Office of Counsel, XYZ District

**Reference:** US OPM PCS for Attorney General Series, GS-0905, OCT 59

### **Title and Series Determination:**

This is a professional legal position serving as an Assistant District Counsel for the Office of Counsel, XYZ District. Thus, the appropriate series for classifying this position is US OPM PCS for Attorney General Series, GS-0905, OCT 59.

The work performed by the incumbent consists of Labor Counselor trial work and being an attorney-advisor on construction contract claims and various general law matters. Thus, the functional title of the position is General Attorney because it involves trial work and attorney-advisor duties. (US OPM Stds., pages 2-3) The subject title would also be "General" since the position deals with more than one legal subject matter. However, this is dropped when the Function Title is also "General." (US OPM Stds., page 3)

The title and series are thus determined to be General Attorney, GS-0905.

**Grade Determination:** The Standard is divided into two grading criteria - Nature of the Case or Legal Problem and Level of Responsibility. Set forth below are examples of regular and recurring work for Labor Counselor duties (performed 50% of the time), Contract Claims (performed 30% of the time), and General Law (performed 20% of the time).

## LABOR COUNSELOR

### **Factor 1 - Nature of the Case or Legal Problem:**

Examples of Regular and Recurring Work:

1. Mr. X, a naturalized American citizen born in XYZ, filed an EEO complaint based upon allegations of discrimination and reprisal for past EEO activities. The specific instances were nonselection for one of two engineering positions and failure to receive higher than a Success Level 3 TAPES rating. Additionally, because complainant alleged reprisal, multiple issues from his prior EEO actions were also introduced which included failure to be given performance appraisals for two prior years and harassment by management. 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. Attorney is an honors graduate of the University of California's Boalt Hall Law School where he was editor of law review. Attorney has achieved an AV rating. The incumbent was solely responsible for the presentation of the agency's case without any additional legal assistance. During the discovery stage of the case, Mr. X's attorney deposed approximately ten Corps employees.

This case fully meets the criteria of Type II in the GS-0905 Classification Standards for attorney positions. First, the standards define Type II complexity and nature and availability of precedent decisions 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.

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 hired extremely capable legal talent to represent him.

2. Mr. Y was a 72-year old engineer. After serving in Panama, he was converted from a CZ-801-13 to a GS-12 in a CONUS District and eligible for special reconsideration for repromotion. By letter he was informed by Human Resources that he had inadvertently been left off a selection list from which two GS-13 positions had been filled. Priority consideration was offered to him to correct the problem. Complainant subsequently filed a complaint alleging discrimination based on race and age. An OCI investigation found no discrimination. Complainant appealed to the EEOC. Upon checking their records, HR discovered that Complainant had been left off two additional selection lists and was provided with additional priority considerations.

This case fully meets the criteria of Type II. First, the standards define Type II complexity and nature and availability of precedent decisions 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 the issue was novel because complainant was in his seventies. There were four missed promotion opportunities and several other administrative errors including an adjustment error in his grade after returning from Panama and two lost pay checks. The testimony was conflicting as to why Complainant's name had been left off the selection lists.

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 individual involved. In this case, Complainant strongly contested his case, both at the OCI level and in the months leading up to the EEOC hearing.

3. This case involved a female engineer over forty years of age who was placed on a Performance Improvement Plan (PIP) for 120 days and given an opportunity to improve her performance through a program instituted by management and monitored through the Human Resources Office. Complainant failed her PIP and was terminated from employment. There was evidence of personality behavior disorders which were adamantly denied by the Complainant because she wanted to be judged on the quality of her work performance alone. After termination she filed for retirement disability and also filed an EEO complaint on grounds she should have been advised by management of her rights under the Americans with

Disabilities Act. Although Complainant was granted a retirement disability, she continued to pursue the EEO action and hired an attorney.

This case fully meets the criteria of Type II in the GS-0905 classification standards for attorney positions. First, the standards define Type II complexity and nature and availability of precedent decisions 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. The complexity of the case was reflected by the fact that Complainant's work performance was poor and she had a manic-depressive type behavior problem. She refused to provide management with evidence of her disability and wanted her work to be judged solely by her performance standards. Regulations provide that an individual cannot be forced to undergo a physical or mental exam, unless they agree to do so. When Complainant was asked if there was any reason to explain her poor performance, her attorney responded with a warning letter. The Americans with Disabilities Act and case law were unclear regarding the degree of accommodation that was to be provided. Management did search for a suitable position but was unsuccessful.

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. Complainant vigorously contested her removal. After termination, she continued to contact HR and the EEO Office regarding the status of her case. Very capable legal talent represented Complainant.

4. This case involved a GS-11 Computer Specialist who was over sixty years old and hearing impaired. He was terminated during his probationary period due to poor performance and abusive behavior toward others. Management contended that Complainant was unable to comprehend the nature of his job duties, failed to carry out the tasks assigned to him, and became over involved in supervising the independent contractors, putting the agency at risk.

Complainant filed an EEO complaint alleging discrimination based on sex, age, and physical impairment. He contended his failure to perform was due to a lack of clear direction regarding duty assignments, inability to hear the supervisor, a failure by IMO to provide proper sound enhancing telephone equipment, and lack of training.

The OCI formal investigation resulted in a finding of no discrimination. Complainant was represented by an attorney who specializes in employment law and was formerly an EEOC Administrative Law Judge. The case was complex and dealt with conflicting testimony regarding Complainant's behavior, job performance, degree of impairment, and whether his performance standards were reasonably attainable.

This case fully meets the criteria of Type II in the GS-0905 Classification Standards for attorney positions. First, the standards define Type II complexity and nature and availability of precedent decisions 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 as to Complainant's performance and attainability of his standards. As to the nature of the precedents, the law is unsettled as to the degree of accommodation required under the Americans with Disabilities Act.

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 was represented by extremely capable legal talent.

5. In this case, Complainant was hired as a Civil Engineer Student Trainee under a one-year Cooperative Education appointment. Complainant worked from 32 to 40 hours a week while attending graduate school. On the eve of his one-year anniversary date, he was terminated for falsifying time records, conducting personal business during duty hours, and unexcused tardiness. Complainant alleged discrimination due to race, national origin, and age. An OCI investigation was undertaken with a finding of no discrimination. Management's witnesses included several supervisors who contended that when Complainant arrived in the morning, he signed in at an earlier time. In addition, he allegedly took extensive lunch-study breaks and used the computer and phone to conduct personal business.

Complainant contended that other employees in his section played games on the computers, took long breaks, and that he was being unfairly singled out. On his own behalf, he pointed to a letter of commendation received for his work, alleged he was being replaced by another minority in the all minority section, and that he

was being subjected to differential treatment as evidenced by the fact that when he requested financial aid he was turned down, although others were not. Management explained this action by saying that financial aid is provided for undergraduate programs, not graduate programs.

This case fully meets the criteria of Type II in the GS-0905 Classification Standards for attorney positions. First, the standards define Type II complexity and nature and availability of precedent decisions 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 as to whether Complainant was subjected to differential treatment. Also, there was conflicting testimony regarding whether management had agreed to allow Complainant to take a longer lunch hour to study at the library during the day and make up the time at the end of the day. And there was failure of management to document counseling sessions with Complainant.

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 and MSPB cases are inherently strongly contested by the complainants. In this case Complainant was not represented by counsel; but during the negotiations and pre-hearing settlement conference, he argued vigorously on his own behalf that the agency had acted unprofessionally by terminating him at the last moment and that Complainant deserved some money damages.

6. This case involved a 67 year old GS-510-09 Accountant. He was allegedly asked by his supervisor "when was he going to retire?" When his request for training was denied and when he was not selected for a GS-11 staff accountant position, Complainant alleged disparate treatment based on age and race. He cited instances where his supervisor had embarrassed him with questions urging him to retire. In addition when he was re-assigned, the word "detail" on his SF-52 was crossed out and "reassignment" was written in its place. The re-assignment was allegedly made to keep complainant from a promotion. The OCI investigation resulted in a finding of no discrimination and Complainant appealed to the EEOC.

This case fully meets the criteria of Type II in the GS-0905 Classification standards for attorney positions. First, the standards define Type II complexity

and nature and availability of precedent decisions as those where there is an absence or 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 the issue was novel because Complainant was in his late 60's, several selection lists were used, and there was a missed consideration where Complainant's name failed to appear on the second list. In addition, since Complainant's spouse had filed a separate discrimination complainant and had won compensatory damages, there was a potential charge of reprisal. The testimony was conflicting as to why Complainant's name had been left off the second list.

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 individual involved. In this case, although Complainant was not represented by counsel, he contested his case vigorously. Because of the conflicting testimony, there was potential jeopardy to the agency.

## **Factor 2 - Level of Responsibility:**

### Nature of Functions

Research and Preparation of Documents - 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 facts indicating the precise nature of the facts needed; 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. (OPM Stds., pages 17-18) Accordingly, the intervening Level D is credited.

Litigation - As to litigation, the incumbent is the Principal Attorney in Charge of the litigation. Incumbent 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 matching skills with the most distinguished and highly paid talent in the country. (OPM Stds., pages 18 and 22) Accordingly, the intervening Level D is credited.

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. (OPM Stds., page 19)

Unlike "Typing" of cases which is described in the standards in terms of minimum characteristics, the "Levels" of responsibility are described in terms of typical characteristics. (OPM 905 Stds., page 9) The above analysis concludes that this position is credited with Level D for Research and Preparation of Documents; 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.

### Supervision and Guidance Received

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

Litigation - As to hearings, unlike Level C attorneys, the supervisor does not discuss the presentation, the line of approach, the possible lines of opposition, or other aspects of the case. Accordingly, Level D is credited.

Supervisor 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 which receive such review before the work is finalized. Thus, Level D is credited.

The overall determination of Level D is credited for Supervision and Guidance Received. (OPM Stds., pages 19-20)

### Personal Work Contacts

Litigation - Level E is credited where, as here, the incumbent tries cases before administrative bodies, i.e. EEOC, MSPB, FLRA, etc. (OPM Stds., page 24)

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.

Unlike "Typing" of cases which is described in the standards in terms of minimum characteristics, the "Levels" of responsibility are described in terms of typical characteristics. (OPM 905 Stds., page 9) 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 - Recommendations for the settlement of litigation and legal advice and counsel given by the incumbent dealing with pending cases 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. (OPM Stds., pages 20-21 and 24-25)

#### **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.

### **CONTRACT CLAIMS**

#### **Factor 1 - Nature of the Case or Legal Problem:**

1. MX Missile Assembly Building at XYZ AFB - This \$8 million claim involved a performance specification. The contractor's design provoked numerous technical design issues with regard to the integrity of the bridge cranes and thousands of welds. Delay damages were also alleged to have been the fault of the Government. This required the review of voluminous documents and the hiring of outside expert engineering and network assistance to help determine which parts of the claim, if any, 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 drafted the final decision of the Contracting Officer and represented the Contracting Officer in settlement negotiations which were ultimately successful. 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 (OPM Stds., page 13) However, it does meet the alternate criteria of Type III complex factual issues being involved since extensive factual research and analysis 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)

2. Space Transportation System (Space Shuttle) at XYZ AFB - The amount of this claim was approximately \$12 million. Honeywell was the subcontractor on three prime contracts for the construction of this facility. The matter dealt with contract performance specifications in three separate prime contracts and the interpretation as to whether the proffered design in all three contracts would, in fact, accomplish the performance requirements for the sophisticated computer control systems to properly operate the entire facility. The matter required extensive factual research of the complex computer software and hardware with analysis of factual design issues and the use of outside expert computer control system engineers and was vigorously defended by a senior partner of an AV rated law firm dealing in Government Contract Law. It is estimated that contractor legal costs alone approached \$2 million before settlement was ultimately reached. The case also involved alleged fraud on the part of Honeywell in the items claimed as extra costs and in pricing said items. This matter was thoroughly investigated by the incumbent and referred to the Army Criminal Investigations Command which ultimately referred the case to the local U.S. Attorney for criminal prosecution. 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 (OPM Stds., page 13) However, it does meet the alternate criteria of Type III complex factual issues being involved since extensive factual research and analysis was required as well as the use and analysis of expert computer control system engineering testimony or information. In addition, Type III is also met due to the unusual delicacy involved with the allegations of fraud. (OPM 905 Stds., pages 14 and 15)

3. XYZ Flood Control Channel - This claim involved the failure of the maintenance road (over three miles) adjacent to the flood control channel. The fix was made by the Government after the contractor refused. The contractor ultimately claimed \$1.6 million alleging that the Government design calling for vegetation with accompanying irrigation caused the road failure. The Government contended that improper compaction by the contractor was the cause. Negotiations were held in an attempt to resolve this matter and prevent an appeal from being filed with the Corps of Engineers Board of Contract Appeals. The incumbent had prepared the final decision of the Contracting Officer and represented the Contracting Officer at negotiations. An extensive research and analysis of the contractor quality control records and the Government quality assurance records was required in addition to those of several follow-on contracts for other reaches of the channel where the maintenance road did not fail. In addition, further compaction tests and the use of an expert foundation and material engineer from Arizona State University was required to present the Government's side at the negotiations. The contractor used three separate soils engineering experts. A resolution was ultimately reached. The contractor was represented by a senior partner in an AV rated law firm. Although this case involved only large sums of money, it was vigorously contested by extremely capable opposing legal talent. But, 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 (OPM Stds., page 13) However, it does meet the alternate criteria of Type III complex factual issues being involved since extensive research and analysis was required as well as the use and analysis of expert soils engineering testimony or information. (OPM 905 Stds., pages 14 and 15)

4. KC-10 Fuel Lines, XYZ AFB - This was a \$5.5 million claim by the contractor concerning alleged impacts and delays caused by the Government and the directed correction of leaking fuel lines. The contractor was represented by a senior partner

in an AV rated law firm. The issues involved extensive factual research and analysis and the use of expert design engineers from the Corps of Engineers Research Laboratory (CERL) with regard to fatigue design of the stainless steel pipe and radiographic analysis of the longitudinal welds. The impact portion was similarly complex in researching and analyzing the job site events with the use of expert engineers involved in network analysis. The incumbent represented the Contracting Officer in a "summit" meeting at Washington, D.C., with representatives from the district, division, HQUSACE, Air Force, and CERL personnel to develop a Government negotiation position since this pipe failed on other construction projects. The incumbent presented the factual and engineering analysis and later represented the Contracting Officer in successful negotiations. Although 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 (OPM Stds., page 13) However, it does meet the alternate criteria of Type III complex factual issues being involved since extensive research and analysis was required as well as the use and analysis of expert metal fatigue engineering testimony or information. (OPM 905 Stds., pages 14 and 15)

5. Concrete Airfield Construction at XYZ AFB - This claim involves slightly greater than \$1 million in costs alleged to have been incurred as the result of additional unanticipated material required to be placed to bring the construction site up to grade. The Contractor asserted that subsidence occurred over a weekend period after it had attained the requisite subgrade elevation. Both the Government and the contractor hired expert soils engineers to help determine whether subsidence occurred and whether the contractor had performed to grade prior to importing additional quantities, as alleged. The incumbent prepared the final decision of the Contracting Officer and represented the Contracting Officer in negotiations. The contractor was represented by an AV rated law firm. Numerous daily quality control reports and engineering test data had to be researched and analyzed coupled with the use of expert engineering assistance in preparing the final decision of the Contracting Officer and in presenting the Government's side at negotiations. Although this case involved only large sums of money, it was vigorously contested by extremely capable opposing legal talent. But, 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 (OPM Stds., page 13) However, it does meet the alternate criteria of Type III complex factual issues

being involved since extensive research and analysis was required as well as the use and analysis of expert soils engineering testimony or information. (OPM 905 Stds., pages 14 and 15)

6. Repairs to Electrical Distribution System at Ft. XYZ - This claim was for approximately \$500,000 mainly associated with the costs of repair to the electrical distribution system which was damaged by lightning during a construction suspension. The contractor argued that it was the Government's fault in its design of certain electrical components. The Government argued that the cause was the contractor's temporary connection to an existing fence rather than constructing the required new grid grounding system. Preparation for the final Contracting Officer's decision required extensive research and analysis of the factual circumstances of the Government's design and the contractor's connection to the fence and expert electrical engineering testimony as to which may have caused the lightening not to ground and thus destroy the completed work. The contractor was represented by an AV rated law firm which vigorously contested this case. Although this case involved only large sums of money, it was vigorously contested by extremely capable opposing legal talent. But, 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 (OPM Stds., page 13) However, it does meet the alternate criteria of Type III complex factual issues being involved since extensive research and analysis was required as well as the use and analysis of expert electrical engineering testimony or information. (OPM 905 Stds., pages 14 and 15)

7. Flight Administration Building at XYZ AFB - This is a \$1.25 million claim for alleged Government delays in issuing the notice to proceed, improper testing rejection, and certain numerous change order work causing impact delays. The Government's case required extensive research and analysis of contractor cost data, and quality control and assurance reports to determine any Government caused impacts to the critical path and, if so, any concurrent contractor delays. Both network analysis and accounting experts were utilized by the Government to determine its position and the preparation of the Contracting Officer's Final Decision by the incumbent. Although this case involved only large sums of money, throughout the dispute the claim was vigorously contested by extremely capable opposing legal talent from an AV rated Government Contracts law firm. But, 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 (OPM Stds., page

13) However, it does meet the alternate criteria of Type III complex factual issues being involved since extensive factual research and analysis was required to construct the actual critical path during construction as well as the use and analysis of expert network analysts and accounting testimony or information with regard to costs. (OPM 905 Stds., pages 14 and 15)

8. Base Operations Building at XYZ AFB - This is a claim for \$3.6 million for impacts and delays caused by a change to the raised flooring for computers. The Government's case required extensive research and analysis of contractor cost data, and quality control and assurance reports to determine any Government caused impacts to the critical path and, if so, any concurrent contractor delays. Both network analysis and accounting experts were utilized by the Government to determine its position and the preparation of the Contracting Officer's Final Decision by the incumbent. Although this case involved only large sums of money, it was vigorously contested throughout the dispute by extremely capable opposing legal talent from an AV rated Government Contracts law firm. But, 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 (OPM Stds., page 13) However, it does meet the alternate criteria of Type III complex factual issues being involved since extensive factual research and analysis was required to construct the actual critical path during construction as well as the use and analysis of expert network analysts and accounting testimony or information with regard to costs. (OPM 905 Stds., pages 14 and 15)

9. Hospital Life Safety Upgrade at XYZ AFB - The contractor encountered asbestos during construction. A unilateral change order was issued for asbestos removal. The contractor filed a claim in the amount of \$6 million for alleged additional costs for asbestos removal and impact and delay costs to the original contract work. The Government's case required extensive research and analysis of contractor cost data, and quality control and assurance reports to determine the true costs of asbestos removal and the costs of the Government caused impacts to the critical path. Both network analysis and accounting experts were utilized by the Government to determine its position and the preparation of the Contracting Officer's Final Decision by the incumbent. This case involved very large sums of money and was vigorously contested throughout the dispute by extremely capable opposing legal talent from an AV rated Government Contracts law firm. But, 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 (OPM Stds., page 13) However, it does meet the alternate criteria of Type III complex factual issues being involved since extensive factual research and analysis was required to determine the true costs of asbestos removal and to construct the actual critical path during construction as well as the use and analysis of expert network analysts and accounting testimony or information with regard to costs. (OPM 905 Stds., pages 14 and 15)

## **Factor 2 - 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 provides the written basis for the Contracting Officer to issue contract modifications. 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 - None

Legal Advice and Counsel - Level C attorneys negotiate usually as a member of a team. Here, the incumbent represents the Contracting Officer during negotiations. Thus, Level C is exceeded. The District Commander exercises management oversight especially over Type III claims and the incumbent provides legal advice and counsel directly to said Commander. Unlike other Federal agencies, there is no "operating" program in the U.S. Army Corps of Engineers at the Washington or Division Headquarters levels. Accordingly, the District Commander is the head of a major operating program of the agency. Furthermore, in April 1987, HQUSACE contracted with E. L. Hamm & Associates to perform a comparative analysis of attorney career progression patterns in counsel organizations in selected Federal agencies. In addition to the Corps Counsel organization, the contractor analyzed ten other Federal agencies including three other Department of Defense agencies; namely, Defense Logistics Agency, Army

Material Command, and the Naval Facilities Engineering Command. The study not only concluded that the District Commanders surveyed were the heads of major operating programs at an installation level; but also, that when compared to the other Federal agencies surveyed, the District Commanders had been delegated unusual authority or authority commonly of a higher echelon. This was the result of Corps policy delegating extensive authority to the District Commanders. In this regard, the study concluded that attorneys at the Corps District level (District and Laboratory Counsels) exercise a range and depth of authority not equaled in the lowest echelon of the two and three-tiered agencies surveyed. (See OPM 905 Stds., page 23) However, here the incumbent, as Assistant District Counsel, does not exercise the same overall Level of Responsibility as the District Counsel. Accordingly, Level E is not met and Level D is credited.

Based on the foregoing, Nature of Functions is credited at Level E and Level D which equates to Level D with strengthening characteristics, i.e., D+.  
Supervision and Guidance Received -

Assignments - The incumbent is responsible for all contract claims cases arising from the XYZ Area Office. This exceeds Level C attorneys who handle only routine cases. Accordingly, Level D is credited.

Research/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 which receive such preliminary instructions. Accordingly, Level D is credited.

Supervisor 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 which receive such review before the work is finalized. Accordingly, Level D is credited.

Litigation - None

Accordingly, the overall determination of Level D is credited for Supervision and Guidance Received. (OPM Stds., pages 19-20)

Personal Work Contacts

Legal Advice and Participation - In analyzing claims within the jurisdiction of the Office of Counsel, contact is made with Corps and contractor field personal to develop the facts. If the claims have merit, the incumbent prepares the necessary documentation to justify a contract modification and advises the Contracting Officer, the Area Engineer, and respective Resident Engineer. This is more than advice. The incumbent provides the basis for executing the decision. This exceeds Level C which involves merely advising negotiating officials. When claims have no merit, the incumbent prepares the final decision of the Contracting Officer. These decisions are prepared in final form and are normally adopted without change. This similarly exceeds Level C, but does not meet Level E. Accordingly, Level D is credited.

In appropriate circumstances, the incumbent will confer on such claims or negotiate settlements with top administrative personnel in the contractor organization, i.e. usually the president, CEO, or Senior Vice-President. The incumbent takes the lead and is assisted by construction personnel. The contractor's top administrative personnel are often accompanied by their counsel. On occasion, the incumbent deals directly with said counsel who is also to be considered in the category of contractor top administrative personnel with authority to settle. However, the regular and recurring work in this area does not involve important legal and policy questions. Accordingly, Level E is not met and Level D is credited. (See OPM 905 Stds., pages 20 and 24)

Litigation - None.

Accordingly, for Personal Work Contacts, an overall evaluation of Level D is credited.

#### Nature and Scope of Recommendations and Decisions

Legal Advice and Counsel - When returning meritorious claims with documentation for contract modifications, such is not given through the supervisor, but directly to Contracting Officers, Area Engineer, and respective Resident Engineer. While not given through the supervisor, the recommendations are also not given to persons outside the agency or administrative officials at higher organizational levels. This exceeds Level C on the one hand since recommendations are not given through the supervisor, but fails to meet Level C on the other (not given outside the agency or to administrative officials at higher

organizational levels). Since Level C is not fully met, Level B is appropriate. (OPM Stds., pages 20 and 21)

With regard to preparing final decisions of the contracting officer, such "decisions" by the incumbent are not given through the supervisor, but through Contracting Officers directly to the contractors involved. These "decisions" by the incumbent are tantamount to final since they are invariably adopted without change by the Contracting Officers as their own. This exceeds Level C (OPM Stds., pages 20-21), but does not meet Level E (OPM Stds., pages 24 and 25). Accordingly, Level D is appropriate.

Litigation - None.

Since the position entails both Level B and Level D, an overall rating of Level C 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 C 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.

### **GENERAL LAW**

Since these duties are performed only 20% of the time, they are not grade controlling. Accordingly, General Law duties need not be evaluated.

### **OVERALL GRADE CLASSIFICATION**

Labor Counselor duties are graded at GS-13 and are performed 50% of the time. However, Contract Claims duties, classified as GS-14, are performed 30% of the time.

NOTE: Although this position consists of GS-13 work 50% of the time, if experience has shown that the amount of Type III work at 30% is regular and

recurring and there are no other attorneys trained in this area who could absorb this work if the position became vacant, then this position could be classified as GS-14. This would meet the minimum grade controlling duties of 25% as provided in the classification regulations and the position management regulations.

EXAMPLE NO. 2 - Real Estate Position

**EVALUATION STATEMENT**

**Position Number:** xxxx

**Classification:** General Attorney (Real Property), GS-0905-13

**Organization:** Office of the Chief, Real Estate Division, XYZ District

**Reference:** US OPM PCS for Attorney Series, GS-0905, OCT 59

**Title and Series Determination:**

This position serves as a Real Estate attorney-advisor for a Branch Chief of Real Estate. The position advises on real estate matters pertaining to that office for both military and civil works projects and involves the rendering of legal advice and services with respect to the acquisition, management, and or disposal of real property interests. This also requires drafting, negotiating, or examining real estate instruments and other legal documents. The position assists the principal trial attorney in Real Estate or Office of Counsel in laying the complete groundwork for condemnation, real estate claims, inverse takings, or other litigation performed by the Department of Justice and in disputes or claims presented in an administrative hearing or to GAO. No actual trial work is performed. However, OPM standards state that the Functional Title of "Trial Attorney" is also applicable for "positions involved in providing technical guidance to persons preparing for or trying cases...." (page 2). Since both Trial Attorney and Attorney-Advisor functional titles are applicable, and because the subject matter pertains to Real Property, the correct title and series for this position is General Attorney (Real Property), GS-0905.

**Grade Determination:**

The OPM Standards are divided into two grading criteria - Nature of the Case or Legal Problem and Level of Responsibility.

## **Factor 1 - Nature of the Case or Legal Problem:**

The examples of regular and recurring work performed in this position set forth below are indicative of Type II work in that they involve one or more of the following: difficult legal or factual issues; large sums of money; less than extremely capable opposing legal talent.

1. Acquisition and Title Evidence Contracts - Researches, analyzes and provides legal advice during various stages of the real estate acquisition process and prepares appropriate legal documents for real estate acquisition impacting a significant segment of private, tribal, state or local governmental entities in a geographic region for various civil work projects and military installations. Reviews title evidence furnished by contractors for legal sufficiency to accomplish the intended purpose of large civil works projects. This review determines whether there were any encumbrances or title deficiencies and, if so, develops and recommends curative actions to be taken by the contractor or the Government negotiator. Often there are different possible constructions that can be placed on these defects to determine the correct cure for the title. As an Attorney approved by the DOJ, for both military and civil, renders title opinions and completes acquisition on behalf of the United States, including preparation deeds and closing. A typical example of regular and recurring work in this area is the ABC Lake Project involving the acquisition of 16 tracts. In this case, numerous liens and encumbrances were discovered and analyzed, and for which curative actions were required. Another example is the acquisition of additional training areas and maneuver permits for Fort ABC.

This is indicative of Type II due to impacts to large segments of the public and difficult legal or factual issues.

2. Facility Relocation Contracts - Determines whether the owner of the facility to be relocated has sufficient title and compensable interest therein requiring relocation to be performed or reimbursed by the Government. Drafts the relocation contract, confers with the Government project manager, as necessary, and negotiates said contract with the facility owner. These contracts typically involve large sums of money and/or are strongly contested during negotiations with the Government agencies or landowners involved, who are represented by capable opposing legal talent. An example is the ABC Creek Bridge Replacement Project. This involved the relocation of facilities belonging to two utility companies. Ownership records

were researched to determine sufficient ownership and compensable interest. The amounts of the relocation contracts were approximately \$500,000 each.

Type II is credited due to the large sums of money involved.

3. Civil Works Local Cooperation Projects - Researches and determines the proper estates necessary to be acquired by the local sponsor to accomplish the purpose of large civil works projects. In coordination with Planning Division, tailors the HQUSACE recommended format of a Project Cooperation Agreement for flood control and navigation projects to meet the specific Real Estate needs of the local sponsor and the particular project in question. Extrapolates from said formats and drafts specific clauses. As a team member, negotiates such agreements with the local sponsor. Reviews all aspects of acquisition performed by the local sponsor to include quotation letters to landowners, relocation assistance to landowners, title evidence and instruments, etc. The ABC Flood Control Project and the XYZ River Flood Control Project are typical examples.

Type II is credited due to the impact on large segments of the public by these large civil works projects.

4. Civil Works and Military Condemnation of Real Estate Interests - Prepares and compiles a "Condemnation Assembly" which includes the Declaration of Taking, Recitation of Ownership and Legal Description, and Maps. Prepares forwarding letter through channels to the appropriate Secretary setting forth the reason for the condemnation and any particular legal problems or issues that may be encountered. Following the filing of the Declaration of Taking, assists the Department of Justice attorney in preparing pleadings, motions, briefs, and trial strategy in the Federal Court condemnation. These cases typically involve large sums of money in dispute between the amount deposited and the amount claimed and are strongly contested in formal hearings or informal negotiation by less than extremely capable opposing legal talent. A typical example is United States v. xxxxx Acres of Land, etc. et al. involving a just compensation deposit of \$6,296,000. The difference between the deposit and the amount claimed was over \$600,000.

Type II is credited due to large sums of money in dispute and the nature of the competition.

5. Outgrants - Prepares, drafts, and reviews recommended deviations to the standard formats and added site specific conditions for environmental, cultural,

historic, or operational protection for real estate instruments granting various interests and/or rights to third parties in land owned by the United States at large civil works projects or military installations. Final outgrant language is usually strongly contested by the grantees or their attorneys. Advises on difficult outgrant administration legal and factual issues arising during the term of the outgrant. A typical example is banking leases issued to ABC Bank at various Army installations. Site specific environmental clauses, liquidated damages clause and definition of fixtures clause were drafted and negotiated. Factual and legal issues arose as to whether the bank breached certain material provisions of the lease. Noncompliance can result in litigation or disputes under the jurisdiction of the Engineer Board. Erroneous termination of the lease can result in a takings claim. It is typically difficult to know which precedents apply due to the different possible constructions that can be placed on the applicable laws and regulations and facts at hand.

Type II is credited due to the impact to large segments of the public, the nature of the competition, and difficult factual issues.

6. Disposals - Prepares, drafts, and reviews disposal documents such as deeds or transfers to another Federal agency. Research, analyze, and advise on legal requirements to dispose, including certification of title. Disposals are accomplished under delegated authority from GSA, under specific continuing disposal authorities, and under special legislative authority. For example, disposal of a deauthorized civil works project impacts economically, or politically, a significant segment of private, tribal, state, or local government entities in a geographic region. Appropriate deed covenants and conditions for environmental, cultural, historic, and reversionary interest involves preparation and interpretation of avious document provisions and the applicability of state and Federal law. These matters are strongly contested by the governmental regulatory entities and the grantees or their attorneys. Also researches, analyzes, and advises on legal, issues of title and regulatory requirements prerequisite to disposal actions for property to be reported to GSA, e.g., Fort ABC or the XYZ Flood Control Project.

Type II is credited due to the geographic impact for a large public works project or military installation or activity, the nature of the competition and difficult factual issues.

7. Encroachments - Researches, analyzes, and advises on difficult legal or factual issues involving whether the case is a boundary dispute requiring title curative work or an encroachment on large civil works projects or military installations have

occurred and, if so, the appropriate recommended corrective action to be taken in accordance with various laws and agency policy. Recommends appropriate remedial action to include boundary line agreements and/or quitclaim deeds, enforced removal, outgrant, disposal, permitting, citations, damages, reimbursement for costs of removal, etc. These are always strongly contested by those committing the encroachments or their attorneys. If the issues is a boundary line dispute, then litigation may result to quiet title. Typical examples include the removal of an extensive fence at the ABC Lake Project, use of a spring box for water withdrawal at XYZ Lake Project, and buildings underneath an electric transmission line along a railroad right of way but within the Fort ABC installation acquisition boundary.

Type II is credited due to the nature of the competition.

## **Factor 2 - Level of Responsibility:**

### Nature of Functions

Research and Preparation of Documents - The incumbent researches the law and refers questions back for further factual development. Sometime researches both the facts as well as the law and then prepares necessary legal documents or advisory opinions, e.g., drafts deeds for acquisitions and disposals and outgrant documents. This is indicative of Level C. However, the incumbent may also render final title opinions under the DOJ delegation which exceeds Level C. But such work is not regular and recurring. Accordingly, Level C is credited.

Litigation - The incumbent assists the principal trial attorney in Real Estate or the Office of Counsel in laying the complete ground work for condemnation, real estate claims, inverse takings or other litigation performed by the Department of Justice and in disputes or claims presented in an administrative hearing or to GAO. Level C is credited.

Legal Advice and Assistance - Incumbent acts in the capacity as a member of a team when drafting contract clauses. This is Level C. In addition, the incumbent advises on more than a single program, i.e. Acquisition and Management and Disposal. This is Level D. Thus, an overall Level D may be credited.

Level C for Research and Preparation of Documents, Level C for litigation, and Level D for Legal Advice and Counsel yields an overall rating of Level C.

## Supervision and Guidance Received

Research/Instructions - The incumbent handles not just the routine cases, but all cases arising within the incumbent's areas of responsibility. Incumbent is apprised of any unusual circumstances or background information and important policy considerations. This exceeds Level C. Accordingly, Level D is credited.

Litigation - Although the incumbent assists the principal trial attorney in Real Estate or Office of Counsel, no actual trial work is performed so this is not applicable.

Supervisory Review - The incumbent is not supervised by an attorney. Although all work is subject to cursory review both as to the technical aspects and as to soundness of approach, the standards contemplate an attorney supervisor. Thus, the technical aspects are normally assumed to be correct. Accordingly, Level D is credited.

This yields an overall rating of Level D.

## Personal Work Contacts

Litigation: Not applicable.

Legal Advice and Participation - Sometimes advises negotiating officials as a member of the team, but also negotiates directly with lessees, etc. Thus Level C is exceeded and Level D is credited.

## Nature and Scope of Recommendations and Decisions

Litigation - not applicable.

Legal Advice and Counsel - Here this is provided to those outside the agency and to higher administrative officials through the supervisor. Thus, Level C is credited.

Nature of Functions is Level C; Supervision and Guidance Received is D; Personal Work Contacts is Level D; and, Nature and Scope of Recommendations and Decisions is Level C. Thus, the overall Level is D.

### **Grade Classification**

Factor 1 is credited with Type II and Factor 2 is credited with Level D. Thus, the overall grade evaluation is GS-13.