

OPM Decision No. C-0083-07-03, dated 1/18/01

This decision reopened, reconsidered, and superseded OPM decision number C-0083-08-02, dated January 3, 2000.

Ms. Carolyn Cohen
Director, Office of Personnel Policy
Office of the Secretary
U.S. Department of the Interior
1849 C Street, NW, Mail Stop 5221
Washington, DC 20240

Dear Ms. Cohen:

This replies to your letter of September 14, 2000, which requests our reconsideration of classification appeal decision No. C-0083-08-02, issued January 3, 2000, by the Office of Personnel Management (OPM), Philadelphia Oversight Division. This decision promotes [appellant] from Park Ranger, GS-025-07, to Police Officer, GS-083-08.

Your request for reconsideration is based on your belief that our decision involves an erroneous interpretation of law and regulation, as established in current OPM classification standards. We have reviewed the written record, information obtained during the appeal process, and your request for reconsideration. We also contacted several refuges within the U.S. Fish and Wildlife Service to determine the nature of the work and the impact of our decision. Based on this information, we are reopening and reconsidering our decision.

We have determined that the OPM classification standards were correctly applied. However, the higher level duties performed by the appellant are not regular and recurring and, therefore, cannot be considered grade controlling. A more detailed explanation of our findings is attached for your review. We will use these findings to overturn classification appeal decision No. C-0083-08-02 and reissue our decision.

We do appreciate your comments on the reconsideration process. We will take them into consideration when we revise our regulations.

Sincerely,

/s/ 1/18/01

Janice R. Lachance
Director

Enclosure

This decision responds to a reconsideration request from the Personnel Director of the Department of Interior to the Director of the Office of Personnel Management (OPM), as provided for in title 5, Code of Federal Regulations (CFR), section 511.614. Based on additional fact finding by the Director, Classification Appeals and FLSA Programs, the original decision, C-0083-08-02, is being overturned and superseded.

The agency disagreed with OPM's determination that Factor 3 should be credited with Level 3-3. Both OPM and the agency agree that the position fully meets Level 3-2. However, the agency questions whether the appellant's position, in exceeding Level 3-2, fully meets Level 3-3. Under the Factor Evaluation System (FES), each factor level describes the minimum characteristics needed to receive credit for that level. Therefore, if a position fails to meet the criteria in a factor level description *in any significant aspect*, it must be credited at a lower level.

To accurately evaluate Factor 3, we referenced the GS-083/085 Guide for Police and Security Positions (Guide), the Introduction to the Position Classification Standards (Introduction), and the Primary Standard, which is the standard on which all other FES standards are based.

The Primary Standard outlines two subfactors within Factor 3 - *Nature of guidelines* and *Judgment exercised*. Although the Guide does not specifically separate the two subfactors, we will separately address them for clarification purposes.

We will first evaluate the appellant's work based on the guidance in the Guide, then discuss the regular and recurring work performed by the appellant based on instructions in the Introduction.

Nature of guidelines

This element covers the nature of the guidelines regularly used to perform the work. Guides used in General Schedule occupations include, for example, desk manuals, established procedures and policies, traditional practices, and reference materials common to the occupation. The Guide describes guidelines used in the GS-0083 occupation as including Federal, state, and local laws; agency and local rules and regulations; and local operating methods, techniques, and procedures (patrol areas, traffic control, and security check requirements).

The Guide states that guidelines at Level 3-3 are generally similar to Level 3-2. However, unlike Level 3-2, there are two potential situations:

- the guidelines are not always applicable; OR
- there are gaps in specific applicability in circumstances such as those encountered in volatile emergency situations such as terrorist attacks, hostage situations, armed robbery, prolonged investigations, **OR** when enforcing traditional (written or unwritten) customs or laws.

One or both of these two elements exist in a position because of the nature of work assignments or the environment in which they are performed. The Primary Standard describes Level 3-3 guidelines as available but not completely applicable to the work or having gaps in specificity. The grade-controlling aspect of this factor is the applicability, or lack thereof, of guidelines and not solely the existence of emergency situations.

To further explain, we reference the discussion of Factor 3 in a previous OPM decision, #C-0083-07-01. In that case, even though the appellant was faced with emergency situations, he was credited at Level 3-2 because he used established procedures, instructions, and guidelines. Therefore, his position fell short of Level 3-3 because of the existence of such guidelines.

Despite the fact that the Guide mentions hostile or emergency situations, its use of 'OR' recognizes that Level 3-3 covers nonvolatile situations as well. We assert that this is true of the appellant's position. In reviewing the appellant's position and similar positions within the Fish and Wildlife Service (FWS), we found that very broad guidelines exist for these situations. FWS refuges are governed by the CFR and a FWS Manual, among others. We also found that some refuges have a Refuge plan, which may or may not include a Law Enforcement section. For the most part, FWS guidelines covering law enforcement situations are not always applicable and must be tailored to the situation at hand.

A large number of visitors use the [name], a suburban refuge and the appellant's duty station, for a wide variety of different and often conflicting purposes, e.g., waterfowl hunting, bird watching, surf fishing, night fishing, clamming, and beach use for sunning and swimming. This produces situations requiring the appellant to deal with a multitude of human and natural resource interactions for which there are no FWS or other specific guidelines available. The Refuge Plan for the [acronym], approved in September 1991 and provided by the Refuge Manager, lists potential law enforcement problems associated with waterfowl hunting, clamming, and surf fishing. However, no policy statement exists on how to proceed when these situations arise. Within the plan, there is only one policy statement, and it pertains to the handling of juvenile offenders. We found that these guidelines do not give instructions on what the appellant should do, for example, when an intruder drives on a closed beach within the [acronym] and violates the nesting habits of the Piping Plover, a Federally threatened species, or when boats wash up on the protected refuge beach and must be removed while at the same time protecting the safety of human and natural resources. Determinations such as these go to the heart of controlling human interaction with the refuge's most fragile natural resources.

This information was substantiated during conversations with the FWS' Regional Law Enforcement Coordinator for Region [#]. He revealed that no regional guidance exists to further interpret the applicability of the broad guidelines found in the CFR and the FWS Manual. In the example of marijuana cultivation cited by the appellant, he stated that it would be left to the officer's discretion on how to proceed. We find that some of the appellant's work assignments and situations are covered by the nature of guidelines described in Level 3-3.

Judgment exercised

This element covers the extent to which judgment is exercised in applying the guidelines regularly used to perform the work. Individual positions in different occupations vary in the specificity, applicability, and availability of the guidelines used to perform assignments. The Guide recognizes that, in the absence of procedures or under broadly stated objectives, employees may use considerable judgment in developing new methods and techniques for doing the work that may become guidelines for others.

At Level 3-3 in the Guide, judgment is used to interpret, adapt, apply, and deviate from guidelines based on two types of situations: unusual **or** emergency circumstances. Both must also have a concern with protecting public safety. The employee analyzes the results of such adaptations and recommends changes in established methods and procedures. The Primary Standard describes the Level 3-3 employee as one who uses judgment to interpret and adapt guidelines such as agency policies, regulations, precedents, and work directions to specific cases or problems. The employee analyzes the results and recommends changes.

The Guide's use of "or" in describing the types of circumstances again recognizes that Level 3-3 covers nonemergency situations. We assert that this is true of the appellant's position. The grade-controlling element within this subfactor is the use of judgment in deviating from guidelines and adapting procedures.

Although the agency referred to the discussion of Factor 3 in a previous OPM decision, #C-0083-07-02, which they believe is germane to the appellant's position, we do not find that discussion applicable to this case. Even though that refuge law enforcement position was found to handle emergency situations (unlike the appellant's), there was a lack of discretion exercised by that employee. The deviations were minor, at best, and did not result in the type of adaptations and changes in established methods and procedures required to credit Level 3-3.

We find that the appellant does use that type of discretion and deviation necessary to meet the Level 3-3 threshold. However, this is not the case with many of the law enforcement officers within the FWS. Therefore, this subfactor needs to be assessed on a case-by-case basis. For this reason, we continue to assert that this position is different and unique from other FWS positions.

Applying FL 3-3 in the Guide to the FWS mission requires that we substitute protecting public safety with protecting natural resources. Based on a [acronym] functional statement, this refuge was established to preserve the habitat for migratory waterfowl, especially the American Black Duck. It is also an important nesting area for the Piping Plover and Least Tern. It provides important resting/feeding habitats for shorebirds, wading birds, raptors, and passerines. Based on the unique inhabitants to this refuge and its distinctive functional purpose, the work environment is considered unusual for the intent of Level 3-3.

The appellant provided examples of situations based on [acronym] important mission, where no guidelines are established and, therefore, required his use of judgment and discretion. These included handling intruders of closed beaches, especially when they violate nesting habitats of the Piping Plover, and handling boaters, especially when they become disabled and must be assisted without harming the natural resources. Specifically, the appellant's approach to removing a stranded boat from the nesting beach required him to weigh the ability of the visitor to remove the vessel unaided, provide for the visitor's safety, and anticipate the consequences of extracting the boat on the protected nesting beach. The appellant also provided examples where he has developed standard operating procedures on how to handle situations which are not specifically addressed in the CFR, the FWS Manual, or the Refuge Plan.

In the case of the appealed position, we find that the appellant exercises judgment and discretion, and the guidelines he has available are not generally applicable to these unusual situations. This is consistent with information obtained from the FWS' Regional Law Enforcement Coordinator for Region [#], who states that interpretation of regulations is provided at the local level and does not come from the regional level.

The appellant's use of discretion is further supported by the Refuge Manager's statement that she does not carry a beeper or a radio. For situations where the Refuge Manager might need to be contacted, she is called at home. However, unlike other Refuge Managers within Region [#], if the Refuge Manager is not at home, she cannot be contacted. This leaves the appellant to make discretionary decisions and judgment calls on his own, which, according to the Refuge Manager, is what she expects of the law enforcement position within the Refuge. Therefore, the results of the appellant's work reflect Level 3-3 judgment and discretion on the part of the appellant and is supported by management's intent for the purpose of the position.

Our findings are further supported by the position description of record, which was certified by the appellant, the first-level supervisor, and the agency as being accurate. The position description includes the following information:

Major Law Enforcement Duties:

- The incumbent enforces all applicable Federal and state fish and wildlife laws, control and protection of the using public within the refuge, including assault, breaking and entering, theft, pollution of air or water, arson, destruction of property, and violation of other laws perpetrated on refuge lands. The enforcement of these laws and regulations is accomplished by conducting patrols, conducting or assisting in investigations, apprehending violators, performing surveillance activities, and making contacts.
- The incumbent preserves and protects the natural, cultural and human resources using law enforcement and other resource protection techniques to enforce laws, acts, rules, and regulations.

Factor 3 - Guidelines:

The guidelines are generally applicable but the incumbent must use judgment in selecting the appropriate guidance from a vast array of possibilities. To meet the demands of unusual or emergency situations, the incumbent independently interprets and may make adaptations to procedures. The incumbent also modifies and makes recommendations on changes to standard operating procedures.

The appellant's work meets both subfactors of Level 3-3. However, the issue remains whether these situations constitute 25 percent or more of the incumbent's time in order to be grade-controlling.

Guidance in the Introduction states that when the highest level of work is performed less than a majority of the time, it may be grade controlling only if the work is officially assigned to the position on a regular and continuing basis; occupies at least 25 percent of the appellant's time; and requires knowledge and skills that would be needed in recruiting for the position if it became vacant. This is consistent with a classification advisory from OPM's Classification Programs Division, which states that individuals involved in responding to nonemergency situations are required to perform the higher-grade duties for 25 percent or more of their time for their positions to be graded at the higher level.

The appellant did provide an end-of-year report, which notes 175 violation notices; 64 of which were motor vehicle-related, 45 trespass-related, and 8 indecent exposures. The appellant also stated that there were 54 incidents reported and listed the most significant as the destruction of a Piping Plover nest, eradication of marijuana, breaking and entering of the Visitor Center, and 4 weapons violations. (The appellant also reported an attempted suicide; however, that incident was handled by the appellant's first-level supervisor and cannot be credited to the appellant.) Of the violation notices, only the

indecent exposures, which required surveillance and investigation, have the potential of meeting Level 3-3. They constitute only 5% of the violation notices issued by the Refuge, so they cannot be considered grade-controlling. Of the 54 incidents, the most unusual situations constitute only 11% of the incidents handled by the appellant; therefore, they are not considered grade-controlling.

Summary

The position is found to fully meet the activities described at Level 3-2 on a regular and recurring basis and for at least 25 percent of the appellant's time. The activities performed by the appellant which meet the threshold for Level 3-3 constitute a total of 16% of his time; therefore, they are not grade-controlling. The appellant's position is correctly credited with Level 3-2.

Factor Evaluation System (FES) Table

In summary, we have evaluated the appealed positions as follows and have highlighted Factor 3, whose crediting changes the outcome of the decision:

Factor	Level	Points
1. Knowledge required by the position	1-4	550
2. Supervisory controls	2-3	275
3. Guidelines	3-2	125
4. Complexity	4-3	150
5. Scope and effect	5-3	150
6. Personal contacts	6-3	60
7. Purpose of contacts	7-3	120
8. Physical demands	8-2	20
9. Work environment	9-2	20
Total points:		1,470

A total of 1,470 points falls within the GS-7 grade level point range of 1,355 - 1,600 points on the Grade Conversion Table in the GS-083/085 Guide.

Decision

The appealed position is classified properly as Police Officer, GS-083-7.