

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 13-02

January 9, 2013

TO: All Division Heads, Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Inclusion of Front Pay in Board Settlements

Following a recommendation from the Quality Committee and after a review of Agency policy and practice regarding settlements with greater-than-one-hundred-percent backpay, I have decided to modify existing policy to permit Agency settlements to include front pay. Compliance Casehandling Manual §10592.8 is revised to eliminate the requirement that such settlement terms be set forth in non-Board “side letters,” and to permit their inclusion in Board settlement agreements. This memorandum discusses that change as well as clarification of the Board agent’s role in such settlements, and the requirement for a written waiver of reinstatement.

Inclusion of Front Pay in Board Settlements

Agency policy favors reinstatement as the preferred means to vindicate statutory rights and restore the status quo after unlawful discrimination. However, parties and discriminatees are free to negotiate a waiver in return for a monetary amount. In practice, they routinely do so and a significant number of settlements approved by Regions in recent years include payments to discriminatees of greater-than-one-hundred-percent backpay.

A monetary payment to an employee as compensation in lieu of reinstatement, known as “front pay,” is a remedial concept that is well recognized by courts. See, e.g., *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001). This form of front pay is not a remedy the Board includes in remedial orders, under existing law. However, remedies that the Agency may approve as part of a voluntary settlement agreement between the parties are not limited to those that the Agency would seek in formal proceedings. Where parties in Board proceedings negotiate front pay in return for a waiver of reinstatement or reinstatement, the front pay is not “punitive,” it is part of a mutually agreed-upon settlement. It is also remedial, as the discriminatee is waiving rights to something of value that was unlawfully denied.

Currently, CHM §10592.8 states that settlement terms for greater-than-one-hundred-percent backpay in return for a waiver of reinstatement (i.e., front pay) cannot be included in a Board settlement, and must be in a “side letter separate from any of the documentation regarding the Agency settlement.” Thus, any negotiated resolution that includes front pay must, at least with respect to the terms regarding front pay, be a non-Board agreement. In practice, it appears that most settlement agreements involving

greater-than-one-hundred-percent backpay are entirely non-Board. Agency policy should favor Board settlements, not discourage them. Accordingly, CHM §10592.8 will be revised to permit front pay in Board settlements.

As noted above, it remains Agency policy that reinstatement is generally the best means to remedy the harm to employee statutory rights caused by an unlawful discharge or layoff. However, it is ultimately the discriminatee who chooses whether to insist on reinstatement, or waive it in return for compensation. In this regard, ULP CHM §10128.7 provides:

An individual entitled to reinstatement under the General Counsel's theory of the case should not be pressured in any way to waive reinstatement, since reinstatement is one of the most effective remedies available under the Act. Of course, for a variety of reasons, individuals may elect to waive reinstatement in response to a settlement offer from a charged party.

Current CHM §10592.8 attempts to provide further guidance to Regions on balancing these competing considerations in the course of settlement negotiations with parties over reinstatement. On the one hand, it directs Regions to "communicate" or "relay" an offer of a monetary amount, including front pay, that is made by a respondent as an inducement for a waiver of reinstatement. On the other hand, it admonishes Regions not to "encourage" a waiver or "advocate a premium above the make-whole remedy for any purpose whatsoever." The distinction between "communicating" an offer, and "encouraging" or "advocating" its acceptance, may be difficult to discern, particularly as Regions are also mandated in CHM §10128.6 to advise parties of the factors favoring settlement, such as the risk, time, expense and emotional impact of litigation. In practice, Regions interpret this guidance differently in negotiations over front pay.

Accordingly, CHM §10592.8 will be revised to incorporate a different approach, one that seeks to ensure that the parties and the discriminatee are fully informed of the Agency's position. Per CHM §10128.7, discriminatees should not be pressured to waive reinstatement. However, where front pay in lieu of reinstatement is proposed, the offer should be communicated. In addition, a Region may raise the issue of front pay if the Region is confident that reinstatement will not be achieved absent litigation. At the same time, the parties and discriminatee should be advised that the Region is not seeking front pay in formal proceedings, and the discriminatee should be advised of the Region's position that the discriminatee is entitled to reinstatement and full backpay and that, absent settlement, the Region intends to pursue formal proceedings to secure these remedies.

If the funds paid to an employee include both backpay and front pay, the heading on the "Backpay" section of the informal settlement agreement should be changed to "Payment of Wages and Benefits" to reflect this change.

Written Waivers of Reinstatement Required

Generally, when there is a waiver of reinstatement, that waiver is in writing and is part of the case file. In OM 11-61, we decided to revise CHM §10130.4, and eliminate the requirement that a waiver be in writing. Upon further reflection, we have determined that to avoid potential misunderstandings and problems with settlements, both Board and non-Board, it is better to require a waiver of reinstatement rights to be in writing and be placed in the case file. However, if a Region believes that circumstances in a particular case warrant proceeding without a written waiver, the Region may contact Operations-Management for authorization to do so. Accordingly, we are revising CHM §10130.4 and CHM §10592.8 to require written waivers unless authorized by Operations-Management in a particular case.

Revised Casehandling Manual Sections

The casehandling manuals will be revised to reflect these changes. The revised CHM §10592.8 reads as follows:

10592.8 Reinstatement

Most cases that involve backpay also require reinstatement. Respondents often propose backpay settlements conditioned upon the discriminatee's waiver of reinstatement. The Region should communicate such an offer but should make sure the discriminatee is aware of the Region's position that the discriminatee is entitled to reinstatement and that absent settlement the Region intends to pursue formal proceedings to obtain an order requiring reinstatement (as well as 100 percent of backpay plus interest). Rejection of a valid offer of reinstatement tolls but does not otherwise affect backpay. If, pursuant to a settlement, a discriminatee voluntarily agrees to waive reinstatement, a signed waiver of reinstatement must be obtained from any discriminatee who is not a charging party and placed in the case file. However, if a Region believes that circumstances in a particular case warrant proceeding without a written waiver, the Region may contact Operations-Management for authorization to do so.

If a respondent offers a discriminatee more than 100 percent of backpay (i.e., front pay) in lieu of reinstatement, or a discriminatee proposes front pay as compensation for a waiver of reinstatement, the Region should relay the settlement proposal, but should make it clear to respondent and the discriminatee that the Region is serving only as a conduit for the proposal and is not seeking front pay in formal proceedings. When the Region is confident that reinstatement will not be achieved absent litigation, the Region may raise the issue of whether front pay would be acceptable to the parties but should make it clear to them that the Region is not seeking front pay in formal proceedings. Agreed-

upon front pay, as compensation for a waiver of reinstatement, may be included in any Board settlement.

Occasionally, a respondent will offer convincing evidence of a discriminatee's unsuitability for employment. If such evidence persuades the Regional Director that the settlement need not provide for employment to effectuate the policies of the Act, he or she has authority to approve it after obtaining authorization from the Division of Operations-Management and, in post judgment cases, from the Contempt Litigation & Compliance Branch.

The revised CHM §10130.4 reads as follows:

10130.4 Reinstatement Declined or Not Desired If an offer of reinstatement is declined or the alleged discriminatee waives reinstatement, the settlement agreement should so state. In such circumstances, a signed waiver of reinstatement must be obtained from any discriminatee who is not a charging party and placed in the case file. However, if a Region believes that circumstances in a particular case warrant proceeding without a written waiver, the Region may contact Operations-Management for authorization to do so.

/s/
L. E. S.

Release to the Public

cc: NLRBU
NLRBPA