

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS¹

COMMONWEALTH OF MASSACHUSETTS/
COMMISSIONER OF ADMINISTRATION

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES

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Case No. SUP-05-5191

Date Issued: March 23, 2012

Hearing Officer:

Margaret M. Sullivan, Esq.

Appearances:

Martha Lipchitz O'Connor, Esq. - Representing the Commonwealth
of Massachusetts/Commissioner
of Administration

Richard S. Waring, Esq. - Representing the National Association
of Government Employees

HEARING OFFICER'S SUPPLEMENTARY DECISION ON COMPLIANCE

SUMMARY

- 1 The issue in this compliance proceeding concerns the nature and scope of the
2 Commonwealth of Massachusetts/Commissioner of Administration's² (Commonwealth)
3 obligation to comply with an order that the Commonwealth Employment Relations Board³

¹ Pursuant to Chapter 145 of the Acts of 2011, the Division of Labor Relations is now the Department of Labor Relations.

² The respondent in this matter, which previously was the Commonwealth of Massachusetts/Commissioner of Administration and Finance, is now the Commonwealth of Massachusetts/Commissioner of Administration.

³ The Board is the DLR's appellate body.

1 (Board) rendered in Case No. SUP-05-5191. I find that the Commonwealth failed, in part,
2 to fully comply with the Board's order.

3 STATEMENT OF THE CASE⁴

4 On October 23, 2009, the Board rendered a decision and order in Case No. SUP-
5 05-5191 that the Commonwealth had violated Sections 10(a)(5) and, derivatively, Section
6 10(a)(1) of M.G.L. c.150E (the Law) by repudiating a grievance settlement between the
7 Commonwealth and the National Association of Government Employees (NAGE or the
8 Union).⁵ The underlying settlement dated April 29, 2003 (April 29, 2003 Agreement)
9 resolved a grievance that NAGE had filed challenging the termination of a statewide
10 bargaining unit 6 member previously referred to as Jane Doe (Doe). Pursuant to the April
11 29, 2003 Agreement, the Commonwealth rescinded Doe's termination, and Doe accepted
12 a voluntary layoff and waived all of her contractual recall rights. Doe then obtained
13 employment with the Social Security Administration (SSA). In response to a subsequent
14 inquiry from the SSA about Doe, the Commonwealth indicated that it had discharged her
15 from employment. The Board concluded that the Commonwealth's actions constituted an
16 unlawful repudiation, which led to Doe's termination from the SSA. As a remedy, the
17 Board ordered the Commonwealth to immediately adhere to all terms of the April 29, 2003
18 Agreement and further directed the Commonwealth to:

- 19 1. Make the affected employee whole for any economic losses that she
20 suffered for the period from March 21, 2005 to the date of this
21 decision, which were a direct result of the Commonwealth's failure to
22 adhere to the April 29, 2003 Agreement, plus interest on any sums
23 owed at the rate specified in M.G.L.c.231, Section 6I, compounded
24 quarterly.

⁴ The DLR's jurisdiction in this matter is uncontested.

⁵ The Board's decision is reported at 36 MLC 65 (2009)

- 1 2. Make the affected employee whole with a sum of money reduced to
2 present value that is equal to her anticipated economic losses for the
3 eighteen month period commencing upon the date of this decision,
4 which are the direct result of the Commonwealth's repudiation of the
5 April 29, 2003 Agreement.

6 In June 2010, the Commonwealth paid Doe the sum of \$179,582.08, which included
7 approximately four and one-half years of back pay and one and one-half years of front pay,
8 which was reduced to present value. When calculating the sum of \$179,582.08, the
9 Commonwealth treated Doe's annual salary as \$36,219 for the entire four and one-half
10 years that she was eligible for back pay and for the one and one-half years that she was
11 eligible for front pay.

12 On April 22, 2010, NAGE filed a petition for compliance pursuant to 456 CMR
13 16.08, because the parties had been unable to agree on the value of the make whole
14 remedy to Doe. Specifically, NAGE was seeking to have Doe compensated for: 1) wage
15 increases that she allegedly would have received at the SSA, if she had not been
16 terminated; 2) monies that the SSA allegedly would have contributed to her employer-
17 sponsored thrift savings plan; and 3) increased tax liability that Doe allegedly incurred as a
18 result of the receipt of a lump sum payment from the Commonwealth. On May 12, 2010
19 and June 15, 2010, the Commonwealth filed responses to NAGE's petition for compliance.
20 The Union filed a supplemental statement in support of its petition on June 15, 2010. On
21 September 16, 2010, the DLR ordered a compliance hearing pursuant to 456 CMR 16.08.

22 I conducted a compliance hearing on June 14, 2011, at which time all parties had
23 the opportunity to be heard, to examine witnesses and to introduce evidence. The parties
24 submitted their post-hearing briefs postmarked on September 8, 2011. Upon review of the

1 entire record, including my observation of the demeanor of the sole witness, I make the
2 following findings of fact and render the following decision.

3 STIPULATIONS OF FACT

4 At the June 14, 2011 hearing, the parties agreed to the following stipulations of fact:

- 5 1. The former Commonwealth employee, [Jane Doe], received payment in the
6 amount of \$179,582.08, less appropriate deductions as the result of the
7 award in SUP-09-5191. The parties disagree as to whether this payment
8 fully satisfies the Board's order.
9
- 10 2. The Social Security Administration (SSA) employed [Jane Doe] as a Claims
11 Representative from September 7, 2004 until March 21, 2005 (six months
12 and fourteen days).
13
- 14 3. New SSA Claims Representatives must participate in six months of training.
15
- 16 4. A SSA Claims Representative who commences employment at the GS-7
17 salary level advances to the GS-9 salary level after one year provided that
18 he/she achieves a satisfactory performance rating.
19
- 20 5. A SSA Claims Representative at the GS-9 salary level advances to the GS-
21 11 salary level provided that he/she has achieved a satisfactory performance
22 rating at the GS-9 level.
23
- 24 6. A SSA Claims Representative who has achieved a GS-11 rating is eligible for
25 within grade pay increases after one year's satisfactory performance in
26 his/her current pay grade up to Step 4.
27
- 28 7. Ms. [Doe's] probationary period at the SSA was two years.
29
- 30 8. Joint Exhibit 1: Front Pay "Grade 11, 4" should read "Grade 7,1".
31
- 32 9. The inclusion of COLAs is not an issue in the current matter.
33
- 34 10. At the time of Ms. [Doe's] employment with the SSA, newly hired employees
35 could have deductions taken out of their salary toward the thrift savings plan
36 as soon as they started work, but the match by the federal government does
37 not start until after the third year of employment.
38
- 39 11. The inclusion of vacation pay in [Doe's] back pay award is not an issue in the
40 current matter.

1 2006

2 In January of 2006, SSA employees in the New England region received a salary
3 increase of 3.39%. Were Doe still employed at the SSA at the GS-9 Step 1 salary grade,
4 her pay would have increased to \$45,806 at that time. Were Doe still employed at the
5 SSA on September 7, 2006, and assuming that she received a satisfactory annual
6 performance evaluation, Doe would have received a classification upgrade to GS-11,⁶
7 Step 1. Doe's salary would have increased to \$55,422 effective September 7, 2006.

8 2007

9 In January of 2007, SSA employees in the New England region received a 2.53%
10 salary increase. Were Doe still employed at the SSA at the GS-11, Step 1 salary grade,
11 her pay would have increased to \$56,824 at that time. Were Doe still employed with the
12 SSA on September 7, 2007 and assuming that she received a satisfactory annual
13 performance evaluation, Doe would have received a step upgrade to GS-11, Step 2.
14 Doe's salary would have increased to \$58,719 effective September 7, 2007.

15 2008

16 In January of 2008, SSA employees in the New England region received a 3.80%
17 salary increase. Were Doe still employed at the SSA at the GS-11, Step 2 salary
18 classification, her pay would have increased to \$60,952 at that time. Were Doe still
19 employed with the SSA on September 7, 2008 and assuming that she received a
20 satisfactory annual performance evaluation, Doe would have received a classification
21 upgrade to GS-11, Step 3. Doe's salary would have increased to \$62,919 effective
22 September 7, 2008.

⁶ Grade 11 is the highest grade on the classification scale for the claims representative position.

1 2009

2 In January of 2009, SSA employees in the New England region received a 4.33%
3 salary increase. Were Doe still employed at the SSA at the GS-11, Step 3 salary
4 classification, her pay would have increased to \$65,518 at that time. Were Doe still
5 employed with the SSA on September 7, 2009, and assuming that she received a
6 satisfactory annual performance evaluation, Doe would have received a classification
7 upgrade to GS-11, Step 4. Doe's salary would have increased to \$67,565 effective
8 September 7, 2009.

9 2010-2011

10 In January of 2010, SSA employees in the New England region received a 2.17%
11 salary increase. Were Doe still employed at the SSA at the GS-11, Step 4 salary
12 classification, her pay would have increased to \$69,033 at that time. The record does not
13 indicate that pursuant to the collective bargaining agreement between the SSA and the
14 AFGE, Doe would have been eligible for a classification upgrade and, thus, a salary
15 increase, if she still were an SSA employee on September 7, 2011. Finally, because the
16 federal government did not pay federal employees, including SSA employees, a statutory
17 salary increase in January 2011, Doe's salary would not have increased at that time, even
18 if she still were an employee of the SSA. On April 23, 2011, Doe's eligibility for front pay
19 ended.

20 2005-2010 Overview of Step and Wage Increases for Claims Representatives

21 For the period from 2005-2010, the SSA employed approximately 975 claims
22 representatives in its New England Region. During that period, the SSA gave satisfactory
23 job evaluations to most of those claims representatives and advanced them on the

1 classification scale either from GS-7, Step 1 to GS-9, Step 1 or from GS-9, Step 1 to GS-
2 11, Step 1. Approximately, five to seven grievances⁷ were filed during that five-year period
3 challenging the SSA's denials of grade increases for claims representatives from GS-7 to
4 GS-9 or GS-9 to GS-11. Also, during the same period, approximately ten grievances were
5 filed challenging the SSA's denial of step increases within grade 11 (within grade
6 increases) to claims representatives. Most of the SSA's claims representatives earned
7 satisfactory annual performance evaluations and, thus, received step increases.

8 Doe's Eligibility for the Federal Government's Thrift Savings Plan

9 The thrift savings plan offers civilian employees of the federal government the same
10 type of savings and tax benefits that many private employers offer their employees under
11 401K plans. The thrift savings plan is a defined contribution plan which allows employees
12 to make pre-tax contributions of up to 10%⁸ of their base pay each pay period.⁹ Federal
13 agencies match each dollar (agency match contributions) that employees contribute up to
14 the first 3% of their base pay and contribute fifty cents for each dollar that employees
15 contribute up to the next 2% of their base pay. Although Doe was eligible to join the thrift

⁷ Pursuant to the collective bargaining agreement between the AFGE and the SSA, probationary employees are permitted to file grievances challenging denials of grade increases.

⁸ The Internal Revenue Service issues annual guidelines that describe the maximum dollar amount that an employee can contribute pre-tax in a pay period.

⁹ The thrift savings plan has annual open periods when employees can join the thrift savings plan.

1 savings plan when she began her employment with the SSA, her first paycheck,¹⁰ which
2 covered a biweekly pay period, shows no contribution to the thrift savings plan.¹¹

3 Even if employees do not contribute to the thrift savings plan, federal agencies will
4 open thrift savings plan accounts for them. Each pay period, the federal agency
5 automatically contributes¹² a sum equal to 1% of an employee's base pay to the
6 employee's thrift savings plan account (agency automatic contributions), regardless of
7 whether the employee also makes contributions. Employees need to work for the federal
8 agency for three years before they become vested in the thrift savings plan and can keep
9 the automatic agency contributions when they leave employment.

10 Opinion

11 The Board consistently has recognized that remedies for violations of the Law
12 should be fashioned to place charging parties in the position that they would have been in
13 but for the unfair labor practice. Commonwealth of Massachusetts, 29 MLC 162, 164-165
14 (2003); Natick School Committee, 11 MLC 1387, 1400 (1985). The Board has broad
15 discretion in fashioning a remedy calculated to effectuate the purposes of the Law and to
16 vitiate the effects of the violation. Boston Police Patrolmen's Association, Inc., 8 MLC
17 1993, 2002 (citing Board of Regional Community Colleges v. Labor Relations Commission,
18 377 Mass. 847 (1979)). Moreover, the Board attempts to fashion remedies that will.

¹⁰ The record only contains a copy of one of Doe's paychecks, her first paycheck.

¹¹ Although it is possible that Doe received her first paycheck before the next open season for employees to enroll in the thrift savings plan, the record contains no other information showing that Doe subsequently joined the thrift savings plan.

¹² The automatic agency contributions do not come from the employee's salary.

1 prevent a respondent from benefitting from its unlawful practice. Amesbury School
2 Committee, 13 MLC 1196, 1197 (1986).

3 Method of Calculation

4 The formula for computing the amount of back pay owed to Doe is:

5 Net back pay = gross back pay - (interim earnings-expenses). Boston School Committee,
6 29 MLC 143, 150 (2003). Gross back pay is the total amount of wages and other
7 economic benefits Doe would have received but for the Commonwealth's unlawful
8 conduct. Greater New Bedford Infant Toddler Center, 15 MLC 1653, 1657 (1988). Interim
9 earnings are amounts earned during the back pay period which offset the loss of
10 compensation resulting from the termination from employment. The Union has the burden
11 of proof of establishing gross back pay. Town of Townsend, 1 MLC 1450, 1453 (1975).

12 Here, the Commonwealth does not seek to subtract any interim earnings from Doe's
13 gross back pay. Additionally, the Commonwealth does not contend that Doe failed to
14 make adequate efforts to secure interim employment after her discharge from the SSA.
15 See Boston School Committee, 29 MLC at 150 (employees have an obligation to mitigate
16 back pay liability by seeking appropriate interim employment). Rather, the parties disagree
17 as to whether Doe's back pay and front pay awards should include wage increases that
18 Doe allegedly would have earned at the SSA, if she had not been terminated. Also, the
19 parties dispute whether the Commonwealth must compensate Doe for: a) monies that the
20 SSA allegedly would have contributed to Doe's thrift savings plan; and b) any tax liability
21 that Doe allegedly incurred as a result of her receipt of the lump sum payment of
22 \$179,582.08.

1 Wage Increases

2 Turning to the issue of wage increases, prior Board cases have included wage
3 increases that individuals would have received during the back pay period in the
4 computation of their back pay award.¹³ Greater New Bedford Infant Toddler Center, 15
5 MLC at 1655, n.5; Town of Townsend, 1 MLC at 1455. Relying on Bontura v. Chase
6 Manhattan Bank, 639 F. Supp. 353, 357 (1986), the Commonwealth argues that because
7 Doe had no historic pattern of wage increases with the SSA, it is speculative to include
8 wage increases in Doe's back pay and front pay awards. Id. (back pay award included
9 compensation for wage increases where plaintiff had a history of receiving wage increases
10 but did not include compensation for bonuses where plaintiff had no consistent pattern of
11 receiving bonuses). In support of its argument, the Commonwealth points out that: a) Doe
12 was still in her probationary period at the SSA; b) salary and grade increases for SSA
13 claims representatives are merit-based; and c) Doe spent almost her entire employment at
14 the SSA in training, and thus, her ability to perform the duties of a claims representative
15 was untested.

16 However, Doe did not have the opportunity to earn wage increases at the SSA
17 because of the Commonwealth's unlawful repudiation of a settlement agreement. To
18 consider no other facts besides the brevity of Doe's employment with the SSA and the
19 merit-based nature of her wage increases would permit the Commonwealth to benefit from
20 its wrongdoing. See Commonwealth of Massachusetts, 4 MLC 1869, 1879, n.13 (1978),
21 aff'd sub. nom, Group Insurance Commission v. Labor Relations Commission, 381 Mass.
22 199 (180) (as between the wrongdoer and the victim, the expense and inconvenience of

¹³ The present case was the first instance in which the Board ordered front pay.

1 repairing the damage belong on the wrongdoer). The SSA was a unionized work place,
2 where a collective bargaining agreement between the AFGE and the SSA provided for
3 contractual wage increases and a grievance procedure by which unit members could
4 challenge their failure to receive increases. Because of Doe's brief employment with the
5 SSA, the history of whether other similarly situated claims representatives received grade
6 or step increases sheds light on the likelihood that Doe would have earned increases.

7 I turn now to consider the history of wage increases for SSA claims representatives
8 during the five-year period between 2005 and 2010. During the relevant five-year period,
9 most of the claims representatives advanced from grade 7 to grade 9, grade 9 to grade 11
10 or within steps of grade 11, the top grade, and received the corresponding wage
11 increases. Because there is a past history of most claims representatives receiving wage
12 increases during the relevant time period, the Union has satisfied its evidentiary burden to
13 show that if Doe had continued as an SSA employee, she most likely would have received
14 wage increases. Cf. Plymouth County and House of Correction and Jail, 6 MLC 1523,
15 1526 (1979) (unlawfully discharged employees entitled to include monies for loss of federal
16 details in their gross back pay, despite their inability to precisely determine exact amounts
17 that would have been earned). Accordingly, I find that Doe is entitled to receive wage
18 increases that she would have received from 2005-2010 in her back pay and front pay
19 awards.

20 Compensation for Doe's Thrift Savings Plan

21 Next, the Union contends that the Commonwealth should compensate Doe for
22 monies that the SSA would have contributed to Doe's employer-sponsored thrift savings
23 plan. It is well settled that a back pay award may also include compensation for lost

1 retirement benefits. Plymouth County House of Correction and Jail, 6 MLC at 1525 (citing
2 Town of Townsend, 1 MLC at 1451-1452.) However, the Commonwealth argues that
3 payment of compensation for any contributions that the SSA made to the thrift savings
4 plan on Doe's behalf would constitute a windfall, because Doe did not contribute to the
5 thrift savings plan and was not vested in the thrift savings plan. The facts show that that
6 the SSA contributes funds to its employee's thrift plans pursuant to two different scenarios.
7 In the first scenario, the SSA makes agency matching contributions that, in part, match up
8 to 5% of an employee's own contributions. Because, as the Commonwealth contends, the
9 record does not show that Doe contributed to her thrift savings plan, she was not eligible to
10 receive to receive an employee match. Thus, the Commonwealth need not compensate
11 Doe for any agency matching contributions.

12 Turning to the second scenario, the SSA makes automatic agency contributions of
13 1% of an employee's base pay to the employee's thrift savings plan account each pay
14 period regardless of whether or not the employee also made contributions. Employees
15 need to work for the SSA for three years before they become vested in the thrift savings
16 plan and can keep the automatic agency contributions when they leave employment. The
17 Commonwealth contends that Doe should not receive compensation for the automatic
18 agency contributions, because Doe never became vested in the thrift savings plan.
19 However, it was the Commonwealth's repudiation of the settlement agreement that caused
20 the SSA to discharge Doe, and thus its unlawful conduct precluded her from becoming
21 vested in the thrift savings plan. See Loeb v. Textron, Inc., 600 F.2d 1003, 1021
22 (C.A.1(R.I.)(1979) (in age discrimination case, trial court could decline to allow an
23 employer to stand on vesting requirements that plaintiff could not meet because of the

1 employer's own wrongful acts). Furthermore, compensation for the value of a retirement
2 plan is appropriate where reinstatement to prior employment is not ordered. See Id.
3 (compensation for a retirement plan should be computed as if plaintiff had been employed
4 until the date damages are settled). Here, the Board could not order the SSA to reinstate
5 Doe, because it does not have jurisdiction over that federal agency.

6 The Board previously has determined that as part of a make whole remedy, it is
7 necessary to restore affected individuals to the same position in their retirement fund that
8 the individuals would have attained but for the wrongdoer's actions. Town of Townsend, 1
9 MLC at 1457 (back pay award for an unlawfully discharged employee included the
10 employer's share of payments to the municipal retirement board). Because Doe would
11 have been entitled to keep the SSA's automatic agency contributions to her thrift savings
12 plan account after she worked for the SSA for three years, she suffered an economic loss
13 when the Commonwealth's wrongdoing caused the SSA to terminate her prior to her third
14 year of employment. Plymouth County House of Correction and Jail, 6 MLC at 1528 (the
15 purpose of the "make whole" order is to compensate the employee for lost economic
16 benefits). I conclude that the loss of the amount of the automatic agency contributions to
17 Doe's thrift savings plan is an appropriate element of Doe's back pay.

18 Compensation for Doe's Alleged Increase in Tax Liability

19 The Union also seeks to include compensation for Doe's alleged increase in tax
20 liability as the result of the receipt of the lump sum payment of \$179,582.08 that she
21 received from the Commonwealth. The Commonwealth argues that an alleged increase in
22 Doe's tax liability is not an economic loss, and that an order requiring the Commonwealth
23 to reimburse her would be punitive in nature. Inclusion of compensation in a back pay

1 award to cover additional tax liability from a lump sum payment is a novel issue before the
2 Board. The National Labor Relations Board (NLRB) has not ordered compensation for
3 increased tax liability as a remedy in back pay awards.¹⁴ Certain federal circuits, including
4 the Third Circuit (See Eshelman v. Agere Systems (Eshelman), 554 F.3d 426, 440 (3rd
5 Cir. 2009)) (Americans with Disabilities Act claim) and the Tenth Circuit (See Sears v.
6 Atchison, Topeka & Santa Fe Railway Co., 749 F.2d 1451, 1456-1457 (10th Cir. 1985))
7 (Title VII of the Civil Rights Act claim), allow recovery for additional tax liability for claims
8 filed under various federal anti-discrimination statutes. However, compensation for
9 increased tax liability due to a lump sum payment is warranted only where there is
10 sufficient evidence to calculate an appropriate adjustment. See Hukkannen v. International
11 Union of Oper. Eng'rs, F.3d 281, 287 (8th Cir.1983) Assuming arguendo that the Board
12 determines that it is an appropriate remedy to include compensation for increased tax

¹⁴ Prior to 2000, the National Labor Relations Board (NLRB) declined to order additional compensation in back pay awards to cover an increased tax liability, because of income averaging provisions in the Internal Revenue Code. See Hendrickson Bros. Inc., 272 N.L.R.B. 438 (1985); enfd, 762 F.2d 990 (2d Cir.1985); Laborers Int'l Union Local 282 (Austin Co.), 271 N.L.R.B. 878 (1984). The Tax Reform Act of 1986 eliminated those income tax averaging provisions. In 2000, the NLRB's Office of General Counsel issued a policy memorandum directing all NLRB regional directors, officers-in-charge, and resident officers to seek a tax component to back pay awards that would obligate respondents to reimburse discriminatees for extra federal and state income taxes, which would result from a back pay award. National Labor Relations General Counsel Memorandum, Reimbursement for Excess Federal and State Income Taxes which Discriminatees Owe as a Result of Receiving a Lump-sum Backpay Award, 2000 NLRB GCM LEXIS 70, at *9 (Sept. 22, 2000). However, the NLRB subsequently did not act on that General Counsel's recommendation. In 2005, the NLRB specifically declined to reach the issue of whether compensation for increased tax liability was an appropriate remedy. See Hotel Employees & Restaurant Employees International Union, Local 26, 344 N.L.R.B. 587, 567 (2005). On March 11, 2011, the NLRB's General Counsel wrote a memorandum to all regional directors, officers-in-charge and resident officers urging them to seek remedies that included compensation in back pay awards for discriminatees' increased tax liability. National Labor Relations General Counsel Memorandum, Changes in the Methods Used to Calculate Backpay in Light of Kentucky River Medical Center and to Better Effectuate the Purposes of the Act, GC11-08, 3022 WL 3348281(N.L.R.B.G.C.) (March 11, 2011)

1 liability in a back pay award, the charging party would still bear the burden of providing
2 factual information demonstrating that the individual actually incurred additional tax liability.

3 The Third Circuit Court of Appeals noted in the Eshelman case that:

4 ...we do not suggest that a prevailing plaintiff in discrimination cases is
5 presumptively entitled to an additional award to offset tax consequences
6 above the amount to which she would be otherwise entitled. Employees will
7 continue to bear the burden to show the extent of the injury that they have
8 suffered. The nature and amount of relief needed to make an aggrieved
9 party whole necessarily varies from case to case. Eshelman v. Agere
10 Systems, 554 F.3d at 443.

11 Here, the Union submitted a copy of the Internal Revenue Service's Tax Rate
12 Schedules for 2010 and indicated that Doe held single filer status. However, the record is
13 devoid of any information about: a) the taxes Doe actually paid on the lump sum payment
14 that she received in June 2010; b) the taxes, if any, that Doe paid in prior years before she
15 received the lump sum payment; and c) the alleged amount of the increased or differential
16 tax burden resulting from Doe's receipt of the lump sum payment. See Barbour v.
17 Medatlantic Management Corp., 952 F.Supp. 857 (D.D.C. 1987) (plaintiff's expert offered
18 testimony on plaintiff's total tax liability but failed to offer any testimony about the
19 differential if the employee were paid over time). In the absence of any information
20 showing that Doe actually suffered an economic loss as a result of the lump sum payment,
21 I decline to include compensation for tax liability in Doe's back pay.

22 CONCLUSION

23 Based on the record and for the reasons stated above, I conclude that the
24 Commonwealth must include compensation for wage increases in Doe's back pay and
25 front pay awards and compensate her for the automatic agency contributions that the SSA
26 would have made to Doe's thrift savings plan. However, the Commonwealth need not

1 compensate her for any agency matching contributions by the SSA to her thrift savings
2 plan or include the payment of any compensation for any increase in Doe's tax liability that
3 she allegedly incurred as the result of the lump sum payment that she received from the
4 Commonwealth.

5 ORDER

6 WHEREFORE, based upon the foregoing, and pursuant to the authority vested in
7 the DLR by Section 11 of the Law, it is hereby ordered that the Commonwealth shall:

8 1. Pay Doe compensation for the differences between \$36,219, which the
9 Commonwealth used as her annual rate of pay when it calculated her
10 lump sum payment, and the following annual rates of pay, which include
11 the appropriate wage increases:

- 12 a) \$44,303 for the period from September 7, 2005 through
13 December 31, 2005;
- 14 b) \$45,806 for the period between January 1, 2006 through
15 September 6, 2006;
- 16 c) \$55,422 for the period between September 7, 2006 through
17 December 31, 2006;
- 18 d) \$56,824 for the period January 1, 2007 through September 6,
19 2007;
- 20 e) \$58,719 for the period between September 7, 2007 through
21 December 31, 2007;
- 22 f) \$60,952 for the period from January 1, 2008 through September
23 6, 2008;
- 24 g) \$62,919 for the period from September 7, 2008 through
25 December 31, 2008;
- 26 h) \$65,518 for the period from January 1, 2009 through September
27 6, 2009;
- 28 i) \$67,565 for the period from September 7, 2009 through
29 December 31, 2009;
- 30 j) \$69,033 for the period from January 1, 2010 to April 23, 2011,
- 31
- 32

33 plus interest on any sums owed at the rate specified in M.G.L.c.231,
34 Section 6I compounded quarterly.

35 2. Pay Doe compensation for automatic agency contributions of 1% of her
36 base pay each bi-weekly pay period from September 7, 2004, which was
37 Doe's date of hire at the SSA, through April 23, 2011, which was when the
38 Board's front pay order ended, with base pay calculated as follows:

- 1
- 2 a) \$34,880 for the period from September 1, 2004 through
- 3 December 31, 2004;
- 4 b) \$36,219 for the period from January 1, 2005 through
- 5 September 6, 2005;
- 6 c) \$44,303 for the period from September 7, 2005 through
- 7 December 31, 2005;
- 8 d) \$45,806 for the period from January 1, 2006 through
- 9 September 6, 2006;
- 10 e) \$55,422 for the period from September 7, 2006 through
- 11 December 31, 2006;
- 12 f) \$56,824 for the period from January 1, 2007 through
- 13 September 6, 2007;
- 14 g) \$58,719 for the period from September 7, 2007 through
- 15 December 31, 2007;
- 16 h) \$60,952 for the period from January 1, 2008 through
- 17 September 6, 2008;
- 18 i) \$62,919 for the period from September 7, 2008 through
- 19 December 31, 2008;
- 20 j) \$65,518 for the period from January 1, 2009 through
- 21 September 6, 2009;
- 22 k) \$67,565 for the period from September 7, 2009 through
- 23 December 31, 2009;
- 24 l) \$69,033 for the period from January 1, 2010 through April 23,
- 25 2011,
- 26

27 plus interest on any sums owed at the rate specified in M.G.L.c.231,
28 Section 6I compounded quarterly.

29 SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS



MARGARET M. SULLIVAN
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L.c.150E, s.11, 456 CMR 13.02(1)(j), and 456 CMR 13.15 to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days

after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, the decision shall become final and binding on the parties.