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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-197140 (NGI)

MAY 23 1980

Mr. W. J. McDonald
Assistant Secretary
(Administration)
Department of the Treasury 3208
Washington, D.C. 20220

Dear Mr. McDonald:

This is in further response to your letter dated November 30, 1979, requesting an opinion as to the legality of the use of agency funds to make cash settlements of discrimination complaints. It is our understanding that you wish to make such settlements without regard to an employee's entitlement to backpay, and without any findings or admissions of discrimination or of an unwarranted or unjustified personnel action.

The Back Pay Act, 5 U.S.C. 5596, would not constitute authorization for cash settlements under the circumstances described in your letter. The Back Pay Act requires a finding by an appropriate authority that an employee has been affected by an unwarranted or unjustified personnel action. 54 Comp. Gen. 760 (1975); B-189239, October 8, 1976. See 5 C.F.R. 550.803(b) (1979); and 5 C.F.R. 550.803(c). No such finding is contained in the proposed settlement submitted, and it is clear from the record that such a finding is not contemplated. Accordingly, and apart from other considerations, the Back Pay Act does not provide authority for the cash settlements you have proposed.

With respect to the application of Title VII of the Civil Rights Act of 1964, as amended, we note that Title VII clearly provides authority for the payment of money damages in the form of a backpay award, and in fact, the courts have permitted the denial of backpay only in limited circumstances. Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975); see, e.g., Kober v. Westinghouse Electric Co. 480 F. 2d 240 (3rd Cir. 1973). However, we assume



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that because you wish to avoid references to backpay, and because the cash payments you have proposed do not appear to be based on the usual backpay formula involving fixed wage rates for definite periods, the money damages you wish to pay could not be characterized as backpay. Instead, such damages must be viewed as punitive damages, or compensatory damages other than backpay, i. e., pain and suffering, mental anguish, etc.

All of the circuits which have addressed the issue have concluded that section 706(g) of Title VII, 42 U.S.C. 2000-5(g), does not authorize awards of punitive damages or compensatory damages other than backpay, De Grace v. Rumsfeld, 21 FEP 1444, 1452 (1st Cir., January 30, 1980) (Black firefighter employed by Navy Department), and cases cited therein. A clear majority of district courts have similarly barred recovery of punitive damages or compensatory damages other than backpay. Curran v. Portland School Committee, 15 FEP 644, 654 (D. Maine S.D. 1977), and cases cited therein.

We recognize that the court cases cited above rely on section 706(g) of Title VII, and the remedies available at the administrative level in the Federal sector are authorized by section 717(b), 42 U.S.C. 2000e-16(b). However, the language of section 706(g) and 717(b) is similar--both refer only to backpay--and the remedial purposes are identical. Further, remedies at the administrative level at best parallel those available at the judicial level. Administrative remedies do not normally exceed judicial remedies. See the settlement policy under the National Labor Relations Act, upon which the remedial provisions of Title VII are based, as discussed in Albermarle supra, at 419. NLRB settlements may not include remedial provisions which exceed that which would be expected from a fully favorable decision if the case were litigated. Section 19124.3, NLRB Casehandling Manual, Part One, Unfair Labor Practice Proceedings. (1977).

We are not aware of any general authority for Federal agencies to enter into compromise settlements, and there is no specific authority to do so in Title VII. In view of the above, we believe the cash settlements you have proposed would not be authorized by Title VII. However, because the authority to implement section 717 has been assigned to the Equal Employment Opportunity Commission (EEOC), and their regulations do not specifically cover this issue, we believe the EEOC may

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wish to address this matter. In the event its view differs from ours we will, upon request, undertake a further review of the issue. See 29 C.F.R. 1613.221(c), as amended at 45 F.R. 24130, 24132, April 9, 1980. We have been advised that such an inquiry should be directed to Constance Dupre, Associate General Counsel, Legal Counsel Division, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506.

Sincerely,

Harry R. Van Cleve

For Milton J. Socolar
General Counsel

cc: Ms. Constance Dupre