OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 98-57 July 15, 1998

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

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Interest on Backpay Escrow Account Deposits

In the past, Regions have had the discretion to request funds deposited in the Agency's backpay escrow account be invested in interest bearing Treasury bonds. (See Section 10640.4 of the Compliance Manual.) With improved technology, we are now able to make interest-bearing accounts more broadly available by consolidating funds for investment. In order to make this benefit available to as many discriminatees as possible, and to maximize the interest earned on all funds, beginning on September 8, 1998, all funds relating to cases in which $2500 or more has been forwarded to Finance for deposit into the Agency's escrow account will be invested in Treasury bonds, unless the transmitting Region specifically requests that they be exempted from investment. In addition to the automatic investment of future deposits, we are initiating a program to invest funds currently held in the escrow account that are not already earning interest.

Prior to implementing a program to consolidate and invest existing deposits, we are conducting a review of the amounts currently in escrow, to eliminate inactive deposits from the account. Regions have, for some time, used the Finance account to protect backpay while efforts were instituted to locate discriminatees, or to consolidate funds while awaiting further deposits from financially unstable respondents. However, in some situations, the money has remained on deposit for more than a year, and no activity has occurred in the account. Where our efforts to locate missing discriminatees have not been fruitful, the funds should be re-distributed to those entitled to share in the backpay, or returned to the party from whom the payments were received. Where the Region is unable to locate a respondent so that the funds can be returned and more than a year has elapsed, backpay remaining in the Agency escrow account should be turned over to the Treasury.

The procedural changes outlined by this memo will be initiated as follows:

1. Regions are requested to review the attached list reflecting the escrow balances maintained on their behalf to determine the status of funds in the escrow account. If the Region has been unable to locate the discriminatee(s), and the backpay has been held long enough to exceed the criteria set forth in Section 10646 of the Compliance Manual, action should be taken to distribute the unclaimed amounts. The Region should prepare a memo requesting Finance to disburse the funds to other discriminatees who have been located and who have not received full backpay, or to return the money to the respondent. If there is a reason to retain the funds in escrow beyond the period set forth in Starlite Cutting, 284 NLRB 620 (1987), the Region should send a memo to Finance, with a copy to Operations-Management, describing the basis for such action and requesting the Finance Branch to retain the money in the account.

2. Where there has been no request to distribute the balance, and the Region has not specifically requested retention of the funds, backpay that was received in the Finance backpay account prior to January 1, 1997 will be turned over (forfeited) to the Treasury. The deadline for submission of requests to distribute or retain these funds is September 8, 1998. If no response is received from the Region by that date, Finance will turn the funds over to Treasury 10 days after e-mail notification to the Regional Director and Operations-Management.

3. Beginning on September 20, 1998, Finance will consolidate and invest funds remaining in cases where the existing balances exceed $2500. The minimum period for investment is 30 days.[1] Therefore, once the money is invested, there may be some instances where the response to a Region's request to disburse backpay to employees will be delayed a few weeks to coincide with the expiration of the investment period. In those cases where such a delay will raise substantive issues, Regions should advise Finance in a timely fashion that the money is not to be consolidated for investment, or that the certificate should not be renewed, and set forth the expected date for disbursement.

[1] Consistent with established practice, in situations where at least $10,000 is being held in escrow with respect to any individual case, such funds will be maintained in a separate account and may be invested for periods in excess of 30 days.

4. Where a Region forwards backpay to Finance with the intention of making a request for disbursement within 30 days of deposit, or in cases where the terms of a settlement require the immediate availability of funds, the Region may request the money not be invested. Such a request should be included in the memo forwarding the payment to the Finance Branch.

5. Beginning on September 8, 1998 all deposits over $2500 (per case) received in Finance will be automatically deposited into an interest bearing account unless the transmitting Region specifically requests that they be exempt from investment.[2]

6. Each month, Finance will provide the Region with a listing of the invested funds for each case and accumulated interest. Requests for disbursement of backpay with interest[3] should be in writing or by e-mail directed to the Finance Branch and should include the name of each beneficiary, social security number and current mailing address. The memo should also state what amounts to be disbursed constitute wages, interest and reimbursement of dues, medical expenses or other components of backpay. As in the past, the Region's request should note the amount of employer FICA tax contribution, if any,[4] and should include the employer's federal tax identification number,[5] together with the employer's current or last known address.

Regions are strongly encouraged to arrange the transfer of funds by respondents directly to the Finance Branch by wire transfer.[6] This procedure eliminates mailing delays and the waiting period for checks to clear, and ensures that the funds are immediately available for investment or distribution.

---

[2] In circumstances where it is apparent the Region will be unable to distribute the money for well in excess of 30 days, Finance should be advised of the anticipated period the funds will be held. This will allow the funds to be invested in treasury bonds with a later maturity date, which may provide a higher rate of interest.

[3] Normally, discriminatees would receive a pro-rated share of interest.

[4] No portion of funds obtained through FDCPA garnishment or execution proceedings should be utilized for the payment of employer payroll taxes, unless the funds obtained through such actions specifically includes an amount designated for such purposes, or unless the amounts exceed that necessary to fully satisfy all remedial requirements.

[5] In cases involving alter egos and continuing entities, where a current federal tax ID is not available, Regions may use a number attached to a related respondent corporation.

[6] Instructions for effecting such wire transfers are attached.

Many Regions take advantage of the procedure by which the Treasury mails backpay checks directly to discriminatees. This is the preferred procedure because in situations where the checks are returned as undeliverable, for example, because of an incorrect address, Treasury automatically notifies Finance, thus greatly facilitating the process of restoring the backpay and tax allocations to the escrow account. However, in those instances where a Region requests that Treasury issue checks for disbursement by the Region, and the check is returned to the Regional Office unclaimed, it is essential that the Region return such checks to Finance promptly, no more than 60 days after the receipt of the check(s) by the Region. This procedure is especially important at the end of the calendar year, because the Agency has experienced situations where the Treasury will not credit the escrow account for taxes withheld from unclaimed checks unless notification is promptly provided by the Agency following the end of the calendar year.

We hope that this program will enhance our efforts to make discriminatees in our cases whole for their losses, especially those that are delayed in the receipt of their backpay. As with any new program, we will be assessing our experience and making necessary adjustments from time to time. If you have any questions or suggestions regarding the procedures outlined here, please contact your District representative, the Finance Branch, or the Contempt Litigation and Compliance Branch.

R.A.S.

Attachment

cc: NLRBU

MEMORANDUM OM 98-57