

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Philadelphia District Office

Doering Meyer and Ryan Gibson, Class Agents,)	
)	EEOC No. 531-2015-00092X
)	Agency No. DOS-F-034-07
)	No. DOS-F-091-08
v.)	
)	
Antony J. Blinken, Secretary,)	
U.S. Department of State,)	
Agency.)	

SETTLEMENT AGREEMENT, EXHIBIT 3

PLAN FOR THE DISTRIBUTION OF SETTLEMENT FUNDS

Pursuant to a settlement reached between the Class and the U.S. Department of State (“Agency”) in this matter (the “Settlement Agreement”), a fund of \$37,500,000 (thirty-seven million, five hundred thousand dollars) is available to pay all claims to members of the Class as well as all attorney’s fees and costs. This Distribution Plan describes how the monetary relief will be distributed. The Settlement Administrator selected by Class Counsel will pay each Class Member under the Settlement Agreement. The Settlement Agreement provides funds for all Class Members to which they are not otherwise entitled, inasmuch as neither the Class Agents nor any of the Class Members have yet proven the Agency’s liability or any individual’s damages. The Settlement Agreement is by its nature a compromise, designed to obtain earlier payment for Class Members, who might otherwise have to wait many more years to recover, or never recover. As such, no Class Member is obtaining “full relief” as part of this Distribution Plan – rather, the Distribution Plan aims to provide fair, adequate, and reasonable compensation to Class Members under the circumstances.

I. CLASS DEFINITION

As described in the Settlement Agreement, Section II.A.5, the Class is defined as “All qualified applicants to the Foreign Service beginning on October 7, 2006, who were denied employment, or whose employment was delayed pending application for and receipt of a waiver, because the State Department deemed them not ‘Worldwide Available’ due to their disability.” Class Members are those appearing on Exhibit 1 of the Settlement Agreement, with additional information in Section VII, below.

II. SUMMARY OF DISTRIBUTION PLAN

The amount of funds for compensating Class Members is \$37,500,000. From that fund one-third, \$12,500,000, will be paid to Class Counsel for attorneys’ fees for 16+ years of litigation of this

action on a strictly contingency basis, up to \$100,000 will be paid to Class Counsel for litigation expenses, up to \$50,000 will be paid to a Settlement Administrator, and \$400,000 will be paid to Class Agents as service payments related to their prosecution of this case. The remainder, the **total Class Member distribution**, of \$24,450,000 will be paid to Class Members as follows:

- \$8,150,000, one-third, in lieu of compensation for **back pay**, from which applicable payroll deductions will be made, to be reflected on an IRS Form W9;
- \$8,150,000, one-third, to compensate for **lost benefits**, including but not necessarily limited to Thrift Savings Fund (TSP) Agency match, lost retirement benefits, and lost benefits associated with overseas assignments, which will be paid without deductions, to be reflected on an IRS Form 1099 MISC; and
- \$8,150,000, one-third in lieu of compensation for **compensatory damages** (pecuniary and non-pecuniary), and in particular, emotional distress, which will be paid without deductions, also to be reflected on the IRS Form 1099 MISC.

Every Class Member will be sent at least a **minimum \$5,000 settlement allocation**, whether or not they have provided any information regarding interim earnings to Class Counsel. For those receiving only the minimum \$5,000 settlement allocation, the payment will be in lieu of compensatory damages for emotional distress. Class Members who have provided information regarding interim earnings may receive increased allocations, as detailed below.

III. BACK PAY ALLOCATIONS

Those who have provided information to Class Counsel regarding interim earnings will receive an allocation of the \$8,150,000 designated as compensation in lieu of back pay.

The basic approach to computing back pay was to calculate the amount of back pay each Class Member would have earned for each year the Class Member would have been working for the Agency minus any interim earnings the Class Member actually earned while working elsewhere.

The **starting salary** used for these calculations was the starting salary in the Class Member's offer letter from the Agency, if the Class Member provided it to Class Counsel, or the average starting salary according to data provided by the Agency for the position in question during the year of the initial Class 1 medical clearance denial.

The **starting date** of the calculation period was the date of each Class Member's first medical clearance action (as shown in the Clearance History tab of each Class Member's e-Med file with the Agency), beginning with the earliest date of October 7, 2006, the start of the Class Period. While this does not correspond with the actual date any Class Member would have commenced Agency employment absent alleged discrimination, it ensures that any delays in employment based upon the medical clearance process and denial are accounted for.

The **end date** of the calculation for Class Members whose employment was delayed was their actual date of hire based upon records provided by the Agency and information supplied by Class Members, and for Class Members not hired the end date was the earlier of December 31, 2022, the date the Class Member turned 65, or, for Class Members applying for the Diplomatic

Security Agent position, the date on which the Class Member turned age 57. The period between the starting date and the end date is the **loss period**.

Back pay was computed for each calendar year using data provided by the Agency relating to each Class Member's hiring cohort. Salaries were increased based upon the average annual increases for each Class Member's hiring cohort, to cover within-grade increases and promotions.

Interest on back pay was not computed.

Wages earned during the loss period, according to tax returns, Social Security earnings statements, W2s, or other corroboration of wages provided by Class Members, were subtracted as **interim earnings** from the back pay calculated according to the foregoing methodology. The difference is the **net back pay**.

If Class Members earned less than the **reasonable minimum income threshold** in a particular year, defined as less than 2x the applicable year's poverty level for one person,¹ then they will be presumed to have failed to mitigate for that year, unless they prove they exercised reasonable diligence to seek other employment during the period. Evidence of due diligence could include: job applications, records of job interviews attended, copies of resumes sent, and names of prospective employers where they made applications and dates applications were made.

All of the net back pay amounts for Class Members who have provided interim earnings information will be summed, and each Class Member will be assigned a **percentage of the class's total net back pay**, and will receive that percentage of the back pay allocation portion of the settlement fund. For example, if Class Member A had \$250,000 net back pay, and the total net back pay of the Class Members who provided information was calculated to be \$25,000,000, then Class Member A would be 1% of the total class net back pay. Class Member A would receive \$81,500 (0.01 x \$8,150,000) for this portion of the settlement, minus appropriate payroll deductions.

Class Members who have not provided information to Class Counsel regarding interim earnings for each year in the loss period will not receive an allocation of this portion of the settlement for any year in which no interim earnings corroboration was provided. Moreover, for any year in which the reported interim earnings are below the reasonable minimum income threshold, *i.e.*, what would be earned by a Class Member exercising reasonable diligence to find comparable employment, Class Members will not receive an allocation of this portion of the settlement, unless they provide proof of an inability to mitigate despite the exercise of due diligence. It will be presumed either: that their interim earnings exceeded the back pay they might otherwise receive in any year regarding which no or minimal interim earnings corroboration was provided; and/or, that Class Members providing no information would not have cooperated fully in prosecuting an individualized damages hearing, as would be required absent this settlement under *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1977) ("*Teamsters hearings*"),

¹ Cf. <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines/prior-hhs-poverty-guidelines-federal-register-references>

thereby making a damages claim more difficult to establish than in the case of those Class Members who cooperated fully with Class Counsel regarding proof of damages.

The back pay due a victim of discrimination is typically, in the event of fully successful litigation, only the amount that will restore the situation as nearly as possible to that which would have obtained but for the illegal discrimination. An "employee is charged with the responsibility to exercise reasonable diligence, especially in mitigation of damages." *Ford Motor Company v. EEOC*, 458 U.S. 219 (1982); *Koronkiewicz v. Rice (Dept. of Ag.)*, EEOC Appeal No. 05920574, (Sept. 24, 1992). For that reason, the amount owed as back pay is generally the difference between what would have been earned had a Class 1 medical clearance not been denied, and the actual interim earnings during the relevant time. This Distribution Plan seeks to avoid a windfall to Class Members who failed to provide information about interim earnings for any year in the loss period, and to recognize that it would be unreasonable to presume that any Class Member's interim earnings, if they were exercising reasonable diligence to obtain comparable employment, were below the reasonable minimum threshold in any year. Moreover, this formulation seeks to reward the assistance, guidance, and time provided by contributing Class Members, whose provision of information timely strengthened the legal position of the Class as a whole, and supported Class Counsel's work toward successfully resolving this matter.

IV. LOST BENEFITS ALLOCATIONS

For the same loss period described above, Class Members who provided any interim earnings documentation to Class Counsel will also receive an allocation in lieu of lost benefits. Though there are many types of possible lost benefits which could affect Class Members, the lost benefits calculated for the purposes of this allocation amount to 66.1% of each Class Member's back pay for each year, without any offsets based upon interim earnings.

This 66.1% figure is based upon the following assumptions:

- 1) lost TSP matches, calculated by multiplying each Class Member's back pay for each year, without any offsets based on interim earnings, by 5%;
- 2) lost retirement benefits, calculated by multiplying 31.1% of the estimated back pay, without any offsets. Class Counsel estimate that 31.1% is the approximate percentage that the State Department would have contributed to fund its employees' retirement system; and
- 3) lost benefits associated with anticipated overseas assignments, calculated by multiplying each Class Member's back pay for each year, without any offsets, by 30%. The actual value of benefits associated with overseas assignments varies according to a variety of factors including the location of the overseas assignment. This percentage is a reasonable estimate of the average overseas assignment benefits.

The same calculations for distributing settlement funds for back pay will be used here. All of the amounts (66.1% x back pay/year) will be summed and each Class Member will be assigned a

percentage of the total class lost benefits, and will receive that percentage of the benefits allocation portion of the settlement fund.

V. COMPENSATORY DAMAGES ALLOCATIONS

The compensatory damages allocation will be calculated according to a point system. Each Class Member will receive 0 to 4 points, as follows:

- 0 points: Class Member provided no information to Class Counsel regarding emotional distress or claimed no particular symptoms: \$5,000 allocation, for presumed minimal emotional distress in suffering discriminatory clearance denial.
- 1 point: Class Member provided information to Class Counsel detailing mild emotional distress, including short- to moderate-term anxiety, depression, sleeplessness, and other common symptoms.
- 2 points: Class Member provided information to Class Counsel detailing moderate emotional distress, including: longer-term anxiety, depression, sleeplessness, change in appetite, negative behavioral patterns (for example, substance abuse), and other common symptoms, including physiological (in addition to psychological) symptoms; significant change in career trajectory; moderate humiliation and embarrassment; some treatment with a psychologist and/or therapist.
- 3 points: Class Member provided information to Class Counsel detailing serious emotional distress, including: long-term anxiety, depression, sleeplessness, change in appetite, negative behavioral patterns (for example, substance abuse), and other common symptoms, including physiological (in addition to psychological) symptoms; severe change in career trajectory; severe humiliation and embarrassment; changes in relationships; long-term treatment with a psychologist and/or therapist; psychotropic medication prescriptions.
- 4 points: Class Member provided information to Class Counsel detailing severe emotional distress, including: long-term anxiety, depression, sleeplessness, change in appetite, negative behavioral patterns (for example, substance abuse), and other common symptoms, including physiological (in addition to psychological) symptoms; severe change in career trajectory; severe humiliation and embarrassment; loss of relationships; long-term treatment with a psychologist and/or therapist; psychotropic medication prescriptions; loss of home or other grave personal losses; suicidal ideation and/or attempt.

The compensatory damages allocations will be based upon each person's **total compensatory damages points** as a percentage of the **total class compensatory damages points**. For example, if 100 Class Members provided no information, and the total class compensatory damages points is 300, and Class Member C had 3 total compensatory damages points, then Class Member C will receive 3/300, or 1%, of the net compensatory damages fund. The compensatory damages fund will be \$8,150,000 minus the number of Class Members earning 0 compensatory damages points multiplied by \$5,000. Therefore, continuing with the example, Class Member C would receive \$76,500 as computed by $0.01 \times \$7,650,000$ (*i.e.*, $\$8,150,000 - [\$5,000 \times 100 \text{ Class Members with } 0 \text{ compensatory damages points}]$).

VI. DISTRIBUTION PLAN EXECUTION

Class Counsel has sought repeatedly to communicate with every Class Member during the course of this litigation to obtain information regarding interim earnings and compensatory damages, as well as other information that might have affected that Class Member's individual recovery if class-wide liability had been found and the Class proceeded to individualized *Teamsters* hearings. Class Counsel will make a further attempt to communicate with Class Members prior to settlement approval to receive information, other than from those Class Members who have stated they do not wish to be contacted by Class Counsel.

Based upon the totality of the information Class Counsel has received regarding interim earnings and compensatory damages on or before January 2, 2022, Class Counsel, in consultation with a damages calculation expert, will calculate an **initial minimum damages allocation** for the entire class.

After preliminary settlement approval, the Settlement Administrator will issue the Class Notice, Exhibit 2 to the Settlement Agreement, as approved by the U.S. Equal Employment Opportunity Commission (EEOC) Administrative Judge. The Class Notice will advise Class Members of their **net initial Class Member minimum individual distribution estimates**, which will be, whichever is more: \$5,000; or, 50% of the sum of their back pay, lost benefits, and compensatory damages allocations. For example, if Class Member D has allocations of \$100,000 each of back pay, lost benefits, and compensatory damages, then that Class Member would receive notice of a minimum allocation of $0.50 \times \$300,000 = \$150,000$.

The Settlement Administrator will not include 50% of the total Class Member distribution in the net initial Class Member minimum individual distribution estimates, to be held back as a **reserve fund**. That is, the net initial Class Member distribution estimate will be based upon a presumed settlement fund of \$12,225,000 (50% of the total Class Member distribution). The reserve fund will be distributed, as necessary, to Class Members who provide additional, specific information to Class Counsel on interim earnings and/or mitigation efforts and/or emotional distress symptoms prior to the deadline provided in the Class Notice, to the extent such information would entitle them to a greater individual allocation based upon the allocation formulas described above. The reserve fund may also be used to provide a *pro rata* allocation to any late-confirmed Class Member, as described in Section VII, below.

At the conclusion of the notice period described in the Class Notice, the **final Class Member distributions** will be based upon the allocation formula described above, using the total Class Member distribution, except that no Class Members will receive a settlement allocation less than their net initial Class Member minimum individual distribution estimates. The final Class Member distributions are expected to exceed the net initial Class Member minimum individual distribution estimates. In the extremely unlikely event that there are more claims against the reserve fund than the amount of the reserve fund, then the proportional allocations of those making claims against the reserve fund will be reduced *pro rata* to ensure that the reserve fund is exhausted but not exceeded.

After receiving the \$37.5 million settlement payment from the Agency into a Qualified Settlement Fund (“the Settlement Fund”), the Settlement Administrator will send the final Class Member distributions according to the timeline provided in the Settlement Agreement in two checks – wage (minus appropriate deductions) and non-wage, as described above – except as to those Class Members who have sought to have a recognized structured settlement vendor to receive their final distribution amount, as described in Section VIII, below.

VII. LATE-CONFIRMED CLASS MEMBERS

If there are individuals who, prior to Final Approval of the Settlement Agreement, notify Class Counsel or the Settlement Administrator that they believe they are part of the Class definition in Section I but were wrongly excluded from Exhibit 1 (the class list), and provide documentation probative of such, they may be added to the Class List by stipulation of the parties’ counsel and approval of the Administrative Judge, and receive a *pro rata* share of the settlement fund from the reserve fund.

VIII. STRUCTURED SETTLEMENT OPTION

Some Class Members receiving particularly sizable settlement allocations may elect to have all, part, or none of their awards paid in periodic payments through a structured settlement arrangement, entered into prior to payment of such award. Notwithstanding any term in the Agreement to the contrary, any award to be so structured shall be paid by the Settlement Fund to reputable assignment company(ies) pursuant to assignment and release agreements reasonably acceptable to the Settlement Administrator (“Assignment Agreements”). Pursuant to such Assignment Agreements, Class Members will have no present right to payment of any structured awards that are the subject of Assignment Agreements. Prior to the payment by the Settlement Fund under any Assignment Agreement, any Class Members electing a structured settlement shall indemnify and hold harmless the Settlement Administrator administering the Settlement Fund. The EEOC in the final approval order will be asked to authorize the Settlement Administrator and Settlement Fund to execute documents and take such actions as may be necessary to effectuate the assignment and payment of awards under any Assignment Agreement.

IX. UNEXPENDED MONEY

If any unexpended balance exists in the Settlement Fund after all payments to eligible Class Members, and a second and third *pro rata* allocation, as provided in Section III.D of the Settlement Agreement, and of all tax and other obligations under the Settlement Agreement, then any unexpended balance will be donated to the National Disability Rights Network as the designated *cy pres* recipient.

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