

October 3, 2002
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Supplemental Order

Name of Case: Janet L. Westbrook

Date of Filing: June 17, 2002

Case Number: VBX-0059

Janet Westbrook (Westbrook or Complainant) filed a Complaint of Retaliation alleging that her former employer, UT-Battelle, LLC (Battelle or the Company), the DOE contractor that manages the Oak Ridge National Laboratory (the Laboratory or ORNL), terminated her as part of a reduction in force (RIF) as a retaliation for making disclosures that are protected under 10 C.F.R. Part 708. On May 9, 2002, the Office of Hearings and Appeals (OHA) of the Department of Energy issued a Decision and Order granting relief to Westbrook in connection with that complaint. *Janet L. Westbrook*, 28 DOE ¶ 87,021 (Case No. VBA-0059 (2002) (*Westbrook*)). ^{1/} In *Westbrook* we noted that the Complainant was eligible for relief including reinstatement, back pay, costs and attorney fees. The instant decision will determine the amount and type of relief that Westbrook will be accorded.

We asked the Complainant to file a detailed statement showing the relief she is claiming, including a justification for any expenses claimed. She submitted a request for reinstatement, back pay of \$171,190.91, and attorney fees of \$27,439.39. The Company filed its own calculation of appropriate back pay for Westbrook, which it believed should total \$69,814. The Company also claimed that the \$200 per hour rate charged by Westbrook's attorney for her services in this proceeding was excessive for this type of case and recommended that Westbrook's attorney be allowed no more than \$150 per hour.

^{1/} *Westbrook* was an appeal to the Director of the Office of Hearings and Appeals of an Initial Agency Determination (IAD) of an OHA Hearing Officer. The IAD found that Westbrook was not entitled to relief. *Janet L. Westbrook* (Case No. VBH-0059), 28 DOE ¶ 87,018 (2001). *Westbrook* reversed that determination and granted the Complainant relief.

Calculation of Back Pay Relief

We have now had extensive briefings from the parties in connection with making a final calculation of the level of back pay appropriate for Westbrook. Battelle calculated Westbrook's basic back pay as \$6,484 per month, including a three percent upward adjustment made retroactive to October 2000. The Complainant did not dispute that figure. We also considered a number of issues involving what types of offsets should be deducted from Westbrook's back pay, and what allowances for benefits should be included as part of the relief. A summary of our conclusions in that regard is set out below.

1. Offset for Company Pension Payments to Westbrook: Westbrook's pension payments of \$350.51 per month from the Company should be offset against the monetary relief in this case. Westbrook is not entitled to receive back pay and a pension for the same period.

2. Offset for "Payments in Lieu of Notice" and Severance Pay: As part of the RIF program, the Company offered affected employees pay in lieu of notice for a period of 60 days. 2/ The Complainant worked for four days after the date she received notice of termination and received payment in lieu of notice for 56 days. Both parties agree that the offset for both the severance and "in lieu" payments is appropriate. However, a key area of disagreement between the parties was how the offset should be accounted for. It was the difference in manner calculation of this offset that was in large measure responsible for the great discrepancy between calculation of back pay relief by the two parties. The Complainant believed that the offset for these payments should be made as a lump sum deduction from the total back pay amount for the entire relief period. Battelle believed that the deductions for these payments should be made on a "running" basis for each month of the relief period. We find the Company's calculation to produce a more nearly accurate result, since Westbrook received these payments as a lump sum when she was terminated in December 2000, i.e., at the beginning of the relief period. 3/

2/ The Company's reduction in force program included a commitment to provide notice to employees who were being terminated, or pay-in-lieu-of-notice for a period of 60 days.

3/ In fact, it would have been more precise to deduct those payments as a lump sum offset in December 2000, the month in which they were received. However, if we had taken this approach, Westbrook would have had a number of months of a

(continued...)

3. Health Insurance, Dental Insurance and Battelle Pension Contribution Offsets: Both parties agree that such offsets should not be included.

4. Westbrook's Teaching Salary and Benefits: During the period December 5, 2001 through July 19, 2002, Westbrook was employed by the University of Tennessee (UT). Both parties agree that offsets for UT salary and benefits are appropriate. However, Westbrook's relief calculation deducted her total salary from UT as a lump sum from total back pay, whereas Battelle's calculation deducted the monthly UT salary as an offset in each month. Since Westbrook received her UT salary on a monthly basis, we will adopt Battelle's approach, and deduct Westbrook's UT salary on a running basis from each month's back pay total. This approach yields a more accurate result, since the offset is deducted in the month in which the salary payment was received. See Note 3 above. The Company also states that Westbrook voluntarily ended her employment with UT effective July 19. Battelle claims that Westbrook has a duty to mitigate damages, and that the amount of her potential UT earnings for the relief period after she left her UT employment should be offset against back pay amounts for the months of July and August 2002. We do not agree that Westbrook is required to keep her employment with UT based on the duty to mitigate theory. Accordingly, this offset was not included in back pay calculations.

5. Offset for Hearing Delay: Battelle contends that Westbrook's relief should be reduced because it was she who requested that the hearing be delayed. Given that the delay was only one month and therefore not unreasonable, we do not find that a reduction on this basis is warranted.

3/ (...continued)
negative total entitlement, before her back pay balance would have turned positive. This methodology would have significantly lowered her total back pay, by reducing the accrual of interest. Battelle's methodology, the one we have adopted, although technically somewhat less accurate, is less harsh to Westbrook. Yet, it still respects to some degree ordinary cash flow principles.

6. Relief Period: The Complainant asserts that relief should be provided through September 30, 2002. However, we find that the Company's calculation of relief, which runs through August 31, 2002, provides a reasonable and appropriate relief period in this case.

The Company has been especially helpful and accommodating in producing numerous corrected relief calculations in this case. It has used its own records when it was necessary. After reviewing the Company's most recent relief calculation, we find it to be reasonable, correct, and consistent with the principles enunciated above. See September 23, 2002 Battelle Revised Exhibits. Accordingly, we will award Westbrook back pay in the amount of \$79,929, as calculated by Battelle. 4/ The Complainant did not file any objections to the Company's last calculation, although she was given the opportunity to do so.

Attorney Fees

As stated above, Westbrook's attorney requested fees based on an hourly rate of \$200. The Company believes that hourly rate is excessive. Westbrook's attorney has asserted that the fees for employment law attorneys in the city where she practices, Knoxville Tennessee, range from \$150 per hour for beginning attorneys to \$250 per hour for attorneys with more than 10 years experience. Westbrook's attorney asserts that since she has five years of experience in this area, she is entitled to an hourly fee in the middle of that range. We agree. Westbrook's attorney has requested additional fees in connection with preparation of a response regarding a Petition for Secretarial Review in this proceeding. We find she is entitled to be compensated for these additional services, and that she should receive her total requested fee of \$36,691.39.

Reinstatement

Our May 9 Order indicated that Westbrook is eligible for reinstatement as part of the relief in this case. She has indicated that she would like reinstatement to her former position

4/ This amount includes interest calculated at the Treasury Department short term interest rate plus two percentage points, compounded quarterly. *Lawrence C. Cornett* (Case No. VWX-0010), 26 DOE ¶ 87,510 (1997).

or to a substantially equivalent position at ORNL. Accordingly, Battelle shall take appropriate steps to reinstate Westbrook.

It Is Therefore Ordered That:

(1) Within 30 days of the date of this Order, UT-Battelle, LLC shall pay Janet L. Westbrook the amount of \$79,929 for lost salary and benefits during the period December 2000 through August 2002.

(2) Within 30 days of the date of this Order, UT-Battelle shall pay Westbrook \$36,691.39 in attorney fees incurred in this proceeding for services of her attorney, Margaret Beebe Held.

(3) UT-Battelle shall immediately reinstate Westbrook to the position she held at the time of her termination or to a substantially equivalent position at Battelle at ORNL in Oak Ridge, Tennessee.

(4) An appeal of any of the determinations made in this Order may be made by filing a supplemental submission in the petition for Secretarial review proceeding that is currently pending with respect to Westbrook's Part 708 complaint (Case No. VBB-0059). A party must file this submission within 10 days of receipt of this Decision and Order.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 3, 2002