



In the Matter of:

**OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, U.S.
DEPARTMENT OF LABOR,**

**ARB CASE NOS. 00-044
01-089**

ALJ CASE NO. 89-OFC-039

PLAINTIFF,

DATE: December 20, 2002

v.

GREENWOOD MILLS, INC.,

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:

**Sarah Crawford, Esq., Gary Buff, Esq., Eugene Scalia, Esq.,
*U.S. Department of Labor, Washington, D.C.***

For the Defendant:

**M. Lee Daniels, Jr., *Wimberly, Lawson, Daniels & Brandon, LLC,
Greenville, South Carolina.***

FINAL DECISION AND ORDER

The Office of Federal Contract Compliance Programs initially brought this case alleging that Greenwood Mills, Inc., had violated the provisions of Executive Order 11246, 30 Fed. Reg. 12319 (1965), *reprinted as amended* in 42 U.S.C.A. § 2000e app. at 24-29 (West 1994), which prohibits employment discrimination by covered Government contractors on the basis of race, color, religion, sex, or national origin. In 1995, after ruling that Greenwood Mills, Inc., had discriminated in hiring based on sex, the Secretary of Labor remanded the case for a determination of the back pay owed to the victims of discrimination. The Board hereby affirms the award of damages as set out in the Administrative Law Judge's recommended decision on remand.

BACKGROUND

Procedural History

After a routine audit of the employment practices at the Greenwood Mills (Greenwood or Company) Adams plant near Ninety-Six, South Carolina, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) notified the Company that, during the 1985-1987 period, it had discriminated against women in hiring for the Job Group 8A laborer position in violation of Executive Order 11246 (Executive Order). [Recommended] Decision & Order ([R.] D. & O.), October 11, 1991, at 1-3. Greenwood denied the discrimination and requested a hearing. *Id.*

The Administrative Law Judge (ALJ) bifurcated the case into a liability phase and a damages phase, and in June 1991 conducted a two-day hearing on liability. *Id.* at 1. In October 1991, the ALJ ruled that Greenwood was not liable for violating the Executive Order because OFCCP had failed to prove discrimination. *Id.* at 13.

OFCCP filed timely exceptions to the ALJ's decision, and in 1995 the Secretary¹ reversed the ALJ's ruling, held that Greenwood had discriminated against a class of women applicants, and remanded the case to the ALJ for a determination of the proper damages to be awarded.² Decision & Order of Remand (D. & O. of Rem.), November 20, 1995, at 2. In February 2000, the ALJ issued the ruling on damages which is presently before this Board and to which each party has filed exceptions. Recommended Decision and Order Awarding Damages on Remand (R. D. & O. Award. Dam.), February 24, 2000.

Facts

Greenwood is a textile manufacturer headquartered in Greenwood, South Carolina. [R.] D. & O., October 11, 1991, at 2. At all relevant times, Greenwood was a Federal contractor covered by the provisions of Executive Order 11246. *Id.* In April 1987, OFCCP conducted an audit of Greenwood's Adams Plant. *Id.* The audit consisted of a review of the Company's

¹ In 1995 the applicable regulations required that appeals from recommended decisions be made directly to the Secretary. 41 C.F.R. § 60-30.28 (1989). In 1996, the Secretary delegated review authority to the newly created Administrative Review Board (ARB) and authorized it to issue final decisions in cases under Executive Order 11246. Sec. Ord. 2-96, 61 Fed. Reg. 19,978 (May 3, 1996); 41 C.F.R. §§ 60-30.28, 60-30.30 (2001). On September 24, 2002, the Secretary canceled the 1996 delegation to the ARB, revised the Board's membership and reporting relationship, added to the matters over which the ARB has authority, and re delegated the authority and responsibility to the ARB for, *inter alia*, appeals in Executive Order cases. Sec. Ord. 1-2002, 67 Fed. Reg. 64,272 (October 17, 2002).

² Greenwood challenged the Secretary's finding of discrimination by filing suit in 1995 in the United States District Court for South Carolina (Docket No. 95-CV-4004, Judge G. Ross Anderson, Jr.). Greenwood's Except. at 2. The District Court has stayed its action until the administrative proceedings are completed. *Id.*

employment practices for the period July 1, 1985, through June 30, 1987, including a review of Greenwood's affirmative action program (AAP). *Id.* at 1-3.

The Executive Order requires Government contractors to develop a written AAP for each of their establishments. 41 C.F.R. § 60-1.40(a) (2001). A required ingredient of an AAP is an analysis by the contractor of its utilization of minorities and women in all major job groups in its workforce. *Id.* at §§ 60-2.10 to 2.12. Job groups are defined as one job or a group of jobs having similar content, wage rates, and opportunities. *Id.* at § 60-2.12(b).

In a post-audit letter, OFCCP notified Greenwood that it had found that, during the 1985-1987 period, the Company had discriminated against women in its hiring into the Job Group 8A laborer position. [R.] D. & O. at 3-4. At the Adams plant, Greenwood had three entry-level Job Groups: 8A, 7B and 7A. R. D. & O. Award. Dam. at 2. Job Group 8A is comprised of laborer positions while the Group 7B and 7A jobs are operative positions. *Id.* During the 1985 through 1987 period, positions in Job Groups 7B and 7A required slightly more training than did those in Job Group 8A, and generally were paid higher than the 8A jobs as well. *Id.* During this same time period, Greenwood hired 30 men but only one woman into Job Group 8A. *Id.*

After the Secretary's 1995 determination of liability and remand for calculation of damages, the ALJ ordered the parties to work out a discovery process which would provide the information needed to determine the names of the victims of discrimination as well as the appropriate remedies. *Id.* at n.4. After substantive discussions with the parties, however, the ALJ determined that a hearing was unnecessary and that the remedy could be decided based on the parties' stipulations, calculations of back pay, and briefs. *Id.*

On November 5, 1999, the parties jointly filed 12 stipulations including nine tables of data (Tables A through I) (Stipulations and Stip. Exhs.). *Id.* at 3. The substance of the stipulations is as follows:

1. For the purposes of calculating back pay, the appropriate starting date for accrual of back pay is January 1, 1986.

2. The latest date on which back pay should continue to accrue is December 31, 1998. This stipulation does not affect accrual of interest, if any.

3. Formula³ relief is appropriate for this case and the number of additional women Greenwood would have been expected to hire in the absence of discrimination is 10.4.

4. Exhibit A lists 208 female applicants who applied at Greenwood for "any" or "laborer" positions between July 1, 1985, and April 17, 1987.

³ Formula relief is a mechanism for determining the compensation for the damage suffered by a class of discriminatees. *See Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260-261 (5th Cir. 1974). The "formula" method is usually used when the number of class members exceeds the total number of job opportunities.

5. Exhibit B lists applicants from Exhibit A who were later offered employment by Greenwood in an 8A, 7B, or 7A job. This exhibit includes the date or dates of the employment offer(s).

6. Exhibit C lists persons to whom employment offers were made for 8A jobs at the Adams plant during the period July 1, 1985, through April 17, 1987. This exhibit also contains the date of each employment offer as well as the Greenwood employment history and tenure of each person through the end of 1998.

7. Exhibit D lists, for 1986 through 1998, the gross earnings from Greenwood of those persons listed on Exhibit C.

8. Exhibit E lists, for 1986 through 1998, the gross earnings from Greenwood of those persons listed on Exhibit B.

9. Exhibit F lists, for 1986 through 1998, the earnings from all sources for 51 of the women shown on Exhibit A who agreed to provide earnings histories.

10. Exhibit G lists, for 1986 through 1998, the jobs in Job Group 8A including the wage rates for each job.

11. Exhibit H lists 31 of the persons from Exhibit A who had one or more periods of time out of the labor market during 1986 through 1998.

12. Exhibit I lists the rate to be used for calculating interest owed on back pay. The rates are to be used to calculate the total interest due from the midpoint of a given year through November 2, 1999, on the back pay that accrued during that year.

The ALJ adopted the stipulations and made them part of the case record. R. D. & O. Award Dam. at 3-4. On November 12, 1999, each party submitted its calculation of damages including an explanation of the methodology used in arriving at the back pay amount. The ALJ accepted aspects of each parties' calculation, and utilizing the stipulated data, performed his own calculation of the back pay owed to the class. *Id.* at 11-14. The parties have each taken exception to the ALJ's calculation methods and to the resulting damage award.

JURISDICTION AND SCOPE OF REVIEW

The ARB has jurisdiction in this matter pursuant to Sections 208 and 209 of Executive Order 11246, 30 Fed. Reg. 12319 (1965), *reprinted as amended* in 42 U.S.C.A. § 2000e app. at 24-29 (West 1994). Under this jurisdiction the ARB reviews the parties' exceptions to the ALJ's recommended decision and issues the final administrative order. Sec. Ord. 1-2002, 67 Fed. Reg. 64,272 (October 17, 2002); 41 C.F.R. § 60-30.30. The ALJ's decision is a recommendation, and the Board has plenary powers to decide the issues *de novo*. See 41 C.F.R. §§ 60-1.4(a) and 60-30.27; *OFCCP v. Goya De Puerto Rico, Inc.*, ARB No. 99-104, ALJ No. 98-OFC-8 (ARB March 21, 2002).

ISSUE

Whether the ARB should adopt the ALJ's method for calculating damages and the amount of damages awarded to the class.

DISCUSSION

Statutory and Regulatory Framework

Executive Order 11246 prohibits Federal contractors from discriminating against employees or applicants for employment on the basis of race, color, sex, religion or national origin, and requires such contractors to take affirmative action to provide equal employment opportunities. Executive Order 11246 at Section 202; 41 C.F.R. §§ 60-1.1 and 60-1.40. OFCCP monitors compliance with the Executive Order by conducting reviews of the contractor's facilities, and contractors agree to furnish OFCCP with all information required to enable the agency to determine whether the contractors have complied with the Order's mandates. 41 C.F.R. §§ 60-1.4(a)(5), 60-1.7, 60-1.12, 60-1.20, and 60-1.43. If OFCCP determines that a contractor has failed to meet its obligations under the Order, the agency will attempt to resolve the matter through conciliation and persuasion. 41 C.F.R. § 60-1.33. If conciliation efforts fail, OFCCP may initiate an administrative enforcement proceeding against the contractor. 41 C.F.R. § 60-1.26.

Legal Standard for the Award of Remedies

The legal standards developed under Title VII of the Civil Rights Act of 1964 apply to cases brought under the Executive Order. *See U. S. Department of Labor v. Honeywell*, 77 OFCCP-03 (Sec'y June 2, 1993); *OFCCP v. Cleveland Clinic Found.*, 91-OFCCP-20 (Sec'y July 17, 1996). After a finding of discrimination, a remedy is appropriate to restore the injured discriminatee, that is, "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Back pay is one element of the "make whole" relief which may be provided to a victim. 41 C.F.R. § 60-1.26 (a)(2).

Rather than individual assessments of the loss of each victim, classwide procedures may be used in calculating back pay. *See Segar v. Smith*, 738 F. 2d 1249 (D.C. Cir. 1984); *OFCCP v. Lawrence Aviation Industries*, 87-OFC-11 (Sec'y June 15, 1994)(decision and remand order), *aff'd*, Order 87-OFC-11 (Sec'y Jan. 20, 1995), *aff'd*, Fin. Dec. (Sec'y Nov. 9, 1995), *aff'd in part and remanded on other grounds sub nom Lawrence Aviation Industries v. Reich*, 28 F. Supp. 2d 728 (E.D.N.Y. 1998), *aff'd in part, vacated in part, and remanded to agency*, 182 F.3d 900 (2d Cir. 1999) (unpublished table decision). In the present case, the parties stipulated to and the ALJ accepted the use of a formula to calculate the back pay owed to the class of victims. *See* n.3, *supra*; R. D. & O. Award. Dam. at 8-10.

In fashioning a remedy for employment discrimination, "the court must, as nearly as possible, 'recreate the conditions and relationships that would have been had there been no' unlawful discrimination." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 372

(1977) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1976)). Back pay remedies should serve the “make whole” purposes of Title VII without constituting a “windfall” for the victim of discrimination at the expense of the employer. *Ingram v. Madison Square Garden Center, Inc.*, 709 F.2d 807, 812 (2d Cir. 1983).

“The theory behind an award of back pay is simple; its application is not.” R. D. & O. Award. Dam. at 8. The “process of recreating the past will necessarily involve a degree of approximation and imprecision.” *Teamsters*, 431 U.S. at 372. The courts have provided three general rules to guide us in the determination of the appropriate back pay figure:

- (1) [U]nrealistic exactitude is not required;
- (2) [A]mbiguities in what an employee or group of employees would have earned but for discrimination should be resolved against the discriminating employer; and
- (3) [T]he [trier of fact] . . . must be granted wide discretion in resolving ambiguities.

Stewart v. General Motors Corp., 542 F.2d 445, 452 (7th Cir. 1976) (citations omitted).

While formula or classwide relief may generate a windfall for some employees who would have never been hired even if the jobs had been filled on a nondiscriminatory basis and may undercompensate the genuine victims of discrimination by forcing them to share the award with some undeserving recipients, it is the best that can be done under the circumstances. *Id.* “Any method [of calculating damages] is simply a process of conjectures.” *Pettway*, 494 F.2d at 260-261. Given a choice between no compensation for those who have been illegally denied jobs and an approximate measure of damages, courts have chosen the latter. *See Stewart*, 542 F.2d at 452.

In the present case, the ALJ reviewed the methods used by each party to determine the amount of back pay owed to the class of women discriminatees. R. D. & O. Award. Dam. at 5-7, 9-13. After determining that each of these methods was faulty in some respect, the ALJ performed his own calculation. *Id.* at 13-14.

OFCCP has taken exception to the ALJ’s calculation citing two cases as authority for its proposition that “[t]he creation of such an original statistical analysis is not within the court’s power.” OFCCP Except. at 13, citing *Calloway v. Westinghouse Electric Corp.*, 642 F. Supp. 663 (M.D. Ga. 1986) (race discrimination found in initial job assignments and promotion), and *Johnson v. United States*, 780 F.2d 902 (11th Cir. 1986) (various challenges to evidentiary rulings made by trial court in medical malpractice case). OFCCP is in error.

First, OFCCP’s exception misstates what the ALJ did. He created no “original statistical analysis,” rather he used various elements of the stipulated data to perform arithmetic calculations. In addition, the cases cited by OFCCP are inapposite as they fail to support the

proposition that a judge is precluded from making arithmetic calculations using stipulated data in the record.

In *Calloway*, the first of the cases cited by OFCCP, the trial court discoursed on its role with regard to expert witness testimony. Specifically the court noted that it decides cases based on the material in the record, evaluates the conflicting statistical evidence presented by the parties, and is prohibited from doing independent statistical analyses itself. *Calloway*, 642 F. Supp. at 690; OFCCP Except. at 13. To emphasize this last point, the court speculated that, if it were sitting on a medical malpractice case, it would not be permitted personally “to examine the plaintiff and then diagnose his medical condition” because the court is neither qualified nor empowered to do so. *Calloway*, 642 F. Supp. at 690.

In *Johnson*, also cited by OFCCP, the appeals court indicated that the trial judge, in order to familiarize himself with the subject matter and to put technical testimony into context, consulted medical journals not in evidence prior to hearing the expert witnesses. *Johnson*, 780 F.2d at 910. The 11th Circuit held that the “outside research” was not sufficient to require a new trial because, *inter alia*, the trial judge stated that he did not rely on those outside sources in reaching his conclusion. *Id.*

In the instant case, the ALJ did not engage in “outside research” nor was there anything “original” or “statistical” about his arithmetic calculations. The ALJ’s method for determining back pay was appropriate and reasonable, and OFCCP’s objection to his making the calculation is denied.

Shortfall

The parties stipulated that the shortfall of women was 10.4. Stip. 3. The shortfall represents the number of women one would have expected Greenwood, absent discrimination, to have hired into the Group 8A job during the 1985-87 time period. *See Lawrence Aviation*, 28 F. Supp. 2d at 740. The parties arrived at the figure by subtracting the actual number of women hired by Greenwood as Group 8A workers during the relevant time period from the number of women who should have been hired in that period if women had been hired in proportion to their representation in the applicant pool. *See Hameed v. International Assoc. of Bridge, Structural and Ornamental Iron Workers*, 637 F.2d 506, 519 (8th Cir. 1980). A shortfall of 10.4 means that during the 1985-87 time period, absent discrimination, Greenwood would have hired 11 women rather than only one. The ALJ accepted the 10.4 shortfall as stipulated and also used it as the basis for his back pay calculation.

Attrition

In order to get an accurate picture of the wages lost by the women whom Greenwood failed to hire, the ALJ accounted for attrition, that is, he factored into his calculation the length of time an employee worked at Greenwood. R. D. & O. Award. Dam. at 9-11. The ALJ’s method for determining the attrition rate was straightforward: he added together the number of months

worked at Greenwood during 1986-1998⁴ by each of the 8A hires listed on Stipulated Exhibit C, and then divided the total (1391.03 months) by 31, the number of persons offered 8A jobs in the relevant time period. This produced the average job tenure of the 8A hires of 44.87 months or 3.74 years. R. D. & O. Award. Dam. at 12. The ALJ then imputed the average tenure of the 8A hires to the affected class of women; thus, the average tenure of each of the women in the class, if she had been hired into the 8A job, would have been 3.74 years. *Id.* at 12-13. As discussed below, the ALJ used the average tenure figure to complete his calculation of back pay.

The parties filed exceptions regarding the ALJ's attrition calculations: OFCCP objects to the use of any attrition factor and Greenwood objects to the ALJ's methodology for determining attrition.

Repeating the legal argument it initially made to the ALJ, OFCCP maintains that the Secretary has prohibited the use of attrition when calculating back pay. OFCCP Except. at 15, citing *Lawrence Aviation*, 87-OFC-11, slip op. at 8 (Sec'y June 15, 1994). According to OFCCP, the following quotation from *Lawrence Aviation* indicates that we are precluded from using attrition in back pay calculations:

[I]n the absence of evidence in the record showing that specific women applicants would have left work . . . before being involuntarily laid off, for example, by moving out of the area or becoming incapacitated for non-work related reasons, members of the affected class are entitled to a presumption that they would have continued to work until they were laid off or terminated for nondiscriminatory reasons.

Id. at 8; R. D. & O. Award. Dam. at 10.

The ALJ rejected the use of the *Lawrence Aviation* presumption based on the case's subsequent history. R. D. & O. Award. Dam. at 11-12. The Second Circuit ruled that the agency's back pay figure was "flawed" because it was based on the presumption that all female class members would work until involuntarily terminated. *Lawrence Aviation*, 182 F.3d 900. Specifically, the appeals court objected to the agency's failure to account for the record evidence that certain female class members were unavailable for work during the relevant time period. *Lawrence Aviation*, 182 F.3d 900.

OFCCP's presumption that each woman in the class would have worked at Greenwood until she was dismissed is also strongly challenged by the evidence. Stip. Exh. H. The work histories of the female class members indicate that many of these women left the workforce during the relevant time period for reasons such as pregnancy, disability, bereavement, surgery, disinterest, lack of transportation, retirement, etc. R. D. & O. Award. Dam. at 12. As in *Lawrence Aviation*, the presumption of continuous employment is not applicable on this record.

⁴ The ALJ used this 1986-1998 period when calculating the tenure of the employees because the parties had stipulated that 1986 was the beginning period for any back pay accrual and 1998 was the end of such accrual period. Stips. 1 and 2.

As the ALJ noted, “it would require a leap of faith to assume that any woman hired at Greenwood into an 8A position from July 1, 1985 to April 17, 1987 would have remained there until December 31, 1998,” the stipulated end date for the back pay accrual. R. D. & O. Award Dam. at 12. OFCCP’s opposition to the ALJ’s use of attrition in his calculation is meritless.⁵

Greenwood objects to the ALJ’s method of calculating tenure. Greenwood Except. at 3-4. According to Greenwood, the ALJ erred by including all of the months worked by the 8A hires regardless of the number of separate periods of employment the worked months represented. *Id.* The 31 8A hires had 48 different periods of employment at Greenwood, and therefore, to account for these breaks in employment, Greenwood argues, the ALJ should have divided the total months worked not by 31 but by 48. *Id.* at 4; *see* Stip. Exh. C.

Alternatively, Greenwood proposes that the ALJ should have counted only the number of months worked at the first period of employment and should not have counted the months worked during any subsequent reemployment. *Id.* Greenwood argues that this method is preferable because the Company should be responsible for back pay *only* for the first hiring as there was never a finding of discrimination after employment began. *Id.*

Not surprisingly, each of Greenwood’s methods would produce a smaller tenure period – 2.41 years or 2.37 years – as compared to the 3.74 years determined by the ALJ. *Id.* Although Greenwood’s arguments are coherent and its preference for a lower figure is understandable, the Company fails to cite any authority which would require us to support its methodology over that used by the ALJ. Furthermore, the ALJ’s paradigm is more accurate since it considers the actual employment history of the 8A hires for the entire 12-year period rather than for just their first period of hire, and reflects that some employees leave but later return to the same employment as was the experience of the class of discriminatees. Accordingly, we adopt the ALJ’s decision to account for attrition as well as his method of doing so.

The 8A Proxies

Calculating back pay required the ALJ to determine what the earnings of the class of women would have been if they had been hired by Greenwood. Each of the parties assumed that the earnings of the 31 8A hires during the 1985-87 period would be a good approximation of what the women would have earned if hired into the same jobs during the same time period. R. D. & O. Award. Dam. at 9. The ALJ also used the earnings of the 8A hires as a proxy for what the women would have earned. *Id.* at 13. We agree that using the 8A hires as proxies for the women is a reasonable method for calculating back pay.

To arrive at the average annual earnings for the 8A hires, the ALJ began by tallying the wages of those 8A hires who worked for Greenwood for a full year. *Id.* The wages of those who worked a full year were averaged by totaling the earnings of those workers in that year and then

⁵ OFCCP argued in the alternative that, if we agreed that attrition should be part of the calculation, the ALJ’s attrition formula be rejected and OFCCP’s formula be adopted. OFCCP Except. at 22.

dividing the total by the number of workers whose earnings were included. This produced the average annual 8A earnings for that year. *Id.*

To account for attrition, the ALJ calculated the earnings of the 8A hires *only* for the first 3.74 years of the liability period, namely, 1986 through 1989. (See discussion of attrition, *supra*). *Id.* Thus, the ALJ determined that in 1987, the average earnings, based on the seven workers who worked all of 1987, were \$11,273.20; in 1988, the average earnings, based on the eight full-year workers, was \$12,857.71; and in 1989, the average earnings figure, based on seven workers, was \$13,458.37. *Id.* at 12-14. Since the ALJ had already determined that any class member would have only worked at Greenwood for an average of 3.74 years, the 1989 average annual earnings figure was multiplied by .74 to yield an adjusted 1989 average earnings of \$9,959.19. *Id.*

The ALJ also adjusted the 1986 earnings figure. *Id.* at 13. There was only one full-year 8A worker in 1986 and his earnings for that year amounted to \$4,279.13. The ALJ noted that this figure was lower than the earnings of other 8A workers who had worked less than a full year in 1986. *Id.* Because the ALJ did not consider the earnings of the one full-year worker to be an accurate representation of the 8A wages for 1986, he varied his calculation process and developed a new average earnings figure for 1986. *Id.* The ALJ added the \$4,279.13 figure to the earnings of each worker who made \$4,379.13 or more in 1986, regardless of whether he worked a full year or not, and then calculated the average. The average earnings figure for 1986 using this method was \$5,603.82. *Id.*

OFCCP objects to the ALJ's method of determining average annual earnings for the 8A hires, characterizing it as "result-oriented, inconsistently applied, and based on incomplete information." OFCCP's Except. at 13-14. OFCCP argues specifically that the ALJ erred by not including all of the 8A hires in his calculation instead of just those who worked a full year, because if all 8A hires working in a given year are counted, the wages of more workers would be included in the average. *Id.* at 14. Apparently the only methodology OFCCP accepts as reasonable is its own,⁶ even if the alternate method results in very similar earnings figures. For the years 1987-1989, there was little difference in the earnings figures⁷ of the 8A proxies under either the ALJ's or OFCCP's calculation method:

ALJ Method

OFCCP Method

⁶ OFCCP's method for determining the average annual earnings of the 8A proxies is a multistep process. First, OFCCP determines the "full time equivalent" (FTE) figure for each year by adding the total number of months that the 8A hires worked in a given year and then dividing that total by 12. OFCCP Except. at 6-7. The earnings of all the 8A hires in each year are then added together and the total is divided by the FTE for that year. *Id.* For example, in 1986, the 8A hires earned collectively \$61,797.02. Dividing that number by 6.26, the FTE for 1986, yields an average annual earnings figure of \$9,875.67. R. D. & O. Award. Dam. at 6.

⁷ There was a greater difference in earnings in 1986 with the ALJ's method resulting in an earnings figure of \$5,603.82 and OFCCP's of \$9,875.67.

1987	\$ 11,273.20	\$ 11,647.91
1988	12,857.71	12,922.24
1989	13,458.37	13,402.00

Id. at 13; OFCCP’s Nov. 12, 1999, Explanation of Back Pay at Exhs. 1 and 2.

Greenwood argues that the ALJ’s average annual earnings figures should be rejected because they are “greatly inflated.” Greenwood Except. at 13. The “inflation” results because the ALJ used the earnings of only those employees who worked a full year, and thus, eliminated the lowest end of the earning spectrum which had the effect of increasing the average earnings figure. *Id.* Greenwood’s solution is to use a “true average,” that is, calculate the earnings by totaling the wages earned at Greenwood for each of the 31 hires in each year and then dividing by 31.⁸ According to Greenwood, the divisor in any calculation must always be 31; if only seven 8A hires worked for the Company in a given year, Greenwood proposes that the total earnings of the seven workers should be added and then the total should be divided by 31 to get the “true average.” *Id.*; Greenwood’s Nov. 12, 1999, Explanation of Back Pay. Greenwood’s “true average” methodology is rejected because it is neither “true” nor an “average,” and because it double counts for attrition. As discussed above, the ALJ has accounted for attrition by determining that the class members would have worked an average of 3.74 years. If, in calculating the earnings of the 8A proxies, the ALJ used Greenwood’s method of averaging in the zero earnings of the 8A offerees who never worked at Greenwood as well as the zero earnings of the 8A hires who were not working in a given year, he would be factoring in attrition again.

The process of recreating the past of necessity involves a degree of approximation and imprecision. *Teamsters*, 431 U.S. at 372. We hold that the ALJ’s method for determining the earnings of the 8A proxies produces a rational approximation of what would have been, but for discrimination, and constitutes a reasonable step in the process of determining back pay. *See Rios v. Enterprise Ass’n Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1176 (2d Cir. 1988) (uncertainties in calculating back pay should be resolved against discriminating party). The exceptions of the parties to the ALJ’s method of calculating the earnings of the 8A proxies are denied.

Interim Earnings

Interim earnings are the amounts earned from employment that is a substitution for the employment the victim would have had with Greenwood. OFCCP Federal Contract Compliance Manual, § 7F07(c)(1) (1998). To accurately determine how much money the class members lost because of discrimination, a determination of their interim earnings was necessary. Of the 208

⁸ Greenwood offered Job Group 8A positions to 30 men and one woman during the 1985-1987 period. Of the 30 men, five failed the Company physical examination, and therefore, did not begin work at the time of the offer. Stip. Exh. D. In its calculations, OFCCP used 26 (31-5) as the relevant number of hires, but Greenwood consistently used 31, whether calculating attrition, earnings, etc. *See* Greenwood Except. at 13-14.

members of the class, the parties received interim earnings information on only 51 women. Stip. Exhs. A and F.

To complete his calculation, the ALJ determined the average interim earnings of the class members for the years 1986 through 1989 by totaling the earnings reported by the 51 women and then dividing that total by 51. R. D. & O. Award. Dam. at 13-14. To arrive at a back pay figure for each year, the ALJ subtracted the average interim earnings of the class members from the average annual earnings of the 8A proxies as follows:

1986	\$5,603.82 (average 8A earnings)	1988	\$12,857.71 (average 8A earnings)
	<u>- 3,641.16</u> (avg. interim earnings)		<u>7,510.84</u> (avg. interim earnings)
	\$1,962.66 back pay		\$ 5,346.87 back pay
1987	\$11,273.20 (average 8A earnings)	1989	\$13,458.37 (average 8A earnings)
	<u>- 6,219.60</u> (avg. interim earnings)		<u>6,916.89</u> (avg. interim earnings)
	\$ 5,053.60 back pay		\$ 6,541.48 x .74 = \$4,840.70.

The ALJ then properly accounted for the shortfall by multiplying each year's back pay figure by 10.4, the stipulated number of women who, but for discrimination, would have been hired by Greenwood in the 1985-1987 period. *Id.* at 14. Thus, the complete back pay figures when shortfall is accounted for are:

1986	(\$1,962.66 x 10.4) = \$20,411.66
1987	(\$5,053.60 x 10.4) = \$52,557.44
1988	(\$5,346.87 x 10.4) = \$55,607.45
1989	(\$4,840.70 x 10.4) = \$50,343.28.

Interest

Interest is paid on back pay awards to compensate the discriminatee for the loss of the use of her money. OFCCP Compliance Manual, §7F07(e) (1998). The parties stipulated to the interest rates to be applied to the back pay figures with the rate for each year reflecting the total interest due from the midpoint of that year through November 2, 1999. Stip. Exh. I.

The ALJ awarded interest on the back pay from 1986 through 1998. R. D. & O. Award. Dam. at 14. Using the parties' stipulated interest rates, the ALJ computed the interest owed for each of the 3.74 years in which back pay accrued by multiplying the back pay figure for each year by the interest rate stipulated by the parties. *Id.*; Stip. Exh. I. After determining the interest due, the ALJ added the interest to the back pay for each year. R. D. & O. Award. Dam. at 14. The ALJ's yearly totals for back pay plus interest are:

1986	\$ 46,701.88	1987	\$114,995.68
1988	\$115,830.32	1989	\$ 99,075.58

Id. Thus, by totaling the figures for 1986 through 1989, the ALJ arrived at the total back pay and interest amount of \$376,603,46⁹ to be divided equally among the 208 class members listed in Stipulated Exhibit A.

Although acknowledging that the award of prejudgment interest is in the discretion of the court, Greenwood nevertheless takes exception to the ALJ's award of interest for the years, 1991 through 1995, the period during which the case was awaiting the Secretary's ruling on liability. Greenwood Excerpt. at 16. The ALJ rejected Greenwood's arguments regarding interest on the authority of the Second Circuit's ruling in the very similar *Lawrence Aviation* case, wherein the appeals court expressly affirmed the award of prejudgment interest. R. D. & O. Award. Dam. at n.12; *see also* 41 C.F.R § 60-1.26(a)(2).

We adopt the ALJ's determination that prejudgment interest is appropriate, that the back pay plus interest amounts to \$376,603.46, and that this sum should be divided equally among the class members listed in Stipulated Exhibit A. *Hameed*, 637 F.2d at 521 and n.19. In addition, we extend the award of interest to the present. Accordingly, interest is to accrue on the back pay up to and including the date of this order.

CONCLUSION

For the foregoing reasons, we affirm the ALJ's determination of back pay plus interest to be awarded to the members of the affected class. In addition, we find that prejudgment interest should be paid on the back pay figure through the date of this final order.

ORDER

Greenwood is **ORDERED** to pay back pay plus interest in the amount of \$376,603.46 in equal amounts to the class of women listed in Stipulated Exhibit A. It is also **ORDERED** that Greenwood pay an amount of additional interest on the back pay for the period from 1998 to the date of this final order. This additional interest payment should be made in accordance with the Executive Order implementing regulations regarding such payments set out in 41 C.F.R. § 60-1.26(a)(2).

It is further **ORDERED** that Greenwood has 120 days in which to comply with this Order. Should Greenwood fail to comply within 120 days of this order, it is **ORDERED** that the present government contracts and subcontracts of Greenwood and its subsidiaries, successors and assigns be canceled, terminated, or suspended, and that Greenwood and its subsidiaries, successors and assigns be declared ineligible for further contracts and subcontracts, and for extension or modification of any existing contracts and subcontracts, until such time that it can satisfy the Secretary of Labor or her designee the Deputy Assistant Secretary for the Office of

⁹ The ALJ inadvertently included an incorrect back pay plus interest figure in his February 24, 2000, decision. On February 29, 2000, the ALJ issued an Errata Order indicating that the correct back pay plus interest figure is \$376,603.46.

Federal Contract Compliance Programs that it is in compliance with the provisions of Executive Order 11246 and the regulations issued pursuant thereto.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge