

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

MAX WENK	)	DOCKET NUMBER
	)	DC03518210518COMP
V.	)	
DEPARTMENT OF HEALTH	)	DATE: <u>16 AUG 1984</u>
AND HUMAN SERVICES	)	

OPINION AND ORDER

Appellant petitions for review of an initial compliance decision which dismissed appellant's petition for enforcement pending resolution of a related case before the Board.

On August 31, 1982, appellant filed a petition for enforcement of an initial decision which became final on July 2, 1982. In that decision, the agency was directed to "return appellant to a GS-13 position retroactive to the effective date of the reduction in force."

In an initial decision issued the same date as the initial decision in this case, a reconsideration decision of the Office of Personnel Management (OPM) denying appellant service credit for the period from July 1, 1945 to April 30, 1951, was reversed (Docket No. DC08318210585). Because the appellant was found to be entitled to six additional years of service credit, the determination of appellant's entitlement under a reduction in force (RIF) action by the Department of Health and Human Services (HHS) was found to have been in error. No petition for review of that decision was filed with the Board.

The decision regarding the RIF was entirely dependent upon the reversal of OPM's reconsideration decision and the award of service credit. OPM submitted a timely petition for review challenging the reversal of its service credit decision. As a result, appellant's award of service credit was delayed pending final resolution of the case by the Board, and HHS was unable to comply with the decision in the instant RIF case. In an initial compliance decision issued March 10, 1983, the Board's Washington Regional Office dismissed appellant's petition for enforcement, stating that "appellant may refile this petition after the decision in the related case of Max Wenk v. Office of Personnel Management, DC08318210585, May 28, 1982, becomes final and the appellant has been awarded the relevant service credit."

By motion dated December 2, 1983, appellant requested that the initial compliance decision be reopened and enforcement granted. On December 14, 1983, the Washington Regional Office advised appellant that "the appropriate action is a petition for review," and further stated that the motion was being sent to the Board's Office of the Secretary. Although the action was forwarded to the Board as a petition for review, by decision dated February 10, 1984, the Director of the Washington Regional Office issued a decision dismissing appellant's December 2, 1983, motion as premature. Because the Board is considering the December 2, 1983 motion as a petition for review, the February 10, 1984 decision of the Director of the Washington Regional Office is hereby VACATED.

Appellant's petition for review of the initial compliance decision of March 10, 1983, is hereby GRANTED pursuant to 5 U.S.C. § 7701(e)(1).

On June 8, 1984, the Board issued a final decision in the case of Max Wenk v. Office of Personnel Management, MSPB Docket No. DC08318210585, denying OPM's petition for review and awarding appellant the disputed service credit.

The initial compliance decision correctly dismissed appellant's petition for enforcement as premature and properly advised refiling subsequent to the final resolution of the companion service credit case. We find, however, that refiling with the Regional Office is not required under the circumstances because the facts are undisputed, and the agency appears to have delayed compliance only because of the necessity for final resolution of the related service credit case. Thus, in the interest of expeditious adjudication the Board hereby GRANTS appellant's request for enforcement and ORDERS agency compliance with the initial decision of May 28, 1982.

Accordingly, the initial compliance decision is hereby REVERSED and the agency is ORDERED to cancel the RIF action with regard to appellant and to return him to a GS-13 position retroactive to the effective date of the RIF. The agency is also ORDERED to award back pay and benefits in accordance with 5 C.F.R. § 550.805. Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within twenty (20) days of the issuance of this Order. Failure to comply with the Board's order as directed may result in sanctions being imposed against the agency in accordance with 5 U.S.C. § 1205(a)(2) and 5 C.F.R. § 1201.184. If appellant believes that the agency has failed to comply fully with the Board's order, he should submit any such evidence or argument to the Secretary.

This is the final order of the Merit Systems Protection Board in this appeal.

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Washington, D.C.

Paula A. Latshaw  
PAULA A. LATSHAW  
ACTING SECRETARY