

**DECISION**

118418 PLM-1  
Pool

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

**FILE:** B-206617**DATE:** May 18, 1982**MATTER OF:** Anthony F. Librande - Retroactive Reinstatement by Order of Merit Systems Protection Board - Backpay - Attorneys fees**DIGEST:**

1. General Services Administration requests advance decision whether it may honor final decision of Merit Systems Protection Board (MSPB) retroactively reinstating individual to position in agency with backpay. This Office will not review final decision of MSPB ordering corrective action under 5 C.F.R. § 330.204 (1978) for violation of individual's re-employment rights under 5 U.S.C. § 8151 (1976). Accordingly, MSPB decision is legal basis upon which individual's backpay entitlements in connection with retroactive reinstatement must be certified for payment.
2. Claimant who successfully appealed agency's failure to accord him priority consideration for reemployment to Merit Systems Protection Board, claims attorney fees in connection with the appeal. Claim for attorney fees under authority of Civil Service Reform Act of 1978 is denied since claimant's administrative proceeding was pending on effective date of Reform Act. Savings provision in section 902(b) of Reform Act precludes application of its provisions to administrative proceedings pending on its effective date.

**ISSUES**

The Assistant Administrator for Plans, Programs, and Financial Management, Region 8, General Services Administration, requests an advance decision as to whether, as a disbursing officer, he may honor a final decision of the Merit Systems Protection Board retroactively reinstating Mr. Anthony F. Librande to a certain position with the agency. This Office will not review the final decisions

of the Merit Systems Protection Board concerning reemployment rights under 5 U.S.C. § 8151 (1976). Accordingly, the Merit Systems Protection Board's Opinion and Order dated October 25, 1981, is the legal basis upon which Mr. Librande's entitlement incident to his retroactive reinstatement must be certified for payment.

In addition, Mr. Librande has asked the Comptroller General to consider the allowance of attorney fees in connection with his successful appeal to the Merit Systems Protection Board. We hold that his claim for attorney fees under the authority granted by the Civil Service Reform Act of 1978 may not be paid in view of the savings provision in section 902(b) of the Reform Act precluding the application of the Act to administrative proceedings which were pending on its effective date.

#### THE AGENCY'S REQUEST FOR RECONSIDERATION

Mr. Librande filed an appeal with the Merit Systems Protection Board (MSPB) alleging that the General Services Administration had failed to accord him priority consideration for reemployment upon cessation of disability compensation for work-related injury. In an Opinion and Order dated October 26, 1981, in Mr. Librande's case, the MSPB noted that the appeal was not governed by the provisions of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, October 13, 1978, because Mr. Librande applied for reemployment on December 6, 1978, before the effective date of that Act. While modifying certain of the pertinent citations to its own enabling authority, the MSPB concluded as follows in regard to the appeal in Mr. Librande's case:

"Accordingly, the Field Office decision dated August 8, 1980, and the compliance order dated February 25, 1981, are hereby AFFIRMED as MODIFIED herein, and the agency is ORDERED to re-employ the appellant as a GS-13 Supervisory Procurement Specialist or in an equivalent position retroactive to November 18, 1979, and to furnish the Field Office with documentation of compliance with this order within ten (10) days of receipt of the order. See 5 C.F.R. § 772.310(g) (1978).

"There is no further right of administrative appeal from a decision of the Merit System Protection Board on a request for reopening. The Board now considers this case to be closed since all administrative appeal rights have been exhausted. Any further remedy lies in the Federal court system."

Under the statutory scheme for protecting the civil service retention rights of employees injured or disabled on the job in 5 U.S.C. § 8151 (1976) and the implementing regulations contained in title 5 of the Code of Federal Regulations (1978) at subpart B of Part 330 and subpart C of Part 772, there is no authority for this Office to review decisions and orders of the Merit Systems Protection Board. Having exhausted this scheme of administrative review, the agency has been correctly advised by the MSPB that the only remaining avenue of contesting Mr. Librande's retroactive reinstatement would have been in a court of competent jurisdiction. There is no evidence that the agency took further action to have MSPB reconsider the order or to ask the Office of Personnel Management to request reconsideration. See 5 U.S.C. § 7703(d) (Supp. III, 1979).

The disbursing officer's request for a decision on the legality of disbursing agency funds under this order in Mr. Librande's case, in effect, requests that we review the decision of the MSPB. The agency asserts that our decision James L. Hancox, B-197884, July 15, 1980, contains identical issues of fact and law concerning re-employment priority and backpay and, therefore, precludes the payment of Mr. Librande's backpay.

In that case we held that an individual appointed by the Air Force after a determination by the Merit Systems Protection Board that his reemployment rights had been violated was not entitled to backpay for the period prior to his actual appointment. He did not have a vested right to employment by virtue of a statute or regulation and the agency had discretion with respect to filling the position. However, we would point out that the fact that the MSPB referred the case to the agency for exercise of its discretionary authority as to the remedy for the violation of

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Mr. Hancox's reemployment rights, distinguishes that case from the MSPB's action in Mr. Librande's case.

In the agency's handling of Mr. Librande's case the MSPB found a clear violation of 5 C.F.R. § 330.201(a) (1979) that adversely affected a right afforded him under 5 U.S.C. § 8151(b). Accordingly, the MSPB ordered the agency to comply with specific corrective actions under 5 C.F.R. § 330.204 (1978). As the conclusion of the MSPB's Opinion and Order dated October 26, 1981, set out above indicates, it is this mandatory compliance with the MSPB order rather than any discretionary agency duty that is being ordered.

As a result, we will not review the MSPB's Opinion and Order dated October 26, 1981, and the disbursing officer is advised that the MSPB order represents the legal authority to make the backpay payments in regard to Mr. Librande's reinstatement.

#### MR. LIBRANDE'S REQUEST FOR ATTORNEY FEES

With regard to the payment of attorney fees, we note that, with the enactment of the Civil Service Reform Act of 1978, authority was vested in the Merit Systems Protection Board under 5 U.S.C. § 7701(g)(1) (Supp. III 1979) to award reasonable attorney fees to employees who prevail on appeal under certain conditions. This authority in section 7701 is limited to the MSPB, and the only appeal from determinations of the MSPB is to the United States Court of Claims or a United States court of appeals. See 5 U.S.C. § 7703 (Supp. III 1979).

As the MSPB pointed out in its October 26, 1981, decision in Mr. Librande's case, the Reform Act precludes the application of its provisions to administrative proceedings pending on its effective date, January 11, 1979. Section 902(b) of the Reform Act (set out in 5 U.S.C. § 1101 note) provides as follows:

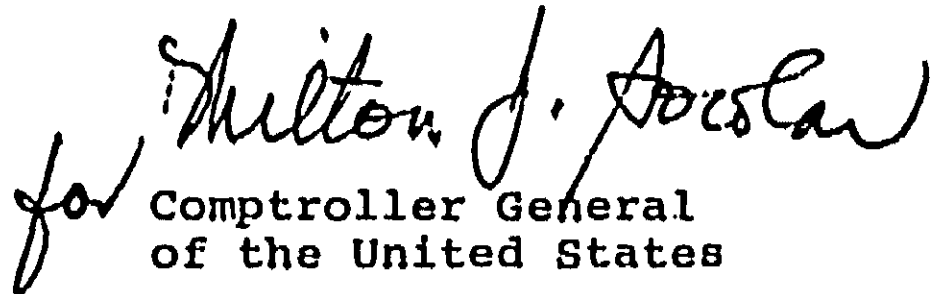
"(b) No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall

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be taken therefrom as if this Act had not been enacted."

Since MSPB found that administrative proceedings were pending in Mr. Librande's case on the effective date of the Reform Act, January 11, 1979, there is no entitlement to attorney fees under section 7701(g)(1). See Carl V. Cox and Emil F. Hawes, B-202849, March 9, 1982.

Although there is separate authority for the payment of attorney fees contained in the Back Pay Act, as amended by the Reform Act, 5 U.S.C. § 5596(b)(1)(A)(ii) (Supp. III 1979), that authority is also limited by the savings provisions in section 902(b) of the Reform Act. See Leslie H. Graham, Jr., B-197737, January 8, 1982. See also the final Back Pay Act regulations, section 550.806(h), appearing at 47 Fed. Reg. 58271, 58277, December 1, 1981. Therefore, we conclude that there is no authority to pay attorney fees in Mr. Librande's case.

*for*   
Comptroller General  
of the United States