IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES POSTAL SERVICE, :

Petitioner :

v. : No. 00-758

MARIA A. GREGORY. :

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Washington, D.C.

Tuesday, October 9, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

GREGORY G. GARRE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

HENK BRANDS, ESQ., Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 00-758, United States Postal Service v. Maria A. Gregory.

Mr. Garre.

ORAL ARGUMENT OF GREGORY G. GARRE

ON BEHALF OF THE PETITIONER

MR. GARRE: Thank you, Mr. Chief Justice, and may it please the Court:

For decades Federal employers and the Merit Systems Protection Board have engaged in the common sense practice of considering an employee's prior disciplinary record in deciding what punishment is appropriate for subsequent misconduct. The settled practice has long been to do so, even when a prior disciplinary action is subject to a pending labor grievance, although in that context, the board permits the employee to collaterally attack the prior actions in proceedings before it.

In this case, the Federal circuit --

QUESTION: If there is a collateral attack, the employee says, look, I filed a grievance and it's pending, what then is the burden of proof by the Government employer?

MR. GARRE: The Government employer bears the

burden of proving the action by a preponderance of the evidence. That's the standard that's set out in the statute. Now, that -- that burden of proof -- the evidentiary focus of the hearing is on whether the Government has proved the charges resulting in the adverse action. Here those charges --

QUESTION: But what -- what is it with regard to the prior offenses, if you will, that have -- for which grievance procedures have been filed? How is that then addressed?

MR. GARRE: Under the longstanding framework, which is established by the board's Bolling decision, the employer has to prove the fact of the prior action, and he has to -- and the employer has to prove that it was preceded by certain procedural protections: first, that the employee received advance notice of the action; second, that the employee had an opportunity to respond to the charges before the supervisor, as well as by a higher authority within the agency; and third, that there was a record --

QUESTION: Does that just mean somebody higher up the ladder in the employing agency?

MR. GARRE: It does, and that's -- and that's the same type of challenge that is framed in the early stages of the grievance process. It's an independent

authority than the supervisor.

In this case, the notice of removal was -- the proposed notice was made by the respondent's supervisor, but the -- the actual notice of decision was entered by a labor relations specialist who -- who was in a different district, independent from the supervisor.

QUESTION: Well, what if the final action, the decision to terminate the services of the employee -- what if it had been based on the commission of some prior failure as an employee and the grievance procedure had proceeded and it had been determined that it was invalid?

MR. GARRE: In that circumstance, the board has held that it would be inappropriate to rely on that action to defend the subsequent action. However, until or unless a prior action is proved to be unreliable, there's no basis for the Federal circuit's rule which presumes that prior disciplinary actions are unreliable and effectively presumes that employers act in faith when they take important disciplinary actions --

QUESTION: What happens --

QUESTION: There was, in fact, here three preceding incidents, as I recall, and a grievance was filed on all of them. As to one, it had already been determined that the grievance -- that the disciplinary action was improper.

MR. GARRE: That's correct. And -- and that can happen, but it doesn't undermine the legitimacy of prior actions that have not been overturned.

And in addition, the board has a reopening mechanism which permits employees to bring to the attention of the board any new evidence, including any evidence that a prior disciplinary action has been set aside.

The grievance is not a step in the decision making of the prior disciplinary action.

QUESTION: What about Justice O'Connor's example? And let me add one thing, that the prior disciplinary actions are being grieved. Now, in this case, the later event leads the board to fire the person in light of the prior disciplinary matters. Then after the person is fired, the board attorney goes to the grievance person, the arbitrator, and says, there's no need to continue this because the person doesn't work for us anymore. Now, what's supposed to happen in that situation?

MR. GARRE: Well, first of all, there's -- grievances can be pressed before, during, and after appeals before the Merit Systems Protection Board. The Merit Systems Protection Board, after all, has come up with a practice which allows it to decide appeals before

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it, and it chooses to consider the prior disciplinary actions, whether or not they're -- they're subject to a pending grievance.

If a grievance does proceed and it proves successful, then the board has a procedure by which it can reopen an appeal and reconsider the appeal --

QUESTION: What's the answer to my question? My question was -- should I repeat it or you have it?

MR. GARRE: My understanding is that even when a grievance is proceeding, the board would -- would proceed with the processing of its appeal.

QUESTION: My question is take the present situation. Let's call it bad thing A. All right? Now, they're going to fire the person because of bad thing A because there are previous disciplinary things, X, Y, and Z. X, Y, and Z are all in the process of being grieved. Now, they fire the person because of A, and then they go to the arbitrator who's doing X, Y, and Z, and the board says, arbitrator, stop everything, cancel the proceeding, don't continue because she doesn't work for us anymore. I want to know how -- how we deal -- how you deal, how the -- how someone deals with that situation.

MR. GARRE: I'm sorry. I misunderstood your question.

The board doesn't have the authority to go to an

arbitrator and tell the arbitrator to stop the proceeding. What sometimes happens is the union chooses to withdraw grievances when an employee -- employee's removal has been affirmed by the board. That's a decision that the Civil Service Reform Act and the collective bargaining agreement leave to the prerogative of the union. The union's decision to withdraw a grievance, after an employee has been removed, provides no more basis for --

QUESTION: So, your answer is, to my hypothetical, it can't happen.

MR. GARRE: The board can't go to an arbitrator and tell him to stop.

QUESTION: Well, can the -- what about the employer? Can the postal department say, well, you know, she's not an employee here anyway, you don't need to continue this? Or is it -- you -- you leave me with the impression, rightly or wrongly, that this -- that this is just at the option of the union.

MR. GARRE: It's --

QUESTION: The union can proceed if it wants or doesn't have to proceed.

MR. GARRE: That's a matter covered by the collective bargaining arrangement. The Civil Service Reform Act provides for the creation of a negotiated grievance procedure. The union and the employer have

reached a memorandum of understanding, under which once, in this case, in the -- in the collective bargaining arrangement in this case governing Postal Service employees, once an employee is removed for disciplinary reasons, the union typically withdraws the grievances. When the employee is not removed for disciplinary reasons, the union chooses to press the grievances. Those are matters covered by the collective bargaining agreement, and they provide no basis for upholding the Federal circuit rule which creates a categorical rule that employers can't --

QUESTION: Well, but -- but what we're trying to establish -- and I think you would have to concede -- that there are some instances in which once the employee is terminated, the grievance proceedings as to other matters must stop.

MR. GARRE: That can happen and it happens because of --

QUESTION: And it -- and it's not just because it's the option of the union other than what the union agreed to in the collective bargaining agreement.

MR. GARRE: The arrangement is the -- the grievances are withdrawn by the union or they're withdrawn under the arrangement that's been worked out under the collective bargaining agreement.

QUESTION: Suppose there's --

QUESTION: Of course, that --

QUESTION: -- the collective bargaining agreement is silent. Can the employer agency say, this employee is no longer with us and therefore you should terminate? And the arbitrator could then do it?

MR. GARRE: That -- that would be a decision left to the arbitrator under the framework of the negotiated grievance. It can happen.

QUESTION: All right. Then once again, if it's covered by the collective bargaining agreement, there's no choice in the matter, the grievance is stopped. If it's not covered by the collective bargaining agreement, it may still be stopped at the option of the arbitrator, and there's nothing the employee can do about it. Now, this may not be fatal to your case, but if this happens, I think we should confront it. And Justice Breyer --

QUESTION: Mr. Garre, I assume that this would happen. Does the ability of the union to terminate a grievance exist even if the employee is fired the first time? When event X occurs, the employer says, this is serious enough, you're fired after a proper hearing. It's up to the union whether to grieve that or not, isn't it?

MR. GARRE: That's right.

QUESTION: And the union could say, you know, I

think you deserved it and -- and we're not going to proceed any further.

MR. GARRE: That's correct. The -- the act leaves to the --

QUESTION: So, this injustice is not an -- if -- if that -- if that's what it is, is not an injustice peculiar to this arrangement. It -- it's a necessary effect of leaving the prosecution of the grievance up to the union.

MR. GARRE: That's right. And -- and the act does leave the prosecution of the -- of the grievance up to the union and --

QUESTION: Mr. Garre?

MR. GARRE: -- through the arbitration.

QUESTION: In civil litigation generally, when there -- when there's a proceeding that's dependent on a prior proceeding that's on appeal, the standard operating procedure is for the second proceeding to be held at abeyance pending the appeal of the first. Now, if we followed that model, then we could say, yes, the employer could take the disciplinary step, but while that's being challenged, the MSPB must hold its case in abeyance until the grievance goes through the process.

Now, why isn't that solution, which applies in civil litigation generally, applicable here?

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MR. GARRE: It's -- it's very problematic. But first of all, the general rule applied by the Federal courts in the collateral estoppel effect is the fact that a prior case is on appeal doesn't prevent a court from giving the underlying case collateral estoppel effect. But --

QUESTION: It doesn't -- doesn't prevent it, but it is the standard proceeding to hold the second one in abeyance.

MR. GARRE: But --

QUESTION: So that you don't have the -- the anomaly of giving effect to a judgment that has been overturned.

MR. GARRE: There are several problems with the abeyance rule adopted by the Federal circuit, which is essentially the narrow rule which is hypothesized by respondent.

First and most fundamentally, the Civil Service Reform Act limits the Federal circuit's scope of review to whether a legal ruling of the board is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. So, it's not enough for the Federal circuit to come up with a rule that it thinks is fair or makes more sense. It has to come up with a rule which it thinks is compelled by a provision of law. And the Federal circuit

did not cite any provision.

Secondly, as a policy matter, the abeyance rule is very problematic. The abeyance rule, first of all, would frustrate Congress' intent to streamline the administrative appeals process --

QUESTION: Why -- why, if the agency action goes into effect immediately? What I'm presenting to you is the -- the thing goes through the agency. The agency says you're out, and the person is out. So, you have the efficiency concern.

If, as, and when the prior grievances are overturned so that the MSPB would no longer have those to rely on, then the remedy could be reinstatement with back pay. But that example, if that's how the Federal circuit decision works, meets your efficiency concern. In the interim, the employee is out.

MR. GARRE: Well, first of all, although the employee is placed in a non-duty/non-pay status when she's removed by the agency, she continues to fill a permanent slot on the agency's rolls, and if the abeyance rule is going to require agencies to keep the employee in that position for months, if not years, on end, that's problematic from the employer's perspective.

Second and more generally, the abeyance --

QUESTION: Well, if that's -- would you explain

that if to me? Two, why would the -- why if the firing is -- is okay, at least until it's overturned, why couldn't the -- the agency fill the vacancy?

MR. GARRE: The -- the employee is placed -- under the practice followed by the Postal Service and I believe other employers as well, the employee occupies the full-time slot, and until her removal is affirmed by the board, she continues to fill that slot. Now, the employee can replace her position with -- with temporary workers, but nevertheless, from the employer's standpoint, he's prevented -- the employer is prevented from filling that -- that full-time slot.

The abeyance rule creates other problems. It -- it leaves the most important disciplinary decisions, including a removal and -- hanging limbo for months, if not years, on end.

QUESTION: Well, when you speak of months --

MR. GARRE: It also --

QUESTION: May I just ask you to get into this problem of months and years? The months and years problem I -- I understand is simply a function of what you claim to be the slow pace of arbitration. It may take months and years to do it. But if the arbitration, in effect, is a creature of the collective bargaining agreement, why isn't it open to the Government and the -- the union

simply to come up with a streamlined arbitration procedure so instead of taking months and years, it's going to take a month?

MR. GARRE: I think they have tried, but the fact is that in the Postal Service, there's currently 126,000 grievances pending in that process, backlogged. And the fact is that grievances are taking as long as years, not in every case, but certainly in many cases, they're taking years to be processed through arbitration. And this is the situation --

QUESTION: Well, I guess we need more arbitrators.

MR. GARRE: Well, this is the situation that exists, and the board isn't required to hold its appeals in abeyance while that procedure is played out.

QUESTION: No, but my -- my -- I guess my point is that you say this is the situation that exists. There are a number of reasons why it exists, but -- but one of the responsible parties, it seems to me, is your client, is the Government. And why -- why isn't it the Government's responsibility, along with the union, to come up with a grievance procedure, whether it calls for more arbitrators or different procedural rules? I have no idea, but why isn't it the -- the responsibility of the parties to come up with a procedure that's not going to

take years?

MR. GARRE: Well, first of all, the inherent informality of the grievance and arbitration process is always going to invite delay. That's not new to this case.

And second of all --

QUESTION: Well, litigation invites delay. But if a judge takes charge of a case, the delay is reduced, and the case moves forward expeditiously. Why not in arbitration?

MR. GARRE: Well, that hasn't happened, and I don't think it's unique to the Postal Service arbitration context.

There are also mechanisms in place, as this Court recognized in the Cornelius case, which can address that, and that's that either side can file an unfair labor practice charge. Either side can seek to compel arbitration. Either side can file a grievances.

QUESTION: Mr. Garre, do you think that for purposes of either collateral estoppel or for purposes of whether a criminal court can use a prior conviction in deciding the sentence -- do you think it's accurate to analogize the grievance procedure as a prior case pending on appeal? Or would you rather characterize it as a collateral attack --

MR. GARRE: I think it's --

QUESTION: -- upon final action by the employer?

MR. GARRE: I think it's the latter. I think that the grievance is a collateral proceeding. It's not -- it's not an appeal in itself. It's -- it's a collateral proceeding --

QUESTION: And -- and what happens to collateral attacks when you have a final criminal conviction and there is a collateral attack on that criminal conviction, although the conviction itself is final? When a sentencing court has that conviction before it, does it not use that conviction?

MR. GARRE: Absolutely. In fact, I think the sentencing guidelines direct the court to take that into --

QUESTION: And if the collateral attack is later successful, what is -- what is the remedy for the person who's been convicted?

MR. GARRE: Then they can bring it to the attention of the court and ask for relief.

QUESTION: To reopen -- to reopen the proceeding.

MR. GARRE: That's correct. And that -- and that --

QUESTION: What should we do here? We have a

case here where, as I understand it, there were three prior complaints by the employer that resulted in some form of disciplinary action. Grievances were filed in all three. With the discharge proceeding, the employee then appealed to the board. And before the board acted, one of the grievances pertaining to the first infraction was found in the employee's favor.

Now, what should we do? It's been remanded, as I understand it, now by the court of appeals to the board. Does it need to be? Because the termination relied in part on all three of these things.

MR. GARRE: Well, we think that this Court should decide the question presented, reverse the decision below, and remand for further proceedings, allow the Federal circuit --

QUESTION: What happened to the other two grievances filed?

MR. GARRE: The other two grievances were withdrawn by the union when the board affirmed the -- the removal. The union has -- has tried to reassert those, and the Postal Service's position is that this Court ought to decide this case, and then we can consider what should happen there.

Now, this Court should decide the question presented, and it can remand for further proceedings.

This -- the Federal circuit --

QUESTION: Why is the remand necessary? What -- if we agree with -- with you on the merits, what -- what remains to be decided by the Federal circuit?

MR. GARRE: The -- the issue that -- that remains open is the question of what effect the grievance that has been set aside should have on the board's decision affirming the removal.

Now, we think that an argument could be made that the Federal circuit could affirm since the respondent did not bring that grievance to the attention of the Federal -- to the Merit Systems Protection Board, although she indisputably could have, and she raised it for the first time in the Federal circuit. But we don't think that this Court needs to address --

QUESTION: You say if we reverse on the question presented, we should leave it to the Federal circuit to decide whether to direct reopening of the proceedings or to affirm the MSPB?

MR. GARRE: We -- we -- that's what we would ask this Court to do.

We're concerned about the Federal circuit's categorical rule that Federal employers and the Merit Systems Protection Board can't consider these prior disciplinary actions, engage in what is, for public

employers and private employers, a time-honored management practice --

QUESTION: There's a disagreement between you and the respondent, is there not, about whether the agency, the Postal Service, is bound or whether it's only the MSPB. I -- I think that you say the Federal circuit has said nobody can take account of these prior infractions. And the respondent says, the MSPB can't but the employing agency can.

MR. GARRE: We -- we think that the fairest reading of the court of appeals decision, as it applies both to Federal employers and the Merit Systems Protection Board, the holding of the court is unqualified. It says that consideration may not be given to these prior actions as long as there are grievances. The remand order of the court indicates that the court of appeals viewed that rule as limiting the -- the prior actions that the agency could consider in this case based on whether or not they're subject to further proceedings.

QUESTION: Okay. Their -- their point on that particularly is -- the particular point I think on this is that the Federal circuit really just said the -- the MSPB. And normally by the time something gets to the MSPB, all the prior grievances will be resolved because that takes a very long time to get there. And then if the occasional

case comes up where it wasn't resolved, the MSPB can just postpone deciding it, I guess, during which time the employee is out of work. So, there's no harm done through that narrow interpretation of the circuit.

What's your response to that?

MR. GARRE: Well, first of all, we don't -- we don't think that's the fairest interpretation of the court of appeals decision. But even assuming this Court were to adopt that interpretation, there are several problems with the Federal circuit's abeyance -- with respondent's abeyance rule.

The first is -- is that it frustrates Congress' intent to streamline the administrative appeals process. Congress placed a duty upon the Merit Systems Protection Board to expedite its proceedings to the extent practicable because one of the factors that led to the enactment of the Civil Service Reform Act in 1978 was the concern that the overly elaborate procedural protections which had developed under the prior Civil Service regime had -- had prevented employers from taking the most effective disciplinary measures because of concerns that things would be subjected to drawn-out appeals. Employers simply weren't taking the most effective disciplinary action. That's one of the problems --

QUESTION: Mr. Garre, does the Government

acknowledge that the MSPB can determine that it is arbitrary, capricious, or an abuse of discretion for the agency to decline to reopen a proceeding after a grievance has gone forward and has found one of the convictions on which the dismissal is based to have been invalid?

MR. GARRE: The -- the board's regulations permit the board to reopen any case at any time to reconsider it in light of a grievance which may have proved successful. And our position is that employees have the opportunity to request --

QUESTION: Excuse me. The board's regulations permit that?

MR. GARRE: Yes.

QUESTION: Is it a matter of the board's right? Doesn't the board have to find that the agency action, in refusing to reopen, is arbitrary, capricious, or an abuse of discretion? I mean, the board can say when it will reopen it's own cases, but -- but the board can't tell the agency when the agency must reopen its cases, can it, unless the failure to reopen is arbitrary or capricious?

MR. GARRE: No. That's correct. That's correct. I'm -- I'm sorry. I thought you were asking about the board's reopening rule.

QUESTION: I'm not talking about the board's reopening. I'm talking about ultimate success in the

grievance and then -- then the employee comes back to the agency and says, look, you -- you goofed. I really wasn't guilty of that. Would you reopen it? And the agency says no.

MR. GARRE: Well, certainly in that --

QUESTION: Can the board find that to be an abuse of discretion?

MR. GARRE: That's -- the typical practice is that the employee will go to the board and say, reopen my appeal because this grievance has proved successful. If the employee went to the employer first and asked it to reconsider it, then I suppose the employee could appeal from another decision, if there were another decision, on the discipline. But the more common practice is for the employee to go to the Merit Systems Protection Board and say, reopen my case because of this subsequent action. So, typically --

QUESTION: And that's the MSPB rule, that if -- if while the MSPB thing is still going on, one of the grievances -- the MSPB, if the person hasn't been fired, will reconsider. So, the employee is instructed to go to the MSPB, not back to the employing agency.

MR. GARRE: The employee may do that, and the board may do that. And the reopening procedure is available under the board's regulations at any time.

QUESTION: But it's discretionary, isn't it? The board doesn't have to reopen if it doesn't want to.

MR. GARRE: It is discretionary, and that's really no different than any other reopening procedure which would exist to enable a court or other body to reconsider something in light of subsequent evidence.

The -- the respondent's basic position and the Federal circuit's basic position is predicated on the notion that prior disciplinary actions are unreliable and that Federal employers act in bad faith when they impose discipline. And we respectfully take issue with that.

QUESTION: Also on the proposition that they are not final in -- in the sense that -- that a -- a judicial determination is final. It seems to me that's -- that's important to the -- to the analysis.

MR. GARRE: We think that they are final. They're preceded by the procedural protections set out in the act, and they're final enough to warrant the imposition of discipline in a minor case. If they're final enough to warrant the imposition of discipline, they're final enough to warrant collateral effect in appeal before the board. And here we're talking about the minor actions.

QUESTION: I don't want to consume your rebuttal time, but there's one question that still hasn't been

answered for me.

On remand, what would your position be as to the two unadjudicated grievances?

MR. GARRE: We think that the board can take those into account under the Bolling framework, which allows the board to consider the prior disciplinary actions under a procedural framework which looks to the procedural protections provided in those proceedings and then considers whether those actions --

QUESTION: What would your position be before the Postal Service as to the union's request to reopen those?

MR. GARRE: To reopen the?

QUESTION: Those -- or to continue those -- those pretermitted grievance proceedings.

MR. GARRE: Those arbitrations could go forward. Again, there's nothing that --

QUESTION: And you have no objection to those going forward?

MR. GARRE: The --

QUESTION: I thought -- I thought the union was wanting to go forward, and the Postal Service didn't.

MR. GARRE: Under the memorandum that's in place, if the respondent's removal were affirmed by the board, then under the memorandum in place, the union's

practice is to withdraw those agreements under the collective bargaining arrangement. That could be renegotiated or reconsidered, but that's the practice in place, and that's something that the act permits the parties to agree to under the negotiated grievance framework.

QUESTION: Mr. Garre, apropos of the remand, you mentioned that the respondent had not brought to the board's attention the fact that the arbitrator had ordered the first disciplinary action vacated. Did the Government have any responsibility to bring that to the attention of the board?

MR. GARRE: Ordinarily we would bring that to the attention of the board. It was not brought to the attention of the board in this case because different parties were -- were governing the different proceedings. But the fact is, is that it was not brought to the attention of the board. It could have been brought to the attention of the board and still could be today.

If there are no further questions --

QUESTION: Thank you, Mr. Garre.

Mr. Brands, we'll hear from you.

ORAL ARGUMENT OF HENK BRANDS

ON BEHALF OF THE RESPONDENT

MR. BRANDS: Mr. Chief Justice, and may it

please the Court:

What I would like to do is I would like to start by responding to Mr. Garre's suggestion that our proposed rule may be a good idea but is not required by the statute. We think it most certainly is, and this also picks up on a question from Justice O'Connor.

5 U.S.C., section 7701(c)(1)(B), which is copied at page 51 in the appendix to the petition, provides that the decision of the agency shall be sustained -- and that is by the MSPB -- only if the agency's decision is supported by a preponderance of the evidence. That provision calls for de novo review in the MSPB, in which the agency bears the burden of proof to prove -- of proof by a preponderance of the evidence.

And it's important to understand that that applies not only to the conduct charged in the particular charge before the MSPB -- here, for example, the conduct charged to have taken place on September 13, 1997 -- but also to aggravating facts to which the agency points in support of its choice of punishment. The MSPB --

QUESTION: You're talking now about review before the MSPB, not before the Federal circuit. Is that correct?

MR. BRANDS: That is correct, Mr. Chief Justice. The MSPB has held that whenever the agency comes before

the MSPB and relies on aggravating facts, not necessarily the particular charge before the MSPB, but other things, for example, the employee is simply not very good or something like that, that has to be proven as well by -- by a preponderance de novo in the MSPB. That was held in Douglas v. Veterans Administration in 1981, a seminal decision in 1981, with which I do not --

QUESTION: You mean even if a grievance is not pending, the board would have to review the prior disciplinary action to be sure that that was supported by a preponderance of the evidence? Surely it doesn't mean that.

MR. BRANDS: Well, Justice Scalia, I think that the burden of proof is always the same. The statute says --

QUESTION: Yes, but the burden of proof is this employee has been convicted of prior disciplinary violations in the past.

MR. BRANDS: And --

QUESTION: Q.E.D., proven.

MR. BRANDS: Certainly when --

QUESTION: You're saying that's not enough. The -- the board has to inquire as to whether that prior conviction, even if it was not grieved, was a valid one.

MR. BRANDS: No, Justice Scalia, we're not

saying that. In the situation you posit, namely where there was a past disciplinary action which either was not taken to the board or which became final after it was taken to the board -- in that situation it may well be reasonable to assume that the prior is supported by a preponderance of the evidence. And in fact, if it was taken to the board or to an arbitrator and the arbitration has become final, then one would think that ordinarily it would become collateral estoppel. But that is not --

QUESTION: Isn't that same presumption still valid even though the -- the action is being grieved?

MR. BRANDS: Well, two things --

QUESTION: It's not as though it were unilateral employer action without a hearing and procedural guarantees. There's a whole -- you know, a whole series of procedures that the employer has -- the Federal employer has to go through, and -- and when those procedures are followed, there is a judgment by the employer.

MR. BRANDS: That is certainly --

QUESTION: And I gather that judgment is final until -- what you're grieving is employer action, and -- and that action is final until a grievance overturns it.

MR. BRANDS: Justice Scalia, I think that the analogy that the Government would like to draw is to an

agency action that is subject to section 706 review under the APA, but that is not the right analogy, we respectfully submit.

The right analogy would be to on-the-record adjudication under section 554 and 556 of the APA, the situation where an agency simply levels charges. If you don't do anything about them, those charges will become final, but if you put the agency to the burden of -- of proof, then you become the defendant in -- in the MSPB. You -- you have the ability to put the Government to the burden of -- of proof.

For example, in Jackson v. Veterans Administration, a Federal circuit decision of 1985, the -- the Federal circuit described it as follows: by seeking review, an employee places the agency in the position of a plaintiff who has the burden of proof, who must come forward with evidence to establish the fact of misconduct, and the ultimate burden of persuasion is on the Government.

QUESTION: Well, what we're reviewing here, Mr. Brands, is not the Merit Systems Protection Board's action, but the action of the Federal circuit. And I think it's agreed that the board decision before it must stand unless it's arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

MR. BRANDS: Right.

QUESTION: As I understand it, the Federal circuit here said this was not in accordance with law. And I was puzzled at that because they didn't seem to point to any law.

MR. BRANDS: Well, that is true, and perhaps the brevity of the -- of the discussion by the court of appeals can be explained on the ground of the fact that the Government did not respond to any of respondent's arguments in the court of appeals.

But the basic answer here is that what is not in accordance with law about how the MSPB treats prior disciplinary actions is that it disregards -- it arbitrarily disregards the burden of proof.

QUESTION: Well, but you -- you say it's not in accordance with law, and then in the same sentence, you say it arbitrarily disregards the burden of proof. Now, I would think those are two separate things under that statutory language. If it's contrary to law, I think you have to point to some provision of law --

MR. BRANDS: And that's --

QUESTION: -- which I don't think the Federal circuit did.

But you also say it's -- it's arbitrary. And why -- why -- the Federal circuit didn't say that.

MR. BRANDS: That is correct, but nevertheless, its judgment, we think, is -- is right on the money.

We think that there are two things wrong with the way the MSPB does -- does -- treats prior disciplinary actions. One is it ignores the statutory burden of proof standard, section 7701(c)(1)(B). Secondly --

QUESTION: Now, that's -- that's the standard you say governs the Merit Systems Protection Board?

MR. BRANDS: That is correct. Whenever the -- whenever an agency comes before the MSPB, it cannot say you have to defer to what we did because there was a hearing and because there was notice and so on and so --

QUESTION: But that wasn't the basis for the Federal circuit's decision here.

MR. BRANDS: We think it actually was, Your Honor, because under --

QUESTION: Where -- where do you find that?

MR. BRANDS: We find that at the petition appendix 7a where the court of appeals said that its rule is necessary because the foundation of the board -- of the MSPB's Douglas analysis would otherwise be compromised. That may be a little telegraphic, but what the court of appeals meant by that is --

QUESTION: Telescopic.

(Laughter.)

MR. BRANDS: And again, we would -- we would suggest that the telegraphic nature of that may -- may also be blamed on the Government's conduct of the litigation in the court of appeals.

QUESTION: Well, why -- why should it be blamed on the Government?

MR. BRANDS: Well, let -- let me just explain real quick what we think that the court of appeals meant by that. The court of appeals meant to say this. Under Douglas v. Veterans Administration, the MSPB in any given case will conduct a -- an inquiry to ensure that the penalty fits the crime, so to speak. It will make sure that the punishment is not disproportional, is not unreasonable, and so on and so forth.

In the course of that, it is well established, also under Douglas, the -- the agency may point to aggravating facts. It may, for example, say this is not a good employee or, as in this case, the employee has a prior disciplinary record. It may do that, but in Douglas, the MSPB held those facts must be supported by a preponderance of the evidence.

QUESTION: I thought you already conceded in -- in response to an earlier question of mine that -- that the -- that the board does not have to establish by a preponderance of the evidence the accuracy of any prior

disciplinary conviction.

MR. BRANDS: I don't think I said that, Your Honor.

QUESTION: I thought you did. If you didn't, then --

MR. BRANDS: I would -- I would draw a distinction --

QUESTION: -- then why isn't it true? Suppose there had been no grievance. Is it possible that the board has to go back and decide whether the prior disciplinary conviction was supported by a preponderance of the evidence?

MR. BRANDS: Well, the -- the statutory burden, of course, always applies. The burden is on the agency.

QUESTION: So, your answer is yes.

MR. BRANDS: No, it's not necessarily yes. I would -- I would distinguish between three factual scenarios.

One, the situation where a punishment is imposed and it simply becomes final because the employee never grieves it or never goes to the MSPB. If it then comes up in a later case before the MSPB, I think it is certainly reasonable for the agency to say, here are the documents that show that this employee was -- was disciplined. She or he never grieved it or never took it before the MSPB,

and therefore, I have sustained my burden of proving --

QUESTION: But it's not up to he or she. It's up to the union.

MR. BRANDS: No, that's actually not entirely true. In a case like this, where a major penalty is at issue, the employee actually can take it to the MSPB and has the right to do that.

QUESTION: But still that isn't this case. We could disagree with you and you'd still have a second argument I take it. If we disagree with you on that, do you lose the case? No, because this -- in this case we have a grievance that was not fully determined.

MR. BRANDS: That's -- that's precisely correct, Your Honor. We have in this particular case --

QUESTION: And -- and frankly, I have trouble with the proposition you just stated, but this case is with -- with an unadjudicated grievance or a grievance that had not been fully determined.

MR. BRANDS: Precisely. That's exactly correct. And --

QUESTION: Well, Mr. Brands, as I understand it, the board, MSPB, applies its so-called Bolling rule. That is a case that the board itself decided, I guess. Now, if the board finds the factors in the Bolling case satisfied is that enough to meet the statute?

MR. BRANDS: We -- we don't think it is enough in a situation like this situation where the prior is being grieved, and here's why.

QUESTION: Did you challenge the Bolling rule? Is that something we've been asked to review here?

MR. BRANDS: Well, the Bolling rule is squarely before the Court. The Government relies on it, and what we're saying is that the Federal circuit held essentially that the Bolling rule is not right. It's not so much the Bolling rule that is wrong --

QUESTION: But do you assert that if -- if the board applies its Bolling standard, that is not enough to satisfy the statutory burden of proof?

MR. BRANDS: We think it is enough in a situation where the prior has become final on its own steam. We think it is not enough in a situation where the prior is still being grieved, and here is why.

If the prior is being grieved, the Government's decision does not get any deference. It -- the Government always bears the burden.

QUESTION: Well, but if you view the prior disciplinary action taken by the employer as final, subject only to some kind of collateral attack in a grievance procedure, then it is final unless, at the end of the day, the grievance procedure is successful.

MR. BRANDS: That is not how we would characterize it. Justice -- Your Honor, this morning the word collateral estoppel was first mentioned by Mr. Garre, and that is remarkable because --

QUESTION: I think not collateral estoppel. Viewing it -- the grievance as a collateral attack --

MR. BRANDS: Well, we --

QUESTION: -- on an otherwise final action.

MR. BRANDS: We would not view it as a collateral attack. What happens if -- you either go to an arbitrator or to the MSPB, if you place the Government in the position of being a plaintiff who has the burden of proof, who has the burden of proving de novo that what it alleges actually happens. It is interesting that the Government is -- is now saying that collateral attack somehow applies to the agency's decision, and Justice Ginsburg asked --

QUESTION: Mr. Brands, it wasn't the Government. It was Justice Scalia who said this is not comparable to an appeal for my suggestion that you would hold the second proceeding in abeyance would apply. It is not an appeal.

MR. BRANDS: Very well.

QUESTION: I'm -- I'm guilty.

(Laughter.)

QUESTION: And unrepentant.

(Laughter.)

QUESTION: But why did -- but when you answer the question, would you tell us why it would make any difference whether it is -- whether there's the collateral proceeding going on, whether there's a direct attack going on? Why isn't there a presumption of regularity that attends the Government's action until it is, in fact, overturned as a result of the arbitration process?

MR. BRANDS: We think there's no presumption of regularity because when the action comes before the board or before an arbitrator itself, it is not entitled to any presumption of regularity.

QUESTION: That's for purposes of the arbitration proceeding. But for purposes outside the arbitration proceeding itself, why isn't there a presumption of regularity until it is overturned and vacated?

MR. BRANDS: Simply for this reason, Justice -- Justice Souter. Whenever the Government comes before the board and points to aggravating circumstances, it must prove those by a preponderance of the evidence.

QUESTION: But that's the -- but I mean, that gets us back to the question we keep going back and forth on. Do they have to prove the fact of the determination that there was in fact some prior infraction or do they

have to prove the existence of the infraction in substance just as if they were proving it as part of the current charge? And it seems odd to me to say that they would have to prove it just as much as if it were part of the current charge.

MR. BRANDS: Well, I would -- I would distinguish between three situations. If it has been adjudicated and has become final before an arbitrator, then collateral estoppel will apply. If, however, it is being challenged, collateral estoppel should not apply. It is hornbook law that collateral estoppel does not apply when a decision --

QUESTION: Well, I'm not saying that collateral estoppel applies. The -- the -- you know, the employee may be able to attack it. I'm simply saying that if it is -- it is not somehow shown to be invalid affirmatively, why shouldn't a presumption of regularity attach. And I think you're saying that no presumption of regularity attaches, that the Government has the burden as an initial matter.

MR. BRANDS: That is correct, although that burden will be very easy to discharge in a case where a prior has already become final or, for that matter, where a prior was never attacked.

QUESTION: Okay. And you're saying the reason

it isn't easy, when it is attacked, is that there is no presumption of regularity.

MR. BRANDS: There is --

QUESTION: And I want to know there should be no presumption of regularity.

MR. BRANDS: Presumption of regularity are applied to a Government action that itself is entitled to deference when it is reviewed by a court. The kind of Government action that we're talking about --

QUESTION: But that's my question. Is it entitled to enough deference so that all you have to do is prove the fact of the Government action, that being sufficient, unless it is affirmatively shown that the Government action was wrong or invalid? That's the question.

MR. BRANDS: The Government action, if it is taken to the MSPB, is not entitled to any deference at all because the Government bears the burden of proving de novo that what happened actually occurred. Therefore, if there's no deference -- if the Government is not entitled to --

QUESTION: Then -- then what you're saying is that the -- that the aggravating fact is subject to exactly the same burden of proof that the specific instance of -- of later conduct is -- is subject to, the

-- the instance that gets us before the board on appeal anyway.

MR. BRANDS: That's precisely correct, although as I said, in two situations that is a burden of proof that should be very easy to discharge.

QUESTION: Yes, and I understand.

MR. BRANDS: It's only in that third situation. And note that the Government cannot rely on collateral estoppel in that situation because it is well established -- it's hornbook law -- that -- that when something is reviewed de novo, it is not subject to collateral review. For example, Wright and Miller say that in section 4433.

QUESTION: Well, but if -- if you're talking about judicial proceedings, I don't think those rules would necessarily carry over to this sort of rather low level administrative proceeding.

MR. BRANDS: Your Honor, far be it for me, of course, to -- to argue that collateral estoppel should apply, but the MSPB, for example, has applied collateral estoppel to prior final arbitral orders, and we don't necessarily see anything wrong with that. And we think that if the Government later comes before the MSPB and points to a prior that was upheld by an arbitrator, it thereby -- it thereby discharges its burden of proving that the prior conduct actually happens. We don't think

that in a situation where that prior is being reviewed de novo it makes sense to simply assume that the conduct charged in that prior disciplinary action actually occurred.

QUESTION: Well, but to say that the prior is reviewed de novo, I'm not sure that that is an entirely accurate statement because it was a prior that was left unchallenged, I take it, at the time.

MR. BRANDS: No, Your Honor. All three priors here were, in fact, under review at the time that the Government pointed to them as -- as --

QUESTION: So, your statement then is limited to the sort of prior which is under review.

MR. BRANDS: That's -- that's precisely correct. We're not saying that the Government, when -- when charging an employee with misconduct, may not point to that prior, but when it comes before the MSPB, it must discharge its burden of proof.

QUESTION: What is --

QUESTION: What -- what if the employer says there is a prior here, as well as the current conduct, that has never been grieved, never been challenged?

MR. BRANDS: Well, in that situation, it would ordinarily be reasonable for the Government to argue and the MSPB to -- to agree that it's reasonable to assume

that a preponderance of the evidence exists in such a situation because if the -- if the employee thought that a preponderance did not exist, then he or she would probably have taken it to the MSPB or to an arbitrator.

QUESTION: The board has to assume that. But as I understand your case, the agency itself doesn't.

MR. BRANDS: Well, the agency is not -- is not -- the question of whether or not the agency may simply level a charge is not subject to this burden of proof. This burden of proof applies before the MSPB.

QUESTION: Do you know of any other situation in which the -- the review of agency action is conducted on a basis more demanding than the agency action itself?

MR. BRANDS: Your Honor --

QUESTION: That is to say, if the agency ignored the fact that -- that a grievance was pending, you assert that would have been entirely lawful. The agency could say, I don't care if a grievance is pending. He's been convicted. On the basis of that, you're fired. And that's perfectly okay, you say, for the agency to do.

MR. BRANDS: Well, that --

QUESTION: But then when it's on appeal to the Merit Systems Protection Board, you say the Merit Systems Protection Board can reverse the agency because at that stage, suddenly the fact of the prior disciplinary action

is not determinative. That's -- it's very strange. I don't know any other instance in administrative law where what the agency does is right, but on appeal it's wrong.

MR. BRANDS: I would not characterize it as an appeal. It's -- it's different from that. It is much more like when, for example, the FTC or the SEC staff charges a defendant with misconduct, it has to prove that to an administrative judge. When the administrative judge hears the case, the burden rests on the agency to prove that by a preponderance. However, when the --

QUESTION: But -- but -- go on.

MR. BRANDS: When the agency levels its charges, brings its charges in the first place, it does not have to worry, do we -- can we sustain the burden of proof. It can simply say we think there's probable cause of misconduct here. It is much more like a prosecutor who charges misconduct.

QUESTION: Well, of course, it has to worry about the burden of proof. It's arbitrary, capricious, or contrary to law if it isn't supported by the evidence.

MR. BRANDS: I don't think so, Your Honor.

QUESTION: And what you're asserting is that this evidence is -- is good evidence before the agency, the mere fact of the prior disciplinary action, but it suddenly becomes bad evidence before the Merit Systems

Protection Board.

MR. BRANDS: Well, it's not bad evidence. It's simply that before the MSPB, the -- the Government agency has to prove his case by a preponderance. Now, at the time that it charges, presumably the agency thinks that those priors are good even though they're being grieved, otherwise it wouldn't have imposed them in the first place. But that doesn't mean that it doesn't have the burden of proving by a preponderance when it comes in the MSPB.

QUESTION: Mr. Brands?

QUESTION: Throughout the -- the proceedings before the Merit Systems Protection Board, in the initial decision of the administrator, the petitioner is referred to -- the respondent is referred to as the appellant. I mean, certainly the Merit Systems Protection Board thought it was an appeal.

MR. BRANDS: Well, Your Honor, it -- that is true. It is termed an appellant, but again, what -- what Jackson v. Veterans Administration, a Federal circuit case from 1985, says about that is that the employee, while denominated the appellant, has the advantageous evidentiary position of a defendant. So, it is much like --

QUESTION: Where did the Federal circuit get

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that from?

(Laughter.)

MR. BRANDS: That is simply because before the Federal -- before the MSPB, the burden is on the Government agency to prove its charges and review is de novo. The burden of proof is on the Government.

QUESTION: Where is -- where is section 7701(b) in the material before us in the briefs?

MR. BRANDS: It's in the appendix to the petition, page 51, and we refer to it in our -- our claim rested on the -- on this burden of proving --

QUESTION: Well, in your opinion, a woman who works for an agency is late for the 20th time. 19 priors are under grievance. Her boss, fed up, says, you're fired. All right? Now, what's supposed to happen?

MR. BRANDS: The Government can fire her. There's no question about that. However, if those priors are all being grieved in those grievance proceedings, the Government will have to prove its case.

QUESTION: All right. Now, that -- that -- of course, then the -- as I read the Federal circuit, it says just what you say. We hold that as a matter of a law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits. So, what you're saying is they

can't use those.

MR. BRANDS: The Government --

QUESTION: The Government cannot use them.

MR. BRANDS: No, I'm not saying that. The Government agency is entitled to rely on them. The Government agency is allowed to say, you were late today. By itself, that would not be enough to fire you. However, you did it 19 times before, and because you did it 19 times before, we're firing you today. We know that your 19 priors are still being grieved, but we think that all of those 19 are good.

QUESTION: Right.

MR. BRANDS: Now, however, when that removal comes to the MSPB, in the ordinary case, those 19 priors will have become final. Either they will have been sustained or they will have been overturned by an arbitrator or by the MSPB.

In the very unusual situation, the white elephant that we have here, the case where somehow the MSPB proceeding goes faster than the prior grievances, in that very unusual situation, we have a problem. What we have there is that the Government would have to prove its case by a -- by a preponderance, but those priors are still -- have not become final yet.

QUESTION: All right. So, the -- the opposite

side is that would be a reasonable approach. The agency says, we have another reasonable approach. Our reasonable approach is that we -- we just let them take account of the fact that they've already been -- you know, they're already finished, the 19, but the individual can ask us to see if they're supported or clearly erroneous.

MR. BRANDS: What we think is --

QUESTION: That's Bolling. So -- so, that's their approach. So, why is yours more reasonable? Theirs -- they see yours as reasonable. They say we have a different one.

MR. BRANDS: It's not a question of reasonableness, Your Honor. We think it's a question of what the statute says.

QUESTION: Well, yes, but that -- that statute seems to be talking about cross referencing B. It seems to be talking about this proceeding. There has to be a preponderance of evidence in this proceeding. And so, the issue is not resolved by the statute. It's up for grabs. I mean --

MR. BRANDS: Your Honor --

QUESTION: -- the question is, is this piece of paper, which says you were convicted 19 times before -- there are 19 pieces of paper, okay -- whether that counts as evidence towards the preponderance to support what they

did now. And you could make the argument either way.

MR. BRANDS: Respectfully, Your Honor, that is not how the MSPB itself has interpreted section 7701(c)(1)(B). It reads that the burden of proof as applying not only to the particular charge before the board, here case number 4. It reads it also as applying to any aggravating circumstance, and in our view, it couldn't really be any other way.

QUESTION: Well, now, Mr. Brands, we're reviewing the Federal circuit's decision here, not the MSPB's decision. Now, did the Federal circuit incorporate that, the view you're expressing --

MR. BRANDS: Yes.

QUESTION: -- now, into its opinion?

MR. BRANDS: Yes, it did, Your Honor.

QUESTION: Whereabouts?

MR. BRANDS: And this is what I was referring to when I was referring to that phrase on page 7 of the appendix to the petition. It said, the Douglas analysis would otherwise be compromised. And here's what it meant by that.

QUESTION: Well, how can you tell --

MR. BRANDS: The Douglas --

QUESTION: How can you tell that one cryptic phrase -- how can you tell that's what it meant by that?

MR. BRANDS: Well, it actually said it twice, Your Honor. But the reason why we believe that's what it said is the Douglas analysis means that the MSPB in any given case must ensure that there is a fit between the punishment and the crime. And the way it does that is it looks at the gravity of the particular offense, but it also looks at other aggravating circumstances. That analysis would be undermined, would be nullified if the Government could simply come in and say, we got this one little charge, and then we have these 19 others. Now, these 19 others have never been proven, but you have to take them as a given and you can only review them for clear error even though --

QUESTION: They have been proven. I mean, that's the fallacy in that. There was a proceeding before the board in which the board adjudicator found that they had been proven.

MR. BRANDS: That's actually not correct, Your Honor. What -- what happens in a disciplinary action is that the Government -- a supervisor will simply charge the misconduct, and then from there, it goes through these grievance steps that are simply nothing other than another supervisor saying, yes, it looks right to us. And finally, it will go to an arbitrator, and that is the first place where the Government is actually put to its

burden of proving its charges by a preponderance.

QUESTION: Is that right? I mean --

MR. BRANDS: Oh, absolutely. These priors have never gone --

QUESTION: The agency adjudicator can say, well, it wasn't proven, but you know, I think we ought to put this on your record anyway.

MR. BRANDS: Well, the agency adjudicator --

QUESTION: Surely the agency has to find, by a preponderance of the evidence, that the employee was guilty of the alleged infraction.

MR. BRANDS: But the question is whether -- whether there's any reason for the MSPB to defer to that, and we submit no. And here's why. If that action itself were appealed to the MSPB, that action itself would not be entitled to any deference. It's sort of like a prosecutor -- prosecutor coming before a trial court. Nobody would argue that somehow the jury, or -- or in a bench trial, the trial court, is supposed to defer to the prosecutor. And we think that just -- just that those charges have been leveled in the past rather than now before the agency -- before the MSPB doesn't mean that any more deference --

QUESTION: But what we're talking --

QUESTION: If you really believe that --

QUESTION: What we're talking about here is --

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QUESTION: If you really believe that, then --

QUESTION: -- sentencing.

QUESTION: -- then you should say that even when there is no grievance, the board should not take account of the prior -- of the prior disciplinary conviction. If you really believe that --

MR. BRANDS: Well, respectfully --

QUESTION: -- you would say even if it's not being grieved.

MR. BRANDS: Justice Scalia, I -- I wouldn't -- I wouldn't put it right that way or precisely that way. I would think that the burden of proving that the prior conduct, the misconduct, happened is still upon the agency. However, it is very easy to prove it because ordinarily what the Government will simply be able to do is say, look, we have here a piece of paper that said she did it and she never went to the MSPB or to an arbitrator. So, therefore, she probably did it. If in that situation --

QUESTION: Mr. Brands, before you finish, I'd like you to answer the Government's assertion that your neat solution, which is, agency, you can fire this person, but MSPB must abide the grievance. And then if the grievances are successful from the employee's point of view, there would be reinstatement, back pay, I take it,

all that.

Mr. Garre told us that the Government is stuck because it can't fill that slot in the meantime because the employee may come back. How do you answer that?

MR. BRANDS: Well, it's an argument that's raised for the first time today here at the lectern. But I -- I don't think that that is -- that -- that doesn't justify saying, well, in that case, we're going to say to the Government, you don't have -- you don't have to meet your burden of proof. The burden, of course, is --

QUESTION: But it does -- it does weaken your argument that the Government serves its purpose. It can fire this person. It can replace the person. And then at the end of the day, if the grievances are overturned, that person simply gets reinstated.

MR. BRANDS: Well, I don't think it quite weakens our argument, Your Honor, because we're talking about letter carriers in this particular case, for example. It's not as though the particular route that was previously served by Maria Gregory is not -- is not getting mail at this moment. What happens, of course, is that other letter carriers are -- are put to work on that route, and things march along just fine, which I assume is why the --

QUESTION: Were the briefs correct in telling us

there are 126,000 pending grievances in the postal system?

MR. BRANDS: The short answer is no, if the allegation is that those are disciplinary grievances. There are 126,000 cases pending, but the vast majority of those are contract grievances and not disciplinary grievances. Disciplinary grievances march through the process in about a year or less, as in fact happened in -- in the two cases to which the -- the Government points in -- in that footnote 3 in its reply brief.

QUESTION: Thank you, Mr. Brands.

Mr. Garre, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF GREGORY G. GARRE

ON BEHALF OF THE PETITIONER

MR. GARRE: The Federal circuit ruling in this case is not based in any way on the burden of proof applied in board proceedings. And respondent didn't even argue before the board that the -- that the board was applying the wrong burden of proof in challenging or considering her prior actions.

Respondent's reliance on the Douglas case is a little bit odd because that case was followed by the Bolling case and scores of other precedents which established the framework by which the Merit Systems Protection Board considers prior disciplinary actions, even when they're subject to grievance. The board allows

-- it requires the employer to prove the fact of the prior action, and then it -- it allows the employee -- in addition to the fact of the prior action, that certain procedural protections were present. And then it allows the employee an opportunity to collaterally attack that action.

That -- that comports with the employer's burden of proof under the statute. It's supported by decades of administrative practice, and the Federal circuit had absolutely no basis for invalidating that practice without citing to any provision of -- of law or anything else.

Now, to follow up on a question by Justice Kennedy, I want to make clear that we would not object to the continuance of the grievance. The employers would not object if this Court reverses the decision below.

If there are no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Garre.

The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)