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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES POSTAL SERVICE, :
Petitioner :
v. : No. 00-758
MARIA A. GREGORY. :
- - - - -X

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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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

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

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

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

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

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

1 authority than the supervisor.

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

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

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

20 QUESTION: What happens --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MR. GARRE: It's --

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

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

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

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

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

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

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

1 QUESTION: Suppose there's --

2 QUESTION: Of course, that --

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

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

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

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

24 MR. GARRE: That's right.

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

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

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

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

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

13 QUESTION: Mr. Garre?

14 MR. GARRE: -- through the arbitration.

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

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

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

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

10 MR. GARRE: But --

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

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

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

1 did not cite any provision.

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

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

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

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

24 Second and more generally, the abeyance --

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

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

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

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

17 QUESTION: Well, when you speak of months --

18 MR. GARRE: It also --

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

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

4 MR. GARRE: I think they have tried, but the
5 fact is that in the Postal Service, there's currently
6 126,000 grievances pending in that process, backlogged.
7 And the fact is that grievances are taking as long as
8 years, not in every case, but certainly in many cases,
9 they're taking years to be processed through arbitration.
10 And this is the situation --

11 QUESTION: Well, I guess we need more
12 arbitrators.

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

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

1 take years?

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

6 And second of all --

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

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

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

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

1 MR. GARRE: I think it's --

2 QUESTION: -- upon final action by the employer?

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

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

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

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

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

21 QUESTION: To reopen -- to reopen the
22 proceeding.

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

25 QUESTION: What should we do here? We have a

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

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

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

16 QUESTION: What happened to the other two
17 grievances filed?

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

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

1 This -- the Federal circuit --

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

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

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

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

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

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

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

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

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

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

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

5 What's your response to that?

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

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

25 QUESTION: Mr. Garre, does the Government

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

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

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

13 MR. GARRE: Yes.

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

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

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

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

5 MR. GARRE: Well, certainly in that --

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

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

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

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

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

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

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

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

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

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

1 answered for me.

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

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

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

13 MR. GARRE: To reopen the?

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

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

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

20 MR. GARRE: The --

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

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

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

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

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

20 If there are no further questions --

21 QUESTION: Thank you, Mr. Garre.

22 Mr. Brands, we'll hear from you.

23 ORAL ARGUMENT OF HENK BRANDS

24 ON BEHALF OF THE RESPONDENT

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

1 please the Court:

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

7 5 U.S.C., section 7701(c)(1)(B), which is copied
8 at page 51 in the appendix to the petition, provides that
9 the decision of the agency shall be sustained -- and that
10 is by the MSPB -- only if the agency's decision is
11 supported by a preponderance of the evidence. That
12 provision calls for de novo review in the MSPB, in which
13 the agency bears the burden of proof to prove -- of proof
14 by a preponderance of the evidence.

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

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

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

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

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

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

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

19 MR. BRANDS: And --

20 QUESTION: Q.E.D., proven.

21 MR. BRANDS: Certainly when --

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

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

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

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

12 MR. BRANDS: Well, two things --

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

20 MR. BRANDS: That is certainly --

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

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

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

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

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

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

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1 MR. BRANDS: Right.

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

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

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

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

21 MR. BRANDS: And that's --

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

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

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

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

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

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

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

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

17 QUESTION: Where -- where do you find that?

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

24 QUESTION: Telescopic.

25 (Laughter.)

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

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

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

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

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

1 disciplinary conviction.

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

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

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

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

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

15 QUESTION: So, your answer is yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 MR. BRANDS: Well, we --

8 QUESTION: -- on an otherwise final action.

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

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

22 MR. BRANDS: Very well.

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

24 (Laughter.)

25 QUESTION: And unrepentant.

1 (Laughter.)

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

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

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

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

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

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

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

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

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

25 QUESTION: Okay. And you're saying the reason

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

3 MR. BRANDS: There is --

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

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

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

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

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

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

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

6 QUESTION: Yes, and I understand.

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

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

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

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

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

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

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

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

19 QUESTION: What is --

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

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

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

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

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

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

14 MR. BRANDS: Your Honor --

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

21 MR. BRANDS: Well, that --

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

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

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

11 QUESTION: But -- but -- go on.

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

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

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

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

1 Protection Board.

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

11 QUESTION: Mr. Brands?

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

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

25 QUESTION: Where did the Federal circuit get

1 that from?

2 (Laughter.)

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

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

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

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

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

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

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1 can't use those.

2 MR. BRANDS: The Government --

3 QUESTION: The Government cannot use them.

4 MR. BRANDS: No, I'm not saying that. The
5 Government agency is entitled to rely on them. The
6 Government agency is allowed to say, you were late today.
7 By itself, that would not be enough to fire you. However,
8 you did it 19 times before, and because you did it 19
9 times before, we're firing you today. We know that your
10 19 priors are still being grieved, but we think that all
11 of those 19 are good.

12 QUESTION: Right.

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

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

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

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

7 MR. BRANDS: What we think is --

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

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

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

21 MR. BRANDS: Your Honor --

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

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

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

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

13 MR. BRANDS: Yes.

14 QUESTION: -- now, into its opinion?

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

16 QUESTION: Whereabouts?

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

22 QUESTION: Well, how can you tell --

23 MR. BRANDS: The Douglas --

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

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

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

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

1 burden of proving its charges by a preponderance.

2 QUESTION: Is that right? I mean --

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

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

8 MR. BRANDS: Well, the agency adjudicator --

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

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

23 QUESTION: But what we're talking --

24 QUESTION: If you really believe that --

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

1 QUESTION: If you really believe that, then --

2 QUESTION: -- sentencing.

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

7 MR. BRANDS: Well, respectfully --

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

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

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

1 all that.

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

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

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

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

25 QUESTION: Were the briefs correct in telling us

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

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

10 QUESTION: Thank you, Mr. Brands.

11 Mr. Garre, you have 2 minutes remaining.

12 REBUTTAL ARGUMENT OF GREGORY G. GARRE

13 ON BEHALF OF THE PETITIONER

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

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

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

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

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

16 If there are no further questions.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Garre.

18 The case is submitted.

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

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