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Can Contested Disciplinary Actions Be Considered in Subsequent Termination Proceedings?

by Barbara J. Fick

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ISSUE

Does the Merit Systems Protection Board (MSPB) abuse its discretion when it considers prior discipline that is currently being challenged by the employee in ongoing grievance proceedings?

FACTS

Maria Gregory had been employed by the United States Postal Service (USPS) since 1985. During her career she received several promotions; at the time of her discharge in 1997 she was a Letter Technician responsible for overseeing five mail routes and delivering the mail if a regular carrier was unavailable. Gregory's employment was subject to the provisions of the Civil Service Reform Act (CSRA) as well as the terms of a collective bargaining agreement (CBA) negotiated between the USPS and the letter carriers' union.

Beginning in April 1997, Gregory began to experience problems at work. On April 7 she received a disciplinary warning letter for insubordination. She grieved this discipli-

nary action pursuant to the grievance-arbitration provisions of the CBA. Shortly thereafter, on April 18, she received a seven-day disciplinary suspension for intentionally delaying the mail; she also filed a challenge to this discipline under the CBA. In July, Gregory was again disciplined and suspended for 14 days. Once again she grieved this discipline under the CBA. These previous disciplinary actions were not subject to challenge under the CSRA; the jurisdiction of the MSPB (the appellate body that reviews agency decisions pursuant to the terms of the CSRA) is limited to terminations and adverse personnel actions involving suspension of more than 14 days. Finally, on Sept. 18, her supervisor notified her that he was recommending her dismissal for failure to perform her duties in a satisfactory manner. The USPS adopted his recommendation and she was terminated on Nov. 26, 1997.

(Continued on Page 24)

UNITED STATES POSTAL SERVICE
v. GREGORY
DOCKET NO. 00-758

ARGUMENT DATE:
OCTOBER 9, 2001
FROM: THE FEDERAL CIRCUIT

Case at a Glance

Federal workers whose employment is regulated by the Civil Service Reform Act have the right to appeal certain adverse personnel decisions to the Merit Systems Protection Board. When reviewing an agency's decision to discharge one of its employees, the Board will take the employee's prior disciplinary record into account. At issue in this case is whether the Board can consider such prior discipline even if it is still being challenged in ongoing grievance proceedings.





Gregory challenged her dismissal under the terms of the CSRA, filing an appeal with the MSPB. At the time she filed her appeal, her challenges to the prior disciplinary actions were working their way through the contractual grievance and arbitration procedure and were awaiting the scheduling of an arbitration hearing. The administrative law judge (ALJ) of the MSPB issued his decision sustaining the termination on Sept. 11, 1998, before any of her contractual challenges had been presented in arbitration. The ALJ's decision was based, in part, on Gregory's disciplinary history.

Gregory appealed the ALJ's decision to the MSPB. While her appeal was pending, an arbitration was held on Gregory's first grievance concerning the April 7 warning letter. The arbitrator upheld her grievance and ordered the letter expunged from her record. Before her other two grievances could be heard by an arbitrator, the MSPB issued its decision in October 1999 denying her appeal for review and affirming the ALJ's decision.

The USPS took the position that since Gregory was no longer a postal service employee (her termination having been finalized by the MSPB decision), she no longer had standing to pursue her two remaining pre-discharge grievances, and it refused to proceed further with the arbitration process. Gregory petitioned the Federal Circuit Court of Appeals to review the MSPB decision. The Court vacated the decision, holding that the MSPB's reliance on Gregory's prior disciplinary record was an abuse of discretion. The court concluded that "consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging the merits. To conclude otherwise would risk harming the legitimacy of the reasonable penalty

analysis, by allowing the use of unreliable evidence ... to support an agency action." *Gregory v. United States Postal Service*, 212 F.3d 1296,1300 (Fed. Cir. 2000).

The USPS asked the Supreme Court to review the Federal Circuit's decision, and the Court granted the petition for a writ of certiorari. 148 L.Ed.2d 954 (2001).

CASE ANALYSIS

Initially, it should be noted that the parties disagree as to the precise scope of the issue being presented for review. The USPS frames the issue as one involving whether a *federal agency* may consider prior contested disciplinary action in reaching a termination decision. Gregory, on the other hand, presents a more narrowly focused interpretation of the Federal Circuit's decision, i.e., whether the *MSPB*, in reviewing an agency action, may consider contested disciplinary action. As a result of these differing perspectives, the parties' arguments in this case have a certain quality of ships passing in the night as they each focus on different legal aspects of the situation.

The USPS emphasizes the well-established nature of the managerial practice of considering an employee's prior record when assessing discipline for a subsequent infraction. This practice has been endorsed by the MSPB in a well-developed body of case law identifying the employee's past record as relevant to determining the appropriateness of a penalty.

One of the underlying purposes that Congress sought to achieve by passing the CSRA was promoting the efficiency and effectiveness of the government workplace. According to the USPS, preventing an agency from considering an employee's prior record would undermine govern-

ment effectiveness, obliging the agency to overlook employee problems and make decisions in a contextual vacuum. Requiring the employer to wait until contested discipline issues are resolved before addressing subsequent employee problems is hardly efficient, inevitably resulting in long delays. In addition, such a rule would encourage employees to challenge every disciplinary action in the hope of delaying subsequent discipline, which in turn would lead to inefficiency and ineffectiveness.

Moreover, the MSPB has an established procedure for employees to challenge the appropriateness of prior disciplinary action in the context of a termination review hearing. In *Bolling v. Department of the Air Force*, 8 M.S.P.B. 658 (1981), the MSPB provided a process for employees to collaterally attack prior discipline when that discipline forms the basis for subsequent adverse action. If the employee received written note of the prior discipline and had an opportunity to challenge it, the MSPB will allow the employer to rely on that discipline unless the employee can prove the prior discipline was clearly erroneous. If the proper procedure was not followed, the MSPB will review the prior discipline *de novo*. Furthermore, if a grievance process subsequently reverses an employee's prior discipline after an MSPB decision, the employee may request the MSPB to reopen and reconsider its decision in light of the reversal. Therefore, the USPS argues, current MSPB practice provides appropriate procedural protections to employees.

Lastly, the USPS argues that the scope of review of MSPB decisions by the Federal Circuit Court of Appeals is limited; it may only vacate or reverse an MSPB decision that is found to have been arbitrary,



capricious, or an abuse of discretion. Since current MSPB procedure is sufficient to protect employees in circumstances such as those presented in this case, the MSPB's decision was not arbitrary or an abuse of discretion and there was no basis for the court of appeals to invalidate it.

Gregory, on the other hand, asserts that she is not contending that the employer may not rely on contested discipline. Thus, she says, the USPS arguments concerning government efficiency and effectiveness are beside the point. Indeed, Gregory says she agrees with the USPS that the MSPB has a long-established policy of allowing the employer to consider prior contested discipline in assessing penalties for current infractions. However, the MSPB has never addressed the issue presented in this case: whether in reviewing the agency action the MSPB may consider the contested discipline.

According to Gregory, the *Bolling* doctrine relied on by the USPS is inadequate. The MSPB applies the "clearly erroneous" standard to collateral attacks when the employee has the opportunity to challenge the discipline. Moreover, an employee who has filed a grievance will be deemed to have had an opportunity to challenge even if the grievance process has not run its full course. The CSRA, however, has set the standard for agency disciplinary action as "preponderance of the evidence" and places this burden on the employer, not the employee. In other words, the agency employer is supposed to prove to the MSPB, by a preponderance of the evidence, that discipline is justified. The *Bolling* rule distorts this standard and allows the MSPB to uphold agency action unless the employee proves that the prior discipline that formed the basis for that action was clearly erroneous. Therefore, the *Bolling*

rule denies the employee any meaningful opportunity to contest the prior discipline consistent with the requirements of the CSRA.

The alternate procedure suggested by the USPS is similarly inadequate. Although in theory an employee has the right to request the MSPB to reconsider its decision if the grievance process subsequently reverses prior discipline, in practice this procedure is not available to employees who are challenging a termination decision. Once the MSPB affirms a discharge, the discharged individual is no longer considered an employee of the agency and therefore lacks standing to continue processing his or her grievance under the CBA. The discharged employee's pending grievance proceedings are discontinued. Thus this reopening procedure, while available in cases involving adverse action less than a discharge (e.g., a suspension), is unavailable to a terminated employee.

In addition, Gregory contends, requiring the MSPB to limit its consideration to uncontested or finalized prior discipline does not create injustice or inefficiency. Rather, the employer is faced with a relatively rational alternative: schedule hearings that challenge discipline in the order in which the discipline was imposed. The usual practice is to postpone hearings concerning subsequent discipline until earlier grievances have been resolved. Indeed, adopting the practice suggested by the USPS provides employers with an incentive to delay earlier grievance proceedings and expedite termination hearings in order to preempt employee challenges to the earlier discipline.

Gregory also points out that the parties' CBA has been interpreted to prohibit reliance on prior contested, but not adjudicated, discipline in a

later disciplinary action. Had Gregory challenged her termination under the CBA rather than under the CSRA, the arbitrator would have refused to consider the prior contested discipline in assessing the appropriateness of the termination penalty. Allowing a different rule for CSRA appeals will result in inconsistency and forum shopping.

Finally, Gregory suggests that the writ of certiorari should be dismissed as improvidently granted. In light of the arbitration decision reversing the issuance of the warning letter, a new penalty decision must be made. Under the progressive discipline system, an employee must receive a letter of warning before a suspension, and a suspension must precede a termination. Since the warning letter was expunged, the subsequent suspension cannot stand, and therefore termination was inappropriate. Thus, the worst result for Gregory would be a 14-day suspension, an issue that need hardly consume the Court's attention.

SIGNIFICANCE

The outcome of this case is of relatively limited significance. It affects only those federal employees whose employment is subject to the CSRA, and the Court's interpretation of the scope of the MSPB's review authority is unlikely to impact the interpretation of other federal statutes. However, for the hundreds of thousands of federal civil service workers, the perceived fairness of termination decisions and their review is a matter of some import.

(Continued on Page 26)



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