No. 00-758

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

MARIA A. GREGORY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a federal agency, when disciplining or removing an employee for misconduct pursuant to the Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.*, may take account of prior disciplinary actions that are the subject of pending grievance proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 212 F.3d 1296. The opinion of the Merit Systems Protection Board (Pet. App. 9a-12a) is unpublished, but the decision is noted at 84 M.S.P.R. 619 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2000. A petition for rehearing was denied on July 13, 2000 (Pet. App. 44a). On October 2, 2000, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 13, 2000. The petition for a writ of certiorari was filed on November 13, 2000, and was granted on February 20, 2001. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C. 1101 *et seq.*) are reproduced at Pet. App. 45a-58a.

STATEMENT

1. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, "comprehensively overhauled the civil service system" and established a "new framework for evaluating adverse personnel actions against [federal employees]." *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (internal quotation marks omitted). In particular, the Act gave "agencies greater ability to remove or discipline expeditiously employees who engage in misconduct," *Cornelius* v. *Nutt*, 472 U.S. 648, 662-663 (1985) (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 51 (1978)), because of "complain[ts]" that the "complex rules and procedures" that had developed under the prior regime to "protect employees from arbitrary management actions ha[d] too often become the refuge of the incompetent employee," S. Rep. No. 969, *supra*, at 3.

The CSRA authorizes federal agencies to take adverse action against a covered employee—including removal, suspension, or demotion—"for such cause as will promote the efficiency of the service." 5 U.S.C. 7503(a), 7513(a). Affected employees, however, enjoy significant procedural protections in defending against such actions, including the right to counsel or another representative, the right to receive advance notice of the proposed action, an opportunity to respond orally and in writing, and a written statement of the reasons for the action. 5 U.S.C. 7503(b), 7513(b). An employee who receives a suspension of greater than 14 days, or more severe penalty such as removal, may appeal the

agency's decision to the Merit Systems Protection Board (MSPB). 5 U.S.C. 4303(e), 7513(d), 7701; see 5 C.F.R. 1201.3.

The MSPB must sustain the agency's decision if it is supported by a preponderance of the evidence and the employee does not show that the decision was the result of "harmful error in the application of the agency's procedures," a prohibited employment practice such as discrimination, or another violation of law. 5 U.S.C. 7701(c)(2)(A). An employee may obtain review of an adverse MSPB decision in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703; 28 U.S.C. 1295(a)(9). However, the Federal Circuit owes the MSPB's decision considerable deference. The Federal Circuit may set aside the Board's decision only if it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. 7703(c).

The CSRA also provides an alternative avenue for challenging adverse agency actions, including less serious disciplinary actions not subject to MSPB review.[1] An employee who is a member of a union may challenge a disciplinary action by invoking the grievance procedure set forth in the governing collective bargaining agreement. 5 U.S.C. 7121. The grievance may be

[1] Federal employees who receive suspensions of 14 days or less are entitled to basic procedural protections afforded by Section 7513—*i.e.*, notice, an opportunity to respond, representation, and a written decision, 5 U.S.C. 7503(b)—but they are not entitled to appeal adverse decisions to the MSPB. However, employees may challenge such short-term suspensions or other less severe disciplinary actions, pursuant to the grievance procedure established by the pertinent collective bargaining agreement. 5 U.S.C. 7121.

presented by the employee or by a union representative on the employee's behalf. 5 U.S.C. 7121(b)(1)(C)(i)-(ii). Any grievance procedure must provide that either the agency or the union may invoke binding arbitration. 5 U.S.C. 7121(b)(1)(C)(iii). An employee who is the subject of a major adverse action, such as a suspension of greater than 14 days or removal, has the option either to appeal the action to the MSPB or to challenge it pursuant to a negotiated grievance procedure, "but not both." 5 U.S.C. 7121(e)(1).

2. Respondent is a covered federal employee under the CSRA. 5 U.S.C. 7511(a)(1)(B)(ii) and (b)(8). The United States Postal Service (Postal Service) employed her as a letter technician until she was removed in November 1997 for unsatisfactory performance. Pet. App. 1a. The responsibilities of a letter technician resemble those of a regular mail carrier, but are more extensive. Letter technicians must be familiar with five mail routes, rather than one. Letter technicians also must train new carriers, report route problems, and provide assistance on other routes. Before they begin a mail delivery route, letter technicians (like regular carriers) must complete a form stating whether they need additional assistance or overtime to complete the route. The Postal Service holds all carriers to a high standard in accurately completing such forms, requiring letter technicians and carriers to estimate the time required to complete a route within a margin of error of 15 to 20 minutes. *Id.* at 15a-16a.

Respondent was disciplined on three separate occasions between May 1997 and August 1997. On May 13, 1997, respondent received a letter of warning for insubordination after she left work for a doctor's appointment without first putting her day's mail in order. Pet. App. 2a, 36a. Less than a month later, on June 7, 1997,

respondent received a seven-day suspension for delaying the mail and failing to follow instructions. *Id.* at 2a. Two months later, on August 7, 1997, respondent received a 14-day suspension for delaying the mail, claiming unauthorized overtime, failing to follow instructions, and performing her duties in an unsatisfactory manner. *Ibid.* In providing notice of the charge, respondent's supervisor recounted that respondent had "made 1.24 units of unauthorized overtime" on July 18, 1997, and another ".62 units of unauthorized overtime" the following day, and that on July 25 and 26, respondent had delayed her "street time for the purpose of making [unauthorized] overtime." J.A. 38-39. The union representing respondent filed grievances challenging each of those disciplinary actions pursuant to the procedure established by the pertinent collective bargaining agreement. Pet. App. 5a.

On September 13, 1997, after serving her 14-day suspension, respondent requested 3.5 hours of overtime (or assistance from another carrier) to prepare and deliver the mail on her route. Pet. App. 14a. That request "seemed like a gross overestimate" to respondent's supervisor. *Id.* at 17a. The supervisor later testified that respondent had "a low volume of mail" on the day in question; that he could not recall another request for so much overtime during a non-holiday period; and that any request for more than two hours of overtime "sends up a red flag." *Ibid.* The supervisor reassigned some of respondent's mail to other letter carriers and accompanied respondent on her route. *Id.* at 17a-18a. The supervisor observed no unusual conditions on the route, and respondent did not appear to suffer any physical impairment. *Id.* at 18a-19a. On the basis of his observations and the amount of time actually taken by respondent and the other letter carri-

ers, the supervisor charged respondent with overestimating her time by 1.5 hours, far in excess of the 15-to-20-minute margin of error allowed for letter carriers. *Id.* at 15a, 29a.

On September 18, 1997, the supervisor gave respondent written notice that he proposed removing her for unsatisfactory performance. J.A. 31-33. In the notice of proposed removal, the supervisor focused on respondent's September 1997 overtime request, but also stated that he had considered respondent's prior disciplinary record. J.A. 32. Respondent replied to the letter through an attorney and met with a senior personnel officer. On November 17, 1997, the officer issued a removal decision, concluding that respondent's "removal will promote the efficiency of the Postal Service." J.A. 28. In so finding, the personnel officer explained that he could not credit respondent's explanation for her September 1997 overtime request. J.A. 25-28. The personnel officer also pointed to respondent's prior disciplinary record with respect to "similar conduct." J.A. 28. Respondent was dismissed from the Postal Service effective November 26, 1997.

3. Respondent appealed the Postal Service's decision to the MSPB. 5 U.S.C. 7701(a). She argued that, among other things, her removal was motivated by discrimination upon the basis of her race, sex, age, and disabled status, and constituted retaliation for her filing of 32 discrimination complaints with the agency's Equal Employment Opportunity (EEO) office. After two days of hearings, an administrative judge of the MSPB affirmed the Postal Service's decision to remove respondent, finding that "[respondent]'s removal promotes the efficiency of the [civil] service." Pet. App. 40a. The administrative judge upheld the Postal Service's finding that respondent failed to perform her

duties in a satisfactory manner, *id.* at 14a-30a, and rejected respondent's affirmative defenses of discrimination and retaliation, *id.* at 30a-35a, finding "no evidence" that the Postal Service had acted against respondent on any improper basis. *Id.* at 30a, 32a, 35a.

The administrative judge also upheld the penalty of removal. Pet. App. 36a. The administrative judge recognized that, in deciding to remove respondent, the Postal Service had relied upon the nature of the charge, "the fact that there was no room for [respondent's overestimate] to have been a mistake," and respondent's history of similar offenses. *Ibid.* Because the prior disciplinary actions against respondent were in writing, a matter of record, and subject to grievance, the administrative judge limited review of those earlier actions to determining whether they were clearly erroneous. *Id.* at 37a (citing *Bolling* v. *Department of the Air Force*, 8 M.S.P.B. 658, 659-661 (1981)). Respondent did not argue in support of her appeal that the prior actions against her were improper. Nevertheless, the administrative judge reviewed those actions and found that they were not clearly erroneous, and therefore concluded "that the agency properly considered [respondent]'s prior disciplinary actions." *Ibid.*

The administrative judge further found that respondent's removal was "within the bounds of reasonableness." Pet. App. 39a. The administrative judge explained that, "[a]t first blush, a removal for one instance of failure to perform duties satisfactorily may appear unreasonable." *Id.* at 37a. But, in light of the fact that "[respondent]'s prior disciplinary actions also involved unauthorized overtime, that one instance takes on additional significance and tends to reveal a pattern of conduct by [respondent] to disregard the agency's and her supervisor's expectations of her performance and

conduct." *Id.* at 37a-38a. The administrative judge also found that respondent's latest "overestimate" of her route time was "intentional," *id.* at 38a, and that respondent's own MSPB testimony indicated that she still "refuses to accept the instructions" of her supervisors and, thus, "has little potential for rehabilitation," *id.* at 39a.

Respondent petitioned the full Board for review of the administrative judge's decision. 5 C.F.R. 1201.114. While that petition was before the MSPB, an arbitrator sided with respondent in resolving the grievance filed in response to the first disciplinary action—the May 1997 letter of warning for insubordination, which did not involve an overtime estimate—and ordered that the warning be expunged from respondent's record. Pet. App. 5a; see J.A. 3-16. Respondent did not advise the MSPB of that ruling. The Board denied respondent's petition for review on October 20, 1999, concluding that respondent had not provided any "new, previously unavailable, evidence," and that "the administrative judge made no error in law or regulation that affects the outcome." Pet. App. 9a-10a. Although the MSPB's rules permit the Board to reopen a decision for reconsideration in light of new evidence or any other consideration, 5 C.F.R. 1201.118, respondent never moved to reopen the MSPB's decision.

4. Respondent petitioned for review of the MSPB's decision in the Federal Circuit, 5 U.S.C. 7703(a), and that court affirmed in part, vacated in part, and remanded for further proceedings. Pet. App. 1a-8a. Deciding the case without argument, the court affirmed the MSPB's determination that respondent failed to perform her duties in a satisfactory manner, as well as the MSPB's rejection of respondent's discrimination and retaliation claims. *Id.* at 4a-5a; see *id.* at 5a ("[N]o

evidence was introduced that would show that discrimination or retaliation played any role in the evaluation of [respondent's] performance or penalty."). Nonetheless, the court vacated the MSPB's approval of the removal penalty on the ground that the MSPB "erred when it rested its analysis of the reasonableness of the penalty upon her three prior disciplinary actions, at least some of which were then the subject of grievance proceedings." *Id.* at 5a.

Although petitioner never brought the arbitrator's decision to the MSPB's attention, the court of appeals took "judicial notice" that an arbitrator had overturned the Postal Service's May 1997 letter of warning to respondent, and that other grievances to respondent's disciplinary record remained pending. Pet. App. 5a-6a. More broadly, the court of appeals "h[e]ld that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits." *Id.* at 7a. "To conclude otherwise," the court reasoned, "would risk harming the legitimacy of the reasonable penalty analysis, by allowing the use of unreliable evidence (the ongoing prior disciplinary actions) to support an agency action." *Ibid.* Thus, because the MSPB relied upon "prior actions that were the subject of ongoing grievance proceedings" in concluding that respondent's removal was reasonable, the court concluded that "the Board abused its discretion," and vacated its decision. *Ibid.* The court remanded to the MSPB for a determination whether the case should be sent back to the Postal Service for it "to select a penalty in light of the precise status of [respondent]'s prior disciplinary record," or whether the MSPB itself should set a new penalty. *Id.* at 7a-8a.

On July 13, 2000, the court of appeals denied the Postal Service's petition for rehearing. Pet. App. 44a.

SUMMARY OF ARGUMENT

The Federal Circuit erred in holding that, in disciplining or removing employees pursuant to the CSRA, federal agencies may not consider prior disciplinary actions that are subject to pending grievances. Both longstanding administrative practice and common sense support the MSPB's rule that agencies may consider an employee's disciplinary record—without regard to pending grievances—in calibrating the discipline for subsequent misconduct. That rule is not arbitrary, capricious, or otherwise contrary to law. 5 U.S.C. 7703(c). Accordingly, it should be given effect.

A. The CSRA overhauled the civil service system with the objective of making the system more efficient and effective. Congress established several merit principles to guide federal personnel matters, including the principles that "inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards." 5 U.S.C. 2301(b)(6). In addition, Congress sought to give federal agencies more leeway in disciplining or removing employees for incompetence, while protecting legitimate employee rights. As part of the overhaul, Congress established the MSPB and vested it with authority to adjudicate challenges to agency action taken pursuant to the CSRA. In performing that role, Congress intended the MSPB to act as a "watch dog" over the merit system in practice. Congress specifically limited the scope of judicial review of MSPB decisions. 5 U.S.C. 7703(c).

B. For nearly two decades, the MSPB has followed the common sense rule that federal agencies may rely

on an employee's disciplinary record in assessing the appropriate discipline for subsequent misconduct, without regard to whether prior disciplinary actions are subject to pending grievances. At the same time, however, the MSPB permits employees to challenge an agency's reliance on such prior actions and to attack the prior actions collaterally under a framework that specifically takes into account the procedural protections that the employee received in the prior action. *Bolling* v. *Department of the Air Force*, 8 M.S.P.B. 658 (1981). In addition, if a prior action is set aside *after* the MSPB has affirmed an agency decision relying upon that action, the Board can reopen its decision and reconsider whether the agency decision remains appropriate. 5 C.F.R. 1201.118.

C. The MSPB's longstanding procedure "promote[s] the efficiency of the service." 5 U.S.C. 7513(a). Experience teaches that recent disciplinary history is highly relevant in assessing an employee's competence for continuing service. That is particularly true where an employee engages in a pattern or practice of misconduct that, when considered as a whole, warrants more serious action than might be appropriate in response to a single infraction standing alone. Allowing federal agencies to consider an employee's disciplinary record—without regard to pending grievances—also promotes the merit system principles. 5 U.S.C. 2301. Indeed, considering an employee's prior record is necessary to ensure that "inadequate performance [is] corrected" and to separate employees "who cannot or will not improve their performance." 5 U.S.C. 2301(b)(6).

D. In overturning the MSPB's longstanding rule, the Federal Circuit fundamentally misconceived the limited scope of its review under the CSRA and improperly

substituted its policy judgment for that of the Board. The court of appeals' review is limited to determining whether the MSPB's rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 7703(c)(1). Nothing in the CSRA *prevents* an agency from considering prior disciplinary actions in deciding what discipline is appropriate, even when the prior actions remain subject to grievances. And, in fact, foreclosing consideration of an employee's recent disciplinary record would disserve the objectives of the Act, without advancing legitimate employee rights.

Although the Federal Circuit did not "doubt" (Pet. App. 6a) the importance of considering an employee's prior disciplinary record, the court's rule makes meaningful consideration of an employee's prior record difficult, if not impossible. Because grievance proceedings typically take several months or years to complete, the court's rule would prevent federal agencies from taking into account substantial aspects of an employee's disciplinary record, and indeed, the most recent and therefore most relevant aspects of that record. That, in turn, would effectively prevent an agency from employing graduated disciplinary measures against employees "who cannot or will not improve their performance." 5 U.S.C. 2301(b)(6). The Federal Circuit precluded reliance on prior actions subject to grievances without applying appropriate deference to either the MSPB or the employing agency, both of which favored consideration of the employee's full record.

The Federal Circuit's rule creates counterproductive incentives for employees to abuse grievance procedures. Because the rule immunizes employees from cumulative discipline for as long as prior disciplinary actions remain subject to pending grievances, the rule

provides employees with an incentive to challenge practically any disciplinary action, even minor ones, and to prolong such proceedings for as long as possible. Such challenges not only provide no basis for disregarding the challenged disciplinary action, but also impose an added burden on the administrative and judicial review process established by the CSRA. That added burden, in turn, could interfere with the rights of employees who have been wrongfully aggrieved by adverse agency action, but find themselves caught in a backlog of cases created by strategic grievances or appeals.

Nor is the Federal Circuit's rule compelled by any principle of due process. Aggrieved employees enjoy more than ample process in challenging an agency's reliance on prior disciplinary actions that remain subject to pending grievances. The employee can challenge the agency's reliance on the prior disciplinary actions consistent with the *Bolling* framework, which allows for some review of *all* prior actions on which the agency relied and for de novo review of any prior actions that were not accompanied by procedural protections. Moreover, if a prior action is ultimately overturned or modified, the employee may invoke the Board's reopening procedure, under which the Board can reconsider its decision at any time in light of any later development. 5 C.F.R. 1201.118.

The Federal Circuit erroneously held that discipline of a federal employee may not be based on prior disciplinary actions that are subject to pending grievance. Its judgment vacating the decision of the MSPB in this case should be reversed and the case remanded for further proceedings.

ARGUMENT

IN DISCIPLINING OR REMOVING A FEDERAL EMPLOYEE FOR MISCONDUCT PURSUANT TO THE CIVIL SERVICE REFORM ACT OF 1978, FEDERAL AGENCIES MAY TAKE ACCOUNT OF PRIOR DISCIPLINARY ACTIONS THAT ARE SUBJECT TO PENDING GRIEVANCE PROCEEDINGS

With nearly three million civilian employees, United States Office of Personnel Management, *The Fact Book: Federal Civilian Workforce Statistics* 8 (2000), the federal government is the Nation's largest employer. Federal agencies inevitably must deal with instances of employee misconduct and unsatisfactory performance. Like their private-sector counterparts, federal employers seek to calibrate disciplinary action to the specific circumstances presented by an employee's record, including not only the circumstances surrounding the current infraction but also any relevant prior disciplinary actions against the employee. Like private-sector employers, federal agencies consider employees' disciplinary records as a matter of common sense. In addition, federal agencies are guided by the statutory merit principle that employees "who cannot or will not improve their performance" should be "separated." 5 U.S.C. 2301(b)(6). A recidivist employee who has repeatedly engaged in similar misconduct has demonstrated that she "cannot or will not improve" her performance. As the court of appeals recognized below, "[t]here is no doubt that prior disciplinary actions are an important factor when considering whether a particular penalty is reasonable under given circumstances." Pet. App. 6a (citing cases). We do not understand respondent to quarrel with that common sense proposition.

The question presented in this case is whether federal employers may take account of prior disciplinary actions that are subject to pending grievances. As we explain below, the longstanding rule followed by federal employers and the MSPB is that such prior actions may be considered in assessing the appropriate discipline for repeated misconduct. The Federal Circuit held that the MSPB erred when—consistent with that settled rule—the Board relied upon respondent's prior disciplinary actions in affirming the Postal Service's decision to remove respondent, when those actions remained subject to pending grievances. Pet. App. 2a, 8a. That decision denies federal employers the opportunity to consider any prior disciplinary action subject to a grievance, no matter how relevant to the present personnel action. The Federal Circuit did not identify any authority that compelled that result. As we explain below, its decision defies common sense, undermines the efficiency of the federal service, and should not stand.

A. The CSRA Vested The MSPB With Authority To Adjudicate Disputes Arising Under The Merit System

1. Before the enactment of the CSRA, there was widespread belief that the "merit principle" had suffered under the civil service system. S. Rep. No. 969, *supra*, at 3. As President Carter stated in his message transmitting proposed legislation to Congress, while the prior system had succeeded in developing "a Federal work force which is basically honest, competent, and dedicated," "the system has serious defects," including that it "neglects merit," "tolerates poor performance," and "permits abuse of legitimate employee rights." H.R. Rep. No. 1396, 95th Cong., 2d Sess. 2 (1978) (quoting transmittal message). As a result of

those defects, morale suffered among federal employers and employees, and the public perceived that the civil service system had "too often become the refuge of the incompetent employee." S. Rep. No. 969, *supra*, at 3.

The CSRA overhauled that system with the objective of making the federal government more "efficient and effective" by "[a]llow[ing] civil servants to be able to be hired and fired more easily, but for the right reasons." S. Rep. No. 969, *supra*, at 4. To that end, Congress adopted several "merit system principles," and directed that "[f]ederal personnel management should be implemented consistent with th[ose] * * * principles." 5 U.S.C. 2301(b). Those principles include the following:

> (4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.
>
> (5) The Federal work force should be used efficiently and effectively.
>
> (6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

5 U.S.C. 2301.

2. The MSPB was an important component of the civil service scheme established by the CSRA. Before the CSRA, the Civil Service Commission had the responsibility for both personnel management and overseeing the merit system, a dual role that many concluded could not be well-served by one agency. S. Rep. No. 969, *supra*, at 5, 24. The CSRA abolished the Commission and replaced it with two agencies: the

Office of Personnel Management (OPM) and the MSPB. Congress gave OPM the central responsibility for "personnel management and agency advisory functions," *id.* at 5; see 5 U.S.C. 1101-1105, and Congress "charged" the MSPB "with insuring adherence to merit system principles and laws," S. Rep. No. 969, *supra*, at 5; see 5 U.S.C. 1204. See also S. Rep. No. 969, *supra*, at 6 ("The [MSPB] * * * is made responsible for safeguarding the effective operation of the merit principles in practice."); *id.* at 24 ("The [MSPB] is charged with protecting the merit system."); H.R. Rep. No. 1396, *supra*, at 5 (The MSPB was established "to serve as a 'watch dog' over the integrity of the merit system.").

To enable the MSPB to fulfill that "watch dog" role, Congress gave the Board "primacy" over the "administrative resolution of disputes over adverse personnel action," *United States* v. *Fausto*, 484 U.S. 439, 449 (1988), and vested it with broad adjudicatory powers. See 5 U.S.C. 1204(a), 4303(e), 7513(d), 7701(a). As this Court has recognized, that scheme "enables the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action." *Fausto*, 484 U.S. at 449.

Rather than relying simply on judicially recognized principles of deference,[2] Congress explicitly limited the

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[2] The Federal Circuit, which has exclusive jurisdiction to review the decisions of the MSPB, has recognized that settled principles governing the deference owed to the policies or rules of federal agencies charged with administering statutory programs apply to the MSPB. See, *e.g.*, *Lovshin* v. *Department of Navy*, 767 F.2d 826, 840 (Fed. Cir. 1985) ("[D]eference is appropriately given to the MSPB's interpretation of the CSRA. Congress has vested the MSPB with substantial responsibility for enforcing the Act."), cert. denied, 475 U.S. 1111 (1986), quoted in *Lachance* v. *Devall*, 178 F.3d 1246, 1254 (Fed. Cir. 1999).

scope of judicial review of MSPB decisions. The Federal Circuit may set aside the Board's decision only if it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. 7703(c). As Congress appreciated when it enacted the CSRA, that scope of review tracks "the traditionally limited appellate review the courts provide agency actions in other areas." S. Rep. No. 969, *supra*, at 52. See, *e.g.*, 5 U.S.C. 706; see also *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.").

B. For At Least 19 Years, The MSPB Has Ruled That Federal Agencies May Consider Prior Disciplinary Actions, Even When Such Actions Are Subject To Pending Grievances

In the more than two decades since its creation, the MSPB has developed a significant body of case law in adjudicating disputes under the CSRA. This case involves a challenge to the well-settled MSPB rule that, in disciplining or removing employees pursuant to the CSRA, federal employers may take account of prior disciplinary actions against an employee, even when such actions are subject to pending grievance proceedings.

1. Federal employers and the MSPB have long recognized that an employee's past disciplinary record is an important ingredient in considering the appropriate sanction for subsequent misconduct. In *Douglas* v. *Veterans Administration*, 5 M.S.P.B. 313 (1981), the

MSPB recognized that Congress authorized the Board to review the reasonableness of discipline imposed by agencies and mitigate actions that are "clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable." Drawing upon a "well developed body of regulatory and case law," the MSPB identified a non-exhaustive list of factors that are "generally recognized as relevant" to the penalty determination, including the "employee's past disciplinary record." *Id.* at 330-332. Both before and after *Douglas*, numerous federal agencies have enacted rules instructing supervisors to consider an employee's prior disciplinary record in assessing subsequent discipline.[3]

Shortly after it decided *Douglas*, the MSPB considered whether an employee may collaterally attack in an MSPB appeal the prior disciplinary record upon which an agency's subsequent penalty is based. *Bolling* v. *Department of the Air Force*, 8 M.S.P.B. 658 (1981). In answering that question, the MSPB looked to the practice followed by the Civil Service Commission. As

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[3] See, *e.g.*, Dep't of Defense Admin. Instruction No. 8, § 6.1.1.1 (Aug. 17, 1981) (In disciplining employee, deciding official should consider, *inter alia*, " * * * previous offenses."); Dep't of Army Reg. No. 690-700, ch. 751, paras. 1-4 ("prior offense *of any type* may form the basis for proposing an enhanced penalty"); Dep't of Air Force Instruction No. 36-704, § F(34) (July 22, 1994) ("Supervisors and managers apply increasingly more severe penalties as the employee continues to breach the employee-employer relationship."); Dep't of Navy, Office of Civilian Personnel Management Instruction No. 12752.1, App. B(2)(b) (Nov. 16, 1989) ("Any past offense may form the basis for proposing a remedy from the next higher range of remedies for a subsequent offense. The offenses need not be identical or similar."). At the same time, however, agency rules or collective bargaining agreements often provide that prior disciplinary actions shall not be considered after a period of reckoning of two or three years. See p. 33, *infra*.

it explained, the Federal Personnel Manual allowed for relatively deferential review of past disciplinary actions when certain procedural safeguards were followed in assessing prior discipline. See *id.* at 658-659 (quoting Federal Personnel Manual, Supp. 752-1, S4-3b(1) ("Reference to past disciplinary record")).

Adopting a similar approach, the MSPB in *Bolling* held that, when the Board reviews a disciplinary action based upon the employee's prior disciplinary record, the prior record is open to review, but the scope of review varies with the procedural protections enjoyed by the employee in the prior disciplinary proceeding. 8 M.S.P.B. at 658-659. In determining the proper scope of review, the MSPB looks to whether the employee received notice of the prior action in writing and had an opportunity to challenge it, and whether the action is a matter of record. *Id.* at 659, 660-661. If one or more of those procedural protections was not observed, the MSPB undertakes "a full, *de novo* review" of the earlier disciplinary action as part of its review of the later disciplinary decision. *Id.* at 659. When all of those procedural protections were afforded, by contrast, the MSPB will credit the agency's reliance on the prior action unless the employee can show, based upon the existing record from the earlier proceeding, that the earlier action was "clearly erroneous." *Id.* at 660-661.

As the MSPB reasoned in *Bolling*, the foregoing analysis "strikes a reasonable and workable balance between the competing interests involved": "an appellant is not allowed to relitigate issues that either were, or could have been, thoroughly litigated previously," but "agencies are not able to utilize clearly erroneous prior actions as aggravating factors so as to enhance the penalties imposed." 8 M.S.P.B. at 660. In the nearly two decades since *Bolling*, the MSPB has

applied that framework in scores of cases—including the instant one, Pet. App. 36a-37a—to decide whether an agency properly relied upon an employee's prior disciplinary record in taking subsequent disciplinary action against that employee. See, *e.g.*, *Holland* v. *Department of Defense*, 83 M.S.P.R. 317, 320-322 (1999); *Crawford* v. *Department of Justice*, 45 M.S.P.R. 234, 236 n.1 (1990) (citing cases).

2. On the heels of *Douglas* and *Bolling*, the MSPB confronted the question presented here: whether, in disciplining or removing an employee, an agency may rely upon prior disciplinary actions that are "the subject of pending grievance or arbitration procedures." *Carr* v. *Department of the Air Force*, 9 M.S.P.B. 714 (1982). The Board answered that question in the affirmative, holding that consideration of a prior action that is subject to a pending grievance is proper under *Douglas*, but that an employee may challenge that action consistent with the framework established by *Bolling*. *Id*. at 715.[4] In the 19 years

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[4] The appellant in *Carr* argued that 5 U.S.C. 7121(e) "divests the Board of appellate jurisdiction over matters grieved under a negotiated grievance procedure." 9 M.S.P.B. at 714. As the Board explained, however, Section 7121(e) only divests the MSPB of jurisdiction over disciplinary actions that are covered by 5 U.S.C. 4303 and 7512 (and thus appealable to the MSPB), and that the employee elects to challenge pursuant to a grievance procedure rather than an MSPB appeal. 9 M.S.P.B. at 714. See 5 U.S.C. 7121(e)(1) (employee may elect to challenge such an action pursuant to "the appellate procedures of [5 U.S.C. 7701] or under the negotiated grievance procedure, but not both"). Thus, where, as in *Carr*, the prior disciplinary action (a one-day suspension) that is the subject of a pending grievance is not appealable to the MSPB in the first place, the MSPB held that nothing in Section 7121(e)(1) prevents the Board from considering the action in reviewing a

since *Carr* was decided, the MSPB repeatedly has affirmed the principle that "an agency may rely on a record of past discipline even where a prior disciplinary action is the subject of a pending grievance." *Freeman* v. *Department of Transp.*, 20 M.S.P.R. 290, 292 (1984).[5]

The MSPB also provides employees with an additional protection. "If the ultimate result of the grievance process is to reverse [an aspect of] the appellant's prior record, he may submit a request that the Board reopen its decision to consider the effect of that determination on the removal penalty." *Morgan* v. *Department of Defense*, 63 M.S.P.R. 58, 62 n.3 (1994). See 5 U.S.C. 7701(e)(1)(B); 5 C.F.R. 1201.117. The Board is receptive to such requests. See, *e.g.*, *Payne* v. *United States Postal Serv.*, 69 M.S.P.R. 503, 508 (1996) (granting motion to reopen MSPB decision and reversing agency's decision to remove employee based on court of appeals decision reversing the criminal conviction on which the agency had relied in removing employee); cf. *Lopez* v. *Department of Justice*, 55 M.S.P.R. 644, 646 (1992) (cancellation of a suspension on which the agency had relied in imposing discipline provided good cause

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subsequent disciplinary action (the employee's removal) that was properly appealed to the MSPB. 5 U.S.C. 7513(d).

[5] Accord, *e.g.*, *Morgan* v. *Department of Defense*, 63 M.S.P.R. 58, 61 (1994); *Taylor* v. *Department of Justice*, 60 M.S.P.R. 686, 689 (1994); *Wilson* v. *Department of Justice*, 58 M.S.P.R. 96, 99 n.2 (1993); *Harrison* v. *Department of the Treasury*, 42 M.S.P.R. 614, 622 (1989); *Delgado* v. *Department of the Air Force*, 36 M.S.P.R. 685, 689 (1988); *Ballew* v. *Department of Army*, 36 M.S.P.R. 400, 403 (1988); *Rewald* v. *United States Postal Serv.*, 34 M.S.P.R. 13, 16 (1987); *Hubbard* v. *United States Postal Serv.*, 32 M.S.P.R. 505, 508 (1987); *Boyd* v. *Veterans Admin.*, 20 M.S.P.R. 672, 675 n.2 (1984); *Ramseur* v. *Department of the Navy*, 16 M.S.P.R. 104, 106 (1983).

for filing untimely MSPB appeal and warranted reversal of the subsequent penalty); *Jones* v. *Department of Air Force*, 24 M.S.P.R. 429, 431 (1984) (removal found to be unreasonable when a prior disciplinary action on which the agency had relied in removing employee "was reversed by grievance").

3. The MSPB followed the longstanding administrative practice developed in *Douglas*, *Bolling*, and *Carr* in this case. First, the administrative judge found "that the agency conscientiously considered the *Douglas* factors," and properly considered "[respondent]'s recent, prior disciplinary actions." Pet. App. 36a. Second, the administrative judge concluded that, "[b]ecause those prior disciplinary actions were in writing, made a matter of record, and the [respondent] had the opportunity to grieve them, the Board's review of a prior disciplinary action is limited to determining whether that action is clearly erroneous." *Id.* at 37a (citing *Bolling*, 8 M.S.P.B. at 659-660). Although respondent (who was represented by counsel before the MSPB) was notified by the prehearing order "that she could present argument concerning whether the prior actions were clearly erroneous," she declined to present such an argument. *Ibid.* Nonetheless, the administrative judge "reviewed the record of the prior disciplinary actions," and concluded that there was no clear error. *Ibid.*

The arbitrator's decision vacating the first disciplinary action—the May 1997 letter of warning for insubordination—was issued while respondent's case was still pending before the full MSPB. Respondent, however, did not avail herself of her right to supplement the record and bring that new evidence to the Board's attention. 5 C.F.R. 1201.115(d). Nor, after the MSPB had issued its final decision in this case, did

respondent avail herself of the procedure available under *Morgan* and ask the Board to reopen its decision and reconsider it in light of the intervening arbitrator's decision. 5 C.F.R. 1201.117.

C. The MSPB's Rule Allowing The Consideration Of Prior Disciplinary Actions That Are Subject To Pending Grievances Promotes Government Efficiency, While Protecting Legitimate Employee Rights

The MSPB's longstanding rule permitting federal agencies to consider prior disciplinary actions that are subject to pending grievances promotes government efficiency and the merit principles, while providing aggrieved employees with more than adequate process to challenge adverse agency actions based on such actions.

1. The MSPB's rule is "faithful to the central congressional purposes underlying the enactment of the CSRA," *Cornelius* v. *Nutt*, 472 U.S. 648, 662 (1985) (internal quotation marks omitted), including the goal of "promot[ing] the efficiency of the service," 5 U.S.C. 7513(a). As discussed pp. 2, 15-16, *supra*, Congress enacted the CSRA against the backdrop of widespread concern that the civil service system had "too often become the refuge of the incompetent employee." S. Rep. No. 969, *supra*, at 3. To address that concern, Congress gave "agencies greater ability to remove or discipline expeditiously employees who engage in misconduct," and thus promote the efficiency of the service. *Nutt*, 472 U.S. at 662-663. Allowing agencies to consider an employee's prior disciplinary record in calibrating the penalty for subsequent misconduct—even when such prior actions are subject to pending grievances or other proceedings—directly promotes that objective.

An employee's recent disciplinary record is one of the most relevant factors that employers (public or private) routinely consider in deciding what discipline is appropriate. That record may establish a pattern or practice of misconduct on the part of an employee necessitating more serious disciplinary measures than might be warranted by the latest infraction alone.[6] Conversely, even when a more severe discipline might be warranted in response to a single infraction, an employer might decide to impose a lesser penalty and wait and see if the misconduct ceases. That approach—commonly known in labor relations as "progressive discipline"—benefits employees by providing them with notice of workplace deficiencies and an opportunity to correct them, and benefits employers by enabling them to target employees who have demonstrated an inability or unwillingness to improve their performance. Cf. *Norfolk Shipbuilding & Drydock Corp.* v. *Local No. 684*, 671 F.2d 797, 799 (4th Cir. 1982).[7] On the other

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[6] Severe discipline or removal may be particularly warranted when an employee engages in a pattern or practice of sexual harassment or similar wrongdoing. In many cases, no single instance of misconduct would justify a lengthy suspension or removal, even though the totality of misconduct often warrants such action. Cf. *Meritor Sav. Bank* v. *Vinson*, 477 U.S. 57, 67 (1986); *King* v. *Hillen*, 21 F.3d 1572, 1580-1581 (Fed. Cir. 1994).

[7] It is commonplace for private-sector employers to consider an employee's prior disciplinary record in responding to continuing misconduct and engage in a practice of progressive discipline. See, *e.g.*, Pamela Fagan, *Do You Investigate Employee Complaints the Right Way?*, 77 Human Resources Focus 1011 (2000) (noting that employers should consider "prior misconduct" and "prior discipline" in deciding what level of discipline to impose for subsequent misconduct); Paul Falcone, *A Blueprint for Progressive Discipline and Terminations*, 77 Human Resources Focus 35 (2000) (advising supervisors to keep records of "bad * * * behavior" and not to

hand, if an agency is told that it cannot rely on the employee's prior record in disciplining her for subsequent misconduct, then the agency might feel compelled to impose the most serious sanction available in the first instance.

Consideration of an employee's prior disciplinary record not only makes sense as a matter of basic human resources management, but also comports with the text of the CSRA. As discussed p. 16, *supra*, the CSRA established merit system principles to govern federal personnel management, which include the principle that "inadequate [employee] performance should be corrected," and that "employees should be separated who cannot or will not improve their performance to meet required standards." 5 U.S.C. 2301(b)(6). Permitting federal agencies to take graduated or accelerated

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remove disciplinary information from an employee's file because such information is often considered in determining the level of discipline for future misconduct). Studies confirm the sensible practice that supervisors are "predisposed to harsher disciplinary responses toward employees with a record of frequent absence." Patricia A. Simpson & Joseph J. Martocchio, *The Influence of Work History Factors on Arbitration Outcomes*, 50 Indus. & Lab. Rel. Rev. 252, 255 (1997) (citing Joseph J. Martocchio & Timothy A. Judge, *When We Don't See Eye to Eye: Discrepancies Between Supervisors and Subordinates in Absence Disciplinary Decisions*, 21 J. Mgmt. 251-278 (1995)). Likewise, prior disciplinary action is often considered in reviewing employment decisions. It is taken into account in internal grievance hearings, and has proved to be a significant factor in such proceedings. See Simpson & Martocchio, *supra*, at 255 ("[T]he number of times an employee was disciplined in the two years prior to the filing of a grievance has been shown to be negatively correlated with a favorable resolution of the grievance on the employee's behalf at higher steps of the internal grievance apparatus.") (citing Brian S. Klaas, *Managerial Decision Making About Employee Grievances: The Impact of the Grievant's Work History*, 42 Personnel Psych. 52, 52-68 (1989)).

disciplinary measures against employees on the basis of their prior disciplinary actions—even if such actions are subject to pending grievances—protects those principles. It gives employees a chance to correct deficiencies or mistakes and allows employers to separate employees "who cannot or will not improve their performance to meet required standards."

2. At the same time, the MSPB's rule governing the consideration of prior disciplinary actions provides employees with ample procedural protections and accords with the CSRA's objective of protecting legitimate employee rights. As this Court has recognized, the CSRA's notice and hearing requirements establish an "elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed." *Bush* v. *Lucas*, 462 U.S. 367, 385 (1983). See *Lachance* v. *Erickson*, 522 U.S. 262, 265-266 (1998) (discussing the "carefully delineated [procedural] rights" established by the CSRA); see also 5 U.S.C. 7503, 7513 (entitling covered employees to notice, opportunity to be heard, an attorney, and a written decision prior to any suspension, removal, or other serious adverse action); 5 U.S.C. 7513(d), 7701 (providing for administrative and judicial review of major adverse actions).[8]

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[8] The negotiated grievance provision (5 U.S.C. 7121) provides covered employees with an additional process to challenge adverse actions under the CSRA, even with respect to minor disciplinary actions that do not trigger the procedural protections set forth in 5 U.S.C. 7503 and 7513. Cf. *Winston* v. *United States Postal Serv.*, 585 F.2d 198, 210 (7th Cir. 1978) ("[W]e hold that the grievance procedures adopted for nonpreference-eligible postal employees by [Postal Service] and the Union do not violate the due process clause of the Fifth Amendment.").

The *Bolling* rule governing the consideration of prior disciplinary actions ensures that the employee does not lose the protections that accompany adverse action by agency reliance on prior minor discipline unaccompanied by such protections. As discussed above, the *Bolling* framework allows collateral challenges to prior discipline. That fully and fairly protects employees' interests. Furthermore, if a prior disciplinary action is set aside as the result of a successful grievance after an initial decision has been issued by the MSPB, the MSPB's rules permit the employee to petition the full Board to review the initial decision in light of the new evidence. 5 C.F.R. 1201.115(d)(1); cf. *Morgan*, 63 M.S.P.R. at 62 n.3. And the MSPB may reopen any final decision—"at any time"—in the event that the employee's prior disciplinary record has been revised as the result of a successful grievance. 5 C.F.R. 1201.118. The ability to reopen MSPB decisions might well prove sufficient standing alone to protect employees, but when coupled with the *Bolling* rule it provides employees with more than adequate procedural safeguards.

3. The MSPB's longstanding rule concerning disciplinary actions that are subject to pending grievances embodies the Board's judgment that allowing federal agencies to consider such prior actions in disciplining or removing employees promotes the objectives of the CSRA and is otherwise in accordance with law. Cf. *Atchison, T. & S.F. R.R.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973) (plurality opinion) ("A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress."). OPM, the agency charged with overseeing federal personnel management matters, has not challenged MSPB's decisions implementing that rule. See 5 U.S.C. 7703(d) (OPM

may seek judicial review of any MSPB decision that, in OPM's "discretion," erroneously "interpret[s] a civil service law, rule, or regulation affecting personnel management"). Respondent accordingly bears an extremely heavy burden in establishing that a court should substitute its judgment for that of the agency.

D. The Court Of Appeals Erred In Holding That The MSPB Abused Its Discretion By Evaluating Respondent's Removal In Accordance With The Longstanding Administrative Rule

With scarcely any discussion of the foregoing considerations, and without even requesting oral argument, the Federal Circuit in this case overturned the MSPB's longstanding treatment of prior disciplinary actions that are subject to pending grievances, and effectively put an end to a time-honored federal personnel management practice. As we explain below, the Federal Circuit's ruling is without precedent or principle and should be set aside.

1. To begin with, the Federal Circuit fundamentally misconceived its limited scope of review under the CSRA. The court of appeals may only substitute its judgment for that of the MSPB when the agency's position is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 7703(c)(1).[9] As this Court has recognized in the APA context, "[t]he scope of review under the 'arbitrary and

[9] The Federal Circuit may also set aside a MSPB decision if it is "obtained without procedures required by law, rule, or regulation having been followed," or "unsupported by substantial evidence." 5 U.S.C. 7703(c). But neither of those provisos is implicated by the question presented in this case and the Federal Circuit specifically grounded its ruling on its conclusion that the MSPB had "abused its discretion." Pet. App. 7a.

capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43. Accord *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 803 (1978). With virtually no explanation for doing so, the court of appeals in this case substituted its judgment for that of the MSPB and numerous federal employers with respect to whether agencies may consider prior disciplinary actions that are subject to pending grievances, and overturned nearly two-decades worth of administrative precedent. That was error.

The Federal Circuit provided no basis to dismiss the longstanding administrative practice as arbitrary and capricious. The court identified no constitutional provision, statute, or regulation that calls into question the *Bolling* regime or the routine practice of federal employers to consider an employee's prior disciplinary record without regard to whether grievances are pending. Instead, the Federal Circuit relied on a flawed syllogism. First, the court stated that there can "be no doubt that a penalty determination cannot be supported by an earlier prior disciplinary action that is subsequently reversed." Pet. App. 6a. Second, the court noted that, if an agency relies on prior disciplinary actions as to which a grievance is pending and the grievance is sustained, "the foundation of" the employer's and the reviewing MSPB's "analysis would be compromised." *Id.* at 7a. From those premises, the court concluded: "Accordingly, we hold that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits. To conclude otherwise would risk harming the legitimacy of the reasonable penalty analysis, by allowing the use of

unreliable evidence (the ongoing prior disciplinary actions) to support an agency action." *Ibid.*

But the Federal Circuit's conclusion does not follow from its premises. The fact that reliance on prior disciplinary actions for which grievances are pending creates a risk that the outcome of the grievances will undermine the decisions of the federal agencies and the MSPB does not justify requiring agencies to *ignore* prior actions entirely during the often lengthy period it takes to process grievances, especially when a mechanism exists to address that risk. The *Bolling* framework greatly minimizes the risk of "compromised" decisions by allowing for a collateral attack on prior decisions. Moreover, the ability to reopen MSPB decisions when the outcome of a grievance undermines an MSPB decision eliminates any unfairness when the possibility that concerned the Federal Circuit in fact comes to pass. Those procedural rules eliminate the potential unfairness that concerned the court below, without precluding the MSPB and every federal employer from reviewing highly relevant evidence.

In the end, the Federal Circuit appeared to prefer a disciplinary scheme that forbids reference to prior discipline subject to grievance, in order to eliminate any possibility that the outcome of a grievance would cast doubt on later discipline. Federal employers and the MSPB traditionally have preferred a different scheme, one in which federal agencies—like private-sector employers—may consider prior discipline subject to grievance, but in which employees are afforded substantial procedural protections to prevent prejudice in the event that a prior action is set aside as the result of a grievance or other proceeding. In our view, MSPB and federal agencies have adopted a far superior policy, but that was not the question before the Federal

Circuit, and it is not the question before this Court. Having failed to identify anything arbitrary and capricious about the longstanding administrative practice, the Federal Circuit simply had no basis to invalidate it.[10]

2. Certainly nothing in the CSRA precludes an agency from considering prior disciplinary actions that are subject to pending grievances in disciplining or removing an employee. To the contrary, requiring agencies to disregard prior disciplinary actions that remain subject to "proceedings challenging their merits" (Pet. App. 7a) would frustrate the statutory goals of promoting efficiency, allowing employees to correct mistakes, and separating employees who cannot or do not meet required standards.

The Federal Circuit itself acknowledged that "[t]here is no doubt that prior disciplinary actions are an important factor when considering whether a particular penalty is reasonable under given circumstances." Pet. App. 6a. Nonetheless, the Federal Circuit's rule precludes agencies from relying on highly relevant evidence of an employee's efficiency and ties the hands of federal agencies in dealing with perhaps the most troublesome class of employees—recidivists. A recidivist employee (or a union) could prevent an employer

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[10] The Federal Circuit's decision had the effect of invalidating not only the longstanding MSPB practice of reviewing disciplinary actions based on prior actions subject to pending grievances, but also the practice of numerous federal employers of looking to an employee's prior record without regard to whether prior discipline is subject to a grievance. Accordingly, the Federal Circuit wiped out the MSPB's administrative regime and the substantive employment polices of numerous federal agencies in one fell swoop, with scarcely any deference at all to the views of MSPB or the employing agencies.

from considering the employee's recent misconduct simply by grieving prior disciplinary actions. Thus, for example, if pending grievances precluded an agency from taking account of an employee's disciplinary record of workplace harassment, then the agency could not sanction a second, third, or tenth incident more severely than the first. Even if part of a pattern of continuing misconduct, the most recent charge would have to be considered in a vacuum as long as the prior acts remained subject to pending grievances. Government efficiency and effectiveness—not to mention the rights of others in the workplace—would suffer enormously under such a regime.

It is no answer to argue that employers can still rely on the aspects of a prior disciplinary record not subject to pending grievances. If agencies cannot consider prior disciplinary actions while a grievance is pending, they may not be able to consider such prior actions at all. Federal personnel regulations and collective bargaining agreements commonly prevent agencies from considering prior disciplinary actions that are more than two or three years old. The Postal Service's collective bargaining agreement provides that "records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years." Agreement Between United States Postal Service and National Ass'n of Letter Carriers, AFL-CIO (1994-1998) art. 16:10. Similarly, Department of Defense Administrative Instruction No. 8 (Aug. 17, 1981) provides for consideration of past suspensions only if they occurred within the last three years, and of past reprimands and admonishments only if they occurred within the last two years. If recent disciplinary actions are excluded

because of pending grievance procedures, and less recent ones are excluded because they are considered stale, the basis for progressive discipline will be eliminated. Moreover, even if the Federal Circuit's rule would allow some window in which past disciplinary actions could be considered, the rule clearly puts the most recent, and therefore most relevant, actions off limits as long as a grievance is pending.

Those problems are particularly acute because the inherent informality of grievance proceedings invites delay. Grievance proceedings initiated under the CSRA —which often include arbitration—are not immune from such delay. Cf. *Clark* v. *Bear Stearns & Co.*, 966 F.2d 1318, 1319 (9th Cir. 1992) ("Arbitration provides a speedy and efficient method for the resolution of disputes. At least that is the theory. In practice, a dispute submitted for arbitration often drones on.") (footnote omitted). In this case, for example, the grievance challenging respondent's May 1997 infraction was not final until July 1999—two years after the infraction. Pet. App. 5a. Respondent's grievances challenging the June 1997 and August 1997 suspensions are still pending after more than three years. Respondent herself acknowledges that "the grievance process no doubt sometimes experiences delay." Br. in Opp. 17. The Federal Circuit rule will only exacerbate matters by giving employees a clear incentive to delay proceedings. Indeed, as far as its effect on future discipline is concerned, a pending grievance is as effective as a successful grievance.[11] As a result, by the time the

[11] Of course, we recognize that the grievance procedure plays a salutary role in allowing employers and employees to resolve legitimate disputes. In pursuing good faith disputes, employees have little incentive to delay and every incentive to obtain a just

grievance is resolved, the prior action may be stale and in some cases no longer subject to consideration under agency rules or agreements.

In the wake of its decision in this case, the Federal Circuit itself has recognized the practical effect of "the rule announced in *Gregory*." *Blank* v. *Department of the Army*, No. 00-3255, 2001 WL 392069, at *5 (Apr. 19, 2001). Relying on the court of appeals' decision in this case, the aggrieved employee in *Blank* argued that the MSPB improperly considered his prior disciplinary record in affirming the agency's decision of removal because prior disciplinary actions against him remained subject to pending EEOC proceedings. The Federal Circuit disagreed. As the court explained, "EEOC appeals often take years to complete." *Ibid.* Thus, "[i]f an agency is unable to consider prior disciplinary actions pending before the EEOC, the agency would be effectively prohibited from timely implementing progressive disciplinary measures." *Ibid.* We agree. However, the same problematic results follow if an agency is unable to consider prior actions that are subject to pending grievances, which—as this case itself illustrates—also can take years to complete.[12]

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result expeditiously. The problem with the Federal Circuit rule is that it creates an incentive for foot dragging in precisely the cases in which the grievance is filed to insulate a disciplinary action from use in subsequent disciplinary actions.

[12] In *Blank*, the Federal Circuit purported to distinguish EEOC proceedings from grievance proceedings on the ground that "an EEOC complaint is not an attack on the validity of the disciplinary action itself." 2001 WL 392069, at *5. But the CSRA explicitly provides that a disciplinary action must be set aside if it is based on a prohibited practice such as discrimination. 5 U.S.C. 7701(c)(2)(B). And, indeed, respondent in this case specifically challenged her removal on the ground that it was motivated by

The incentives created by the Federal Circuit's rule also would undermine the efficiency of the system established by the CSRA for reviewing agency action. Immunizing employees from cumulative discipline based on prior disciplinary actions for as long as such actions remain subject to challenge would encourage recidivist employees (or their unions) to file grievances against virtually *any* disciplinary action, even minor ones, and to prolong such proceedings for as long as possible (or at least until the reckoning period in the agency's rules or a collective bargaining agreement has expired), in order to bar an agency from relying on prior misconduct in dealing with subsequent misconduct. The added burdens imposed on the system by such proceedings could interfere with the legitimate rights of employees who have been wrongfully aggrieved by major adverse agency action by creating a backlog of cases that would hamper their ability to obtain redress.

More fundamentally, the Federal Circuit's rule flouts the presumption of regularity traditionally afforded agency action. The time-honored presumption is that administrative officials perform their duties properly and in good faith. See *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("[I]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties."); *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); accord *United States* v. *Mezzanatto*, 513 U.S. 196, 210 (1995); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 101 (1949); see also *FTC* v. *Invention Submission*

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illegal discrimination. Pet. App. 30a-32a. Moreover, employees can and do present allegations of discrimination in grievance proceedings challenging adverse actions. See 5 U.S.C. 7121(d).

Corp., 965 F.2d 1086, 1091 (D.C. Cir. 1992) ("As we have so often said, 'agencies are entitled to a presumption of administrative regularity and good faith.'"), cert. denied, 507 U.S. 910 (1993); *Hubbard* v. *United States Postal Serv.*, 32 M.S.P.R. 505, 508 (1987) (agency action enjoys "the presumption of honesty and integrity which accompanies administrative adjudicators").

There is no reason to treat differently an agency's decision to take a particular disciplinary action against an employee, especially when that action is preceded by notice and an opportunity to be heard. Cf. *Miguel* v. *Department of the Army*, 727 F.2d 1081, 1083 (Fed. Cir. 1984) ("It is a well-established rule of civil service law that the penalty for employee misconduct is left to the sound discretion of the agency.") (citing cases). Yet the Federal Circuit's rule effectively reverses the presumption of regularity in the case of any prior disciplinary action that is subject to a pending grievance, and requires the MSPB and federal agencies to presume that such an action is "unreliable" (Pet. App. 7a) until the grievance is shown to have failed.

3. Nor is the Federal Circuit's rule compelled by principles of due process. See *Gilbert* v. *Homar*, 520 U.S. 924, 928-929 (1997) (discussing due process requirements applicable to suspension and removal of public employees); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 545-546 (1985). The elaborate procedures established by the CSRA and the MSPB—including the *Bolling* rule and reopening procedure—provide employees more than sufficient process to satisfy any constitutional or statutory command. As explained pp. 2-4, 20-23, *supra*, employees enjoy several different layers of procedural protections that enable them to challenge adverse agency actions under the CSRA. Standing alone, the *Bolling* framework or

reopening mechanism might satisfy any lack-of-sufficient-process objection, but when considered together, they plainly afford aggrieved employees more than adequate process to challenge adverse actions.

Respondent, moreover, is hardly in a position to argue that she is entitled to *more* process, when she has not even fully availed herself of the procedures that are in place. As discussed above, respondent did not bring the arbitrator's decision to the attention of the full Board while her appeal was still pending before it, 5 C.F.R. 1201.115(d)(1), and she has not asked the Board to reopen her case, 5 C.F.R. 1201.118.

4. Because the Federal Circuit erred in holding that "consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits," Pet. App. 7a, the judgment of the court of appeals should be reversed and the case remanded for further proceedings. The Federal Circuit predicated its decision on the conclusion that the Board (and the Postal Service) improperly relied upon respondent's prior disciplinary actions—including both the action set aside by the arbitrator and the actions that remain subject to pending grievances—in determining the reasonableness of respondent's removal, because those actions "were the subject of ongoing grievance proceedings." *Ibid.*; see *id.* at 1a-2a. The Federal Circuit erroneously refused to allow agencies to look to any prior disciplinary action subject to a grievance, but a remand remains necessary to permit the court to consider the effect of the arbitrator's invalidation of one prior action.

In its petition for rehearing in the court of appeals, the Postal Service suggested that the court should "remand this action to the MSPB to determine the issue of the appropriate penalty, with instructions that the

board may not consider the one prior disciplinary action that was overturned by the arbitrator." Gov't C.A. Pet. for Reh'g 20. Alternatively, the court of appeals could also determine that such a remand is unnecessary or inappropriate, and that respondent's proper remedy lies in directly asking the MSPB to reopen the decision in her case. Respondent never placed the arbitrator's decision overturning the first disciplinary action into the MSPB record, even though that decision was issued months before the MSPB issued its final decision. The Federal Circuit took "judicial notice" of the arbitrator's decision, Pet. App. 5a, but the CSRA expressly limits the Federal Circuit's review of MSPB decisions to "the record." 5 U.S.C. 7703(c). Cf. *Fisher* v. *INS*, 79 F.3d 955, 963 (9th Cir. 1996) (en banc) (where petitioner could have put evidence into administrative record but did not, court of appeals could not take judicial notice of evidence because its review was limited by statute to the administrative record). Accordingly, the proper course may be for the Federal Circuit to resolve this appeal against respondent and for respondent to file a motion to reopen directly with the MSPB.[13] In either

[13] Moreover, even considering the arbitrator's decision expunging the *first* disciplinary action, respondent's removal may still be supported by substantial evidence. 5 U.S.C. 7703(c)(3). As discussed, in upholding the Postal Service's decision to remove respondent, the MSPB did not place any particular reliance on the May 1997 letter of warning expunged by the arbitrator. Instead, the Board emphasized that respondent's prior disciplinary record "involved unauthorized overtime," a reference to the misconduct resulting in respondent's August 1997 suspension. Pet. App. 37a. See *id.* at 37a-38a ("At first blush, a removal for one instance of failure to perform duties satisfactorily may appear unreasonable. However, *considering the [respondent's] prior disciplinary actions also involved unauthorized overtime*, that one instance takes on additional significance and tends to reveal a pattern of conduct

event, we believe that the propriety of a remand to the MSPB may be left for the Federal Circuit on remand.

* * * * *

For nearly two decades, the MSPB has recognized that federal agencies may consider an employee's disciplinary record in calibrating the discipline for subsequent misconduct without regard to whether prior discipline remains subject to pending grievances. That common sense practice is deeply entrenched in the Board's decisions and advances the CSRA's objectives of promoting government efficiency, providing employees the opportunity to correct mistakes, and enabling employers to separate employees who cannot or do not improve. At the same time, the MSPB has afforded employees significant procedural protections in challenging adverse agency action that is based on prior disciplinary actions. The Federal Circuit in this case improperly substituted its judgment for the MSPB's and overturned that longstanding rule. The Federal Circuit's ill-considered decision effectively prevents federal employers from using the most relevant aspects of an employee's disciplinary record in sanctioning misconduct. It amounts to an unwarranted incursion into the sensitive area of federal employer-employee relations, raises the same sort of concerns

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by the appellant to disregard the agency's and her supervisor's expectations of her performance and conduct.") (emphasis added). *Jones* v. *Department of Air Force*, is not to the contrary. There, the MSPB held that the appellant's removal was unreasonable, because a prior disciplinary action on which the agency had relied "was reversed by grievance." 24 M.S.P.R. at 431. But once that prior action was "effectively cancelled" by the successful grievance, there was little, if anything, in the appellant's prior disciplinary record in *Jones* to justify the removal. *Ibid.*

that led to the enactment of the CSRA, and should be reversed by this Court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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