In the

Supreme Court of the United States

JEAN CHRISTIAN and VICTOR L. GREEN,

Appellants,

vs

NEW YORK STATE DEPARTMENT OF LABOR ET AL,

Appellees.

Docket No. 72-5704

Washington, D.C.

November 13, 1973

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Tuesday, November 13, 1973

The above-entitled matter came on for argument at 1:45 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

E. RICHARD LARSON, ESQ., 423 West 118th Street, New York, New York 10027, for the Appellants.

MARK L. EVANS, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C., for the Appellees.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-5704 Christian against New York State Department of Labor.

Mr. Larson, you may proceed whenever you are ready.

ORAL ARGUMENT OF E. RICHARD LARSON, ON BEHALF OF THE APPELLANTS

MR. LARSON: Mr. Chief Justice, and may it please the Court, this case is on appeal from a final judgment of a three-judge district court, one judge dissenting, in the Southern District of New York.

The issue here involves questions of due process, equal protection, and statutory construction. The issue here stated specifically is whether consistent with the statutory and constitutional framework of Unemployment Compensation, a Federal agency may deny compension, unemployment compensation, to a former Federal probationary employee solely on the basis of the employing agency's statement of its reasons for discharging the former employee without that employee ever being provided with an opportunity for a fair hearing at which the employee may contest the reasons for which he has been denied unemployment compensation.

Stated more simply, the issue simply is whether unemployment compensation may be denied without any hearing at any time on the basic reasons for the denial of compensation.

This case arises within the context of the jointly administered State and Federal Unemployment Compensation Program, the program through which the States administer the payments of unemployment compensation to all covered employees pursuant to various Federal requirements.

One of those Federal statutory requirements is the requirement that a fair hearing before an impartial tribunal be provided to all individuals whose claims for compensation are denied.

This case arises from the appellees' interpretation of one of the unemployment compensation statutes, a section of the Social Security Act codified as 5 U.S.C. Section 8506(a). Pursuant to the appellees' interpretation of this particular statute, a Federal agency's ex parte statement of its reasons for discharging a probationary employee are final and conclusive upon the State Unemployment Compensation agency and accordingly may not be reviewed by the State in a fair hearing which is provided by the State.

This interpretation, it should be noted at the outset, is directly contrary to the statutory interpretation provided by the case of Smith v. District Unemployment Compensation Board, a case decided more than three years ago by the Court of Appeals for the District of Columbia. The appellees' interpretation which is at issue in this case is best illustrated by describing the facts relevant to the denial of compensation to appellant

Christian in this case.

Appellant Christian was discharged by her employer, the Post Office during her probationary period on the grounds allgedly of having an unsatisfactory attendance record, specifically that she had not reported her absences to her employer during a period when she was on a restricted sick leave list. Since Appellant Christian was not a permanent employee, she was not eligible for a termination hearing. This is not something that is contested in this case at all. We concede she is not eligible for a termination hearing and do not seek termination hearing.

Similarly, however, since she had not resigned her Federal employment, she was not provided with an unemployment compensation fair hearing for purposes of unemployment compensation. She was, however, basically eligible for compensation, because she had worked the minimum amount of time and earned a minimum amount of remuneration in order to have her contractual right to unemployment compensation, a contractual right which this Court recognized in the case of California Department of Human Resources v. Java at 402 U.S.

Accordingly, she applied for compensation through a claims examiner at the New York State Department of Labor. The claims examiner normally obtains information both from the claimant and from the former employer and makes an impartial decision on the information that is received relevant to such

issues as reasons for termination of employment. In this case, however, the claims examiner felt himself bound by the Federal appellees' interpretation of the statute at issue here, and accordingly, after receiving the ex parte statement of the reasons for discharging appellant Christian, the claims examiner denied compensation to appellant Christian on the grounds of that ex parte statement.

QUESTION: What would have been the case if appellant had been a New York State employee?

MR. LARSON: If the appellant had been a New York State employee, and particularly a probationary State employee, the appellant would have been treated as are all private employees. The claims examiner would have obtained information from the State of New York concerning the reasons for discharge and information from the claimant himself or herself, and on the basis of that information, the claims examiner would have made a fair determination as to the reasons for discharge for the purposes of compensation.

QUESTION: And your only point is that as a Federal employee, she should get the same treatment.

MR. LARSON: Oh, very definitely, your Honor. I should point out that --

QUESTION: That is the point of this case.

MR. LARSON: Yes, it is.

Permanent and probationary private employees and

permanent and probationary State employees, permanent and probationary Federal employees who resign, and all permanent Federal employees receive this fair determination through an opportunity for a fair hearing for purposes of unemployment compensation.

QUESTION: Some of the Federal employees get it in the Federal form, not in the State form.

MR. LARSON: Yes, in the Federal form through their termination hearing, because of their status as permanent employees.

QUESTION: Under the Williams statute process for the State employee it was not a hearing, if I followed you correctly, but merely an inquiry.

MR. LARSON: That is the initial determination procedure which you described in the Java case, Mr. Chief Justice. Subsequent to the initial determination procedure, as is illustrated by the facts of appellant Christian here, if the initial determination is adverse to the claimant, the Social Security Act requires that the State must provide an opportunity for a fair hearing before an impartial tribunal.

QUESTION: You weren't undertaking to describe the whole process, but only the initial eligibility.

MR. LARSON: Well, at this stage, yes. I am getting to the hearing because something significant happened at this hearing with regard to appellant Christian, and that is that

although the appellees' interpretation of the statute at issue here requires the fair hearing referee at the second stage, now, requires the fair hearing referee to accept the ex parte statement of reasons by the Federal agency as final and conclusive. The hearing referee in this case, after hearing the evidence submitted orally on the issue of termination by appellant Christian and after having received a statement from the Post Office submitted in lieu of appearance through the Industrial Commissioner, the hearing referee here disregarded the appellees' interpretation of the statute and in fact did make a fair finding on the issue that was before the referee.

Now, this was a very short-lived fair determination procedure because the State immediately appealed this fair finding, this fair determination procedure, to the State Appeal Board, and the State Appeal Board reversed on the grounds that the State had to accept the Federal reasons as final and conclusive. So it is a two-step process.

QUESTION: So I gather as a Federal employee, she gets neither the initial determination nor the ultimate final determination.

MR. LARSON: That is correct, Justice Brennan.

QUESTION: Well, I suppose she gets the initial determination, but it is preordained, is that it?

MR. LARSON: It certainly is not a fair determination.

QUESTION: No, she has no fair hearing.

MR. LARSON: For example, in Java this Court noted that the word "due" in section 503 of the Social Security Act meant after the first time when both parties could be heard and an impartial decision rendered. That was the initial determination procedure. That, as a fair process reached in Java, never occurs with regard to Federal probationary employees.

QUESTION: There is no argument there between you and your brothers on the other side as to what happens.

MR. LARSON: There is no argument. This is accepted.

Before turning to the due process and equal protection and the statutory construction issues in this case, I would like to reiterate a couple of points about what this case is about and what it is not about. This is particularly in light of the brief submitted by the Federal appellees in this case.

The hearing which is sought in this case and which we contend is constitutionally and statutorily required is an unemployment compensation hearing for purposes of unemployment compensation. The appellants do not seek a termination hearing. They do not seek re-employment. Rather, all that is sought here is a fair determination procedure through a fair hearing for purposes of unemployment compensation.

Now, second, the provision of a fair hearing for purposes of unemployment compensation to the appellants here would have no effect whatsoever upon the Federal discharge

procedures with regard to probationary employees. It is conceded on the record, indeed the Federal regulations provide, and we do not challenge them, that a Federal probationary employee may be discharged without cause during his probationary period. Accordingly, if there may be a discharge without cause, a subsequent hearing for purposes of unemployment compensation which merely review the reasons or the lack of reasons for the discharge, could have no effect upon the discharge procedure for that employee.

Now, thirdly, the issue here, the unemployment compensation issue at the hearings, the reasons for termination, as this Court noted in Java, the reasons for termination constitute the most frequently disputed issue in unemployment compensation. And as we point out in our brief, note 8 on page 10, more than 60 percent of the claims in the State of New York that reach the fair hearing referee involve issues concerning reasons for termination. So it is a frequently disputed issue in unemployment compensation, and this is what is being denied to the appellants here.

Now, fourth, we have contended and we continue to contend that the fair hearing which we say is required both constitutionally and statutorily, may be provided either by the Federal appellees or by the State appellees. Now, particularly relevant here is the Circuit Court of Appeals decision in Smith. What happened in Smith is that the panel composed of

Judges Leventhal, Lahey and Robb said that in the first instance the Federal agencies or the Civil Service Commission could provide the hearing for purposes of unemployment compensation to the Federal employee. But if the Federal agencies or the Civil Service Commission did not provide the hearing, in that case the State mechanism, the unemployment compensation agency mechanism for fair hearings which is already in existence and which provides fair hearings to all other employees should be made available and would be made available for the Federal employees in a similar manner. In other words, the fair hearing could be provided either at the State level or at the Federal level.

Fifth, the Smith case which the --

QUESTION: Are you saying that you should have a hearing to determine whether that cause existed? Let's assume the unemployment people say, "You were discharged for cause." Is the issue whether you were discharged -- whether the Government said you were discharged for cause or as a matter of fact whether there was cause?

MR. LARSON: Well, the issue is whether there was cause, whether as a matter of fact there was cause.

QUESTION: Do you agree that the Government may discharge a probationary employee for no cause at all?

MR. LARSON: Right.

QUESTION: You must agree also that they could

discharge him for cause.

MR. LARSON: Certainly, they may, by just saying, you were late yesterday, and discharge him.

QUESTION: Whether it is true or false.

MR. LARSON: Correct. In that situation --

QUESTION: If that is the reason they discharged him, you say there must be a hearing to go behind that statement at the unemployment stage?

MR. LARSON: Well, the way the system operates right now, pursuant to the appellees' interpretation of the statute, whatever reason the Federal appellees, or the Federal agency gives is final and conclusive and can never be reviewed. For instance, the Federal agency may say, "You were late yesterday." In appellant Christian's case, the facts were very similar to that, they were, "You were absent yesterday and you did not call in." Appellant Christian said, "My older daughter did call in, and she advised me that she did so, and I had her do so. The telephone in my apartment does not work." There were underlying facts as to whether or not she did call in, which is a crucial determination, because the State applies its state law as to whether it is misconduct or --

QUESTION: Well, then, I gather you say the hearing you require then really is something that you can't get satisfied just by a paper record. You think you must have --

MR. LARSON: Oh, certainly not.

QUESTION: -- have a witness, confrontation, impartial hearing officer, et cetera?

MR. LARSON: In our due process claim, of course, we alleged the fundamental requisites of due process, the normal requisite elements of a due process hearing should be provided. I think I can illustrate what the plaintiffs here --

QUESTION: The statutory procedure if it were available would be enough for you.

MR. LARSON: The procedure with regard to the State procedure.

QUESTION: Yes.

MR. LARSON: I should note here that the State procedure as well as the Federal procedure with regard to terminating Federal employees, the elements of the hearings are basically the due process element. There is an impartial hearing examiner, there is a decision -- the requirement that the decision must be based upon the evidence.

QUESTION: But that's at the discharge stage. How about at the unemployment --

MR. LARSON: This is also present at the unemployment --

QUESTION: Whatever hearing they provide,where it's available, that hearing is enough for your purposes.

MR. LARSON: Yes.

QUESTION: O.K.

QUESTION: Let me see if I understand this. If this

were a State employee, at the initial stage, whatever form that hearing takes, the determination by the hearing examiner would be what, that there was cause or there was not cause, which?

MR. LARSON: I --

QUESTION: At the initial stage. There's a dismissal in the State service.

MR. LARSON: In the State situation the hearing examiner would base its determination upon --

QUESTION: I know, but what would he decide, there was cause or there was not cause, which?

MR. LARSON: It depends upon the facts before him.

QUESTION: But that's what he would decide.

MR. LARSON: That's what he would decide. He would decide the facts before him.

QUESTION: If he decided there was cause, whatever it may have been, then she would be ineligible for unemployment compensation?

MR. LARSON: At that stage, yes.

QUESTION: If there was no cause, then she would be eligible at that stage, is that it?

MR. LARSON: Correct.

QUESTION: And then the next step is the fair hearing at which the issue is the same, isn't it?

MR. LARSON: That is correct.

QUESTION: With just a different procedure.

MR. LARSON: More elaborate procedure where there is an opportunity for cross-examination and confrontation of witnesses.

QUESTION: But the State agencies handling the Federal employees accept the certification of the Federal officials there was cause, period.

MR. LARSON: Final and conclusive.

QUESTION: At both stages.

MR. LARSON: At both stages.

QUESTION: What if, instead of having a one-year probationary period, the petitioner here, the appellant here, had been hired on a one-year contract, .. if the Government wanted them. If the year expires, the contract expires, there is unemployment, not renewed.

MR. LARSON: Section 8501 which provides the basic coverage of the law specifically excepts from coverage certain Federal employees. It does except that type of Federal employee who is on a contractor fee basis. So that person would not be covered.

QUESTION: How do you distinguish a one-year probationer from a one-year termination?

MR. LARSON: I'm not sure I understand your question, Mr. Chief Justice.

QUESTION: How is a one-year probationer who is not continued in the service different from a one-year contract

employee who is not renewed?

MR. LARSON: Well, the unemployment compensation is not available to the latter employee. If it were available to the latter employees who were on a contract basis, I would say that that would be a resignation situation basically, or it may be interpreted as a layoff. If it is a layoff, then the person would be eligible. But this is a factor which under State law or with regard to all State employees, private employees, Federal permanent employees, is fairly decided if there are factual issues, it is fairly decided for those employees. But if it's a Federal probationary employee, it is not fairly decided. The Federal reasons are automatically accepted as binding and conclusive.

With regard to the due process argument, most of the due process cases which come before this Court, of course, concern the finer issues of due process with regard to the timing of the hearing or the form of the specific elements of the hearing. Here, of course, the issue is much more basic since there is no hearing at any time, yet this contractual right is taken away from the appellant. Here there is no impartial decision-maker, there is no decision to be based upon the evidence, there is no oral presentation of evidence, no oral argument, no right to representation, no confrontation or cross-examination. None of these elements are here.

QUESTION: Burnew and Torres, I take it

approved the absence of some of those procedures for a termination of unemployment compensation. Would you apply a different standard to the initial eligibility determination?

MR. LARSON: No. I think I should point out that in Torres, of course, as in the Burney case, the prior hearing cases which were at issue here already provided the precise procedure which we are seeking here. The issue in Torres and Burney was a prior hearing, what was required prior to the termination of benefits. But as required by statute, as Mr. Chief Justice asked, the procedure that we are seeking here was required to be provided in Torres and in Burney, the fair initial determination and the fair hearing procedure later. That was not at issue in Burney or Torres. That was already statutorily provided.

This is not a prior hearing. This is just a hearing. There is no hearing, no fairness in this procedure at all. As the appellees state at page 17 of their brief, all they find, all they determine, they state that it's merely a statement of the agency's reasons for discharging the employee. That's all there is.

QUESTION: You say a more far-reaching type of hearing is required in making an initial determination that you are entitled to a right than in making a later determination that takes it away from you?

MR. LARSON: No, I am not suggesting that at all.

QUESTION: Well, then, why is there that distinction that you suggest between a hearing in determining initial eligibility and a hearing terminating the right?

MR. LARSON: That's provided for in the statute. We do not challenge that statutory scheme of having an initial determination procedure, which is not a full-blown hearing. We do not challenge the absence of full-blown hearing procedures at the initial stage, because there is a later statutory hearing. Here there is never any statutory hearing, nor is there even a fair initial determination process.

I think the lack of one of the essential elements of a due process hearing, confrontation and cross-examination, is particularly well illustrated by appellant Green's case. Appellant Green was discharged by his employer, the Treasury Department, as noted on page 52 of the appendix as "you were observed " engaging in such and such alleged misconduct.

Now, appellant Green never knew who this observer was --

QUESTION: Is he the sky marshal?

MR. LARSON: He is the sky marshal, yes.

QUESTION: Drinking 24 hours before he had to fly?

MR. LARSON: Yes. Now, it's alleged --

QUESTION: Or was observed to.

MR. LARSON: He was observed to have been drinking. The observation, as a matter of fact, occurred -- or alleged to have occurred more than three and a half months prior to his

termination. In other words, he was not terminated immediately after this alleged event took place. Rather, they waited . It was six days before the end of his probationary period at which he was terminated for this alleged observation which took place three and a half months before.

Now, of course, appellant Green was allowed no opportunity for confrontation or cross-examination of this unknown observer. This element was completely absent, as are the other elements of a fair hearing. There is no procedure, there is no requirement for a fair hearing examiner or fair decision-maker. Instead, the decision-maker here is conceded to be the agency, a biased party. Indeed, there is no requirement that the decision be based upon the evidence. Instead all that we have is the ex parte statement of the reasons by the Federal agency. This procedure, we submit, is a one-sided determination of facts decisive of contractual rights --

QUESTION: ... turns on 501 and 503, does it?

MR. LARSON: The statutory argument is based on, I guess, many different factors. At the outset we would look at the panel decision in the Smith case, and what they did, of course, is they looked at unemployment compensation generally, the right to a fair hearing, that this is a very important right in the unemployment compensation statutory scheme, and that this fair hearing cannot be lightly taken away.

Now, of course, the appellees in this case do not contend that their interpretation of the statute is necessarily the only interpretation of the statute. All they contend is that the Secretary has been granted the authority to make whatever fact-finding procedure it chooses to make, and that here it chose not to provide for fairness or for hearing procedures.

We contend that so long as they concede that their construction is not one that they contend is statutorily required, indeed the contrary interpretation is required, that a fair hearing must be provided here. Also, it is significant we hinge on the word "findings." Congressused the word "findings." It is not used in other words. This is a contextual work, and in the context of unemployment compensation, the word "findings" very fairly can mean findings after a hearing.

Additionally, we look very strongly to the dominant legislative theme of providing unemployment compensation to Federal employees. That dominant scheme is simply to make employees equal to State and private employees, provide them with the same terms and conditions of employment as are provided to other employees.

So I should note that this Court need not declare the statute unconstitutional, that the proper statutory construction here does require that a hearing be provided to the appellants. I should also note that this Court, of course, has reviewed many cases of statutory construction which have involved

questions of due process where the due process consideration --

QUESTION: What I was asking particularly, Mr. Larson, 42 U.S.C. 503 says that the Secretary of Labor takes no certification unless he finds that the law of the State provides opportunity for a fair hearing before an impartial tribunal for all individuals whose claims for unemployment compensation are denied. And my question was, is that the statute on which you rely?

MR. LARSON: That is one of the statutes which we rely on very definitely. That is the most clear statement made by the Congress with regard to the provision of fair hearing. But there are a host of other avenues which lead to the same conclusion that a hearing must be provided.

I notice my time has expired. I would like to save whatever time I have left for rebuttal.

QUESTION: Let me ask you one question. Lead me out of the wilderness. Isn't there a little jurisdictional problem so far as the Federal appellees are concerned here?

MR. LARSON: I don't think there is, Mr. Justice Blackmun.

QUESTION: Didn't the District Court decide against you so far as the Federal employees are concerned?

MR. LARSON: Yes, the District Court did. I think the District Court was clearly wrong, of course. A 1908 decision by this Court on mandamus under 1361 jurisdiction

makes clear that common law -- the relief available through common law mandamus includes corrective orders against Federal officials who violated the Constitution. What the District Court did was it held that -- it determined there was no mandamus jurisdiction over the Federal defendants and consequently did not reach the constitutional issues as to the Federal defendants. But I would submit that Garfield, a decision more than 60 years old reached by this Court, makes clear that the mandamus remedy extends to the corrective orders against unconstitutional activity.

QUESTION: Well, Federal courts usually don't so clearly misstep as to jurisdiction.

MR. LARSON: I submit they did in this case, your Honor. I should also note that the Federal District Court dismissed for lack of jurisdiction under 1343(3), and we contend through a joint participation theory of this Federal-State program, that the Federal Government is in joint participation with the State appellees and accordingly are properly named as defendants under 1343(3).

QUESTION: What about 1337?

MR. LARSON: We did not allege that in our complaint.

QUESTION: Isn't that a pretty good statute in your favor?

MR. LARSON: It certainly is.

QUESTION: Where do you get joint participation here

between the State and Federal employees? My impression of the State's position was that they are perfectly willing to give you whatever the Federal Government provides by statute. They are willing to give you the benefit of their full hearing if they are not precluded by the Federal statute. They really have no dispute with you at all.

MR. LARSON: Well, that's, of course, the position they have taken in argument with us, but I must remember that they, of course, denied a fair hearing to appellants Christian and Green in this case. If it had not been for their cooperation, their agreement with the Federal defendants or Federal appellees in this action, a joint participation which is clear to the statute, both section 8502 and 8504 make clear that the Federal Government assigns all wages, all claims to the State and that the State is to operate the program.

I think also a quote from Shapiro v. Thompson is appropriate where the Court stated that Congress is without power to compel State cooperation in a program, a joint Federal-State program, which violates the equal protection clause.

Now, this is a joint Federal-State program, and unquestionably it is pursuant to Federal law, but it is the State actually which has denied the fair hearing here.

I notice my time is up. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Evans.

ORAL ARGUMENT OF MARK L. EVANS ON BEHALF

OF THE APPELLEES

MR. EVANS: Mr. Chief Justice, and may it please the Court, before addressing the constitutional issues that Mr. Larson has discussed, I would like to raise an alternative ground for affirmance which I think will permit this Court to decide the case without reaching the constitutional issues.

The appellants stand before this Court in this posture: They are attacking the constitutional adequacy of procedures that they have never invcked. Under familiar principles requiring exhaustion of administrative remedies, their claim should not be entertained. To understand why we take this position, it is necessary to have a clear understanding of what the procedures are that are provided by the regulations,and those government regulations are set out at pages 33 to 38 of our brief.

The stage is set for these procedures, of course, when an applicant for unemployment compensation submits an application to a State unemployment compensation board. The State unemployment compensation board thereupon seeks information from the Federal employing agency with respect to the employee's service, including most particularly for this case the reasons for the termination.

Now, if a discharged probationary employee, which is what we have in this case, is denied unemployment compensation

the
because of/stated reason for his discharge, he has the following procedures available to him:

First, under section 609.22 of the regulations, which appears at page 36, he may obtain from the employing agency any information he needs relating to the basis for the Federal finding, the Federal finding being the reason stated for his discharge.

Under section 609.8 which is two pages earlier, on 34, the employing agency must furnish this information in writing. And I add right here that for appellant Green, if he wished to know who it was who observed him drinking at the time he was observed drinking, he was free to ask the question and get a response in writing.

Second, under 609.23, which is at the bottom of page 36, top of page 37, the employee may file a written request for reconsideration and correction of the findings that have been submitted to the State agency, and he may submit together with that request any information he has to support his request. Again, referring back to the preceding page at 609.9, the agency must consider all information submitted, it must review its findings, it must correct any errors, and it must then affirm, modify, or reverse whatever findings are affected.

QUESTION: What book are you referring to, Mr. Evans?

MR. EVANS: I am referring to the Government's brief in this case, the appendix to our brief.

QUESTION: That, of course, is all a paper proceeding.

MR. EVANS: This is all a paper proceeding.

QUESTION: That, you suggest, is at least as good as the initial --

MR. EVANS: Yes, I think that's right. Well, yes, that's a fair statement.

If there is a correction that is made by the Federal employing agency, the agency is required to submit this to the State and the State, if the corrections look like they entitle the employee to a redetermination, the State is required by the regulations to make that redetermination.

QUESTION: ".. shall affirm, modify, or reverse any or all of its Federal findings in writing." If it affirms them, what does it do?

MR. EVANS: Well, it just sends the same slip it sent in the first place saying, "We have considered and we affirm, or sustain."

QUESTION: Do you think "modify" is more elaborate. If they reverse, I suppose, it is still more elaborate.

MR. EVANS: That's right.

QUETSION: But if they affirm, they send the same old slip back to the State and that's the end of the matter, isn't it?

MR. EVANS: That's the end of the matter.

QUESTION: The State may not go behind that.

MR. EVANS: That's right.

Now, I emphasize --

QUESTION: So that at least the so-called full due process hearing is not available to this.

MR. EVANS: That is absolutely right. We don't claim that the full due process hearings are. As a matter of fact, we claim there is no due process, the right is implicated.

I will turn to that in a moment, but right now, I am just trying to point out the existing procedures, whether valid or invalid under the Constitution, were never invoked by --

QUESTION: He can't refer the complaint unless he has at least exhausted these first.

MR. EVANS: That's my point. That's right.

QUESTION: Was this argument made to the district court?

MR. EVANS: The argument was not,so far as I can tell, made to the district court. It was made in our briefs in this Court at pages 8 and 23.

QUESTION: Were you involved in the -- not you --

MR. EVANS: Yes. We are parties, but the Federal defendants in that case were dismissed on subject matter jurisdiction grounds. And I might add in response to Mr. Justice Blackmun's question, Mr. Larson is right, we do not contest jurisdiction under mandamus statute.

QUESTION: Of course you can't stipulate to it.

MR. EVANS: No. I can see that I can't stipulate to jurisdiction.

These are, in any event, the procedures, the corrective procedures that are available and not invoked. And it's important to consider how they might have operated in these cases if they had been invoked. Appellant Christian was terminated after six months of employment as a letter carrier because of a history of unauthorized absences which climaxed in two instances in which she was -- two days in which she was absent without notifying her supervisor. This is after she had been warned and had been placed on a restricted sick list which required her to bring in an authorized medical excuse for any further absences. And upon receipt by the State board of this information, the determination was made that she would not be eligible for unemployment compensation because the facts amounted to a voluntary quitting without good cause, that is, under State law these facts led to the conclusion that she provoked her discharge by the final two absences.

QUESTION: First, with regard to this argument on exhaustion, I gather your position is, no matter how meritorious the due process claims may be, not entitled to have them determined here because they didn't exhaust these.

MR. EVANS: That is my point. That is right.

QUESTION: But you say this argument was never made to the --

MR. EVANS: It was never made to the district court so far as I can determine, Mr. Justice Stewart, but it is an alternative ground for affirmance, and I think we are entitled to present it here, and I think this Court is entitled to consider the argument in disposing of the case.

QUESTION: Well, maybe, instead of our considering it, we should send it back to the district court to consider it.

MR. EVANS: Well, it's a possibility. I don't think it requires any factual inquiry that would be more appropriate for the district court. It seems to me the kind of question that can be decided on the basis of what's before this Court and there is no real benefit to be gained by remanding it for the purpose.

QUESTION: Well, do you claim that this procedure is still available and that either Mr. Christian or Mr. Green -- I guess it's Ms. Christian -- or Mr. Green could now get a redetermination under these procedures?

MR. EVANS: That's problematical, Mr. Justice --

QUESTION: Of a reason for termination that would not foreclose them from State unemployment compensation?

MR. EVANS: That presents a problem. The regulations provide that the employing agency shall make any corrections that it finds must be made within one year. Now, obviously the year has passed as a consequence of the litigation. It may be impossible. I would think that the regulations might

liberally be construed in these cases to permit them to exhaust these procedures if they sought to do so on remand or upon their own.

After the denial of Christian's claim, she was given a copy of the findings, and as she states in her affidavit which appears in the appendix at pages 15 and 18, she sets out her disagreement with the underlying facts that were transmitted to the State agency. She claimed that she failed to report her absences in the older absences because she couldn't find a telephone that was in working order in her neighborhood to call in and she said that the last two absences were required by compelling family circumstances and that in fact she had asked her oldest daughter to make a telephone call to her supervisor, and in fact her daughter said that she had done so.

These are precisely the kinds of new facts, new information that the regulations contemplate being submitted to the agency for their consideration. That was never done here. The agency never had a chance to consider these new facts. The facts that were stated by appellant Christian, she might well have submitted --

QUESTION: The record shows that that never was done?

MR. EVANS: The record, I suppose, is blank on the point, but I --

QUESTION: How could we assume it wasn't done.

MR. EVANS: It wasn't done. I believe the record is clear, as a matter of fact, that it wasn't done. I don't know where I can point to it, but there has never been any suggestion by anyone that it has been done.

QUESTION: I think before I could say somebody was guilty of not exhausting their remedies, I would have to know whether they did or didn't.

MR. EVANS: Well, it's clear -- I can't put my finger on it.

QUESTION: (Inaudible)

MR. EVANS: I think Mr. Larson will concede that this was not done. I don't think it's a factual issue here.

QUESTION: Actually, to me right now, unless you can say it positively that she didn't do it.

MR. EVANS: I can say it, but I don't think I can point it out to you in the record. The reason I can't point it out to you in the record is that the issue wasn't presented. The only thing there is in the record that's of relevance here --

QUESTION: If you present a factual point to this Court, I don't think this Court can decide a factual point.

MR. EVANS: The complaint and the agreed upon statement of material facts as to which there was no dispute make it clear that appellants have not sought any relief from the employing agency, although they recognize that the procedures exist. They make no mention of any fact of having exhausted

those procedures.

QUESTION: Is there anything in there that says they did or did not? That's my only question.

MR. EVANS: There is nothing in there that says they did.

QUESTION: Or that they did not.

MR. EVANS: That's right.

QUESTION: The plaintiffs brought this action, didn't they? Did they allege in their complaint that they exhausted --

MR. EVANS: They did not. Although again in their complaint they took cognizance of the existence of these procedures. There was no allegation that they were invoked.

QUESTION: But if they had raised that point at that time, they might have.

MR. EVANS: Well, they --

QUESTION: The decision is now to raise it where there is no way for them to answer it.

MR. EVANS: Well, as I say, think the regulations might be construed to permit them to exhaust their remedies even now even though the time has elapsed because of this litigation. But I think they would be permitted an opportunity to undergo those procedures.

The same situation is present in the case of appellant Green who was discharged for drinking before flight duty. He claims he was denied -- his unemployment compensation

claim was denied on the grounds that he was discharged for misconduct under State law. And he claims again he is innocent of these charges, but he never bothered to give his employer the benefit of any exculpatory information he may have, nor did he take advantage of the opportunity he had to get the information he claims he didn't have to make the judgment with.

In these circumstances, in our view, the appellants should not be heard to complain of corrective procedures they haven't invoked. The exhaustion principle has traditionally been required because of what this Court in McCord v. United States called the practical notions of judicial efficiency. If Christian and Green had invoked the procedures, it may be that their employing agencies would have agreed that they had made a mistake and would have corrected the findings. If that were the result, this Court, or no court would have had to intervene. There would have been no judicial issue.

QUESTION: If exhaustion is a matter of defense, I suppose Justice Marshall is quite right that this is something the Government should have raised in answer to the complaint. On the other hand, if it is a prerequisite to be able to proceed with adjudication, then I suppose the plaintiff has to allege. Do you have any citations as to which side of the line it's on?

MR. EVANS: I don't have any citations, Mr. Justice Rehnquist. I believe it ought to be the burden of the

plaintiff to make the allegation.

But I say again, while the issue may be somewhat ambiguous in the state of the record here. I don't think there is any legitimate factual dispute over it. I think Mr. Larson will concede that there is no question that they didn't exhaust these procedures.

QUESTION: Of course, that's kind of tough to ask opposing counsel to concede something that's outside the record.

MR. EVANS: Well, the problem is that there is nothing in the record to suggest that they did exhaust it, and there is nothing in the record to suggest they didn't either. But I guess the question comes down to where the burden lies, and I think I would --

QUESTION: Doesn't .. come down that the facts are needed for this should have been presented in the lower court, and since you are raising them, why didn't you raise it then instead of raising it now?

MR. EVANS: Well, maybe --

QUESTION: Why didn't you raise it in the lower court?

MR. EVANS: I wasn't there below, and I don't know what went into their --

QUESTION: But you are responsible for it.

MR. EVANS: Yes, I certainly am. I think that the thrust of the Government's response to the suit in the court below was that there was no subject matter jurisdiction and

they responded on the merits of the constitutional claims, and they proceeded on the jurisdictional issues, and the constitutional claims of course were not addressed with respect to the Federal defendants in this case.

There is a corollary notion to that of judicial efficiency that impels, that suggests that this Court ought not to entertain the issue at this time, and that is the notion of administrative autonomy which requires that an agency be given a chance to correct its own errors. Here no such chance was given.

The only response that the appellants have made to this argument, incidentally, is contained in a footnote in their reply brief. As a matter of fact, that might be where they indicated that they didn't exchaust the procedures. Well, they say in the footnote as follows: "The appellees also contend that appellants cannot complain about the constitutional inadequacy of the Federal appellees' ex parte procedure"-- I am reading, by the way, from page 8 of their reply brief -- "since they did not utilize the ex parte corrective procedures. Such an allegation is wholly without merit where, as here, the adequacy of the administrative procedure is the very issue to be resolved.

QUESTION: That's on page 9, footnote 6.

MR. EVANS: I am on page 8, but I don't have the printed brief. That may explain the difference. I'm sorry.

QUESTION: That doesn't admit the facts.

MR. EVANS: Well, the inference is available in any event that they have not in fact exhausted the procedure. But I don't want to press it any more because, as you say, there is nothing definitive that I can point to in the record.

QUESTION: Mr. Evans.

MR. EVANS: Yes, Mr. Justice.

QUESTION: I don't know whether you reach this, but I would like to have it clarified. I'm looking at the bottom of page 11 of the appellees' brief. I would like to read you a sentence, it's the last sentence. "The consequence of permitting probationary employees to litigate the reasons for their discharge, ostensibly merely to determine their eligiblity fo unemployment benefits, would be to overturn the settled principle that a probationary employee does not have the right to contest the propriety of his discharge."

I take it that means that the principle that you say is settled and is conceded by your opponent is that a probationary employee may be discharged with or without cause and with or without a hearing, no hearing as a matter of fact. Now, I understand your brief to say that if we decide the case against the Government on this issue that this will then become a precedent that will overturn the settled practice with respect to the discharge of probationary employees.

Now, if that's so, please tell me why.

MR. EVANS: I think it's probably an overstatement, Mr. Justice. There is, of course, an analytical distinction between a hearing with respect to the reasons for discharge as it relates to unemployment compensation and a hearing with respect to the validity of the discharge looking towards reinstatement. And there is no question that they are separate. But the thrust of the statement, while it may have been an overstatement, I think is accurate.

One of the reasons why a hearing would be inadvisable and one of the reasons why a hearing is not provided, I think, is that with respect to probationary employees, there needs to be the greatest amount of flexibility in an effort to weed out before an employee gets tenured status incompetent and unsuitable employees because of the importance of having able people administering the Government's vital programs. Once a man becomes tenured, it's very difficult to remove him, and there are a whole panoply of procedures, and just because of that extra protection he gets, it's necessary that there be great flexibility in the early stage.

Now, a hearing on the reason for discharge of a probationary employee is going to have an impact on the decisions supervisors make necessarily. It is not because the issue is one of reinstatement. The fact of the matter is that a hearing, the prospect of a hearing is likely to be a deterrent to a supervisor just because he realizes that there is a great

deal of manpower that has to go into it, a great deal of preparation. His decision in a sense is going to be put on the line, even though there is not going to be a reinstatement that will result from it. There is going to be a psychological impact, and it will, I think, inhibit the flexibility I think is so essential.

So in answer to your question, there is a relationship, though it's not an analytically clear one.

I would like to turn briefly to the statutory interpretation question. Mr. Justice Brennan, I should note for your benefit, I think, the issue turns not on the section that you had read; it turns on section 8506 of Title V which is set forth at our brief at pages 31 and 32.

QUESTION: That's the one, isn't it, that authorizes the statement of reasons, or something?

MR. EVANS: That's right. That's the one that requires the Federal employing agency to respond to a request from a State agency by giving the findings, is what the word is.

Now, the issue really turns on whether findings imply the hearings. It seems to me plain that "findings" doesn't have that implication. What it means here is simply a determination after an inquiry. It has no implication one way or the other as to the form that inquiry would take, and you know, when Congress has had a desire to require a hearing, it has not found it difficult to do so ambiguously. And I

should mention in the very next section, 8507, which is not reprinted in the brief -- 8507 deals with the right of a State agency or the Secretary of Labor to recoup compensation paid to an employee who made a false statement if he first finds that there has been a false statement made.

Now, what that says is a finding by a State agency or the Secretary may be made only after an opportunity for a fair hearing.

In the very next section, using the exact same words, they found it necessary to add "only after a hearing." I think that makes it quite clear that Congress did not contemplate that there necessarily be a hearing preceding the findings that are referred to in 8506.

Mr. Larson is correct in saying that we do not say that this is the only possible interpretation of the statute. I think a lot of the policy of the unemployment statutes that the appellants set forth in their brief may well give this Court the option, if it came to that, of reading the statute to require a hearing if it was necessary to preserve its constitutionality.

The point is, however, that this is a reading of the statute by the agency principally responsible for administering it, that we think it's permissible, and that we think ought to be respected unless there is a constitutional problem.

There are really two constitutional issues here. One

is a due process issue and one is an equal protection issue, and our position is that neither argument is valid. To start with the due process issue, we believe that the due process clause is not even implicated. It provides that no person shall be deprived of life, liberty or property without due process of law. There is no question that the appellants have not been deprived of life; they don't assert that they have been deprived of liberty. So the question is whether there is a property right at stake.

Our position is that the property right in unemployment compensation benefits, like the right to continued employment in the Roth case is defined by the rules and understandings under which the benefit is granted. In Roth the rule and understandings were contained in the terms of the appointment. In this case the rules and understandings are contained within the terms of the statutes and governing regulation. And those statutes and governing regulations make clear that the procedures available for correcting errors is the only procedure and that is the only way one can correct errors that they find are made. So when one seeks unemployment compensation benefits, one seeks them with the understanding that if there are errors in the Federal findings, they can be corrected by one method and one method only. In these circumstances there is no property right unless the procedures that are specified have in some sense been denied to the person.

I can think of one example that might serve to make the point. Suppose that Congress enacted a statute granting benefits to victims of crime provided that the administrator should first find on the basis of an application that has been submitted on the basis of certified hospital and police records, that in fact the person was injured in the course of a violent crime. And suppose further that the administrative determination was made unreviewable except that the applicant after a denial of his application might inquire further of the administrator as to the basis of the denial and might seek reconsideration.

Now, this is basically what we have here, and I think it clear that there would be no due process right, no legitimate entitlement that an applicant who had been injured, who claimed to have been injured in the course of a violent crime would have to a due process hearing before the denial. This is because the right as Congress has defined it includes only the procedure that Congress has specified.

QUESTION: Now, as Congress has defined the right, however, to statutory entitlement of unemployment compensation, it's required that the State system give an opportunity for a fair hearing before an impartial tribunal for all individuals whose claims for unemployment compensation are denied. Now, those are the terms of State unemployment compensation.

MR. EVANS: Mr. Justice Stewart, that language comes from, I believe, Title 42 of the Social Security Act which, of

course, does set up the standard by which the Secretary will approve State unemployment compensation plans. But that is quite different than the statutory scheme that was created for unemployment compensation for Federal employees.

QUESTION: Basically, Federal employees were to be given the benefits that these State statutes give to other unemployed.

MR. EVANS: That's right, except that the statute clearly said that the information that is submitted to the State agency by the Federal employing agency shall be binding and conclusive. There is no ambiguity about that. There may be some ambiguity about whether the Federal Government needs first to give them a hearing before they transmit the findings or after they have transmitted the findings.

QUESTION: It modifies the other provisions.

MR. EVANS: That's right. The statutory scheme has been set up for the Federal employees, makes special provision for this.

QUESTION: It says the information shall be binding and conclusive.

MR. EVANS: It says --

QUESTION: The findings, somewhere?

MR. EVANS: The findings may be --

QUESTION: Where?

MR. EVANS: I'm sorry. On page 32 of my brief, of our

brief, which is section 8506 towards the middle of the page. "Findings made in accordance with the regulations are final and conclusive for the purpose of sections 8502"...

Now, there is no question that the findings here were made in accordance with the regulations.

QUESTION: Well, it's a question about whether or not they were findings.

MR. EVANS: Well, there is a statutory question, and I dealt with that. But assuming that the Secretary's reading is correct, or permissible, I should say, and that findings needn't be predicated upon a hearing, it seems to me quite clear that Congress has made it clear that they have defined the right with the condition that these findings will be conclusive and not be open for further litigation.

I would like to touch very briefly on the equal protection argument. There has been suggestion that there is a constitutionally impermissible discrimination between State employees and private employees who are given the full benefits and between probationary Federal employees who are not given full benefits. But again these statutes have been set up at different times for different purposes, and it seems to me perfectly proper for Congress to strike a different balance in the context of Federally funded benefits when you are dealing with Federal employing agencies. The Congress might reasonably determine that it was too much of a burden on the

Federal Government to require it to respond with hearings in every case, and especially where they are giving as an alternative, at least on its face, so far as we can tell from this case, an adequate way of correcting the errors that might have been made.

QUESTION: Mr. Evans, do I understand the agency is now going along with the District of Columbia decisions of the Smith case is it?

MR. EVANS: Yes, it is. Shortly after the Smith case was decided, the Secretary of Labor amended his regulations to provide that an employee who has resigned, a probationary employee who has resigned and who disputes the findings of the Federal employing agency may have a hearing. Now, there is a reason for that, too. In the case of a discharged employee, there is no question as to what the reasons were. I mean, it is within the Federal Government competence to know what was in its own mind when it discharged an employee. When an employee resigns however, for example, if he resigns saying that he resigned because it was too cold to work in that building, and in fact the fact is that from the Federal standpoint he resigned three days after he was told he was going to be terminated or might be terminated, there is no way to resolve definitively what was in the employee's mind. And if he wishes to come in at that point and show that what was in his mind was that the room was cold, that's available to him under the regulations.

There is one other distinction, and that is between the treatment of probationary employees and permanent employees. And I think that the differences there relate not to the statute which gives permanent employees no greater rights to hearings. For them, too, the findings are final and conclusive. But it relates to their different civil service status. They have a right to a hearing with respect to their continued tenure, and if it turns out after that hearing that the findings need to be corrected, well, the regulations specify that the agency must correct findings, if it determines that there was an error, within a year. But the purpose of the hearing is not to challenge the findings for unemployment compensation, but solely to challenge the validity of the discharge. So again there is a distinction between them, and in light of all this, we submit that the decision below should be affirmed.

MR. CHIEF JUSTICE BURGER. I think your time is consumed, Mr. Larson.

REBUTTAL ORGAL ARGUMENT OF E. RICHARD LARSON

ON BEHALF OF THE APPELLANTS

MR. LARSON: If I may make one comment about exhaustion. We did note --

MR. CHIEF JUSTICE BURGER: Would you get to the microphone so we will get on the record?

MR. LARSON: As pointed out by Mr. Evans on page 9, note 6, of our reply brief, this Court held last term that where

the adequacy of the administrative procedure is the issue to be resolved, exhaustion is not required.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:44 p.m., the argument in the above-entitled matter was completed.)