OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1673

TITLE DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, Petitioner v. ALLISON E. NUTT, ET AL.

PLACE Washington, D. C.

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PAGES 1 thru 55

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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD J. DEVINE, DIRECTOR, :
OFFICE OF PERSONNEL :
MANAGEMENT, :
Petitioner, :
V. : No. 83-1673
ALLISON E. NUTT, ET AL. :

- -x

Washington, D.C.

Monday, January 7, 1985

The above-entitled matter came on for oral argument at 1:54 o'clock p.m.

APPEARANCES:

CHARLES A. ROTHFELD, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; pro hac vice.

CHARLES A. HOBBIE, ESQ., Washington, D.C.; on behalf of the respondents.

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C O N T E N T S

ORAL ARGUMENT OF	PAGE
CHARLES A. ROTHFELD, ESQ.	
Pro hac vice	3
CHARLES A. HOBBIE, ESQ.,	
On behalf of the respondents	24
CHARLES A. ROTHFELD, ESQ.,	
Pro hac vice - rebuttal	50

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Devine against Nutt.

Mr. Rothfeld, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF CHARLES A. ROTHFELD, ESQ.,
PRO HAC VICE

MR. ROTHFELD: Mr. Chief Justice, and may it please the Court, this case concerns the federal government's ability to fire or discipline employees who have engaged in serious misconduct.

Under the Civil Service Reform Act of 1978, an employee who is fired or subjected to another form of so-called adverse agency action may challenge that action in one of two ways. Any employee may seek to have the action set aside by filing an appeal with the Merit System Protection Board.

Alternatively, an employee who belongs to a bargaining unit may invoke the grievance procedures set out in the contract between his union and the agency that employs him.

No matter which of the routes the employees follow, the statute sets out the standards of proof and substantive rules that must control the decision in the case.

One of these statutory standards is the harmful error rule, which provides that an employee may have otherwise justified adverse action against him overturned if he is able to demonstrate harmful error in the agency's application of its procedures in arriving at its decision.

Reversal also is in order if the employee may demonstrate that the agency committed harmful error in the application of a procedural rule set out in the collective bargaining agreement.

The issue here is the application of this harmful error rule to two federal employees who undoubtedly engaged in serious misconduct. The two were employed by the General Services Administration as officers in the Federal Protective Service when their employer received information that they had falsified law enforcement records to cover up misbehavior and had misused government property.

After conducting an investigation, GSA concluded that the charges had been proved, and it ordered the two employees separated from federal service.

The employees, who were members of a bargaining unit, elected to challenge this action by filing a grievance through the negotiated procedure.

The case went to arbitration. The arbitrator found that --

QUESTION: Excuse me, Mr. Rothfeld.

Do most collective bargaining agreements in the federal service have a grievance prccedure that concludes with arbitration?

MR. ROTHFELD: Yes, they are required to provide for arbitration.

QUESTION: Do they have a standard form of arbitration clause, or may they differ depending on how the union and the agency negotiate?

MR. ROTHFELD: They may differ, Your Honor.

In this case, the arbitrator found that the employees had committed the acts alleged, and that those acts fully justified the separation of the employees from federal service.

The arbitrator also found that GSA had misinterpreted its contract with the employees' union, and that misinterpretation led it to commit two procedural errors during the investigation into the employees' misconduct.

The employees had not been informed that they had a right to request the presence of a union representative when they were interviewed by investigating agents. And the agency had delayed

unnecessarily before informing the employees that they would be fired.

But the arbitrator concluded that these procedural mistakes in no way prejudiced the grievance case, did not affect the course of the agency's investigation, and had no impact on the agency's decision to fire the two employees.

Despite these findings, however, the arbitrator, in order to penalize the agency, ordered it to reinstate the two employees in the Federal Protective Service after they had served a two-week suspension.

The Court of Appeals for the Federal Circuit upheld this decision. The court accepted the arbitrator's findings that the grievants had committed the acts alleged and that those acts fully warranted their being removed from federal employment.

The court also accepted the arbitrator's finding that the procedural mistakes had no effect on the outcome of the case, and the court acknowledged that the statutory harmful error rule controls arbitral decisions.

But the court went on to conclude that a union may assert its own institutional interests during the course of an individual employee's adverse action challenge, if that challenge is brought through a

negctiated grievance procedure.

As a result, the court found that an arbitrator must set aside otherwise justified adverse action taken against an emplcyee on acccunt of non-prejudicial procedural error if the arbitrator finds that that error was in some undefined sense harmful to the employee's union.

QUESTION: Could the government begin all over again and remedy the defects seen by the court?

MR. ROTHFELD: It is not clear whether they could, Your Honor. Since the arbitrator and the Court of Appeals imposed or took away the sanctions that had been imposed by the agency tc penalize the agency, it might well be that the court would then find that the agency would be circumventing its order if it attempted to get around the penalty by reinstituting proceedings.

So, it is not clear whether --

QUESTION: On this holding of the Court of Appeals, would it be ccrrect tc say that it wouldn't make any difference what the offenses of these emplcyees were?

MR. ROTHFELD: That is true, Your Honor.

QUESTION: It would be -- they would be in the same boat if they had been caught selling drugs, or

caught stealing typewriters?

MR. ROTHFELD: I think that is true. The focus --

QUESTION: Purely a procedural problem.

MR. ROTHFELD: The arbitrator focused solely on the procedural mistakes that were made by the agency, and in fact the actions of the employees in this case were serious violations which the arbitrator noted could be subjected to criminal penalties.

The case had been referred to the United States Attorney, and he delayed taking action because he believed that it could be settled through the agency process. So, even violations of law obviously are affected by the arbitrator's decision and the Court of Appeals' affirmance in this case.

QUESTION: Mr. Rothfeld, what remedies do you propose for the union under your view of the case to enforce the terms of the collective bargaining agreement in this regard?

MR. ROTHFELD: Well, there are two points to make in response to that, Justice O'Connor.

First, most procedural violations will be addressed during the course of an adverse action challenge anyway, because any consequential violation of the collective bargaining agreement which had an effect

or might have affected the agency's decision will be taken into account and may lead to the overturning of adverse action.

In those cases in which procedural errors had no effect on the agency's decision, the Act gives unions their own distinct remedial procedures that they can use. Any union can file a grievance of its own challenging any violation of the collective bargaining agreement, and if it prevails, it might ask the arbitrator to issue a cease and desist order to the offending agency.

In clear cases of contractual violations, the union could also file an unfair labor practice charge with the Federal Labor Relations Authority.

QUESTION: I am sorry, Mr. Rothfeld. You say both the arbitrator as well as the agency, the FD -- whatever that labor agency is styled, each can issue cease and desist orders when a grievance is prosecuted by the union?

MR. ROTHFELD: Well, certainly the Federal Labor Relations Authority.

QUESTION: It may, of course, because it is proceeding, alleging an unfair labor practice, but what about -- may the arbitrator issue a cease and desist order?

MR. ROTHFELD: Well, the arbitrator certainly can remedy in any way they find appropriate a violation of --

QUESTION: Well, including a -- I thought I heard you say earlier, including a cease and desist order. Against the agency?

MR. ROTHFELD: I believe that would be an appropriate remedy, if the arbitrator found that a violation had occurred, and that that was a way to redress the violation.

QUESTION: Are cease and desist orders something that private arbitrators can do, do you think?

MR. ROTHFELD: Private arbitrators generally direct the remedy to whatever violations have been found, and I think that -- if this is an instance where the union is asserting its institutional interests, and as the statute clearly allows it to do for any violation of the collective bargaining agreement.

QUESTION: Well, now, what about the past misconduct, assuming the cease and desist order, whether it is the Labor Board or the arbitrator? What is done about the past misconduct if it is the arbitrator who wishes -- has the remedy of cease and desist?

MR. ROTHFELD: Well, past misconduct or past

procedural violations that had no effect on the outcome of the agency's decision, one thing the arbitrator certainly cannot do is reinstate penalized employees. The harmful error rule forecloses the arbitrator from taking that action.

So, to that sense, procedural violations won't be addressed by the arbitrator except to the extent he will prevent the agency from committing -- or direct the agency not to commit further violations in the future.

I think, Your Honor, the interpretation of the harmful error rule that is provided by the Court of Appeals can only benefit one narrow class of federal employee under any reading of the rule. An employee whose adverse action was affected by procedural error will have that action overturned.

And under any reading of the rule an employee who brought his adverse action to the Merit Systems Protection Board will have that action overturned only if he can demonstrate that the procedural mistake had some effect on the outcome of his case.

QUESTION: Now, as I recall it, the Congressional history here of this statute weighs heavily in favor -- indicated Congress weighed heavily in favor of arbitration, did it not?

MR. ROTHFELD: It made provision for

arbitration. Yes, Your Honor.

QUESTION: But there is much in the legislative history that says that that is the preferred course?

MR. ROTHFELD: Well, Congress recognized that there are a variety of advantages to arbitration, and certainly we don't dispute that. Arbitration is faster and is often less expensive than litigation, and may well be less acrimonious.

But Congress did not make arbitration preferred in the sense that it intended there would be outcome determinative differences between arbitration and appeals through the Merit Systems Protection Board. It was quite explicit on that, providing that they were to be governed by the same standards and that -- in fact, the legislative history said they should be applied identically.

So, I don't think arbitration was the preferred method in the sense that it intended every employee with a claim of procedural error to go to arbitration because he knew that he would win in arbitration and might not win before the Merit Systems Protection Board.

But that in fact is the only -- the only category of employees who are benefitted by the Court of

Appeals' ruling are those who have been demonstrated to be unfit for federal service who are challenging a procedural error that concededly did not affect the outcome of their case, and who chose to go through the negotiated grievance procedure.

And this result, for a variety of reasons, is clearly not what Congress intended when it enacted the Civil Service Reform Act. I think the problem with the Court of Appeals decision is plain on the face of the statute.

In so many words, the Act places on the affected employee the burden of demonstrating that harmful procedural error was committed while the agency was arriving at its decision.

Given any straightforward reading, this appears to place on the employee the burden of demonstrating that the agency's result in the case might have been affected by the error, and that is the definition of the term given by the Merit Systems Protection Board, which is the agency that is given responsibility for interpreting the Act's standard of proof provisions, and it is the only interpretation that gives effect to the full Congressional purpose.

QUESTION: The union represented the employee before the arbitrator?

MR. ROTHFELD: That's correct, Your Honor.

QUESTION: Sc it had an opportunity at that time to ask -- or did it have an opportunity to ask for a remedy tailored to its own interests?

MR. ROTHFELD: Well, the nature of the proceeding --

QUESTION: Or would it have had to file a separate grievance of its own?

MR. ROTHFELD: I think, Your Honor, that if it had wanted to assert its institutional interests, it would have been required to file a separate union grievance, which the arbitrator might have consolidated.

QUESTION: Well, if that is clear enough, then it was clearly out of bounds to give a remedy to the union in this case.

MR. ROTHFELD: I think that is correct, Justice White.

QUESTION: Is there something clear about that in the Act, or is there any -- it is just clear because the union is free to file a grievance of its own? Is that it?

MR. ROTHFELD: Well, the nature of the statutory adverse action proceeding, I think, does make that clear. In addition to the remedies that are given the union --

QUESTION: May the union invoke independently the adverse action procedure?

MR. ROTHFELD: The union may independently invoke -- file a grievance of its own and invoke arbitration on its own behalf.

QUESTION: No, no, but that is under the collective bargaining agreement, isn't it?

MR. ROTHFELD: Yes, that's correct.

QUESTION: But how about the route that the non-union member may take before the -- what do you call it, the agency or something?

MR. ROTHFELD: Through the Merit Systems Protection Board.

QUESTION: Yes. May the union independently go to the Merit Systems Protection Board?

MR. ROTHFELD: No, it may not. In either --

QUESTION: Its only remedy is either to go file its own grievance under the collective bargaining agreement, right, or go to the Labor Relations Board?

MR. ROTHFELD: Correct.

QUESTION: Those are the only two routes you think that the union may take?

MR. ROTHFELD: That's correct, Your Honor. The employee is also given two routes. He can go to the Merit Systems --

QUESTION: But that isn't what the Federal Circuit held, was it?

MR. ROTHFELD: Well, the Federal Circuit we think incorrectly held that the union is a participant or is an independent party to the employee's adverse action charge through arbitration, and in fact, the answer to your question is no.

QUESTION: You just say that is plain wrong.

MR. ROTHFELD: We do say that is plain wrong, not only because the union has its own independent remedies, but because the adverse action procedures place the focus on the employee. It is the employee, not the union, which decides the forum for the challenge.

QUESTION: And this remedy was imposed plainly to benefit the union, not the employee.

MR. ROTHFELD: Explicitly, Your Honor. The Court of Appeals opinion explicitly provided that it is the union which is being benefitted.

In response to you, Justice Brennan, it is the employee and not the union which chooses the forum, either the Merit Systems --

QUESTION: Wasn't Congress focused on the employee, not on the union?

MR. ROTHFELD: That's correct. In an adverse

action --

QUESTION: And it gave the employee the options of going the collective bargaining route or going the Merit Board route, didn't it?

MR. ROTHFELD: That's right, Justice Brennan.

QUESTION: It didn't give the union that.

MR. ROTHFELD: No, if the employee opts not to go through the grievance procedure, the union has no recourse. And if the employee -- if the case goes to arbitration and the arbitrator issues a decision adverse to the employee's interest, it is only the employee who can then appeal to the Federal Circuit.

The union has no independent right to appeal on the employee's behalf. So, the entire procedural structure of the adverse action proceeding is focused on the rights of the employee, not on the rights of the union.

QUESTION: Incidentally, do non-union members, do they have -- may they invoke the collective bargaining grievance procedure?

MR. ROTHFELD: Members of bargaining units, whether or not they are dues-paying union members, may invoke the negotiating procedure.

When Congress placed the harmful error rule in the statute to address these problems, it did so

expressly to provide that a federal employee adverse action would not be overturned simply because of technical or procedural mistakes on the part of their employers.

And it did this with the express purpose of overcoming the widely held view that federal employees cannot be fired no matter how egregious or unacceptable their conduct, and it cannot be consistent with this intent to keep employees on the federal payroll after they have been demonstrated unfit simply because their employer committed a concededly non-prejudicial procedural mistake while attempting to fire them, but that is the effect of the Court of Appeals' ruling. That is its primary effect.

Here, for example, the court reinstated in the Federal Protective Service two employees after the arbitrator, in his own words, found that their actions had rendered them unworthy of their employer's trust.

And the decision will lead to other results that Congress wished to avoid as well. While the Civil Service Reform Act gives unions broad leeway to negotiate the procedural rights, it also insists that arbitrators and the Merit Systems Protection Board apply identical standards in judging adverse action challenges.

Congress placed that provision in the Act expressly to promote consistency between board and arbitral decisions, and to prevent forum shopping on the part of the aggrieved employees between those two decision-makers. But it seems undeniable that the Court of Appeals decision will frustrate both of those purposes.

It guarantees that there will be inconsistent decisions because it establishes two entirely distinct harmful error rules, one to be applied by the board, one to be applied by arbitrators. Had one of the employees in this case gone to the board, for example, he would have lost, while his identically situated co-worker was being returned to his job at the Federal Protective Service by the arbitrator's decision.

And this state of affairs in turn guarantees that forum shopping will occur. The Act gives the aggrieved employee the right to choose between which two forums he will bring his challenge.

If employees realize that arbitrators are applying their own outcome-determinative, more generous standards in cases involving procedural error, every sensible bargaining unit employee who has a procedural claim will choose to go through the negotiated grievance route.

The result will be consistently more favorable treatment for the 60 percent of federal employees who are bargaining unit members than for the 40 percent who are not. Not only is this result inequitable, but it distorts the procedural scheme that Congress envisioned.

The Act establishes a single uniform system for disposing of adverse action challenges which gives the bargaining unit employee the right to choose between two -- what are supposed to be two roughly equivalent fora for bringing their appeals.

While Congress certainly recognized that a variety of factors would impel employees to choose one route rather than the other for their challenges, the Act's emphasis on consistency makes it plain that one of those factors should not be the existence of substantive rules that make one forum predictably more likely to grant relief than the other.

The Court of Appeals sidestepped all of these considerations by asserting that the union's role as the representative of the employee in an adverse action challenge means that it can assert its own institutional interests during the course of the employee's adverse action appeal.

But this reasoning is squarely inconsistent

with the language and purposes of the harmful error rule and with the Act's emphasis on consistency between board and arbitral judgments. As noted before, the emphasis of the adverse action procedures is squarely on the protected employee.

QUESTION: Perhaps you answered this already, Mr. Rothfeld, but did you say or not that the individual employee who elects to go the Merit Board route on appeal may or may not have the help of his union?

MR. ROTHFELD: He may be represented by his union, but the union is not his exclusive representative as it is in the arbitration.

QUESTION: He is not going to collective bargaining unit, now, he is going to the Merit Board.

MR. ROTHFELD: The union has no statutory role in that --

QUESTION: Does the union in fact play any role on behalf of the employee when the employee elects to go the Merit Board route?

MR. ROTHFELD: The union may elect to provide representation, but it has no statutory role, and it has no official role in the proceedings.

QUESTION: How about this case?

MR. ROTHFELD: In this case -- in every case in which arbitration is invoked, the union represents

the employee. So the union did provide representation in this case.

A final point. The Court of Appeals apparently believed that the collective bargaining process would be made meaningless if employees were not permitted to have adverse action overturned on account of non-prejudicial procedural violations.

Now, it is obvious that this concern was vastly overstated. Under any interpretation of the harmful error rule, unions will be free to negotiate for whatever procedures they wish. Under any interpretation of the rule, agencies are obligated to abide by those procedures.

QUESTION: Well, may an agency and the union negotiate a provision limiting the scope of an arbitrator's authority, or does the requirement that they go to arbitration spell out what the scope of the arbitration is?

MR. ROTHFELD: No, it does not, Your Honor. By contract, the nature of the issues that can go to arbitration may be determined by the union and the agency.

QUESTION: By the collective bargaining agreement.

MR. ROTHFELD: That's correct. Any adverse

action affected by a violation of rights contained in the collective bargaining agreement will be overturned either by the board or by an arbitrator.

As a result, it is only the least meaningful of procedural violations, those found by an arbitrator or the board to have had no effect on the outcome of the case, that will not be taken into account during an employee's adverse action challenge.

And the union may obtain a remedy even for these types of procedural mistakes by filing its own grievance or an unfair labor practice charge if appropriate.

In drafting the Act, Congress explicitly balanced all of these concerns and protected the interests of unions by giving them their own set of remedies, and by providing that agency decisions affected by violations of the collective bargaining agreement cannot stand.

It protected the rights of employees by giving them a variety of procedural options to challenge adverse action, and by providing that action taken against them in violation either of regulations or of the terms of the collective bargaining agreement, so long as the action was affected by the violation, will be overturned.

And it explicitly protected the public's interest in a competent and efficient government by providing that inconsequential agency errors will not force the retention on the federal payroll of demonstrably unfit federal employees simply because the agency committed a procedural mistake while attempting to remove those employees from federal service.

If there are no further questions, Your Honor, I will reserve.

CHIEF JUSTICE BURGER: Very well.

Mr. Hobbie.

ORAL ARGUMENT OF CHARLES A. HOBBIE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. HOBBIE: Mr. Chief Justice, and may it please the Court, the question presented this afternoon may be more simply stated than the government has done. The question is, does the arbitral award violate the harmful error provision of the Reform Act.

It is not disputed that if the award is not inconsistent with the Reform Act, it should be upheld. We contend that the Court of Appeals correctly decided that the extension of the harmful error rule to be applicable to important rights of the rest of the members of the collective bargaining unit, the collective rights, if you will, of employees represented

by the union, is entirely consistent with law.

The government claims specifically that only error harmful to the rights of the individual grievant may be considered in the arbitral context. This contention is based on an interpretation of the statute by the Merit Systems Protection Board.

QUESTION: Could the union have filed its own grievance?

MR. HOBBIE: Yes, Your Honor, the union --

QUESTION: And gotten an appropriate remedy for its omission from the initial steps?

MR. HOBBIE: That is the critical question, Your Honor, what would be an appropriate remedy --

QUESTION: I just asked -- how about the answer to my question? It might have had that kind of a remedy?

MR. HOBBIE: Yes, Your Honor, the union could have filed --

QUESTION: And the employer could have been told, don't do it any more?

MR. HOBBIE: Yes, that's right, Your Honor.

QUESTION: By the arbitrator?

MR. HOBBIE: By the arbitrator, but, Your Honor, I would point out in the context of this particular case early in the arbitral decision the

arbitrator makes reference to a previous arbitration award by another arbitrator involving the same parties, GSA and this local.

In that situation, which happened the previous year, again, the agency had not provided the grievant with the opportunity to be represented by the union. So the arbitrator in this case, knowing that this violation had occurred just the previous year, would, I suggest, be reluctant just to issue a cease and desist order, because he knows the agency last year did exactly the same thing, and was put on notice by another arbitrator not to do it again, and yet they go ahead and do exactly the same thing.

QUESTION: Well, suppose an employee is discharged for what -- if he did what he did, anybody would say he shouldn't be working for this agency, and it goes to arbitration, and the arbitrator says, yes, you certainly shouldn't be working for this agency but you didn't have the benefit of your union at the initial sit-down, so we are going to put you back on the payroll.

Is that your argument?

MR. HOBBIE: Our argument is, Your Honor, that the arbitrator is in the best position to devise a remedy for the situation. In this case, these were

police officers.

One of them -- both of them were accused of tampering with agency records to cover up misconduct, and the arbitrator recognized that the employee who had access to agency records should not be returned to that position, specifically ordered that upon reinstatement this employee should not be returned to a position of trust such as he had occupied before.

The other employee, who was not directly involved in that kind of tampering with records, Mr. Rogers, who was just guilty, if you will, of picking up the beer and misusing a government vehicle for that purpose, there was no such limitation in his case because it was not appropriate in view of the facts.

QUESTION: Are there lots of positions in the federal government that don't involve trust?

MR. HOBBIE: Well, the particular officer, Your Honor, to answer your question, was returned to a custodial position. Now, of course, that involves a certain amount of trust, but it is not the same as being a police officer.

Our point is that in this award, the arbitrator did not violate the statute, he only violated an interpretation of the statute made by the Merit Systems Protection Board. The board can never have the

union before it as a party.

To answer the question, I believe, of Justice Brennan concerning whether in fact the union could represent the grievant before the MSPB, the Merit System Protection Board, the answer is, if they did so, it would be out of good will, if you will.

QUESTION: The union can't go before the board with its own?

MR. HOBBIE: It cannot. It cannot.

QUESTION: The only places it may go if there is a collective bargaining agreement is to the arbitrator.

MR. HOBBIE: That's correct.

QUESTION: Or to the Labor Board.

MR. HOBBIE: That's correct. And the significance of that is that the Merit System Protection Board therefore could never have extended the rule before to cover violations harmful to the union because they never would have had that occasion. The union has never been before the board as a party.

QUESTION: Do you agree with your friend that if these two men had been caught selling narcotics, heroin and what-not, this situation would be the same as it is now?

MR. HOBBIE: Your Honor, no, I do not. Again,

I would --

QUESTION: What do you think the remedy would have been?

MR. HOBBIE: I believe that the arbitrator in that case would have devised a remedy different from reinstatement.

QUESTION: Would you suggest some alternatives? What might he have done?

MR. HOBBIE: I think that in that particular case, and I am assuming that there have been pervasive violations, that the violations have been repeated, and that the conduct, the misconduct approaches the level, for example, of theft, as I believe you suggested.

QUESTION: Well, just they caught them selling heroin once. Are you suggesting that once isn't a serious matter?

MR. HOBBIE: No, Your Honor, I am not. Certainly, particularly for police officers, that kind of misconduct would be indeed serious.

QUESTION: Or stealing typewriters.

MR. HOBBIE: Yes, I would agree. That would be the same. But in this case that was not the situation, and the arbitrator --

QUESTION: Procedurally, might they not have come out just where they came out?

MR. HOBBIE: Procedurally they would have. The difference, however, Your Honor, between the artibral context and the Merit Systems Protection Board is important in analyzing that particular question. The arbitrator is given a certain amount of discretion, if you will, in the arbitral system.

That discretion is reviewable by the Federal Circuit Court of Appeals, which is charged by statute with, if you will, enforcing the overall symmetry of the system.

QUESTION: So you are suggesting that if it had been a drug case or a theft of a typewriter, then they might have come to a different result?

MR. HOBBIE: We wouldn't be here today, Your Honor, if it had been a theft case, I am quite sure. I believe if you look directly at the language of the award and note the circumstance of the unions participating in this procedure and asserting from the beginning that the violations of the collective bargaining agreement so tainted the evidence before the arbitrator that the union wasn't even going to put on any case, and they didn't. They didn't even contest the misconduct.

The arbitrator, however, expressly declined to accept the union's invitation to apply some sort of

exclusionary rule. He said he would not agree with the union that this kind of technical procedural violation should result in the voiding of disciplinary action.

He specifically refused -- he refused to void the discipline on the basis of minor, if you will, procedural irregularities, as the government has characterized them. What he did do, though, was to mitigate the penalty.

He examined the discipline that had been imposed, and he said that under the circumstances, in view of the totality of the circumstances, including the incident of the previous year which is referred to in the award, where the agency had pervasively violated the agreement before, under those circumstances, mitigation of the penalty was appropriate.

QUESTION: Even though nothing in this particular employee's record would deserve mitigation. In effect, the agency is being required to take back an employee that it ought not to take back because the agency has violated procedural rights. It made no difference in this case.

MR. HOBBIE: The procedural rights, Your Honor -- that's correct, Your Honor, but the procedural rights nevertheless are very important in this scheme, particularly when one recalls that procedures are the

only thing in the federal sector that unions may bargain over.

There are certain management rights that are reserved for management exclusively, and only the procedures by which management implements that authority are negotiable. Wages in the federal sector are not negotiable. They are set by statute. Most conditions of work are set by statute.

Therefore, procedures are the only thing that is negotiable.

QUESTION: Well, supposing that you have six people who have done what the most serious offender of these particular two did, and the arbitrator says, well, you know, this agency hasn't just violated the procedures once.

It has violated them three or four times, and I have admonished them before. In fact, I mitigated an award, or mitigated a discharge last year. I don't know how I am going to bring them to -- I am going to order all six of these people reinstated.

Now, do you think that is a proper decision of the arbitrator?

MR. HOBBIE: I would say that it would be under those circumstances. The prerogative of the arbitrator to make that kind of decision, if he is faced

with an agency that so adamantly, as your example suggests, refuses to follow the contractual provisions.

QUESTION: Even though the violation of the contractual provisions had no effect on the factfinding process in this particular arbitration?

MR. HOBBIE: Your Honor, it is a subjective determination as to whether it did or did not, and the arbitrator must make that decision.

QUESTION: Did the arbitrator here, in the case before us, make the determination that the violations of the procedure by the agency did have an effect on the factfinding process?

MR. HOBBIE: Not on the factfinding process, Your Honor. I would remind the Court, however, that these employees admitted their guilt in affidavits executed while they were being effectively denied representation by the union.

QUESTION: But this remedy was imposed expressly just to vindicate the union's rights.

MR. HOBBIE: That's correct, Your Honor.

QUESTION: Nothing to do with whether these people did or didn't do what they were charged with doing, or what their desserts were.

MR. HOBBIE: The union didn't even, in this arbitration, contest the facts of the misconduct, Your

Honcr, because they felt they had been so grievously prejudiced.

QUESTION: Would they have contested the remedy, I suppose, would they, except for their exclusion from the sit-down process?

MR. HOBBIE: I am sorry, Your Honcr. I am not sure I understand your question.

QUESTION: Well, what was their position before the arbitrator? Just the remedy?

MR. HOBBIE: No, their position before the arbitrator was --

QUESTION: The union's.

MR. HOBBIE: -- that there was no case, because the agency's infractions had so grievously tainted the evidence that had been obtained against the grievants that the matter could not be supported at all. All of the evidence should be excluded, in other words.

That was the union's position, and the arbitrator did not accept that position. He refused to void the action, and instead used the remedy of mitigating the penalties.

Returning to the question of what would be a proper remedy, I believe, that Justice O'Connor posed, it is possible to go to the Federal Labor Relations

Authority and file an unfair labor practice charge. In fact, in this case, that is exactly what the union did.

They filed a charge alleging that the agency had violated the contract. The Federal Labor Relations Authority, which is charged with administering the labor relations statute, declined to issue a charge because it said the matter was more appropriately resolved through grievance proceedings.

Therefore, the union would be in the position of having to go back and file another grievance before a different arbitrator, involving a whole nother proceeding, additional costs for both the union and the agency, of course.

In other words, it would be a waste of the resources of the government and the union. We would submit that in the facts of this case in particular, it is a much more economic use of resources to have one arbitrator address all of the issues that happen to be attached to a certain set of circumstances.

QUESTION: Except that it deprives the employer of a right to discharge an employee that legally is dischargable. That is the problem.

MR. HOBBIE: Justice O'Connor, the Merit System Protection Board, however, would also have the right to mitigate a penalty based upon the consideration

of all the relevant factors in the record.

The board has delineated those factors in a case, Douglas versus Veterans Administration. They delineated factors that did not include, I will admit, violations of a collective bargaining agreement, but again, a union is not properly before the MSPB, and the board specifically stated there that these were not exclusive factors, that there could be others.

QUESTION: Do you think under the law the board could have imposed this very remedy if the employee in appearing before the board had said, I am entitled to relief here because I didn't have my representative earlier in this procedure, and the entire factfinding process was tainted?

Do you think the board could have said, well, we don't agree with you at all, but you were entitled to the presence of the union, so we are going to reinstate you. Do you think the board had that authority?

MR. HOBBIE: The board could have done that under the -- in my own opinion, Your Honor. The board could have done that. In fact, as I said, by judging, if you will, the appropriateness of a particular penalty, the board does that all of the time.

It says that a particular penalty is not appropriate, constitutes an abuse of discretion or an

abuse of authority, based on many factors, and mitigates a penalty without using the harmful error rule.

It is important to realize here the nature of the differences between the arbitral context and the Merit Systems Protection Board, and how Congress specified in the statute arbitration and collective bargaining were to fit into the overall scheme.

Taking the latter first, in Title 7 of the Civil Service Reform Act, even the government does nct dispute that collective bargaining is of primary importance, and that the intent of the statute was tc promote collective bargaining.

In that scheme, arbitration was expressly the mechanism by which the procedures negotiated in collective bargaining were to be enforced. This can easily be seen when you realize that in the previous scheme, under the executive order, Executive Order 11491, artibration was not mandatory.

The Congress expressly departed from this past practice, if you will, by mandating arbitration in the new scheme. They also departed from the scheme under the executive order by requiring or by permitting, I should say, that adverse actions could be aggrieved and arbitrated under the new scheme.

In the past, adverse actions had been

excluded, had been excluded from the coverage of grievance procedures negotiated by the parties.

In view of the fact that the union is the one who selects an arbitrator, in fact, invokes, has the authority whether or not to invoke arbitration, and the union has the authority to negotiate the exclusion of adverse actions from the arbitral process, the union jointly with the agency selects the arbitrator, pays the arbitrator, pays the costs of the arbitration, in view of all of these circumstances expressed in the language of the Act, the Courts of Appeals have found that the union is an important party in the arbitral process, a party whose significant interests are to be protected.

The government implies in their argument that some kind of a per se rule is here involved, that any kind of violation of a collective bargaining agreement could cause an arbitrator to throw out this discipline that has been imposed.

In a later case, Devine versus Brisco, the Federal Circuit addressed this exact question, and held that there must be a demonstration by the union of prejudice to its rights, and the kind of demonstration that the Court was talking about in Brisco was exactly what occurred here, and they referred to this, the filing of an unfair labor practice charge indicating

that the union in fact believed that its rights had been prejudiced to the degree that they are going to file a charge.

In the face of Brisco, I think that this argument of the government cannot really be given any credence. Clearly, the Federal Circuit, which has been charged with the oversight of this whole arbitral process, has determined that contractual violations which are demonstrably harmful to the union have to be considered.

QUESTION: In grievances brought by employees in the collective bargaining --

MR. HOBBIE: That's correct, Your Honor, and that's a very important addition to what I said, because in fact we are talking about the integrity of the whole collective bargaining process here, and the only effective mechanism to really preserve the integrity of that process.

A very important question would be, what would be the effect of this Court's refusing to permit an arbitrator to so mitigate penalties. We would submit that this would result in the subordination of arbitration and the statutory scheme to the point where it would virtually disappear as a mechanism.

The union, which again has the power to invoke

arbitration, is hardly going to invoke it if it feels that arbitration is going to be a completely ineffectual remedy. There would be no incentive for the union to expend its rescurces unless it believes that the arbitrator who has been selected by the parties is actually going to be able to effectuate a remedy that protects the union's interests.

QUESTION: When you say the union's interests, do you mean the union's interests as distinguished from the grievant's interest?

MR. HOBBIE: Distinguished from the grievant's interest to a certain degree, Your Honor. The union's interests --

QUESTION: In the immediate case.

MR. HOBBIE: Yes. The union's interests are, after all, the collective interests of the employees it represents. We are not talking about purely institutional interests like the collection of dues and things like this, obviously.

Here we are talking about prejudice to the rights of the -- the collective rights, if you will, of the members of the bargaining unit, and this would include the grievants, of course. They are also members of the bargaining unit.

QUESTION: And this individual grievant may

have been denied a right, but it was found to be harmless, that it had no effect on the outcome.

MR. HOBBIE: That is correct, Your Honor, but that interpretation of the statutory harmful error rule is the MSPB's interpretation, and we are saying that that interpretation does not necessarily relate to the arbitral process, because the union cannot be a party before the Merit System Protection Board.

Had they argued that before the board, the board might have adopted that position, but they could not have. It would have been an impossibility. So, what the government is alleging is merely that it is -- the arbitration award is inconsistent with an interpretation of law.

The Federal Circuit and the Court of Appeals for the District of Columbia have repeatedly held in three different cases that nothing in the Civil Service Reform Act requires that the standards be applied in exactly the same way.

We would admit, and it is plain in the language of the statute, that Congress intended the standards of proof and the burdens of proof, if you will, to be uniformly applied in both parallel appeals processes, arbitration and before the Merit System Protection Board.

But the fact that Congress has chosen to impose a certain symmetry on the appeals processes to discourage, as the government has said, forum shopping, and to promote consistency in adjudications, does not mean that in every application of the statute, of the standards of proof, that arbitrations must be exactly the same as the MSPB proceedings.

In Devine versus Sutermeister in the Federal Circuit, this question was expressly addressed by the Federal Circuit, which concurred in the prior holding of the Court of Appeals for the District of Columbia Circuit.

QUESTION: Well, of course, the same grievant can't be before both the board and the arbitrator at the same time, can they?

MR. HOBBIE: That's correct, Your Honor.

QUESTION: Cannot be.

MR. HOBBIE: Cannot be.

QUESTION: Once he elects the route he wants to take, he is stuck with it, and he can't go the other route ever.

MR. HOBBIE: That's correct.

QUESTION: How do you get these differences between the board and the arbitrator on the interpretation of harmful error?

Didn't you say there are differences, that the board has interpreted what is such error --

MR. HOBBIE: The board -- yes, Your Honor.

QUESTION: -- and that you disagree with the interpretation the board has put on it?

MR. HOBBIE: Yes, because -- I will clarify that. I don't disagree with the interpretation that the board has put on the harmful error rule with respect to the individual grievants.

That is not the question in this case. I think the government would concede that with respect to the individual grievants here, the arbitrator correctly applied the harmful error rule. He refused to touch the penalty imposed because of his finding that they were not prejudiced.

QUESTION: How did the board in your view improperly interpret the harmful error rule?

MR. HOBBIE: The board, Your Honor, has not had occasion to interpret the --

QUESTION: Well, then, I don't understand where the conflict --

MR. HOBBIE: Well, there is no conflict, we would submit, between this award --

QUESTION: What is it you disagree with that the board has done in the way of intepretation?

MR. HOBBIE: Your Honor, in this case, that is not an issue. We do not disagree with what the board has said. It is the government that is saying that because of the board's interpretation of the statute, this arbitrator's decision is inconsistent with law, because it is inconsistent with the board's interpretation.

QUESTION: That you disagree with.

MR. HOBBIE: We would disagree with that, yes. Clearly our position is that the arbitrator correctly and could easily extend the application of this harmful error rule to protect the interests of other parties in this separate process.

QUESTION: And was not required to follow the board's interepretation, because the union was not party to the board's proceeding.

MR. HOBBIE: That's correct, Your Honor, and nothing else in the statute requires that the arbitrator follow board precedent. Nothing requires that an arbitrator follow the precedents of the Merit System Protection Board.

QUESTION: Nor the other way around, I take it.

MR. HOBBIE: Or the other way around. That's correct.

QUESTION: But I take it both are supposed to follow the applicable statutes, not ignore the applicable statutes.

MR. HOBBIE: Of course, Your Honor, that is correct. An arbitrator cannot make an award that is inconsistent with law, or for that matter with the precedents, the binding precedents of the Federal Circuit Court of Appeals.

QUESTION: The government says the arbitrator did that in this case.

MR. HOBBIE: The government is relying, however, on an interpretation by the Merit System Protection Board, which does not, in our opinion --

QUESTION: Well, it is also relying on its own.

MR. HOBBIE: Yes, Your Honor, clearly. We would submit that that interpretation is wrong.

QUESTION: Yes.

MR. HOBBIE: We are left in the private sector -- we wish to emphasize this -- with the arbitral mechanism to enforce the negotiated rights of the employees represented by unions, striking down the approach followed by the award at bar, which was to balance the competing interests of the agency --

QUESTION: May I just ask this one question?

Other than the argument that it would duplicate proceedings, is there any reason to believe that an unfair labor practice proceeding would be an inadequate remedy for the wrong that you are vindicating here?

MR. HOBBIE: The Federal Labor Relations Authority in the context of an unfair labor practice complaint, could also order the remedy of reinstatement based upon violations of the statute or pervasive and repeated violations of the contract. Of course, in this case, as you pointed out, they chose not to.

QUESTION: They could also issue a cease and desist order, couldn't they?

MR. HOBBIE: They could also issue a cease and desist order, although again the fact that the agency had previously apparently ignored an arbitrator's determination --

QUESTION: Ignored an arbitrator, but that is why I wonder if the arbitrator is really the most effective tribunal for granting relief to the union.

MR. HOBBIE: Well, an arbitrator is supposed to be a parallel process in the context of adverse actions.

QUESTION: But adverse actions between the employee and the government.

MR. HOBBIE: In which the union, though, in

the arbitral context, is a co-party, if you will, if not the most important party, as the two Courts of Appeals have found.

QUESTION: What steps can the union take to ensure that this won't happen again other than filing some procedure, proceeding? How does it ever get into the initial stages? Who tells them about what?

MR. HOBBIE: In the context of the grievance procedures, most contracts provide that the union must be notified, Your Honor.

QUESTION: By whom?

MR. HOBBIE: By the agency, which is the other party --

QUESTION: The employer. The employer.

MR. HOBBIE: The employer. The employing agency. That discipline is being proposed.

QUESTION: And of course any employee can notify the union, can't it?

MR. HOBBIE: Yes. In fact, that might be an example of when a harmful error might have been corrected, and therefore would not have harmed the rights of the union.

QUESTION: Who can file a grievance?

MR. HOBBIE: The employee may file a grievance, or the union may file a grievance.

QUESTION: And the employee files a grievance and doesn't even tell the union. Is that what happened in this case?

MR. HOBBIE: No, Your Honor.

QUESTION: What happened?

MR. HOBBIE: The grievance was filed by the employees with notice to the union. There is no question about that.

QUESTION: And then what happened?

MR. HOBBIE: The grievance was processed through a number of steps, and at the conclusion of the two or three steps --

QUESTION: And during the processing was the employee there?

MR. HOBBIE: Yes, the employees were there and the union was represented. At the conclusion of those steps, the union --

QUESTION: Those were meetings with supervisors up the line?

MR. HOBBIE: Yes, that's correct.

QUESTION: And then what happened?

MR. HOBBIE: Then the union is faced with the option of electing arbitration or not. If it chooses not to elect arbitration, that is the end of the process. The employee is foreclosed from going anywhere

else. He cannot then file an appeal to the Merit System Protection Board.

QUESTION: Yes.

MR. HOBBIE: If the union elects arbitration, they proceed to arbitration inder the procedures negotiated by the union and the agency. In other words, when, how, why --

QUESTION: What wrong was committed against the union here?

MR. HOBBIE: Well, in this particular case, Your Honor, the union hypothetically, had they been present at the time of the investigation, the investigatory interviews with these officers --

QUESTION: Did it file the grievance?

MR. HOBBIE: It did not.

QUESTION: Did the employee file the grievance?

MR. HOBBIE: The employees filed the grievance.

QUESTION: In this case.

MR. HOBBIE: In this case.

QUESTION: This particular case. And never notified the union?

MR. HOBBIE: No, the employees did notify the union, Your Honor. That is not a problem in this case.

What is a problem is that the union was unaware at first of the investigation, and the employees were never afforded the opportunity to have the union present during the investigation and at the time they executed these admissions of guilt.

QUESTION: Isn't there some indication in the record that the employees knew of their right to have the union present, and just didn't either feel it worthwhile or didn't bother to call the union people?

MR. HOBBIE: The arbitrator did not indicate that they knew of the right to have the union present. He merely said that because they were police officers, in the execution of these all-important admissions of guilt, they were aware of their right not to do this. That is correct, Your Honor.

My time has expired. Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Rothfeld?

ORAL ARGUMENT OF CHARLES A. ROTHFELD, ESQ.,
PRO HAC VICE

MR. ROTHFELD: A few quick points, Your Honor.

First, while it is true the Merit System Protection Board may mitigate an employee's penalty, it does so based on an analysis of the employee's situation

to make the remedy fit the cffense. It does not in any event consider the harmless procedural error in deciding whether mitigation is appropriate.

There is no reason to believe that the bcard would ever take a union's institutional rights into acccunt, because the bcard's own regulation defines harmful error as error that affects or might have affected the outcome of the case.

It follows from that we are not arguing that the arbitrator here abused his discretion, or that the arbitratcr was wrong because he departed from the board's interpretation of the harmful error rule. The arbitrator was incorrect because he departed from the statutory standard that Congress laid down to control in a parallel way both the decisions of the board and the decisions of arbitrators.

QUESTION: Mr. Rothfeld, I think your colleague just said that if the employee goes all thrcugh the grievance procedure with the union, up tc the last supervisor, and that the union does not elect to go arbitration, the emplcyee is finished. He can't go either to the board or to the arbitrator. Is that right?

MR. ROTHFELD: I think that is true, Your Honcr. The statute gives the employee the cption of

filing either a grievance through the negotiated procedure or with the Merit Systems Protection Board.

QUESTION: You mean, at the very first, at the initial step. Is that it?

MR. ROTHFELD: At the initial step, but of course the union is obligated by its duty of fair representation to safeguard the employee's rights --

QUESTION: It may be that the employee then may never want a union through those initial steps.

MR. ROTHFELD: That is true, Your Honor, and an employee who doesn't wish representation by a union may go through the Merit Systems Protection Board and obtain the -- or should be able to --

QUESTION: But if he takes union help through the initial steps, then he is stuck with it. He can't go to the board. He has to go the collective bargaining route. Is that it?

MR. ROTHFELD: If he elects to follow the negotiated procedure, that is his choice, and once he has done that, that is it.

QUESTION: I see. Well, now, I don't -- suppose he has union help through the early stages of the grievance procedure, and then the question is -- from there on it is either to the board or to arbitration. Do you mean, if he has had union help in

the initial phases, he has got to go to arbitration as a further remedy if the union will let him? Is that it? He cannot go to the board at all.

MR. ROTHFELD: I believe that is correct, Justice White. The statute gives him an option of electing to go one way or the other.

QUESTION: I would think there would be a lot of employees that wouldn't want the union.

MR. ROTHFELD: I think that is true, Your Honor. At least the figures available from the GSA indicate that many employees elect to go through the board and not through the negotiated grievance procedure.

QUESTION: Well, they can't if they have had a union.

MR. ROTHFELD: They can go to the board if they have not yet elected to use the grievance procedure. There is no obligation that they do so.

QUESTION: Oh, I see.

QUESTION: Even though the grievance procedure is available to them because they are union members at the beginning, they can elect to go to the board.

MR. ROTHFELD: That is right, Justice Rehnquist. Congress explicitly gave employees a choice, one or the other.

And to answer one of your questions, Chief Justice Burger, there is no indication in the opinion of the Court of Appeals or the arbitrator that the type of crime or violation committed by the employees should make any difference in the remedy that is provided, because it is not the employee's situation which is being considered by the arbitrator.

It is the violation of the union's institutional rights. And in either case, no matter what the employee did, that violation presumably is the same.

I think two quick final points. There certainly is no reason to believe that arbitration will be made meaningless in any sense if inconsequential procedural errors cannot lead to the overturning of adverse action action. Any important violation would be remedied in precisely the same way that it would be remedied before the board.

In fact, coming to any other conclusion would be entirely inconsistent with the Congressional emphasis on avoiding forum shopping. It seems undeniable that forum shopping will occur if the arbitrators are permitted to take into account the violations that the board, by statute and by its regulations, cannot take into account.

Finally, one final point, it is true that there are a variety of management rights that are not negotiable with unions. One of the things which the federal circuit has also found is not negotiable is the harmful error rule. A union and an agency cannot agree to dispense with the harmful error rule because Congress believed it was so important that unfit federal employees not be retained on the federal work force because of inconsequential procedural mistakes.

If there are no further questions, Your Honor.

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

(Whereupon, at 2:52 o'clock p.m., the case in the above-entitled action was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

83-1673 - DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, Petitioner v. ALLISON E. NUTT, ET AL.

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BY Paul A. Richardson

(REPORTER)