

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: FRANCIS BERNARD AUER, ET AL., Petitioner v.
DAVID A. ROBBINS, ET AL.

CASE NO: No. 95-897

PLACE: Washington, D.C.

DATE: Tuesday, December 10, 1996

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IN THE SUPREME COURT OF THE UNITED STATES

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FRANCIS BERNARD AUER, ET AL., :

Petitioners :

V. : No. 95-897

DAVID A. ROBBINS, ET AL. :

-----X

Washington, D.C.

Tuesday, December 10, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:10 a.m.

APPEARANCES:

MICHAEL T. LEIBIG, ESQ., Fairfax, Virginia; on behalf of
the Petitioners.

IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor

General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae.

JOHN B. RENICK, ESQ., St.Louis, Missouri; on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 95-897, Francis Bernard Auer v. David
5 Robbins.

6 Mr. Leibig, you may proceed whenever you're
7 ready.

8 ORAL ARGUMENT OF MICHAEL T. LEIBIG

9 ON BEHALF OF THE PETITIONERS

10 MR. LEIBIG: Mr. Chief Justice, and may it
11 please the Court:

12 This case involves the application of a rule in
13 the Fair Labor Standards Act dealing with the salary basis
14 test. The rule is contained in 29 C.F.R. 541.5d and
15 541.118.

16 The rule basically provides that for persons to
17 be considered white collar exempt -- that is, professional
18 exempt adminis -- professionals, administrators, exempt
19 administrators or exempt executives, their salary must be
20 fixed and not contingent.

21 The specifics of the rule provide that they must
22 receive a predetermined amount not subject to deduction
23 because of the variations in quality or quantity of work.

24 QUESTION: I've noticed with interest that the
25 Federal Government does not follow the salary basis test

1 for employees that are under the jurisdiction of the
2 Office of Personnel Management. It chooses not to go
3 along with that at all.

4 MR. LEIBIG: Well, it attempted to choose not to
5 go along with that at all.

6 In 1975, I believe, when the Federal Government
7 first came under the act, Congress provided that the Fair
8 Labor Standard Act would be enforced by the Office of
9 Personnel Management, but that the rule -- but the
10 definitions would still be defined and delineated by the
11 Department of Labor, and when the Office of Personnel
12 Management initially issued regulations for the Federal
13 sector, they defined exempt status for salaried persons
14 based on salary classifications.

15 But that definition was challenged in court in a
16 specific case involving the Uniform Division of the Secret
17 Service, Police Sergeants and Lieutenants, and the court
18 of claims in that case specifically found that the
19 enforcement by the Office of Personnel Management has to
20 be undertaken consistently, consistent with the Department
21 of Labor regulations, because it's the Department of Labor
22 that defines and limits exemptions --

23 QUESTION: And now are all Federal employees
24 applying this salary basis test?

25 MR. LEIBIG: Well, first of all the court of

1 claims found that to be the case. They found it -- and
2 they also found it in some other cases involving the AFG
3 case, which is cited in the briefs, and currently the
4 position in the Department of Labor -- I'm sorry.

5 The position in the Federal Government is that
6 the Office of Personnel Management often treats people as
7 exempt even though they're not salaried, but the Court of
8 Claims and the United States District -- the United States
9 Court of Appeals for the District of Columbia have held
10 that they should apply the salary test.

11 And when that has been a challenge -- and the
12 one place it's been challenged specifically is in the
13 Uniform Division of the Secret Service and for employees
14 that are exactly -- do the exact work of the employees in
15 this case, that is, sergeants and lieutenants in the
16 Uniform Division, and the court ruled that the Department
17 of Labor pay classification things have to be applied
18 consistent with the salary basis.

19 QUESTION: But Justice O'Connor was not asking
20 about court decisions, she was asking about the position
21 being taken by the executive branch --

22 MR. LEIBIG: I believe the --

23 QUESTION: -- and in fact -- and OPM takes a
24 different --

25 MR. LEIBIG: Right.

1 QUESTION: -- view from Labor, doesn't it?

2 MR. LEIBIG: The Office of Personnel Management
3 takes the position that Federal employees can be exempted
4 based on pay classification alone. I do not think that,
5 and I think that the courts have found that to be the
6 case, and I don't think it's consistent with the statute.

7 For example, when Congress passed the statute
8 applying the Fair Labor Standards Act to themselves, they
9 did make -- apply the salary basis test to themselves, and
10 under the Professional Accountability Act, the regulations
11 under that act specifically say that the salary basis test
12 does apply to congressional employees.

13 And it specifically includes the regulation
14 including, there was some discussion in the comments on
15 the regulation of whether 541.5d, which is a special rule
16 limiting part of it -- I'll talk about in a minute -- how
17 that should be dealt with by the Congressional
18 Accountability Office, and after considering the comments
19 they included the regulation and specifically made
20 reference to the applicability of the salary basis test to
21 congressional employees.

22 So -- and in addition to that, in the record
23 there's a history of the Department of Labor's current
24 consideration of the regulations and as part of that
25 history the Director of OMB has had a series of reports

1 and considerations with the Department of Labor about this
2 problem and what to deal -- how to deal with it in the
3 future.

4 So the answer is, the Office of Personnel
5 Management, just like a lot of employers in a lot of
6 places, claim that they can exempt people based on
7 classifications alone, but when the Federal Government and
8 when the Congress have looked at it they've said they have
9 to --

10 QUESTION: Well, they also have a regulation
11 saying the Federal Government can dismiss or suspend
12 employees for 14 days or less.

13 MR. LEIBIG: Right.

14 QUESTION: By way of discipline.

15 MR. LEIBIG: They have a regulation to -- yes,
16 that's true, they do, and in the -- and the -- that raises
17 the question of whether that would make all Federal
18 employees subject to that rule, which doesn't cover all
19 Federal employees, but I think it covers all Federal
20 employees in the Classified Service, nonexempt, and I
21 think that is part of the struggle the Department of Labor
22 has had, and that is why the Department of Labor has had
23 the practical rule to the longstanding salary basis test,
24 and I think I can explain how the practical rule I think
25 works.

1 But if you look at, and we attach the Department
2 of Labor briefs going back from 1981 and their positions,
3 there has been some development in how you deal with the
4 problem where there's a rule on the books that seems
5 counterintuitive. How can an employer apply that rule?

6 And I think the rule that I would argue is that
7 the first rule of the regulation, and after all, the
8 Department of Labor that issued this regulation issued it
9 under a direct rule of Congress, is that the employee's
10 salary must be fixed, and it cannot be contingent.

11 An exempt employee cannot have contingent
12 income, and that, however -- that is the test, and then,
13 however, there can be a situation where there are rules on
14 the books, where people have a rule that says you're --
15 you can be subject to discipline by -- for 14 days, which
16 would be longer than a work period, so that would be okay.

17 But if under that rule they discipline somebody
18 for 1 day, which, by the way, the statute -- the Federal
19 regulation doesn't say they can do, but if they did do it,
20 that would raise the question of whether the people were
21 practically subject to deductions for less than a full
22 work period, and I think in that case you'd have to
23 prove -- if all you had was a rule and the employer
24 claimed that the people were exempt and that they were not
25 doing deductions, I think the burden's on the employer to

1 come forward with some evidence.

2 They at least have to assert that we wouldn't
3 exempt -- we would not punish anybody for less than a pay
4 period, which the Federal Government could do in a --

5 QUESTION: Well, of course, here you're
6 asserting, I guess, that because of one instance involving
7 one sergeant that all the other people who have never been
8 disciplined fall under some nonexempt status.

9 MR. LEIBIG: I am -- I am --

10 QUESTION: Just on the basis of some possibly
11 broader State rule applicab -- or a county rule, or police
12 department rule here.

13 MR. LEIBIG: I'm asserting that all sergeants
14 and lieutenants in the St. Louis Police Department whose
15 pay is contingent and who all the witnesses, including the
16 chief of police, including all -- everyone who testified,
17 no one ever testified that any sergeant or lieutenant's
18 pay was not subject to discipline. No one not only didn't
19 testify, but nobody ever even asserted that.

20 I did not rely on Mr. Guzy -- it isn't because
21 Mr. Guzy received one 2-day suspension that that
22 transferred all of the employees who had a contingent
23 pay --

24 QUESTION: Well, that's what it looks like,
25 because it didn't happen to anybody else in the numerous

1 plaintiffs here, did it?

2 MR. LEIBIG: It -- I'm sorry, it didn't -- there
3 is evidence in the record that it did happen to other
4 sergeants, in fact, and in fact it did happen to other
5 sergeants.

6 What's not in the record is an example of a
7 specific sergeant who testified that he was suspended, but
8 the reason for that is, if you look at the whole record,
9 the case was bifurcated, and it was tried on the basis of
10 representative witnesses.

11 For example, there was only one witness that
12 testified that he was a homicide detective --

13 QUESTION: Well, the --

14 MR. LEIBIG: -- and yet all the homicide
15 detectives --

16 QUESTION: The Eighth Circuit, as I read its
17 opinion, said that a one-time suspension without pay for
18 violating the city's residence requirement doesn't mean
19 that the whole thing is over. Now, do you disagree with
20 that ruling?

21 MR. LEIBIG: I agree that a one-time suspension,
22 standing in isolation, if the employer took the position
23 that the pay was guaranteed and that was a mistake, it was
24 inadvertent, that it wouldn't automatically mean, so a
25 one-time suspension all by itself would not settle the

1 case, and one reason for that is the burden's on the
2 employer in the first in to establish -- in the first
3 instance to establish the employees are guaranteed a
4 predetermined amount of pay.

5 One instance of a -- somebody losing a
6 guaranteed amount of pay would certainly raise a lot of
7 suspicion, but if the employer were in some case -- in a
8 given case, for instance, to claim that was a mistake, it
9 wasn't under the rules, that's different.

10 But in our case the chief of police, the
11 30(b)(6) designees of the employer for exempt status and
12 for application to the regulations, and everyone else
13 testified that in fact all sergeants were subject to being
14 disciplined, and there is repeated evidence in the record
15 which -- which is cited in the brief.

16 QUESTION: What evidence in the record of actual
17 discipline, other than this one sergeant?

18 MR. LEIBIG: In -- there is -- at page -- the
19 chief of police testified that all sergeants were subject
20 to suspension.

21 QUESTION: Yes, I -- but that wasn't my
22 question. I asked you what evidence is there in the
23 record of actual discipline, not whether someone was
24 subject to discipline.

25 MR. LEIBIG: Well, for instance, Sergeant

1 Michael Fredericks testified that he knew of sergeants
2 that were suspended for less than a day. There's no --
3 there is no -- in the record there is no other name of a
4 specific sergeant who was suspended, but there is a great
5 deal of evidence that in fact other sergeants, other than
6 Mr. Guzy, were suspended.

7 QUESTION: Yes, but the Eighth Circuit didn't
8 find the -- didn't find for you as a fact on that point --

9 MR. LEIBIG: No.

10 QUESTION: -- did it?

11 MR. LEIBIG: Because the Eighth Circuit did not
12 agree with the base rule -- a) they didn't agree that the
13 burden was on the employer to establish that pay was fixed
14 rather than contingent, and b) they put the burden on the
15 plaintiffs to establish actual instances of deduction,
16 which I don't think they should have done, but looking at
17 all the evidence of the record, no one could conclude from
18 the evidence of that record that the regulation which says
19 pay is not subject to deduction was followed in this case.

20 I mean, it would be different if the -- and
21 there are cases that are reported --

22 QUESTION: You're just asking for a factual
23 revision, then, from this Court.

24 MR. LEIBIG: No.

25 QUESTION: The Eighth Circuit saw it one way,

1 and you're asking us --

2 MR. LEIBIG: No.

3 QUESTION: -- to see it a different way.

4 MR. LEIBIG: No. The Eighth Circuit -- the
5 Eighth Circuit said that Mr. Guzy was suspended. The
6 Eighth Circuit did not say that the Department did not
7 have a rule that made everybody subject to suspension.
8 They don't think that's required.

9 For instance, if you compare the Eighth Circuit
10 decisions to the decisions in, now, seven of the eight
11 circuits, in the Second Circuit the Yourman case, in the
12 Third Circuit the Balgowan case, in the Fourth Circuit the
13 Shockley case, in the Sixth Circuit the two Michigan court
14 cases, and in the Seventh Circuit Mueller and Bankston,
15 and in the Ninth Circuit Abshire and six or seven other
16 cases, in the Tenth Circuit Carpenter and Spradling, all
17 of those cases heard said that the test is not whether or
18 not there were actual individual instances of deductions.
19 The question is whether the person working there is
20 subject is fixed -- pay is fixed or contingent.

21 If you have contingent pay, then you cannot be
22 exempt, and there's a reason for that. If you only say
23 the people who are disciplined lose the exemption, then
24 you say only rule-breakers would be exempt. For example,
25 in --

1 QUESTION: Well, but you have a letter, a couple
2 of letters from the Secretary here --

3 MR. LEIBIG: Mm-hmm.

4 QUESTION: -- saying that the exemption -- the
5 exemption is lost as to all employees only if the employer
6 engages in a regular and recurrent practice of making
7 impermissible deductions, and the opinion we have before
8 us does not find that the police department had a regular
9 and recurring practice. It dealt only with the one
10 sergeant.

11 MR. LEIBIG: The -- there aren't a series of
12 letters from the Department. The Department of Labor has
13 written one letter in one other place where they said that
14 they will look for regularly recurring exemptions, but
15 they've always done that in the context of whether -- and
16 the regulation itself, the plain wording of the regulation
17 itself says the key is whether you're subject to
18 deduction, not whether actual deductions occur.

19 There's also some confusion because --

20 QUESTION: It would be an important factor in
21 deciding whether you were subject to deduction to know
22 whether actual deductions occurred, would it not?

23 MR. LEIBIG: Absolutely.

24 QUESTION: May I ask one question --

25 MR. LEIBIG: Could I make one other -- yes.

1 QUESTION: Go ahead and finish -- you had --

2 MR. LEIBIG: Just one other point. That
3 Department of Labor letter also, there's another thing in
4 the regulation. There's a difference -- there's two
5 parts of the regulation. One talks about deductions for
6 part of a day for being absent. Another part talks about
7 disciplinary deductions, and I think the enact -- the part
8 about being absent for part of a day doesn't apply in the
9 public sector any more anyway, and I can explain more
10 about that why -- why, if you need to.

11 But the point is, disciplinary deductions are
12 different than deductions for part of a day. An employer
13 that allows employees to leave for part of a day means to
14 adopt a flexible work schedule, and intends people to be
15 able to come and go as they please. It would be unusual
16 if people didn't leave for part of a day, so you'd want to
17 find -- you'd expect to find a lot of people who did.

18 However, disciplinary rules are exactly the
19 opposite. The reason the employer imposes disciplinary
20 rules is so people will obey them and anticipates that
21 they will not disobey them.

22 QUESTION: May I ask a question about these
23 disciplinary rules? Is this manual applicable to all
24 employees, including people who are undoubtedly covered by
25 the Fair Labor Standards Act? This is not a discrete code

1 for --

2 MR. LEIBIG: It's covered by -- excuse me.

3 QUESTION: Just for professional,
4 administrative, and executive?

5 MR. LEIBIG: The manual, in this case the police
6 manual is covered by all commissioned police officers,
7 which in St. Louis includes -- probably doesn't include
8 the chief, but there's two deputy chiefs.

9 QUESTION: But it would include people who are
10 covered by the FLSA.

11 MR. LEIBIG: Yes.

12 QUESTION: All right.

13 MR. LEIBIG: Regular line officers.

14 QUESTION: Now, why couldn't somebody look at
15 this code and say, gee, it's got a range of sanctions,
16 from reprimand to dismissal, and we'll assume that a law-
17 abiding employer is going to apply to the people who are
18 subject to the act, the sanctions, the full range of
19 sanctions, but to the people who are exempt, only -- only
20 those sanctions that would fit with exempt status.

21 MR. LEIBIG: Hypothetically you could have this
22 manual in some police department where you ask the people
23 in charge of discipline do you apply this manual to
24 sergeants and lieutenants, and they could say no, we
25 don't, but in the facts of this case, the chief of police,

1 the person in charge of discipline, the person in charge
2 of record-keeping, and the 30(b)(6) designee in terms of
3 exemptions, all testified that sergeants and lieutenants
4 were subject to the manual, and those --

5 QUESTION: Yes, but may I ask the question --

6 MR. LEIBIG: -- so it's not the manual alone.
7 It's the manual plus.

8 QUESTION: But it's -- but one could say yes,
9 the manual, but only those sanctions in it that are
10 compatible with exempt status.

11 MR. LEIBIG: No, but they testified that they
12 were subject to 2-day suspensions and suspensions less
13 than a day under the manual. The chief testified to that,
14 the 30(b)(6) -- I mean, an employer could have that
15 manual --

16 QUESTION: What is the testimony in this record
17 that says people who are in this category in fact got such
18 sanctions, that there was a pattern and practice of
19 applying the sanctions that would ordinarily be
20 disqualifying?

21 MR. LEIBIG: The last part of your question --
22 there is evidence, the evidence in the record that any
23 police sergeant or lieutenant in the St. Louis Police
24 Department who violates a rule that provides -- has one of
25 the potential penalties of a suspension of, say, 2 days,

1 is subject to them, is that the -- the chief testified to
2 that at joint appendix page 60, and joint appendix page
3 62.

4 When he was asked did he recall any specific
5 person -- this is at page 62 -- who had ever been
6 disciplined he said he didn't remember any names, but yes,
7 there would be people that had done that.

8 Ms. Cortelyou, who was the recordkeeper that
9 keeps track of exemptions testified in the joint appendix
10 from page 49 through 57 that people were not subject for
11 absenting themselves for part of a day under a flexible
12 work week rule, but if they broke the rules, they were
13 subject to being suspended for a day or two, and she
14 specifically said that they could be disciplined and that
15 they could lose pay for a day or two. Larry Patterson --

16 QUESTION: Could, but where --

17 MR. LEIBIG: If they broke the rules they would
18 be, and they said that.

19 QUESTION: Where is this testimony?

20 MR. LEIBIG: Well, that -- let me get the joint
21 appendix. Why don't I, ma'am -- at page 60 -- let's do
22 one at a time. That's the chief. This is the joint
23 appendix at page 60.

24 QUESTION: And which is the testimony from
25 there?

1 MR. LEIBIG: This is the testimony of the chief
2 of police at the time, Robert Sheetz, and at the top of
3 the page -- well, first he was asked, as a result of
4 charges, could they be docked pay, and there's a question
5 right before that.

6 And at the top of the page he says -- this is if
7 someone was -- broke a rule, could they -- and he said, I
8 would say that he probably would be. He could be. He
9 would be suspended in lieu of, say, maybe 1-day suspension
10 or 2-days suspension. I don't recall that we've ever
11 docked anybody, you know, like you're docked \$10 or
12 something like that. I don't know. I don't recall any
13 time the department has ever -- that has ever happened.
14 But I --

15 QUESTION: Well, that seems to me the answer is,
16 as long as I've been in this Department, it hasn't
17 happened.

18 MR. LEIBIG: No. It could be, except he says
19 more, because he's -- that -- there's a follow-up on that,
20 and then on page 62 --

21 QUESTION: Where is the followup?

22 MR. LEIBIG: Well, it goes along -- there's a
23 series of questions about that --

24 QUESTION: Well, I see the last statement he
25 made is, I don't recall in my time in the Department that

1 that ever happened. Now, what qualifies that?

2 MR. LEIBIG: This -- what he -- let me get you
3 the -- it's on page 62. On page 62 he says --

4 QUESTION: Down at the bottom of the page.

5 MR. LEIBIG: He says at the bottom of where --
6 40 -- it says, Okay. Do you know if a sergeant has ever
7 been disciplined for AWOL, say in the recent past, in the
8 last 3 or 4 years? I don't recall any specifics, but I
9 would say yes.

10 I don't take the chief's testimony, by the way,
11 in isolation. In our brief on page 42, on page 42 and
12 then page 9 through 17, we go through -- a whole bunch of
13 witnesses testified that people --

14 QUESTION: May I ask the question I've been
15 trying to ask for a little while?

16 MR. LEIBIG: I'm sorry.

17 QUESTION: The manual -- you rely heavily on the
18 manual, and you rely on this testimony they might be
19 disciplined.

20 MR. LEIBIG: Right.

21 QUESTION: But would you not agree that there
22 are forms of discipline other than docking for a day's
23 pay, or 2 days' pay?

24 MR. LEIBIG: Right. There are.

25 QUESTION: So this -- the general -- the text of

1 the manual doesn't make out your case. It's only if you
2 can get enough --

3 MR. LEIBIG: Well, there are some provisions in
4 the manual that the penalty, the only penalty listed there
5 is less than a full week's --

6 QUESTION: Well, do you take the position that
7 the only form of discipline is docking?

8 MR. LEIBIG: No.

9 QUESTION: All right. So the manual itself
10 doesn't get you home, at least, nor does the testimony at
11 page 62, because he just says there's been some
12 discipline, and I think that we must assume that there are
13 possibly forms of discipline other than docking.

14 MR. LEIBIG: There are, and there's a chart in
15 the manual that says when it's docking and when it's not
16 docking, and in some of the penalties, the only penalty --
17 for instance, in the second -- in the second non -- in the
18 preventable accident, the only penalty is a 1 or 2-day
19 suspension.

20 And by the way, it's not just chief -- the
21 chief's not the only one who testified. All of the
22 designees testified that people were suspension and their
23 pay -- were subject to being suspended.

24 QUESTION: Yes, but in actual cases, and what I
25 tried to ask you before about this manual, which has a

1 range of sanctions -- and discipline doesn't show docking.
2 Discipline can be many things, from a reprimand to
3 termination.

4 MR. LEIBIG: No -- I'm sorry. It shows -- the
5 manual at page -- in the manual from page 43a -- this is
6 in the appendix to the petition, and from page 43a through
7 50 -- 49a there are charts that have the list of all the
8 violations and then it has a list of all the penalties,
9 and it says what the penalty is for a first offense and a
10 second offense, and many of those penalties include
11 suspensions, from a letter of reprimand to a 5-day
12 suspension, and for a first or second day, and for
13 example, one of the penalties provides a 1-day suspension.
14 That's on page 147. And so it's clear that the sergeants
15 are subject to being suspended for periods of less than a
16 full week.

17 QUESTION: Well, I don't see even on that
18 reasoning that it's clear, because I come back to a
19 question that's been asked before.

20 In the absence of evidence to the contrary, why
21 shouldn't we assume that an employer who knows that he
22 cannot apply a particular disciplinary form consistent
23 with the status, with the salaried status for the Fair
24 Labor Standards Act, will not apply it?

25 You've got a manual that applies across the

1 board to everybody. Why shouldn't we assume, in the
2 absence of evidence to the contrary, that the employer
3 will not apply what is in that manual in such a way as to
4 destroy the salaried status?

5 MR. LEIBIG: First -- for two reasons. One is,
6 under the statute the requirement to establish exemptions,
7 the burden is on the employer, not on the employee, so you
8 shouldn't assume anything.

9 The second thing, however, is, suppose the
10 employer -- the employer should at least be put to a
11 standard of proof to assert that sergeants and
12 lieutenants -- have some witnesses or have somebody assert
13 on the record that sergeants and lieutenants are not
14 subject to being suspended for a 2-day suspension, for
15 example, and in this case the employer simply never did
16 that.

17 The reason they simply never did that is, people
18 had been suspended, and it -- there are --

19 QUESTION: Well, we know of only one instance,
20 right?

21 MR. LEIBIG: Well, for instance, Sergeant
22 Frederick testified that there were other instances, but
23 he didn't name --

24 QUESTION: Yes, but he couldn't come up with
25 any. The only specific instance that is in fact shown on

1 the record is this one --

2 MR. LEIBIG: Right.

3 QUESTION: -- instance, Guzy, or Guzy.

4 MR. LEIBIG: The first reason you shouldn't
5 assume that the employer, just because they claim
6 exemptions, that they automatically are going to apply all
7 the rules not to do exemptions, is because that would put
8 the burden on the employees to prove exempt status.

9 The second reason which you should not approve
10 it is because it's contrary to the whole idea of having --
11 of the plain wording of the statute itself, which says
12 it's not the act of making exemptions, but it's the fact
13 of putting employees and making their pay subject to
14 deductions, that's been the --

15 QUESTION: But on that point, it seemed to me
16 that the regulation, which says, subject to -- not subject
17 to reduction because of variations in the quality or
18 quantity of work might not apply to discipline at all. It
19 might be just the operational needs of the employer. On
20 one day you have to unload the dustbin, and on the other
21 day you get to perform a skilled job.

22 It seems to me that that is a plausible reading
23 and that that's all that it means. Is there any authority
24 to support my reading at all?

25 MR. LEIBIG: Sure. The Department -- The

1 regulations go on, if you read the whole regulations, and
2 down at a later point it talks about discipline for safety
3 reasons but not discipline for other reasons. Plus, the
4 Department of Labor has interpreted the regulations for 40
5 years to require disciplinary docking, and there's a lot
6 of cites in the record, plus --

7 QUESTION: Thank you --

8 MR. LEIBIG: -- the last 20 seconds --

9 QUESTION: Mr. Liebig.

10 MR. LEIBIG: -- the quality of work --

11 QUESTION: I think you've answered the question.
12 Your time has expired.

13 MR. LEIBIG: Thank you.

14 QUESTION: We'll hear from you, Mr. Gornstein.

15 ORAL ARGUMENT OF IRVING L. GORNSTEIN

16 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

17 MR. GORNSTEIN: Mr. Chief Justice, and may it
18 please the Court:

19 Our position is that the existence of the
20 respondent's police manual cannot by itself show that
21 petitioners as a class are subject to disciplinary
22 deductions of less than 1 week's pay within the meaning of
23 the Secretary's salary basis test, and we reach that
24 conclusion for three reasons.

25 The first is that the Secretary interprets the

1 phrase subject to reduction to mean that there must be
2 more than a theoretical possibility that a violation of a
3 work rule will result in a partial week disciplinary
4 deduction.

5 QUESTION: Would that more than theoretical
6 possibility be satisfied in an instance in which the
7 employer had promulgated the manual solely to salaried
8 employees, and yet nonetheless provided as to them that
9 there would be these impermissible dockings. Would you
10 say that was enough that --

11 MR. GORNSTEIN: I would say that if you just had
12 that you could reach that conclusion, Justice Souter,
13 subject to whatever the employer might show in response to
14 that.

15 QUESTION: I've lost you here. If you just had
16 that you could reach what conclusion? If you just --

17 MR. GORNSTEIN: That you are -- that if the only
18 possible sanctions are -- if I took the --

19 QUESTION: Only possible sanctions and the only
20 possible class --

21 MR. GORNSTEIN: Class --

22 QUESTION: -- was a salaried class.

23 MR. GORNSTEIN: It's a book for sergeants, and
24 the only possible sanctions are partial week disciplinary
25 sanctions. I think you could infer from that that

1 sergeants as a class are subject to reductions, subject to
2 the employer coming back and say, look, we don't really --
3 I know we said this, but this is out of date, or it's
4 ineffective for some reason.

5 QUESTION: But that's the part I don't
6 understand -- see, you're all knowledgeable, and I just
7 don't understand this. I don't know which way it cuts.

8 But there's a statute here, and the statute uses
9 the words, executive, professional, or administrative
10 employees, and it says they're not subject to overtime.

11 MR. GORNSTEIN: Correct.

12 QUESTION: And then there's a reg that I can't
13 fit with the statute.

14 That is, suppose Microsoft says, Bill Gates has
15 to dock a day's pay every time he wrongly uses the
16 corporate jet, okay. Does that make Bill Gates an hourly
17 employee, subject to overtime?

18 MR. GORNSTEIN: It does for purposes of the
19 regulation, Justice --

20 QUESTION: Well, if it does, how do you
21 reconcile that with the statute, because I would think
22 there's no one in history who's less an hourly worker than
23 Bill Gates --

24 MR. GORNSTEIN: And I doubt very much that --

25 QUESTION: -- and so if you have a reg --

1 MR. GORNSTEIN: That's right, and I --

2 QUESTION: -- that seems to make him an hourly
3 worker, that seems to me to be a problem.

4 MR. GORNSTEIN: I think, Justice -- I --

5 QUESTION: And that's what I want to understand,
6 how that fits within this case.

7 MR. GORNSTEIN: I think what the Secretary did
8 when he originally formulated the regulations was to try
9 to draw a line that would not necessarily make a 100-
10 percent case in every single case, but would be a
11 reasonable line for the vast amount of cases.

12 And what the Secretary concluded, based on
13 hearings that were held after, in the wake of the Fair
14 Labor Standards Act being enacted, is that one of the
15 hallmarks of having the exempt status, the exempt -- that
16 exempt employees, one of the hallmarks of the importance
17 and status that those employees had is that they were paid
18 on a weekly basis, that for any week in which they worked
19 they would receive a full week's pay.

20 QUESTION: But he makes it the hallmark. He
21 doesn't make it one of the characteristics. He says, this
22 is the criterion, and is it adequate to say, you know,
23 that will handle maybe 90 percent of the cases. It won't
24 get Gates, but, you know, close enough for Government
25 work. Is that what you --

1 MR. GORNSTEIN: I think it is wrong to --

2 QUESTION: The statute doesn't say that. The
3 fact is, Gates shouldn't be within it.

4 MR. GORNSTEIN: Justice Scalia, what the statute
5 says is that they are executive, administrative, and
6 professional, as defined by the Secretary. That's what
7 the statute says, and it gives the Secretary wide leeway
8 to give content to the meaning of those terms.

9 And what the Secretary has done is set out an
10 administrable statute, not to leave to a district court or
11 an employer in every case to figure out whether under the
12 totality of circumstances we are going to regard this
13 person as executive, administrative, or professional.

14 QUESTION: So your response is, if Microsoft
15 doesn't like it, it can just rescind the rule that -- you
16 know, punish Gates some other way.

17 MR. GORNSTEIN: Some other way, or if it was a
18 one-time deduction, then the window of correction could be
19 used to retroactively restore his exempt status.

20 QUESTION: And that's good, and so that's why
21 you say the effect of making a deduction which is not
22 permitted under the rule as a practical matter depends on
23 the case.

24 MR. GORNSTEIN: It does, but I would --

25 QUESTION: That's what the reg says, and are you

1 saying that then here you look at practically what happens
2 in this case. You're saying as a practical matter the
3 facts of this case show the deductions that they made
4 didn't transmute them into hourly employees.

5 MR. GORNSTEIN: That is correct, that that --

6 QUESTION: And that's a --

7 MR. GORNSTEIN: That as a practical matter in
8 this case, I don't think you have to get to the window of
9 correction to decide that, though. I think you can look
10 at just the text of the 541.118 and here we interpret the
11 term, subject to reduction, to mean that as a practical
12 matter the employees in the class have to face a
13 significant possibility of having their pay reduced.

14 If there is no such practice, there is no such
15 policy, and nonetheless there is a deduction taken, for
16 whatever reason, then you look to the window of correction
17 to restore retroactive status.

18 Now, the second point --

19 QUESTION: But the burden is on the employer --

20 MR. GORNSTEIN: The burden --

21 QUESTION: -- to show that there is no such
22 possibility, is that right?

23 MR. GORNSTEIN: That there's not a significant
24 possibility.

25 QUESTION: Right.

1 MR. GORNSTEIN: That's correct, that there's not
2 a significant possibility that employees in this class
3 will face partial week disciplinary suspensions.

4 QUESTION: And in this case the employer bears
5 not just that initial burden, but also the burden of
6 overcoming a manual which on its face is applicable to all
7 employees, and on its face seems to say that these people
8 are subject to it.

9 MR. GORNSTEIN: Well, let me talk about the
10 manual on its face, because the manual is broadly
11 applicable to all employees, both those who clearly
12 perform exempt duties, like captains on up, and clearly
13 perform nonexempt duties, like patrol officers who patrol
14 the beat, and those rules can all be enforced in ways that
15 are completely consistent with retaining exempt status for
16 those employees who perform clearly exempt duties, so I
17 think if you just look at the manual --

18 QUESTION: Well, what do you do with the -- what
19 do you do with the point that your brother was making
20 about the record, that the chief and the others who came
21 in and testified didn't testify that these particular
22 sanctions would be applied only to the nonsalaried. They
23 said something like, well, gee, yeah, I guess it could,
24 but I can't think of any instance.

25 They didn't take the position that's consistent

1 with your argument, did they?

2 MR. GORNSTEIN: I think that as the case came to
3 the court of appeals that the petitioner in this case
4 really put the case to the court of appeals, you can just
5 look at the manual and you can add in the Guzy incident,
6 and we should win this case.

7 None of this was brought to the attention of the
8 court of appeals. None of this was part of the question
9 that was framed for review by this Court.

10 Again, I think the question that was framed for
11 review by this Court was, can you just look at this manual
12 and conclude that these people are subject to disciplinary
13 deductions.

14 The burden of proof issue was not raised in the
15 court of appeals, and I don't think it was raised here. I
16 think there is a problem. When you look at all the
17 testimony there's a lot of ambiguous statements about what
18 could or could not happen.

19 But I think as the case went to the court of
20 appeals, and to this Court at the certiorari stage, the
21 understanding was there was not a single incident of
22 actual deductions having ever occurred with the exception
23 of the one case of Sergeant Guzy, and that took place
24 under such highly unusual circumstances that I don't think
25 it was indicative that sergeants as a class face a

1 significant possibility of having their pay reduced.

2 QUESTION: The Government's position is that the
3 judgment of the court of appeals should be affirmed.

4 MR. GORNSTEIN: It is that it should be
5 affirmed.

6 QUESTION: And that we don't need to get to the
7 window of correction, or --

8 MR. GORNSTEIN: With respect to Sergeant Guzy,
9 that in our view the only -- the window of correction is
10 only implicated with respect to Sergeant Guzy. That
11 incident doesn't show that the class is subject --

12 QUESTION: But isn't it probative of --

13 MR. GORNSTEIN: -- but Sergeant --

14 QUESTION: Isn't it probative of the treatment
15 of the whole class when they said, well, we'll correct it
16 if we have to?

17 MR. GORNSTEIN: I don't think that that is -- I
18 think that the position of the employer here is, we don't
19 think we owed Sergeant Guzy money, but if we do, we want
20 to be able to restore his retroactive status, and under
21 the --

22 QUESTION: If they don't think they owe him
23 money, they must interpret the fact that they ever -- they
24 are agreeing with your opponent.

25 MR. GORNSTEIN: I think that in fact what they

1 did is, they took a view similar to the one that Justice
2 Kennedy was raising in his question about what it means to
3 be subject to reduction for quality and quantity of work,
4 and they said, we don't think Guzy was reduced for that
5 reason, but if he was, we want to restore his status
6 retroactively. In our view, the window of correction --

7 QUESTION: And the court has to tell him why he
8 was reduced. I don't quite understand that.

9 MR. GORNSTEIN: Well, there is nothing in the
10 window of correction rule that precludes an employee from
11 correcting after litigation. I -- we don't think that
12 there is a prelitigation correction rule in the window.

13 QUESTION: Maybe the employer -- as I understand
14 the Guzy case there was a kind of a plea bargain for this
15 lesser sanction when the sanction that eventually was
16 made, the single sanction termination, would not have
17 affected FLS --

18 MR. GORNSTEIN: That's correct. He was
19 originally filed, or that was the original imposition of a
20 penalty, was a firing, which would not implicate the rule
21 at all.

22 QUESTION: Thank you, Mr. Gornstein.

23 Mr. Renick, we'll hear from you.

24 ORAL ARGUMENT OF JOHN B. RENICK

25 ON BEHALF OF THE RESPONDENTS

1 MR. RENICK: Mr. Chief Justice, and may it
2 please the Court:

3 Let me address this -- at least partially this
4 question about the chief of police's testimony. First of
5 all, I think it's important for the Court to understand
6 that the chief of police does not impose discipline. That
7 is the role of the police board, which is the defendant in
8 this case.

9 Secondly, if you examine the testimony that
10 Mr. Leibig was referring to, the chief consistently says,
11 you know, maybe that could happen, it's possible, but he
12 can't recall it ever happening, and I think that's
13 important, and I think that points out the problem with
14 petitioner's position here as to someone who's subject to
15 a deduction.

16 And it goes to Justice Breyer's point.
17 Logically, you could file one of these lawsuits and take
18 the deposition of the chief executive officer and simply
19 ask the question, is it possible that you could discipline
20 one of your vice presidents who is found to have engaged
21 in some kind of misconduct for a period of less than a
22 week.

23 And if the answer to that is yes, it's possible,
24 because that is part of the inherent right of management,
25 then the logical extension of petitioner's argument is

1 that everyone in that organization, because they are
2 conceivably subject to an improper deduction, would be
3 nonexempt. Therefore, no one, whether you're a vice
4 president, or Bill Gates, whatever it would be, under that
5 theory would be exempt.

6 QUESTION: Well, he could say that's not my
7 fault, that's the Secretary's fault. He wrote this
8 regulation.

9 MR. RENICK: Well --

10 QUESTION: I mean, we'll blame it on him.

11 MR. RENICK: We think that that shows that that
12 interpretation really doesn't make sense.

13 QUESTION: Well, would you agree that if you had
14 a manual that applied only to salaried employees, and
15 specifically provided for discipline that would be
16 inconsistent with salaried status, that that would be
17 enough to preclude salaried status?

18 MR. RENICK: If the discipline -- if the manual
19 was worded in such a way that discipline was mandatory, I
20 would agree with you, Justice Souter.

21 QUESTION: Well, I -- wouldn't -- wouldn't we be
22 entitled to act on the assumption that the manual was not
23 a totally nugatory exercise and that, in at least some
24 instances, consistently with the manual, discipline would
25 be applied? Wouldn't that be a reasonable basis for a

1 decision?

2 MR. RENICK: Yes, but I still --

3 QUESTION: I mean, your argument has to say --
4 it seems to me seems to be, even when they specifically
5 say they will do and are entitled to do what is
6 inconsistent with salaried status, we won't take them at
7 their word. We'll wait and see. That surely is --

8 MR. RENICK: What I'm saying is, and I think the
9 Secretary of Labor has agreed with our position, is
10 that -- is that as -- you have to look at what actual
11 experience -- the best evidence is what is the actual
12 experience in the application of whatever manual -- if you
13 have a manual or not, what has actually happened, and the
14 evidence in this case is very clear.

15 In 1979, which was 6 years before the Garcia
16 case was decided by this Court, the legislature of the
17 State of Missouri amended the governing statute which
18 controls the operations of the St. Louis Police Department
19 to convert all commissioned officers at the rank of
20 sergeant or above to a salary basis of payment.

21 It specifically amended the statute to disallow
22 payment of overtime and to compensate for that they gave
23 everyone an across-the-board 8 percent increase, and none
24 of the individuals in this case have come forward --
25 contrary to any other representations, the record is

1 devoid of any evidence -- we had 288 sergeants by the time
2 we go to trial. Not a single one of those sergeants took
3 the witness stand and testified that he or she had
4 actually suffered an improper deduction.

5 QUESTION: Oh, I quite agree, but that's not the
6 case that I put to you in the question.

7 MR. RENICK: Well, I think I'm agreeing with you
8 if you have a manual that says this is specifically
9 applicable to exempt employees, or functionally exempt,
10 and it provides that penalties will be imposed for certain
11 forms of misconduct that would be periods of less than a
12 week, if you accept the Secretary's interpretation of the
13 salary basis test, then I would agree with you.

14 QUESTION: But the Secre -- but penalties may be
15 imposed. If it says penalties may be imposed, your
16 position is that would not be enough.

17 MR. RENICK: Well, I think then you have to look
18 at the practice, because I think as one of the justices
19 earlier pointed out, I think you -- where there are a
20 range of penalties, as there are in this case, there's no
21 reason to assume that the employer is going to choose a
22 new proper penalty and thereby convert all of his or her
23 salaried employees to nonexempt employees.

24 QUESTION: Well, you know, all the text of the
25 regulation says is not which amount must be reduced

1 because of variations in the quality or -- it says which
2 amount is not subject to reduction, and you know, subject
3 to reduction doesn't mean will certainly be reduced.

4 MR. RENICK: Well --

5 QUESTION: It just means it's subject to
6 reduction, and as I understood the exception is, if that
7 thing is just a paper tiger, that in fact it is never
8 used, that's one thing, but if it's even used in one case,
9 it seems to me that's enough to show that it's for real.

10 MR. RENICK: Well, but the state of the record
11 here, Justice Scalia, is that in the period between 1979,
12 when the statute was amended, and the time we went to
13 trial in 1993, not one witness came forth to testify that
14 he or she had been subjected to a disciplinary proceeding
15 initiated by the department, by the police department,
16 based on a variation, which is the word in the
17 interpretation, on a variation in the quality or quantity
18 of work. There's --

19 QUESTION: Of course, the burden's on the
20 employer.

21 MR. RENICK: Not one appears.

22 QUESTION: The burden's on the employer here to
23 show that nobody had.

24 MR. RENICK: The employer --

25 QUESTION: Did anyone come in on behalf of the

1 employer and say, nobody has?

2 MR. RENICK: The employer prevailed on the
3 salary test on partial summary judgment prior to the
4 trial, and the record shows that I queried the trial judge
5 both at the beginning and at the end of my presentation to
6 ensure that that issue was no longer in the case.

7 QUESTION: Do you claim to have established at
8 trial that nobody had, that nobody had been subjected to
9 this disqualifying kind of discipline?

10 MR. RENICK: At the trial there was no evidence
11 to that effect because we had prevailed on partial summary
12 judgment prior to trial.

13 QUESTION: Okay, but it seems to me that's your
14 burden.

15 MR. RENICK: The trial judge found that we met
16 that burden when he ruled in a pretrial ruling which
17 granted partial summary judgment on the salary basis issue
18 and took that out of the case.

19 QUESTION: May I ask you to just address the one
20 thing that I find a little puzzling? Why, if you're
21 correct that the -- Sergeant Guzy was not subject to the
22 particular discipline he got, why hasn't he been repaid?

23 MR. RENICK: Well, I think there are a couple of
24 reasons for that. First of all, we believe, and I think
25 it's clear, that the basis for the discipline in that case

1 was the fact that he had violated a city residency
2 requirement.

3 QUESTION: Right.

4 MR. RENICK: Which was a requirement of
5 employment. That had absolutely nothing to do with the
6 quality or quantity of his work, so it would be my
7 position that he was never subjected to a reduction in his
8 salary based on anything that had to do with the quality
9 or quantity of his work, which is the phrase that the
10 Secretary uses.

11 Secondly, our position has been consistently in
12 this litigation that if we are wrong -- and the Eighth
13 Circuit's opinion actually only says arguably that this
14 deduction made Sergeant Guzy nonexempt, and we think it's
15 just as reasonable that it may not be, but our position
16 has been all along that if at the outcome of this
17 litigation it is determined that that was an impermissible
18 deduction, the salary test basis is validly applied to the
19 Board of Police Commissioners, then we will comply by
20 reimbursing Sergeant Guzy, and we will continue our
21 existing practice of not allowing deductions of less than
22 a week for exempt officers.

23 QUESTION: So you construe the disciplinary
24 manual really as saying that although you may have some of
25 the deductions, we won't have them if they're based on

1 defects in quality or quantity of work.

2 MR. RENICK: That's correct.

3 QUESTION: Now, you raise a lot of other issues,
4 I think, in your response, an Eleventh Amendment issue, a
5 claim that the FSLA does not apply at all to public
6 employees of State and local government, and so forth.

7 MR. RENICK: Yes, Your Honor.

8 QUESTION: Respondents never filed a cross-
9 petition here, did they?

10 MR. RENICK: No, we did not.

11 QUESTION: And the court below assumed without
12 deciding that the Fair Labor Standards Act applied to the
13 public employees here.

14 MR. RENICK: That's correct.

15 QUESTION: And you went forward under that
16 assumption the court --

17 MR. RENICK: Well, the first question presented
18 in the petition for the writ of certiorari, as I recall,
19 is does the salary basis test validly apply to public
20 employees, and we would say on the facts of this case,
21 just demonstrates that taking this disciplinary deduction
22 rule and trying to apply it to a law enforcement agency is
23 arbitrary and capricious.

24 QUESTION: Well, we really didn't grant, as I
25 see it, on a question of applicability of the Federal Fair

1 Labor Standards Act. There was no request made by you in
2 any event, by a cross-petition, that we consider Garcia --
3 we consider Garcia.

4 MR. RENICK: I agree with you, Justice --

5 QUESTION: Some amici have made that point, but
6 you did not raise that.

7 MR. RENICK: That's correct, Justice. We --

8 QUESTION: And I assume that the respondents
9 waived the Eleventh Amendment immunity below.

10 MR. RENICK: I don't believe that we did. We
11 don't believe that we have ever waived that. They pointed
12 out that we consented to the judgment, but I believe
13 the -- our Eleventh Amendment argument is based on this
14 Court's decision on Seminole Tribe v. Florida, which only
15 came out, I believe, March of this year, but at the time
16 this litigation was taking place, my recollection is that
17 Pennsylvania v. Union Gas was still good law, and there
18 was really no basis for me to make that claim until this
19 Court decided the Seminole Tribe.

20 QUESTION: I would have thought there might be
21 some cross-petition to get into these things.

22 MR. RENICK: Well, we raised it simply at the
23 point in time that the Court's Seminole Tribe decision had
24 come out, and the timing of the sequence of events, we
25 raised it basically as a jurisdictional issue, which, as I

1 read the Court's cases, can be raised under these
2 circumstances.

3 QUESTION: Is there any authority in the
4 circuits to support the argument that the subject to
5 clause doesn't apply to disciplinary actions at all, it
6 simply applies when the work changes, for the operational
7 needs of the employer? That is what I thought was the
8 common sense reading of it when I read the regulation, but
9 I don't know if there's any support for that.

10 MR. RENICK: I think that is the common sense
11 reading. When you read 541.118(a) in the general sense,
12 what the Secretary of Labor --

13 QUESTION: It's such a common sense reading that
14 none of the circuits seem to have adopted it.

15 MR. RENICK: The circuits --

16 (Laughter.)

17 MR. RENICK: The circuits have all picked up the
18 point of what we're dealing with here, that a disciplinary
19 suspension fits under 541.118(a)(5), which says
20 penalties -- it's actually worded in the affirmative, that
21 an employer may impose penalties which -- for violations
22 of major safety rules.

23 That has since been interpreted to mean a
24 penalty can be a suspension without pay, and the courts
25 have then read and said the converse of that, then, is

1 that you can't impose a penalty for something that's not a
2 violation of a major safety rule, and I think that's how
3 we get where we are here.

4 QUESTION: Has the agency ever expressly
5 rejected the interpretation I suggest?

6 MR. RENICK: Not to my knowledge, although it is
7 a matter of record at pages 43 through 46 of the joint
8 appendix that the Secretary of Labor went on record this
9 May and indicated that there was still confusion among
10 litigants, particularly in the public sector, as to what
11 all this means, and it appears that the Secretary intends
12 to undertake some kind of a rulemaking procedure to review
13 this disciplinary aspect of the salary test.

14 QUESTION: In any number --

15 MR. RENICK: It has never been done to date.

16 QUESTION: Any number of the specific rulings,
17 the letters that the Secretary has given seems to be
18 inconsistent with the reading I suggest. Or is that
19 correct?

20 MR. RENICK: I can't cite you to one, Justice
21 Kennedy.

22 QUESTION: In any event, your main argument, as
23 I understand it, is you -- accepting the Government's
24 current interpretation of the regulation, that you
25 properly prevailed in the Eighth Circuit, but didn't

1 you -- you made -- one of your border attacks was on the
2 Government's position as irrational in distinguishing
3 between suspension for a full week versus a couple of
4 days.

5 MR. RENICK: That's correct. We believe that,
6 particularly on the facts of this case, we are dealing
7 with a law enforcement agency where you have a recognized
8 exception that -- and you -- and again, you have to go
9 back to the premise that all of these sections of the
10 salary basis test are based on studies that were conducted
11 in the 1940's and fifties, when public employers were not
12 subject to the law, and that's part of the problem, is now
13 trying to take what seemed to make sense back in the
14 1940's and fifties, when these studies were done, and then
15 there was never any contemplation that the law would apply
16 to public employers.

17 QUESTION: But if we were to get into that, we
18 would be going considerably beyond where the Eighth
19 Circuit was in this case.

20 MR. RENICK: That would be true, yes, but we
21 believe that, as I said, on the facts of this case this
22 demonstrates that -- and the Secretary has specifically
23 recognized that you don't treat law enforcement agencies
24 the same as even other public employees, let alone private
25 employees.

1 There are differences in the standards for hours
2 worked, there are differences in the fact that they get
3 compensatory time, and our point here is that this
4 disciplinary deduction prohibition doesn't make sense when
5 you try to fit it into this kind of a situation.

6 This is a -- as the trial judge found, this is a
7 quasimilitary organization, it would be my position, where
8 the sole or primary function of the St. Louis Police
9 Department is to ensure the public safety, that by
10 limiting our ability to impose discipline on the members
11 of that police department, that the Secretary of Labor, in
12 application, that that application is improper, it's
13 arbitrary, it's capricious, and should be invalid.

14 QUESTION: That might be your dispute with the
15 Secretary of Labor, but it doesn't -- this case, your
16 victory in this case doesn't turn on --

17 MR. RENICK: It doesn't depend on that. Our
18 position is that if you assume that the regulations and
19 the Secretary's interpretations are entirely valid in
20 their application to the St. Louis Police Board, that the
21 actions in this case demonstrate first of all the -- we
22 tried the case.

23 We had 21 different categories of sergeants, all
24 of whom were found to perform exempt functions as either
25 executive or administrative employees. They were

1 functionally exempt, and they've come to this Court and
2 claimed that solely because they were subject to a
3 disciplinary action which might possibly include a
4 suspension of less than a week, for that sole reason,
5 without demonstrating that it ever actually happened, that
6 they are thus nonexempt, and we think --

7 QUESTION: Why does the distinction between
8 suspension for less than a week and suspension for a week
9 make sense for non-Government employees, or nonpolice
10 employees, rather?

11 MR. RENICK: Why does it make sense?

12 QUESTION: Yes.

13 MR. RENICK: I don't know that it does. It
14 just -- that has been in the Secretary's interpretation of
15 541.118(a) I think since 1954.

16 QUESTION: What's the theory of it? Why does --

17 MR. RENICK: The Secretary --

18 QUESTION: -- suspended for a whole week,
19 not --

20 MR. RENICK: It's just included, a proviso that
21 says in a week in which an employee performs no work at
22 all, that the employer is under no obligation to pay the
23 salary. There are some distinctions as to when you have
24 to pay the full salary.

25 The Secretary's interpretation is that

1 generally, if you perform any work at all within a week,
2 if you're a salaried employee, you shouldn't look at the
3 number of hours. It shouldn't matter. You're entitled to
4 your full salary. Then they draw the distinction and say,
5 in a week in which no work is performed, that the employer
6 need not pay the salary.

7 QUESTION: Yes, but they also -- the docking
8 rule also applies. A docking for a whole week is okay,
9 even though you work.

10 MR. RENICK: Docking for a whole week of work is
11 okay, according to the Secretary of Labor.

12 QUESTION: I don't understand that.

13 MR. RENICK: Well, we think that's even more so
14 demonstrated by the fact that in 1992 the Secretary of
15 Labor amended the regulation 541.5d that applies to public
16 employees, so that the salary basis test, if you read it,
17 doesn't even mean what it says for public employees,
18 because the salary basis test says you're supposed to
19 receive a predetermined amount of compensation every pay
20 period that is not subject to reduction based on quality
21 or quantity of work.

22 The Secretary of Labor, through a rulemaking
23 procedure in '91, looked at the outcry that this caused in
24 the public area, that there are many people who are
25 exempt, but because of principles of public accountability

1 are -- under State laws are not able to be paid for time
2 they don't work, so the Secretary amended the regulation
3 to specifically allow a public employer to make deductions
4 on an hour-by-hour basis from an otherwise exempt
5 employee's salary and still allow them to claim that
6 they're paid on a salary basis, which in and of itself is
7 inconsistent.

8 So the salary basis test as applied to public
9 employers no longer means what it says, and we say, why
10 should there be this disciplinary deduction aspect
11 maintained when the Secretary has already recognized that
12 the variation in quantity of work does not destroy the
13 salary basis.

14 I would also point out that, in the petition
15 that was filed by the petitioners in this case, they took
16 the position very clearly that this Court was required to
17 defer to the interpretations of the Secretary of Labor,
18 and this Court invited the views of the Government, asking
19 the Solicitor General to file a brief prior to deciding
20 whether or not to accept this case.

21 In that case, the Secretary of Labor's views
22 were specifically expressed, and it was described in that
23 brief as for the sole -- for the very specific purpose of
24 clarifying what the Secretary's position was on these
25 interpretations, and the Secretary has specifically

1 disagreed with the position taken by the petitioners.

2 But the petitioners continue nonetheless to have
3 had -- apparently have had a change of heart as to the
4 deference owed to the Secretary of Labor under the
5 circumstances, and we would submit that the -- whether or
6 not the Secretary's interpretations are agreeable to the
7 petitioner should not determine whether or not they are
8 entitled to deference in this case, and we believe, under
9 the circumstances, that they clearly are, and as I said
10 earlier, if you accept the Secretary's current
11 clarification of what the interpretations mean, this case
12 fits squarely within it, whether or not you get to the
13 window of correction.

14 If there are no other questions, thank you.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Renick.
16 The case is submitted.

17 (Whereupon, at 12:02 p.m., the case in the
18 above-entitled matter was submitted.)
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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:

FRANCIS BERNARD AUER, ET AL., Petitioner v. DAVID A. ROBBINS, ET AL.
CASE NO. 95-897

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mari Federico

(REPORTER)