

GINSBURG, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 00–758

UNITED STATES POSTAL SERVICE, PETITIONER *v.*
MARIA A. GREGORY

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

[November 13, 2001]

JUSTICE GINSBURG, concurring in the judgment.

Although I join the Court’s judgment, I do so on grounds not stated in the Court’s opinion. I note first that under *Bolling v. Department of Air Force*, the Board’s review of prior disciplinary actions pending in negotiated grievance proceedings requires, in cases like this one, only that the Board determine whether an agency action was “clearly erroneous.” 8 M. S. P. B. 658, 660 (1981). This summary and highly deferential standard is arguably inconsistent with the statutory requirement that the Board sustain a decision of an agency “only if . . . [it] is supported by a preponderance of the evidence.” 5 U. S. C. §7701(c)(1)(B). The Court maintains that the adequacy of *Bolling* review to meet §7701(c)(1)(B)’s preponderance of the evidence standard is a question “not before us.” *Ante*, at 5, 8. In light of the unsettled issue, however, I would place no reliance upon the Board’s “independent review” of prior discipline, see *ante*, at 5, 6, in this case. Nevertheless, I do not resist the Court’s remand order for the reasons set out below.

MSPB regulations allow the Board to reopen an appeal and reconsider its decision “at any time.” 5 CFR §1201.118 (2001) (“The Board may reopen an appeal and reconsider a decision of [an administrative judge] on its own motion at any time, regardless of any other provisions

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of this part.”). There is every reason to believe that the Board would reopen to reconsider a decision that credited a prior disciplinary action later overturned in arbitration. See *Jones v. Department of Air Force*, 24 MSPR 429, 431 (1984) (suspension “reversed by grievance . . . was effectively cancelled and thus should not be considered in determining a reasonable penalty for the current charge”).¹ Notably, the Postal Service agrees that the Board may invoke its provision for reopening “in the event that the employee’s prior disciplinary record has been revised as the result of a successful grievance.” Brief for Petitioner 28; see also Tr. of Oral Arg. 22 (counsel for the Postal Service confirmed Service’s recognition that “the [B]oard’s regulations permit the [B]oard to reopen any case at any time to reconsider it in light of a grievance which may have proved successful”).

Indeed, it might well be “arbitrary and capricious” in such a situation for the Board to disregard the employee’s revised record and refuse to reopen. Cf. 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* §4433, p. 311 (1981) (a “judgment based upon the preclusive effects of [a prior] judgment should not stand if the [prior] judgment is reversed”); *id.*, at 312–315; Restatement (Second) of Judgments §16 and Comment *c* (1980) (nullification of an earlier judgment on which a subsequent judgment relied “may be made the ground for appropriate proceedings for relief from the later judgment with any suitable provision for restitution of benefits that may have been obtained under that judgment”); *id.*, §84 (generally, “a valid and final award by arbitration has the same effects under the rules of *res judicata*, subject to the

¹The Board thus comprehends the two schemes—its own review, and arbitration under the bargained-for grievance procedure—as harmonious and not, as JUSTICE THOMAS does, *ante*, at 3–4 (concurring opinion), as entirely unrelated to each other.

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same exceptions and qualifications, as a judgment of a court”).²

Gregory did not bring to the Board’s attention her successful grievance of the Postal Service’s first disciplinary action, *i.e.*, a letter of warning dated May 13, 1997, based on the April 7, 1997, incident, see *ante*, at 1–2; App. 43, 47–48. Under the MSPB’s regulations, she may even now ask the Board to reopen based on the expungement of that action, or the Board may reopen “on its own motion.” 5 CFR §1201.118 (2001); see Tr. of Oral Arg. 26 (counsel for the Postal Service acknowledged that successful grievance of first disciplinary action “could have been brought to the attention of the [B]oard and still could be today”). Gregory may also bring to the Board’s attention any revision resulting from successful grievances of the Postal Service’s second and third disciplinary actions, *i.e.*, the seven-day suspension ordered on June 7, 1997, see *ante*, at 2; App. 41–42, 45–46, and the fourteen-day suspension ordered on August 7, 1997, see *ante*, at 2; App. 38–40.

Gregory asserts that the Postal Service resists arbitration of her second and third grievances on the ground that

²JUSTICE THOMAS suggests, *ante*, at 3 (concurring opinion), that Gregory’s argument would logically require the Board to review *de novo* any prior disciplinary action upon which the employer relied in removing an employee, “whether or not the prior actions were ever grieved.” Failure to pursue an available grievance procedure or other avenue of appeal, however, would end the matter. It is well settled that one who fails timely to appeal an adverse decision is bound by that decision in later proceedings. See, *e.g.*, *New Haven Inclusion Cases*, 399 U. S. 392, 481 (1970) (holding that a party who “took no appeal” from an adverse order is “foreclosed by *res judicata*” from later seeking relief inconsistent with that order); see also 18 Wright, Miller & Cooper, *supra*, §4433, at 305 (“preclusion cannot be defeated by electing to fo[r]go an available opportunity to appeal”); *id.*, at 305–308; Restatement (Second) of Judgments §§83 and Comment *a*, 84 and Comment *e* (in general, administrative adjudications and arbitration awards have the same preclusive effects as court judgments).

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under the collective-bargaining agreement between the Postal Service and her union, predischarge grievances do not survive a discharge which has been made final. Brief for Respondent 10–12, and n. 5, 26–27. She does not suggest, however, that the union is disarmed from bargaining for postdischarge continuation of grievances through to completion of arbitration.³

Gregory, moreover, elected to resort to the MSPB “[a]t the advice of her then-counsel.” *Id.*, at 9. She could have asked her union to challenge her dismissal before an arbitrator.⁴ Had she and her union opted for arbitration rather than MSPB review of the dismissal, she might have fared better; it appears that a labor arbitrator, in determining the reasonableness of a penalty, would have accorded no weight to prior discipline grieved but not yet resolved by a completed arbitration. See *Arbitration Between National Assn. of Letter Carriers, AFL–CIO, and USPS*, Case No. E94 N–4E–D 96075418, pp. 16–18 (Apr. 19, 1999) (Snow, Arb.), Lodging of Respondent 57–59 (referring to parties’ “past practice of giving unresolved grievances no standing in removal hearings,” arbitrator granted a continuance “pending resolution of an underlying disciplinary grievance”); *Arbitration Between USPS and National Assn. of Letter Carriers, AFL–CIO*, Case No. D90 N–4D–D 95076768, pp. 19–21 (Mar. 20, 1996) (Sickles, Arb.), Lodging of Respondent 27–29 (although employing agency need not await resolution of prior griev-

³At oral argument counsel for the Postal Service sought to “make clear” that “if this Court reverses the decision [of the Federal Circuit],” the Service “would not object to the continuance of [a] grievance.” Tr. of Oral Arg. 55.

⁴Grievances “may be appealed to . . . arbitration” only “by the certified representative of the Union.” 1998–2001 Agreement Between National Association of Letter Carriers, AFL–CIO and U. S. Postal Service, Art. 15, §4(A)(2).

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ances before ordering an employee's removal, an arbitrator may not take account of prior discipline until the appeals process has yielded a final resolution); *Arbitration Between USPS and National Post Office Mail Handlers*, Case No. MC-S-0874-D, p. 7 (June 18, 1977) (Fasser, Arb.), Lodging of Respondent 7 ("Until th[e] appeal [of a prior disciplinary action] is finally adjudicated, it has no standing *in* this proceeding."). Gregory, having at her own option forgone arbitration proceedings, in which prior discipline could not weigh against her while grievances were underway, is not comfortably situated to complain that the procedure she elected employed a different rule.

Given (1) the Board's reopening regulation, (2) the alternative arbitration forum Gregory might have pursued, (3) the Court's explicit reservation of the question of "the adequacy of *Bolling* review," *ante*, at 5, 8, and (4) the apparent, incorrect view of the Federal Circuit that the Postal Service itself could not take account of prior disciplinary action that is the subject of a pending grievance proceeding, see 212 F. 3d 1296, 1299, 1300 (2000),⁵ I agree that a remand is in order.

⁵The petition for certiorari and the brief for petitioner state the question presented as follows: "Whether a federal *agency*, when disciplining or removing an employee for misconduct pursuant to the Civil Service Reform Act of 1978, 5 U. S. C. §1101 *et seq.*, may take account of prior disciplinary actions that are the subject of pending grievance proceedings." Pet. for Cert. (I); Brief for Petitioner (I) (emphasis added).