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## When Procedure Moonlights as Reason, There Is Nothing Left to Abuse

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# When Procedure Moonlights as Reason, There is Nothing Left to Abuse

*Greenstreet v. Social Security Administration*<sup>1</sup>

## I. INTRODUCTION

The phrase “abuse of discretion” carries with it the connotation of judges running amok, deciding disputes willy-nilly, and doing justice a grave disservice. And rightly so, but for the phrase to have any meaning whatsoever, there must first exist some leeway that a judge took too far. That is, if a decision-maker is tasked with merely comparing his checklist to the situation at hand and then tallying up a final score to determine the ultimate outcome, the above phrase has no application; discretion cannot be abused when it does not exist in the first place. Therefore, where Congress has granted broad discretion to arbitrators’ decisions in certain contexts, Congress has told any court reviewing an arbitrators’ decision to keep its hands off unless the evidence is overwhelmingly clear that the arbitrator went beyond his bounds.

But in *Greenstreet v. Social Security Administration*,<sup>2</sup> when the Federal Circuit Court of Appeals could not discern exactly what basis upon which an arbitrator acted, it leapt past any presumption in favor of the arbitrator’s discretion and found that what an arbitrator *did not do* was an abuse of his decision-making volition, just as an act beyond his prescriptive powers would have been an abuse of discretion. So, in attempting to weed out the arbitrariness in the arbitration processes that decide workplace punishments, the court heaped needless and unreasoned process squarely into the arbitrator’s path, thereby greatly lessening the amount of discretion he had in the first place.

## II. FACTS AND HOLDING

Lance Greenstreet was an eleven-year veteran of the Social Security Administration (SSA), where he worked as an IT Specialist. In March 2006, he confronted a coworker about some of his missing “valued property.”<sup>3</sup> In the argument that ensued, Greenstreet swung his cane, knocked over a flower pot and, perhaps more importantly, a computer.<sup>4</sup> As a result of this incident, he was placed on administrative leave, and in July of that year was fired.<sup>5</sup>

The employees’ union filed a grievance on his behalf, challenging the termination—as well as demanding back pay, leave and benefits—and invoking the

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1. 543 F.3d 705 (Fed. Cir. 2008).

2. *Id.*

3. Brief for Petitioner at \*3, *Greenstreet v. Soc. Sec. Admin.*, 2008 WL 713381 (Fed. Cir. 2008) (No. 2007-3312).

4. *Id.* The parties stipulated that the amount of damage Greenstreet caused was \$1,100. *Id.*

5. *Greenstreet*, 543 F.3d at 706.

arbitration clause in its collective bargaining agreement with the SSA.<sup>6</sup> His grievance was not heard until April 2007, and during that hearing, Greenstreet argued that termination was too severe a penalty, though he conceded his actions warranted a suspension of some kind.<sup>7</sup> In July 2007—342 days after he was fired—the arbitrator issued his decision, which stated that a “substantial suspension is the maximum reasonable penalty” considering the circumstances.<sup>8</sup> The decision ordered the SSA to reinstate Greenstreet to his prior position but without back pay.<sup>9</sup>

Greenstreet then appealed the arbitrator’s decision to the U.S. Court of Appeals for the Federal Circuit.<sup>10</sup> Because one of the criteria by which the court is to review an arbitration decision is whether it is arbitrary,<sup>11</sup> Greenstreet’s main point on appeal was that the arbitrator’s decision amounted to the imposition of a 342-day suspension, the length of which was arbitrarily set by the amount of time that elapsed between his misconduct and the date of the arbitrator’s decision.<sup>12</sup>

The SSA, in response, argued that the only precedent supporting this proposition—the *per se* arbitrariness of so-called “time served” suspensions—is found in the decisions of an administrative review board, which are not binding on a federal court.<sup>13</sup> The SSA instead proffered a line of cases where the Federal Circuit had upheld “time served” suspensions, arguing that, these penalties are not arbitrary on their face; therefore they can be upheld when the circumstances call for them.<sup>14</sup>

The Federal Circuit, however, held that basing the length of an employee’s suspension solely on “time served” is arbitrary, vacated that portion of the arbitrator’s decision, and remanded for consideration the appropriate length of Greenstreet’s suspension.<sup>15</sup>

### III. LEGAL BACKGROUND

#### A. *The Civil Service Reform Act*

The procedure by which the Federal Circuit acquires jurisdiction in a case like this, and the manner by which it is required to review an arbitrator’s decision, are products of federal statutes collectively titled the Civil Service Reform Act of 1978 (the Act).<sup>16</sup> The Act is “a comprehensive revision of the laws governing the

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6. *Id.*

7. *Id.*

8. *Id.* The arbitrator noted Greenstreet’s lack of a disciplinary record, the fact that he paid for the damaged property, his satisfactory work performance, and SSA’s failure to consider rehabilitation in finding for Greenstreet as to his reinstatement. *Id.*

9. *Id.*

10. *Id.* at 707. Judicial review of an arbitrator’s decision as it pertains to federal employees is provided by 5 U.S.C. § 7121(f) (2006). Jurisdiction is vested in the Federal Circuit by 5 U.S.C. § 7703(b)(1) (2006).

11. 5 U.S.C. § 7703(c)(1) (2006). This statute and the appellate court’s responsibilities thereunder will be discussed in fuller detail later in this note.

12. *Greenstreet*, 543 F.3d at 707.

13. *Id.* at 708.

14. *Id.* at 708-09.

15. *Id.* at 706, 710.

16. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). The various provisions of the act are codified throughout scattered sections of the United States Code.

rights and obligations of civil servants, [and] contains the first statutory scheme governing labor relations between federal agencies and their employees.”<sup>17</sup>

Specifically, the Act permits, inter alia, certain federal employees to challenge adverse employment actions to the Merit Systems Protection Board (MSPB).<sup>18</sup> The MSPB must sustain the agency’s decision if it was supported by the required level of evidence.<sup>19</sup> An appeal beyond the MSPB (or the arbitrator, as will be explained below) is permitted and is exclusively the province of the U.S. Court of Appeals for the Federal Circuit.<sup>20</sup> The Federal Circuit is to review the record of the appeal and set aside any action, finding, or conclusion that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>21</sup>

Because one of the purposes of the Act was to “strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument,”<sup>22</sup> the Act forces federal agencies and their employee union counterparts to come up with a grievance procedure and binding arbitration for resolving disputes.<sup>23</sup> Interestingly, arbitration may only be invoked by the agency or the union, not the grieving employee.<sup>24</sup> Appeals from an arbitrator’s decision are also heard by the Federal Circuit, which is to apply the same standard had the decision been handled by the MSPB.<sup>25</sup> As noted by the U.S. Supreme Court, the reason that judicial review of both arbitrators’ decisions and decisions of the MSPB is conducted in the same manner is “to assure conformity” between the decisions.<sup>26</sup> That does not mean that the Federal Circuit is bound by the MSPB’s decisions, however.<sup>27</sup>

The arbitrator or the MSPB is required to analyze an employer’s adverse action under the *Douglas* test (or *Douglas* factors).<sup>28</sup> In *Douglas v Veterans Administration*, the MSPB ruled that an agency must consider a number of specific factors in determining an appropriate penalty.<sup>29</sup> The twelve factors include the nature

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17. ATF v. Fed. Lab. Relations Auth., 464 U.S. 89, 91 (1983).

18. 5 U.S.C. § 7701 (2006). The circumstances in which an aggrieved party may appeal to the MSPB are covered by 5 U.S.C. §§ 4303, 7512; most pertinent here is “removal.” *Id.* § 7512(1).

19. *Id.* § 7701(c)(1).

20. *Id.* § 7703(b)(1). Jurisdiction can also be found in the statute Congress enacted when first creating the Federal Circuit in 1982. *See* 28 U.S.C. § 1295(a)(9) (2006).

21. 5 U.S.C. § 7703(c)(1). The statute also allows the Federal Circuit to overturn any finding “obtained without procedures required by law, rule, or regulation having been followed” or “unsupported by substantial evidence.” *Id.* § 7703(c)(2)-(3).

22. *Fed. Lab. Relations Auth.*, 464 U.S. at 107.

23. 5 U.S.C. § 7121(a)-(b). Specifically, the grievance procedure must include procedures that “provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration.” *Id.* § 7121(b)(1)(C)(iii).

24. *Id.* § 7121(b)(1)(A)(iii).

25. 5 U.S.C. § 7121(f); *see also* *Cornelius v. Nutt*, 472 U.S. 648, 652 (1985) (“The arbitrator is to apply the same substantive standards that the Board would apply if the matter had been appealed. . . .”). The authority wielded by an arbitrator is to be neither more nor less than that of the MSPB. *Devine v. Pastore*, 732 F.2d 213, 216 (D.C. Cir. 1984).

26. *Cornelius*, 472 U.S. at 661 n.16.

27. *Crispin v. Dep’t of Commerce*, 732 F.2d 919, 923 n.4 (Fed. Cir. 1984).

28. *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313, 331-32 (1981). Thousands of decisions have invoked this case when considering the appropriate sanction to be meted out against a malcontent employee. Edward H. Passman & Bryan J. Schwartz, *In the Name of Security, Insecurity: The Trend to Diminish Federal Employees’ Rights*, 21 LAB. LAW. 57, 72 (2005).

29. *Douglas*, 5 M.S.P.B. at 331-32.

and seriousness of the offense, the employee's past record, consistency of the penalty with those imposed upon other similarly situated employees, the potential rehabilitation, and mitigating circumstances.<sup>30</sup> The reviewer—be it the MSPB or an arbitrator—need not specifically consider all twelve factors, and may consider anything else that is potentially relevant.<sup>31</sup> In essence, the underlying issue is whether the penalty falls under the general auspices of reasonableness.<sup>32</sup>

### B. The Dawn of "Time Served"

The main source from which the *Greenstreet* court divined its authority was a 1955 decision of the U.S. Court of Claims, the predecessor to the Federal Circuit.<sup>33</sup> In *Cuiffo v. U.S.*, the plaintiff lost his job at a Brooklyn, N.Y., Army port for taking home some lumber that he mistakenly thought had been discarded.<sup>34</sup> Under the appeals process available at the time, Cuiffo, the plaintiff, appealed his dismissal to the Civilian Personnel Grievance Review Board, which took into account his good work record and general reputation for honesty in restoring him to duty.<sup>35</sup> Importantly, the board considered the time between losing his job and then regaining it "non-pay status and just punishment."<sup>36</sup>

In reviewing Cuiffo's punishment—which amounted to a 320-day time-served suspension—the Court of Claims noted that the Department of the Army had a "Table of Standard Penalties," which stated that theft was to be punishable by either dismissal or a suspension of one to ten days.<sup>37</sup> The Board said dismissal would be inappropriate; however, the resulting suspension was thirty-two times the maximum punishment allowable for the offense according to the Army's own regulations.<sup>38</sup> The Court of Claims then reasoned that the "punishment was determined by accident and not by a process of logical deliberation and decision."<sup>39</sup> It held the punishment to be "arbitrary and unfair," and therefore the court set it aside.<sup>40</sup>

*Cuiffo* exists, as it were, on a bit of an island. No U.S. court decision citing it does so to address the issue of time-served suspensions.<sup>41</sup> Yet from this decision,

30. *Id.* at 332.

31. *Parker v. U.S. Postal Serv.*, 819 F.2d 1113, 1116 (Fed. Cir. 1987) ("[T]he factors discussed in Douglas were not exhaustive of all factors which might be considered in a particular case and, by the same token, not all of the twelve factors would be pertinent in every case . . .").

32. Maj. Timothy J. Malloy, *Procedural Issues in Merit Systems Protection Board Practice*, 35 A.F.L. REV. 279, 280 (1991).

33. See *Greenstreet v. Soc. Sec. Admin.*, 543 F.3d 705, 708 (Fed. Cir. 2008); *Cuiffo v. U.S.*, 137 F. Supp. 944 (Ct. Cl. 1955).

34. *Cuiffo*, 137 F. Supp. at 945.

35. *Id.* at 946.

36. *Id.*

37. *Id.* at 949.

38. *Id.* at 950.

39. *Id.*

40. *Id.*

41. The vast majority of the cases that do cite *Cuiffo* do so for a procedural issue not addressed here. See, e.g., *Morelli v. U.S.*, 161 Ct. Cl. 44 (1963) (discussing ability to waive appeal to Civil Service Commission). Only one case appears to cite *Cuiffo* for its discussion of damages, but not in the same manner discussed here. *Moten v. U.S.*, 229 Ct. Cl. 796 (1982) (discussing characteristics of cases where penalties were reversed).

the MSPB and the Federal Circuit have addressed the appropriateness of these types of suspensions in differing ways.

### C. *The MSPB and Federal Circuit Take Different Paths*

There are several cases where the MSPB has held these suspensions to be arbitrary, as illustrated by *Fulks v. Department of Defense*.<sup>42</sup> *Fulks* attempted to make it clear that penalties determined merely by reference to the time between the adverse employment action and the date of the decision are per se arbitrary.<sup>43</sup> In this case, the MSPB even went so far as to overturn previous decisions in which time-served penalties were upheld even when the arbitrator conducted a thorough *Douglas* factors analysis.<sup>44</sup>

Two years after the *Fulks* decision, the Federal Circuit addressed the issue of time-served suspensions and in so doing paid short shrift to the MSPB's reasoning proffered in *Fulks*.<sup>45</sup> In the case *Stilley v. Department of Veterans Affairs*, the court stated that the general rule of law is that time-served suspensions can be appropriate if the employee is "'at least in part responsible for the removal action' and 'some personnel action was justified.'"<sup>46</sup>

The two main cases the *Stilley* court relied upon were prefaced upon the Back Pay Act, which states that an employee found to have been affected by an unjustified personnel action that led to a loss of pay is entitled to receive the pay for the period in which the personnel action was in effect once the action is corrected.<sup>47</sup>

In the *American Federation* case, an arbitrator expressly mitigated a loss of job to a fifteen-day suspension without pay for an Immigration and Naturalization Service worker who was found to have fraudulently processed green cards for foreign nationals.<sup>48</sup> The court there held that the Back Pay Act only applied when, for example, an arbitrator has *reversed* an agency-imposed termination or suspension, not when it merely *mitigates* a removal.<sup>49</sup> Where an arbitrator has found the employee as responsible for the action as the agency, she can expressly deny back pay as part of the punishment.<sup>50</sup>

And in *Ollett v. Department of Air Force*, the court relied upon *American Federation* in stating the general rule that an award of back pay is not required by the Back Pay Act when a penalty is mitigated from termination to suspension.<sup>51</sup>

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42. See, e.g., *Fulks v. Dep't of Defense*, 100 M.S.P.R. 228, 237-38 (2005) (citing *Belldina v. Dep't of Justice*, 50 M.S.P.R. 497, 501-02 (1991), *declined to be followed by Stilley v. Dep't of Veterans Affairs*, 225 F. App'x. 889 (Fed. Cir. 2007) (per curiam); and *Montalvo v. U.S. Postal Serv.*, 50 M.S.P.R. 48, 49-51 (1991)).

43. *Fulks*, 100 M.S.P.R. at 237-38. In this case, the MSPB found a time-served suspension of 20 months, 13 days to be arbitrary and instead imposed a 120-day suspension on a teacher who fell asleep on the job. *Id.* at 239-40.

44. *Id.* at 239.

45. See *Stilley*, 225 F. App'x at 890.

46. *Id.* at 890 (quoting *Ollett v. Dep't of Air Force*, 253 F.3d 692, 694 (Fed. Cir. 2001)); see also *Am. Fed'n of Gov't Employees, Local 2718 v. Dep't of Justice*, 768 F.2d 348, 351 (Fed. Cir. 1985).

47. 5 U.S.C. § 5596(b)(1)(A)(i); *Ollett*, 253 F.3d at 694; *Am. Fed'n of Gov't Employees*, 768 F.2d at 350.

48. *Am. Fed'n of Gov't Employees*, 768 F.2d at 350.

49. *Id.* at 350-51.

50. *Id.* at 351.

51. *Ollett*, 253 F.3d at 694.

The court here was forced to parse the arbitrator's ruling because it equally appeared that the arbitrator was reversing an agency imposed termination as it did mitigating the penalty of removal.<sup>52</sup> It remanded the case for clarification but kept intact the rule of law *American Federation* had espoused.<sup>53</sup>

In *Stilley*, a nurse who ordered laboratory tests for herself was fired but reinstated after the arbitrator's decision.<sup>54</sup> The arbitrator did not award back pay, and the plaintiff did not argue that the lack thereof violated the Back Pay Act, but instead amounted to an improper time-served suspension.<sup>55</sup> The Federal Circuit noted that the arbitrator acted appropriately in considering the mitigating circumstances that supported the imposition of a suspension rather than termination, and thus, it found no fault with the decision.<sup>56</sup> The Federal Circuit even expressly noted that MSPB decisions like *Fulks* "of course do not affect the outcome of [this] case" even if they seem to be inconsistent with the governing law of the circuit.<sup>57</sup> The court gave considerable deference to the arbitrator, holding that the time-served suspension was not arbitrary under the circumstances.<sup>58</sup>

However, there is an open question as to whether *Stilley* is good law: the decision was not selected for publication, which, in part, led the *Greenstreet* court to dismiss its precedential value.<sup>59</sup> Federal Rule of Appellate Procedure 32.1 states that courts may not prohibit or restrict the citation of federal judicial opinions published after January 1, 2007.<sup>60</sup> This newly enacted rule was intended to create a uniform regulation throughout the federal system whereby "a court of appeals may not prohibit a party from citing an unpublished opinion of a federal court for its persuasive value or for any other reason."<sup>61</sup> The Federal Circuit's own rules deal with opinions or orders specifically designated as "nonprecedential," as *Stilley* was, stating that any decision so designated is not mandatory authority but instead merely persuasive.<sup>62</sup> Therefore, because *Stilley* was not selected for publication, it remains merely persuasive in its authority.<sup>63</sup>

#### IV. INSTANT DECISION

At its core, the choice the Federal Circuit Court of Appeals had to make in *Greenstreet v. Social Security Administration* was between the express prohibition against time-served suspensions in the nonprecedential *Fulks* line of MSPB cases, and the express sanction of time-served suspensions as articulated by the equally nonprecedential *Stilley* decision. The Federal Circuit went with *Fulks* and the

52. *Id.* at 695.

53. *Id.*

54. *Stilley v. Dep't of Veterans Affairs*, 225 F. App'x 889, 889-90 (Fed. Cir. 2007) (per curiam). The arbitrator stated that because the employee was denied union representation, as provided in the collective bargaining agreement, the agency's evidence against her could not be used. *Id.* at 890.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. See *Greenstreet v. Soc. Sec. Admin.*, 543 F.3d 705, 709 (Fed. Cir. 2008) (noting that *Stilley* was a "nonprecedential decision").

60. FED. R. APP. P. 32.1.

61. FED. R. APP. P. 32.1 advisory committee's note.

62. FED. CIR. R. 32.1(d).

63. *Id.*

MSPB, and found that the analysis needed for Back Pay Act cases and time-served decisions were inherently different.<sup>64</sup>

The *Greenstreet* court distinguished the *American Federation* and *Ollett* cases because they “did not involve an arbitrariness challenge to the length of a suspension” but merely a challenge to their lost wages.<sup>65</sup> *Stilley* was found inapposite because (1) the arbitrator there made no affirmative findings of the appropriateness of the length of the suspension; (2) *Stilley* only challenged her suspension as disproportionate to the offense whereas *Greenstreet* argued that his suspension was inappropriate because it was based solely on time served; and (3) *Stilley* relied upon two cases whose backbone was the Back Pay Act.<sup>66</sup>

In contrast, the court found the *Cuiffo* reasoning to be “sound” and that punishment “determined by accident, and not a process of logical deliberation,” is inherently arbitrary.<sup>67</sup> It found that permitting a suspension based solely on “time served” would ignore the *Douglas* factors and make one’s suspension determined not upon the individual circumstances of the case, but the speed at which the judicial system operates.<sup>68</sup> The court clarified its approach when it said that a suspension “coincident with or nearly coincident with ‘time served’” is not completely foreclosed; the court emphasized that where the length of suspension is *solely* based on time served would it be vacated.<sup>69</sup> Because the arbitrator in *Greenstreet*’s case used the *Douglas* factors only to assist his decision with regard to termination as an appropriate penalty—and conducted no analysis, the court said, as to the appropriate length of any suspension—the degree of punishment was based only upon time served and was therefore vacated for being arbitrary.<sup>70</sup>

## V. COMMENT

Notwithstanding any judgment on its final disposition in the case, there are several problems with the Federal Circuit’s reasoning in *Greenstreet*. Firstly, it relied primarily on a fifty-year-old case in which the basis for the court’s decision is not entirely clear. Secondly, it dismissed out of hand a more factually similar and more recent case on the basis, at least in part, of being nonprecedential. And thirdly, in framing the issue as it did, the court clarified little and missed an opportunity to lay down a firm rule of law in an area where little guidance exists.

The *Cuiffo* case has several strikes against it. First, it was decided in 1955, or 53 years before the Federal Circuit made its decision in *Greenstreet*. No opinions issued prior to *Greenstreet* have cited *Cuiffo* for its supposed proscription against time-served suspensions.<sup>71</sup>

Most damaging, though, is that it represents an unhealthy commingling of administrative and purely judicial lawmaking. Famously, the promulgation of administrative bodies, such as the MSPB, has been labeled the Fourth Branch of

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64. *Greenstreet*, 543 F.3d at 709.

65. *Id.*

66. *Id.*

67. *Id.* at 709-10.

68. *Id.* at 710.

69. *Id.*

70. *Id.*

71. See cases cited *supra* note 41.



government.<sup>72</sup> Their mere existence—especially in the sense of the MSPB, a judicial-like body created by Congress—raises constitutional separation of powers issues.<sup>73</sup> Yet, clearly, courts are supposed to give the fact-finding and decision-making ability of these administrative bodies great deference, only overruling the agency under certain expressly outlined conditions.<sup>74</sup>

The *Greenstreet* court, of course, did what it was allowed to do when it deferred to the MSPB's findings.<sup>75</sup> However, the court, without any analysis as to the source of the rule of law it was about to adopt, summarily adopted the precedent (stemming from *Cuiffo*) that had been first adopted by an administrative body, the MSPB.<sup>76</sup> In fact, in so doing, the Federal Circuit went so far as to state, "we proceed with caution when asked to depart from twenty-five years of MSPB precedent."<sup>77</sup> If anything, the court should have proceeded with caution when asked to *adopt* twenty-five years of MSPB precedent, especially considering there was Federal Circuit authority on point. As one scholar has noted, "[p]erhaps additional procedural safeguards, or a harsher standard of review, would be appropriate."<sup>78</sup>

Furthermore, it is not perfectly clear upon what basis the Court of Claims made its decision in *Cuiffo*. Remember, the Army had a table designating the length of appropriate suspensions for different offenses, and the time-served suspension in that case amounted to thirty-two times longer than the suspension provided for by the regulation.<sup>79</sup> Yes, the court there did say the suspension was "arbitrary," but it also stated the suspension "was out of all proportion to the offense."<sup>80</sup> It is not unreasonable to conclude that the "determined by accident, and not by a process of logical deliberation and decision" language so heavily relied upon by the *Greenstreet* court defines a decision as arbitrary where it is out of proportion with the offense. In other words, the two thoughts—"arbitrary" and "out of proportion"—are not necessarily two distinct lines of reasoning, but may be mere synonyms. *Cuiffo* could just as easily be read to mean different things: that the suspension was arbitrary *because* it was out of proportion to the offense, that being out of proportion to the offense is a factor that leads to a conclusion that a suspension is arbitrary, or that the suspension it levied was determined by accident because little heed was paid to the Army's regulations.

Therefore, given the whole of the circumstances, it is an unfortunate smoothing of the edges to say *Cuiffo* stands simply for the proposition that the length of a suspension is *necessarily* arbitrary when based upon the employee's time served, as the *Greenstreet* court did.<sup>81</sup> In this later decision, the Federal Circuit pays little

72. Fed. Trade Comm. v. Ruberoid Co., 343 U.S. 470, 487 (1952) (dissenting, Jackson, J.).

73. Peter B. McCutchen, *Mistakes, Precedent and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 2 (1994).

74. *Id.* at 41.

75. 5 U.S.C. § 7703(c) (2006) (describing the role of the reviewing court in cases first heard by the MSPB).

76. *Greenstreet v. Soc. Sec. Admin.*, 543 F.3d 705, 709 (Fed. Cir. 2008) ("We conclude that the reasoning of *Cuiffo*, consistent with the holdings of the MSPB, is sound. . . .").

77. *Id.* at 708 (emphasis added).

78. McCutchen, *supra* note 73, at 41.

79. *Cuiffo v. U.S.*, 137 F. Supp. 944, 950 (Ct. Cl. 1955).

80. *Id.* at 949-50.

81. *Greenstreet*, 543 F.3d at 709.

attention to the “out of proportion” language and indeed even goes so far as to find *Stilley* inapposite at least in part because the challenge in that case was based on an “out of proportion” theory.<sup>82</sup>

*Cuiffo*, in sum, does not automatically stand for what the Federal Circuit said it stood for in *Greenstreet*. The court should have found something else on which to hang its hat, and the defense provided just such support when citing to *Stilley*. That the court dismissed this case, mainly for its supposed lack of precedential value and because the supporting cases relied upon the Back Pay Act, is unfortunate.

As an introductory matter, the fact that courts can even designate some opinions as persuasive rather than mandatory authority is a matter of some debate.<sup>83</sup> As one scholar notes, “[t]he premise that judges can and should make [a] determination [as to a decision’s precedential value] at the moment a ruling is made, and without the benefit of input from others, is seriously flawed.”<sup>84</sup> In not designating *Stilley* for publication, the Federal Circuit was in essence making a prediction as to its future value and promulgating the fiction that only judges—and not their fellow lawyers as well as legal commentators—can draw out the full meaning of their opinions.<sup>85</sup> The Federal Circuit, it seems, when handing down the *Stilley* decision, underestimated the decision’s importance to the narrow issue of time-served suspensions, and in not selecting it for publication stacked the deck that the court was to use later in *Greenstreet*. The *Greenstreet* court certainly took note that *Stilley* was of lower precedential value, and while it is impossible to know how much that fact led to the court dismissing it as authority, the fact remains that *Stilley* was found inapposite.<sup>86</sup> Had *Stilley* been on equal authoritative footing with *Cuiffo*, it is not unfair to wonder if the outcome would have been different.

And perhaps the *Greenstreet* court would not have had to resort to logical mind tricks to distinguish the *Stilley* case from the case at bar. The Back Pay Act, in expressly allowing for the denial of a suspended employee’s pay, seems to be a clear codification of time-served suspensions: when mitigating a firing to a suspension under the Back Pay Act, to deny pay during the time in which an employee is suspended has exactly the same effect as, after the fact, handing down a time-served suspension, something strongly disfavored by the Federal Circuit in *Greenstreet*.

Even though a disallowance of back pay and a time-served suspension without pay are essentially the same thing, the *Greenstreet* court goes to great lengths to differentiate the two. The court here proffers that the *Douglas* factors are better followed by proscribing time-served suspensions than by the rule of law promulgated in *Stilley*.<sup>87</sup> And this is the biggest problem with the court’s seemingly commonsensical decision in *Greenstreet*. Where the *Stilley* opinion left a certain amount of discretion to the person or panel imposing the penalties, the *Green-*

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82. *See id.*

83. *See* Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705, 706 (2006) (“Critics of unpublished opinions charge that they permit appeals courts to suppress precedent, lead to the dedication of insufficient attention to unpublished dispositions, and are inconsistent with principles of judicial accountability.”)

84. *Id.* at 726.

85. *Id.* at 727-28.

86. *Id.*

87. *See id.* at 710.

*street* decision takes that discretion away when it says that time served cannot be the sole basis for the length of the suspension.<sup>88</sup> But in the same breath, the court further says that a suspension whose length is coincidental with the amount of time served does not fall within the general proscription.<sup>89</sup>

While not logically incongruent, such reasoning probably leaves arbitrators scratching their heads. Let us take a hypothetical example. A government employee breaks an agency rule regarding parking spaces, devilishly stealing the director's prime spot on far-too-often an occasion. He is told to knock it off, and when he does not, he is fired. Understandably upset over the loss of a good, loyal employee, his union representative files a grievance against the agency, and the cause goes to binding arbitration as dictated by the collective bargaining agreement between the employee's union and the agency. For some reason or another, only three days have elapsed between the date the agency director fired the employee and the date the arbitrator handles the grievance. The arbitrator decides that the best course of action would be to give the employee his job back, without back pay, a penalty that amounts to a three-day, unpaid, time-served suspension. It was, after all, only a dispute about a parking space. He flagrantly broke the rules, the arbitrator might reason, but he did not deserve to lose his job.

Under *Stilley* and the Back Pay Act, this would appear to be perfectly fine. An arbitrator has the discretion to deny back pay when the employee is at least as responsible for the adverse action as the employer was, i.e., when the employee screws up and then the employer takes the punishment too far.

Under *Greenstreet*, the legality of the arbitrator's action in our hypothetical is not clear. The opinion purports to pay heed to the arbitrator-friendly *Douglas* factors, but at the same time it prevents the arbitrator from being able to base the length of the suspension *solely* on the amount of time-served. But in the same breath, the suspension might pass *Greenstreet* muster as *coincidental* to the amount of time served. So the arbitrator needs to be able to justify *exactly* a three-day suspension—even if a suspension of similar length would have realistically sufficed just as well. Even if the arbitrator believes a “short” suspension is required under the circumstances, in the end, how can one possibly differentiate between a three-, four-, or five-day suspension, assuming the absence of a military-style table of prescribed punishments? What possible set of circumstances would lead an arbitrator to opine, as Goldilocks would, “Yeah, two days is too short, but three is just right”?

*Greenstreet* demands such differentiation—that the arbitrator render an impossibly objective decision when given a thanklessly subjective task. The arbitrator needs to specifically justify the length of the suspension even though the principles of equity guiding her decision are inherently vague. Time-served, in this hypothetical, may simply just fit. A short suspension is required under the circumstances; it is utterly impossible to say with to-the-day precision exactly how much time an employee should lose pay. Furthermore, there is no justification in forcing an arbitrator to articulate exactly why three days is the right length, nor is there any reason for an arbitrator to expressly justify a suspension of a different length just to avoid the appearance of a now-proscribed time-served suspension.

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88. *Id.*

89. *Id.*

The Federal Circuit in *Greenstreet* would have been better off combining the rule espoused in *Stillely* and the Back Pay Act—that time-served suspensions can be justified under the right circumstances—with the rule in *Cuiffo*, that suspensions so out of proportion to the offense are inherently arbitrary.

That essentially seems to be the crux of the *Greenstreet* court's concern. After all, the arbitrator *did* look to mitigating factors under *Douglas* and *did* feel that a very long suspension was justified.<sup>90</sup> The arbitrator, unable as any rational, reasoning human being would have been, to determine precisely how long the employee should have been suspended, probably felt that 342 days was simply “long enough,” even if that thought was not expressly articulated in the decision.

If actually applying the *Douglas* factors did not placate the court, maybe the arbitrator needed only to have articulated a nice, round number of days for which the employee should have been suspended, though such a decision does not smack one as inherently more just and would furthermore appear to be the very definition of arbitrary. Or perhaps underlying its decision, the court felt that a nearly year-long suspension for breaking a computer—especially one for which restitution was provided—was “out of proportion” to the actual offense. But it certainly did not say that, and it instead planted a needless and pointless hurdle in front of an arbitrator's decision-making progression.

What *Greenstreet* amounts to, then, is a mere item on an arbitrator's checklist, and not a solidification or articulation of a needed rule of law. If an arbitrator feels that a time-served suspension equitably fits the circumstances, she must now simply articulate a post hoc rationalization so as to avoid the perception that the length of the suspension was left to chance. Even though there really should be nothing wrong with crafting a solution that an arbitrator feels equitably suits the situation, arbitrators are impeded from doing so by this decision.

## VI. CONCLUSION

The Federal Circuit Court of Appeals was on the right path. Certainly, the court is right to require arbitrators to justify their decisions, and all would be better served if such decisions were not based on whims. But in missing the emphasis of a decades-old case, ignoring an on-point case at least in part because it was not selected for publication, and awkwardly distinguishing between the denial of back pay to a suspended employee and a de facto suspension without pay, the court tripped over its own reasoning. What it felt were competing doctrines are not really mutually exclusive provisions, and the combination of the two would have simplified and codified a doctrine of law where one did not previously exist.

What results by its decision, then, is not a tool by which arbitrators can make sure their decisions are just, but a mere procedural task, easily surmounted not by reasoned analysis, but only by a post hoc excuse. Despite language decrying an arbitrary result, the *Greenstreet* court at its core is merely concerned with procedure—procedure that, it should be said, seems very arbitrary.

MATTHEW E. TERRY

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90. *Id.*

