

UNITED STATES OF AMERICA
TACOM HEARING
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:

LERROY J. PLETTEN

vs.

UNITED STATES DEPARTMENT
OF THE ARMY

11 Transcript of the Deposition of CARMA J.
12 AVERHART, a witness in the above-entitled cause, taken before
13 Jo Gallagher, Notary Public in and for the County of Wayne
14 and State of Michigan, at 3000 Town Center, Suite 1150,
15 Southfield, Michigan, on Friday, April 23, 1982, commencing
16 at or about 2:44 p.m.

17 APPEARANCES:

18 COOPER & COHEN, 3000 Town Center, Suite 1150, Southfield,
19 Michigan 48075; Appearing on Behalf of Leroy J. Pletten.
20 BY: STEVEN Z. COHEN, ESQ.

21 DEPARTMENT OF THE ARMY, TACOM LEGAL OFFICE, DRSTA-LA, Warren,
22 Michigan 48090; Appearing on Behalf of United States
23 Department of the Army.
24 BY: EMILY SEVALD BACON, ESQ.

25 Also Present: Leroy J. Pletten

I N D E XWITNESS:PAGECARMA J. AVERHART

Direct Examination by Ms. Bacon	3
Voir Dire Examination by Mr. Cohen	8
Direct Examination by Ms. Bacon	10
Voir Dire Examination by Mr. Cohen	10
Direct Examination by Ms. Bacon	12
Voir Dire Examination by Mr. Cohen	15
Direct Examination by Ms. Bacon	16
Cross-Examination by Mr. Cohen	18
Voir Dire Examination by Ms. Bacon	27

EXHIBITS

Agency No. 8	6
Agency No. 9	6
Agency No. 10	9
Agency No. 11	9
Agency No. 12	12
Agency No. 13	12
Agency No. 14	13
Agency No. 15	14
Agency No. 16	16
Agency No. 17	17

1 Southfield, Michigan

2 Friday, April 23, 1982

3 2:44 p.m.

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

5 C A R M A J. A V E R H A R T,

6 being first duly sworn, was examined and testified on
7 her oath as follows:

8 DIRECT EXAMINATION

9 BY MS. BACON:

10 Q Ms. Averhart, what is your position?

11 A I am presently Chief of Position and Pay Management
12 Branch.

13 Q How long have you held that position?

14 A For almost two years. Since July of 1980.

15 Q What was your position prior to the present one you hold?

16 A Before that I was a Position Classification Specialist
17 in the same branch.

18 Q When did you first take that job?

19 A I believe it was 1976. I came here in 1975. I had
20 another job in personnel for about nine months.

21 Q Are you familiar with the appellant in this case;
22 Mr. Pletten?

23 A Yes.

24 Q How did you make Mr. Pletten's acquaintance?

25 A Well, we both worked in civilian personnel when I first

1 came here, in different branches. Eventually we ended
2 up in the same branch.

3 Q In your position as Chief of the Position and Pay
4 Management Office was he one of your employees then?

5 A Yes.

6 Q Are you familiar with his sensitivity and objection to
7 tabacco smoke?

8 A Yes.

9 Q How did you first become aware of his objections to
10 tabacco smoke?

11 A Well, I believe it was about 1979. Mr. Kator was the
12 Chief at that time and he notified the people in the
13 branch that Leroy was sensitive to tabacco smoke and
14 that we should not smoke in his presence.

15 Q You said you had worked there since 1976. Prior to
16 Mr. Kator informing you of his sensitivity -- prior to
17 that 1979 time -- had he ever indicated to you his
18 sensitivity to it?

19 A Not that I can remember.

20 Q Was Mr. Kator's direction followed to the best of your
21 knowledge?

22 A As far as I know, yes.

23 Q The case file at Tab 7 reflects that a letter was sent --
24 dated 27 November 1981 -- proposing Mr. Pletten's
25 separation for medical disqualification.

1 Do you recall sending Mr. Pletten that
2 letter?

3 A Yes.

4 Q Can you give us some background of the events which led
5 up to the drafting and signing of that letter?

6 A Well, we had been notified by Office of Personnel
7 Management that our application for Mr. Pletten's
8 disability retirement had been disapproved.

9 So, therefore, this letter was sent out.

10 Q What prompted your filing a disability retirement
11 application on his behalf?

12 A Well, Mr. Pletten had been on extended sick leave and
13 there didn't seem to be any likelihood that he would be
14 returning to work.

15 Before we can separate him we have to try
16 everything possible and application for disability
17 retirement is one of the things that we do have to try.

18 Q After Mr. Pletten had been put on sick leave did he on
19 any occasion try to return back to duty?

20 A Yes.

21 Q I ask if you can identify this document?

22 A Yes, I prepared that.

23 MS. BACON: Okay. I move for the
24 submission of this memorandum to the record, dated
25 March 20, 1980, as Agency Exhibit 8.

1 (Agency Exhibit 8 marked for
2 identification.)

3 MS. BACON: Off the record, please.

4 (Off the record.)

5 (Back on the record.)

6 MR. COHEN: No objection.

7 Q (By Ms. Bacon) Did Mr. Pletten on any other occasion
8 attempt to return to work?

9 A Yes, he did.

10 Q I ask if you can identify this document?

11 A Yes, I prepared this also.

12 MS. BACON: I would move for the
13 submission of a memorandum for the record, dated
14 29 January 1981, as Agency Exhibit 9.

15 (Agency Exhibit 9 marked for
16 identification.)

17 MR. COHEN: I will object to the admission
18 of the document to the extent that it states as to what
19 Mrs. Jones informed her as being hearsay.

20 MS. BACON: Objection noted.

21 Q (By Ms. Bacon) Did you contact the dispensary after you
22 told Mr. Pletten to report there to be cleared for duty?

23 A Yes, I did. And I was advised that he had --

24 MR. COHEN: Objection.

25 MS. BACON: All right. The memorandum can

1 speak for itself.

2 Q (By Ms. Bacon) At Tab 7 again, your November 27th
3 letter, you indicate that an Agency filed disability
4 retirement application was disapproved by the Office of
5 Personnel Management. Were you involved in the filing
6 of that disability retirement application?

7 A Well, yes. I initiated it. I didn't do the actual
8 processing but I requested that such an application be
9 filed.

10 Q What did you base that decision on?

11 A A combination of things. Mr. Pletten's physician had
12 indicated that he had to have a completely smoke-free
13 work environment. We had attempted to find such an
14 environment and we could not find one in our Command and
15 there did not appear to be any likelihood that he would
16 return to work unless such were provided.

17 So I had a job to get done and I needed

18 someone to do it.

19 Q You say that you attempted to find if there was someplace
20 on the installation that had the kind of environment that
21 his doctors advised he had to have; am I correct?

22 A Yes.

23 Q Can you identify this document? In fact, these two
24 documents?

25 A Yes. I prepared these for Mr. Hoover's signature.

1 MS. BACON: I would move for the
2 submission of the DF dated 17 December 1980, unsigned
3 but for the signature of E. E. Hoover, at this time as
4 Agency Exhibit 10.

5 MR. COHEN: I would like to voir dire if
6 I may.

7 MS. BACON: Yes.

8 VOIR DIRE EXAMINATION

9 BY MR. COHEN:

10 Q Ms. Averhart, did you write this?

11 A Yes.

12 Q You wrote it for --

13 A For Mr. Hoover's signature.

14 Q -- for Mr. Hoover?

15 What did you base this document on?

16 A What do you mean?

17 MS. BACON: I also don't understand the
18 question.

19 Q (By Mr. Cohen) Did you base it strictly on a letter
20 from Dr. Salomon?

21 A It was a lot of things but Dr. Salomon's letter was
22 certainly the main thing.

23 Q So there were a lot of other things besides that which
24 was included in the document?

25 I am reading this but maybe I am reading

1 it wrong. It says,

2 "Jack Salomon, M.D., has advised this
3 Command that Leroy J. Pletten requires a smoke-free work
4 environment (see enclosed letter)."

5 Now, were there other things besides the
6 letter that prompted this?

7 A Well, there is never one single thing that prompts an
8 action so I am not sure what you mean.

9 Q Okay. I will question you later. I just --

10 A I had a job to get done and Mr. Pletten wasn't at work
11 and all sorts of things.

12 Q Well, I just wanted to know with voir dire of the document
13 because it is not my turn yet.

14 A Okay.

15 Q I have to follow the rules.

16 MR. COHEN: To the extent that it was
17 drafted by Ms. Averhart, but retaining any objections
18 as to hearsay pending Mr. Hoover's appearance, no
19 problems.

20 Is this Agency 10?

21 MS. BACON: The one directed to the
22 Command Industrial Hygienist will be Agency Exhibit 11
23 and the one directed to the Safety Office will be
24 Agency Exhibit 10.

25 (Agency Exhibits 10 and 11 marked

1 for identification.)

2 DIRECT EXAMINATION (Continued)

3 BY MS. BACON:

4 Q I ask if you can identify this document?

5 A Yes. This was the response I received from the
6 industrial hygienist.

7 MS. BACON: I would move for submission
8 of Agency Exhibit 12; the response dated 23 December 1980
9 from the Agency hygienist.

10 VOIR DIRE EXAMINATION

11 BY MR. COHEN:

12 Q Was this directed to you, Ms. Averhart?

13 A It was directed to Mr. Hoover.

14 Q I take it you saw it? It was directed to you subsequent
15 to that by Mr. Hoover?

16 A Right.

17 Q So you did see it?

18 A Yes.

19 Q Are your initials on there anywhere?

20 A No, they aren't.

21 Q So, other than that Mr. Braun has apparently signed his
22 name to it, you have no knowledge of its preparation or
23 the circumstances by which it was prepared?

24 A I don't understand what you mean.

25 Q Do you have any knowledge of how Mr. Braun prepared it or

1 if he prepared it, other than the writing?

2 MS. BACON: I object to the question.

3 MR. COHEN: I am voir diring the document.

4 MS. BACON: Yes, I know you are.

5 MR. COHEN: I have a right to, Counsel.

6 MS. BACON: Well, ask a question she can
7 understand then.

8 Q (By Mr. Cohen) Well, if you don't understand a question
9 ask me and I will rephrase it.

10 Other than the fact that it says "Edwin F.
11 Braun" did you see Mr. Braun write this?

12 A No, I didn't see him write this.

13 Q Did you talk to him about this?

14 A I really can't remember.

15 Q Did you talk to Mr. Hoover about this?

16 A Yes.

17 Q You did? Subsequent to his receiving it?

18 A Probably.

19 Q Do you know if Mr. Hoover talked to Mr. Braun about this?

20 A No.

21 Q Do you know if Mr. Hoover knows that Mr. Braun wrote this?

22 A No.

23 Q Do you know anything about this other than the fact that
24 you received it at one time?

25 A I know that it came in and it was signed by Mr. Braun and

1 I received it.

2 Q All right.

3 MR. COHEN: I object to the admission of
4 the document except for the limited purpose of her
5 having received it.

6 I would submit the document can be admitted
7 to show that she received it and read it. But as to the
8 content thereof I would consider it hearsay.

9 Is this Agency 12?

10 MS. BACON: Yes.

11 (Agency Exhibit 12 marked for
12 identification.)

13 DIRECT EXAMINATION (Continued)

14 BY MS. BACON:

15 Q Can you identify this document?

16 Just to save time, I would suggest that
17 it could be admitted under the same objection as the
18 previous objection.

19 THE WITNESS: Yes, I recognize this.

20 MR. COHEN: Previous objection.

21 MS. BACON: I would submit Agency Exhibit
22 13, which is subject to the same objection as made to
23 Agency Exhibit 12. This is a DF from the Safety Director
24 dated 29 December 1980.

25 (Agency Exhibit 13 marked for

1 identification.)

2 Q (By Ms. Bacon) Now, you testified that when you got those
3 responses back from Safety and the industrial hygienist
4 that you read them.

5 And that previously you had testified
6 that you had wanted to check out to see if there was an
7 area on the Command that would meet his doctors' require-
8 ments.

9 Based on your review of Agency Exhibits
10 12 and 13, in your view was there an area that you could
11 bring him back to?

12 A No, there was not.

13 Q Can you identify this document?

14 A Yes. This was signed by me.

15 MS. BACON: I would submit as Agency
16 Exhibit 14 a letter to Mr. Leroy Pletten from Carma J.
17 Averhart, dated 24 February 1981.

18 MR. COHEN: No objection. Is that Agency
19 14?

20 MS. BACON: Yes.

21 (Agency Exhibit 14 marked for
22 identification.)

23 Q (By Ms. Bacon) Ms. Averhart, in the body of this letter
24 you indicate that if Mr. Pletten has any comments or
25 input to make as regarding the filing for disability

1 application, he has a right to respond to your notifica-
2 tion; correct?

3 A That's correct.

4 Q Did Mr. Pletten ever make a response?

5 A Yes, he did.

6 Q I ask if you can identify this document?

7 A Yes. This is Mr. Pletten's response.

8 MS. BACON: I would move as Agency Exhibit
9 15 a letter to Jarma J. Averhart from Leroy Pletten,
10 dated March 12, 1981.

11 MR. COHEN: No objections.

12 (Agency Exhibit 15 marked for
13 identification.)

14 MR. COHEN: Off the record, please.

15 (Off the record.)

16 (Back on the record.)

17 Q (By Ms. Bacon) In your reading of Mr. Pletten's response
18 did your reading of the letter indicate that he did not
19 want a disability retirement filed for?

20 A He indicated that he did not want one, right.

21 Q Was his response considered in the making of the decision
22 to file a disability retirement for him?

23 A Yes, it was. However, there wasn't any new information
24 in his response.

25 Q Was Mr. Pletten informed of this decision to file for him?

1 A Yes, he was.

2 Q I ask if you can identify this letter?

3 I do not ask this witness to identify it
4 as to the contents because it is a letter from Mr. Hoover.
5 I submit it at this time only for the purpose of
6 Ms. Averhart's testimony to the fact that he was informed
7 of the results of his objection to the filing and the
8 fact that the filing was made.

9 VOIR DIRE EXAMINATION

10 BY MR. COHEN:

11 Q Ms. Averhart, did you write this for Mr. Hoover?

12 A No.

13 Q Pardon me?

14 A No, I did not.

15 MR. COHEN: May I suggest this is an
16 inappropriate time to enter it into evidence. Why don't
17 we wait for Mr. Hoover? He will be testifying.

18 MS. BACON: Yes. He will be testifying to
19 it in the bulk of his testimony.

20 In order to keep the record straight I
21 would like to admit it at this time, okay? You can object
22 to it again the next time it is referred to.

23 MR. COHEN: I object for the reasons
24 stated. It may be admitted.

25 Well, let me ask this, Ms. Averhart, before

1 I go any further.

2 Q (By Mr. Cohen) Did you have knowledge of this? Did you
3 get a copy of this?

4 A Yes, I did. I was aware of the letter.

5 MR. COHEN: For the limited purpose that
6 she was aware of it I will admit it.

7 MS. BACON: I submit then as Agency
8 Exhibit 16 a letter to Mr. Leroy Pletten from Mr. E. E.
9 Hoover, dated 9 April 1981.

10 (Agency Exhibit 16 marked for
11 identification.)

12 DIRECT EXAMINATION (Continuing)

13 BY MS. BACON:

14 Q Did you ever receive a decision back from the Office of
15 Personnel Management?

16 A Yes, we did. We were informed that his application had
17 not been approved.

18 Q Can you identify this document?

19 MR. COHEN: Counsel, that's part of the
20 record.

21 MS. BACON: Pardon?

22 MR. COHEN: That's in the tabbed record.

23 MS. BACON: Can you point it out to me.

24 MR. COHEN: Let's go off the record for
25 a minute.

(Off the record.)

(Back on the record.)

Q (By Ms. Bacon) Tab 8 of the Agency's response, I ask you if you can identify that document?

A Yes. This was the notification we received from the Office of Personnel Management.

Q To the best of your recollection, when did you receive that?

A I believe it was in October.

Q What action did you take upon being notified that the OPM action or that OPM in fact had disapproved the Agency-filed disability application?

A I discussed it with Mr. Hoover and decided to remove Mr. Pletten for a medical disability.

Q I ask if you can identify this document?

A Yes, I prepared that.

MS. BACON: I move for the submission as Agency Exhibit 17, a DF entitled "Request for Separation Due to Medical Disqualification," signed by Carma J. Averhart.

MR. COHEN: No objection.

(Agency Exhibit No. 17 marked for identification.)

Q (By Ms. Bacon) I think you have already testified to this before but I would like to go through it again.

Why did you go through the disability retirement application?

(3)

1 A Well, before an employee can be separated for medical
2 disqualification the Agency or the employee should file
3 for a disability retirement. It's part of the procedural
4 steps as I understand them.

5 Q Now your request is dated October 19 and the date of the
6 proposed separation action is November 27. Can you
7 account for the time lag at all?

8 A No, I can't. It was really out of my hands after I made
9 that request.

10 Q So somebody else would be in charge of all the technical
11 procedures in establishing and making sure that you have
12 the proper grounds and that sort of thing?

13 A That's correct.

14 Q Who would do that?

15 A That was Mrs. Bertram in the Management/Employee Relations
16 Branch.

17 MS. BACON: I have no further questions
18 at this time.

19 MR. COHEN: May we go off the record for
20 a minute, please?

21 (Off the record.)

22 (Back on the record.)

23 CROSS-EXAMINATION

24 BY MR. COHEN:

25 Q Ms. Averhart, if I ask you a question that you don't

1 understand please stop me and ask me to clarify it so
2 that we don't have any misunderstandings of information.

3 I am particularly interested in the
4 documents that have been submitted by the Agency and I
5 am going to ask you to refer to them. I am going to try
6 and keep the numbers straight.

7 What date did you become involved with
8 Mr. Pletten's case, if you recall?

9 A I am not sure of the exact date because I was Acting Chief
10 for a period of time before I became the permanent super-
11 visor. So sometime around the beginning of 1980 I believe.

12 Q All right. We'll use that as an approximation.

13 Were you familiar with prior decisions in
14 Mr. Pletten's case?

15 A I became familiar with them. It's hard for me to pinpoint
16 an exact time and say I was familiar with something at a
17 given time or not.

18 Q If I were to refer you to Col. Benacquista's reactions to
19 various grievances of Mr. Pletten back in October of 1980
20 and July of 1980, would you have been familiar with those?

21 A It's possible. I don't know. I'm not always made aware
22 of everything that someone else has decided.

23 MR. COHEN: I inform you, Counselor, that
24 I will have copies made of this. I don't believe it is
25 in the record.

1 MS. BACON: Yes, it is.

2 MR. COHEN: The October 6 letter?

3 MS. BACON: Yes.

4 MR. COHEN: Can we go off the record for
5 a second?

6 (Off the record.)

7 (Back on the record.)

8 Q (By Mr. Cohen) I refer you to Agency Exhibit No. 5.

9 Are you familiar with that?

10 A I've seen this, yes.

11 Q Had you seen it before you took any actions with regard
12 to Mr. Pletten?

13 A What do you mean by "any actions"?

14 Q Well, when did you get it, first of all?

15 A I didn't get it. I've seen it.

16 Q When did you see it?

17 A I have no idea.

18 Q Was it before or after you proposed his removal?

19 A It would have been before.

20 Q How much before?

21 A I have no idea.

22 Q Would that letter have affected your judgment in terms
23 of your treatment of Mr. Pletten's case?

24 A No, it would not.

25 Q Why not?

1 A Because I am able to separate someone else's opinion
2 from my own.

3 Q But the Colonel's opinion, of course, is based on the
4 information supplied by his subordinates; isn't that true?

5 A I have no idea what the Colonel's opinion is based on.

6 Q Let me understand something.

7 The Civilian Personnel Office doesn't
8 provide information and guidance to the senior officials
9 like the Chief of Staff?

10 A Civilian Personnel Office certainly provides information
11 to a lot of people. But the way the grievance procedure
12 works, depending on when the grievance was filed, I may
13 or may not have been involved in it. And even if I am
14 involved in it I am only involved at the initial step
15 and not at the final decision-making step of Mr. Pletten's
16 or anyone else's grievances.

17 Q But, obviously, in this circumstance you recommended removal.
18 You were involved in triggering the final step in his
19 circumstance; aren't you?

20 A Right. But that was totally unrelated to a grievance. It
21 was based on other considerations? I did not suggest a
22 removal because of a grievance.

23 Q The reason I suggest this is that I am somewhat confused.
24 Agency Exhibit 5 indicates that as of October 1980 the
25 Command had taken a position with regard to a health or

1 safety hazard and had indicated that they would not be
2 taking any further actions.

3 In addition I point you to July 24, 1980,
4 Exhibit No. 4 proposed by the Agency. That exhibit
5 indicates that the Agency is no longer going to consider
6 future correspondence from Mr. Pletten and that they have
7 made a determination --

8 MS. BACON: Objection. I think you are
9 reading that out of context.

10 MR. COHEN: Excuse me. I will rephrase it,
11 Counsel.

12 Q (By Mr. Cohen). That letter states:

13 "As the above stated issues are already
14 under consideration, the Command will no longer respond
15 to your future correspondence concerning these matters."

16 That is referring to Mr. Pletten. And it
17 says in the text, if I am not mistaken, that they have
18 attempted to accommodate.

19 "Is complying and will continue to comply
20 with regard to banning smoking and maintaining an equit-
21 able balance."

22 Are you familiar with those documents?

23 A I have seen this letter.

24 Q When did you see this one

25 A I don't remember.

1 Q You don't remember.

2 The question I ask is why did it take so
3 long for you to send Agency Documents Nos. 10 and 11
4 when the Colonel said that he wasn't going to do anything
5 more for Mr. Pletten with regard to compliance?

6 Why did those things come out all of a
7 sudden?

8 A I can't really answer that question because I didn't do
9 it based on the letter sent by someone else.

10 Q Who directed you to send this compliance letter?

11 A Which compliance letter?

12 Q The one that Mr. Hoover signed supposedly; "Appropriate
13 Work Areas for Leroy J. Pletten," 10 and 11.

14 MS. BACON: If you will rephrase your --

15 MR. COHEN: No, I won't.

16 THE WITNESS: All right. I was not
17 directed to send these. I was attempting to find out
18 what my options were in the face of having a mounting
19 workload and no employee to carry out the work. I was
20 advised that there are certain procedures that we go
21 through.

22 We try to accommodate the employee. We
23 try to find out if there is a place they can work, if
24 there is a job the employee can do. And this was what
25 I was attempting to do.

1 Q Who informed you that that was what you were supposed
2 to do?

3 A The regulations and the Advisor of Management-Employee
4 Relations Branch.

5 Q So if this wasn't done before it means it's something
6 that should have been done prior to your December 17, 1980
7 letter, if there was an issue of this before; is that
8 correct?

9 A We had been attempting to find something that Mr. Pletten
10 could do but is not just can he do the job or what is he
11 qualified to do, but is there anyplace that he can do
12 them.

13 Q No, I understand. But it seemed to me by the way that
14 it is a very legitimate request and makes sense that you
15 send such a document. But why was it so long in coming?
16 If all this had started well into 1979, why did it take
17 almost a year or year and a half to make such a request?

18 A Well, I don't know. I can't say that such a request had
19 never been made, whether it was in writing or verbally,
20 but at the time Mr. Pletten first brought his condition
21 to our attention it wasn't known whether it was going to
22 be permanent or temporary.

23 Q What made you think that Mr. Pletten couldn't return to
24 work?

25 A His physician's statement.

1 Q All the physicians' statements or just one of them?

2 A I don't know about all the statements. I've seen at
3 least two that said he required a totally smoke-free
work environment.

5 Q Do you have a file that indicates what you considered?

6 A Do I have a file of what?

7 Q Do you have a file that you used in considering
8 Mr. Pletten's case, that you kept?

9 A Yes, I have materials that Mr. Pletten supplied me from
10 his --

11 Q Do you have a case file called Leroy Pletten?

12 A No, I don't have a case file called Leroy Pletten. I
13 have information related to Mr. Pletten's case.

14 Q Where would that be kept?

15 A In my office.

16 Q Do you have that with you?

17 A No.

18 Q Do those documents differ from the ones before us?

19 A No.

20 Q Not at all?

21 A I have some notes to myself that we don't have here but
22 I don't know what kinds of information you're looking for.

23 MR. COHEN: Can we go off the record for
24 a minute?

25 (Off the record.)

1 (Back on the record.)

2 Q Coming back on the record, we had a long discussion
3 with regard to the availability of documents.

4 Ms. Averhart had indicated that there
5 were some personal notes that she may have had in a file
6 and they were not produced here.

7 I have asked Ms. Bacon to produce them.
8 The agreement that we have reached is tentatively as
9 follows. On Monday, when we resume depositions for
10 trial, Ms. Averhard will have supplied Ms. Bacon with
11 whatever files she has.

12 MS. BACON: I would correct you right now.
13 If we are starting at 8:00 I will be coming directly here.
14 I will not be going to the office so it will have to be
15 at a later date than Monday. Monday afternoon or early
16 the next day or whenever.

17 MR. COHEN: Well, at some date when these
18 matters resume Ms. Averhard will produce her files to
19 Ms. Bacon and they will be submitted subject to the
20 objection of Counsel; to Ms. Bacon's subsequent objections.

21 If she has a problem letting me look
22 through the files on behalf of Mr. Pletten, we have agreed
23 to contact Mr. Manrose of the MSPB for a ruling as to
24 whether the documents should be provided or not provided.

25 That is how we left it, so I presume that

1 will happen.

2 Q (By Mr. Cohen) Let's talk about the disability retire-
3 ment because I now have some copies here.

4 I would like you to identify this if you
5 could.

6 A I don't recognize it.

7 Q You don't?

8 A No.

9 Q You don't recognize it. Do you recognize the form?

10 A I recognize the form, yes.

11 VOIR DIRE EXAMINATION

12 BY MS. BACON:

13 Q Have you ever seen this one with this writing on it before?

14 A No. I don't recognize this one.

15 Q Do you know who wrote this?

16 A No.

17 Q Do you know if it came from the Office of Personnel
18 Management?

19 A No.

20 Q Is any of the information on it filled in?

21 A Yes.

22 Q Is this form typed?

23 A No. It is handwritten.

24 Q Do you know who made the handwriting on it?

25 A No, I don't.

1 Q Do you know if anybody from OPM made the handwriting on
2 it?

3 A No, I don't.

4 MS. BACON: Well, I would object for
5 its admission.

6 MR. COHEN: I haven't moved for its
7 admission.

8 MS. BACON: Okay.

9 Q (By Mr. Cohen) You have never received that in your
10 experience with regard to this case?

11 A No.

12 Q You have never seen the document before?

13 A No.

14 Q Hypothetically, if I were to tell you that such a
15 document was received by Mr. Pletten, pursuant to a
16 Freedom of Information Act request, and that the document
17 indicated that no reasonable accommodations of his
18 circumstances had been shown, would that click in your
19 mind as to anything you had been told by anybody at the
20 Command with regard to Mr. Pletten?

21 A No.

22 Q You have never been informed by anybody from OPM -- have
23 you had any discussions with OPM? Let me ask that.

24 A No.

25 Q You never contacted them at all personally?

1 A No.

2 Q Other than the written request I take it?

3 A I don't actually process the written request.

4 Q Who does?

5 A A Technical Service Office representative.

6 Q Who would that be?

7 A It would have probably been Mrs. Blevins.

8 Q And in your estimation she would have in all probability
9 have processed the disability papers?

10 A Yes.

11 Q You indicated earlier in your testimony that before --
12 I think I can quote exactly.

13 "Before we separate someone we have to
14 try everything possible."

15 Is that what you said before?

16 A I probably did.

17 Q Was it your intention to separate Mr. Pletten before you
18 had authorized the "go ahead" for disability retirement?

19 A I can't separate Mr. Pletten. I wanted to get a job done
20 and I wanted to find out what my options were and what
21 the requirements were.

22 Q Well, why did you earlier say that "before we separate
23 someone we have to try everything possible"?

24 A It just came out like that.

25 Q It just came out like that. And you had no intentions in

1 taking these actions to separate Mr. Pletten? You only
2 wanted your job done?

3 A Mr. Pletten was already not there. Mr. Pletten has not
4 physically been there since I have been the supervisor.

5 Q But he hasn't been separated from the Federal Service yet,
6 has he?

7 A But I am saying that he was not physically there to do
8 the job.

9 Q Did you ask for a manpower increase in your bailiwick
10 there as Chief of the Branch?

11 A Let me explain something to you. We had five people
12 there to do the job. Mr. Pletten represented 1/5 of my
13 work force.

14 Q I understand.

15 A And when he left --

16 Q So you were understaffed?

17 A So I was grossly understaffed.

18 Q Did you make a request from your superior for an additional
19 person, notwithstanding Mr. Pletten's status?

20 A I always request additional people, continually.

21 Q Why?

22 A Because I need them to get the job done.

23 Q You always need people? I mean, when you say "continually"

24 I --

25 A At that time we were more critically understaffed than at

1 any other time since I have been there, okay? So I
2 am continually asking for more people.

3 When Mr. Pletten left it was a significant
4 loss.

5 Q Mr. Pletten had been gone for a long period of time by
6 this time, hadn't he?

7 A Yes.

8 Q Let me understand. If Mr. Pletten were to be severed
9 from the Service and you were to be successful in this
10 action against him would that promote your getting
11 another person into that position?

12 A If Mr. Pletten was not in a space, right. Then I could
13 hire someone else to take his place.

14 Q Am I to understand -- and maybe I am getting this wrong.
15 Am I to understand that the main thrust and reason this
16 is being done is to free up a space so you could hire
17 somebody?

18 A No. That is not the main thrust.

19 Q Why isn't it? It seems like it.

20 A The main thrust for me is to get my job done.

21 Mr. Pletten did not appear to be returning
22 to work and I don't understand the rationale for having
23 someone on the rolls who does not appear to be ever be
24 coming back.

25 Q Well, what does being on the rolls cost the government?

1 A I don't know.

2 Q Does it cost them anything to your knowledge?

3 A I don't know what it cost the government.

4 Q Were they paying Mr. Pletten?

5 A Mr. Pletten was in a sick leave status so he was entitled
6 to use all of his sick leave.

Q And did you check to see if he had used all of his sick
leave?

A Yes.

Q Had he?

A He finally used it all by -- I am not sure of the date --
December of 1980 or somewhere around there.

Q December of 1980 and here we are in 1982; are we not?

A Yes, we are.

Q Okay. And it was an extended period of time between the
time he no longer had sick leave until the time you
started the administrative actions, wasn't it?

17 A I don't know which administrative action you mean.

18 Well, let's talk about the application for disability
19 retirement. When was that made?
20

21 A I can't remember all the dates.

22 Q Well, let's see.

23 A April of 1981.

24 Q April of 1981. It's almost a year ago, isn't it?

25 A Yes.

1 Q So it has been a year ago that you applied for the
2 disability retirement for Mr. Pletten. I mean, I don't
3 understand why it took that long a period of time.

4 Do you understand the thrust of my question,
5 Ms. Averhart?

6 A I guess not.

7 Q All right. You knew for a year that he was not getting
8 sick leave -- excuse me. You knew since December of
9 1980 until April of 1981 that he was not getting any sick
10 leave, correct?

11 A Yes.

12 Q Was he receiving any other remuneration from the Federal
13 Government at that point?

14 A I don't know.

15 Q Did you check?

16 A I don't know what other remuneration he might be entitled
17 to. He was out of sick leave and he was out of his
18 annual leave. And those are the only two things that I
19 would really be able to find out about.

20 Q Did the Pay Office tell you that he was receiving anything?

21 Did you ask Mr. Hoover? I'm sorry, let me
22 ask it this way. Did you ask Ed Hoover if he was getting
23 any moneys at all from the government?

24 A I don't know what other moneys you are talking about. I
25 think he is entitled to sick leave and annual leave. And

1 he used those.

2 Q And you testified that he had used all those.

3 A That's right.

4 Q Does that get replenished?

5 A No, it does not.

6 Q All right. Then he had used up all his entitlements?

7 A The ones that I was aware of, yes.

8 Q Did you ask if there was anything else he was getting?

9 A No.

10 Q No, you didn't. Can we presume that Mr. Pletten was
11 receiving not dime one from the Federal Government, from
12 what you just testified?

13 A I don't know what Mr. Pletten was receiving.

14 Q But based on your investigation you didn't think he was
15 getting anything?

16 A I wasn't investigating to see what kind of money
17 Mr. Pletten was getting.

18 Q You obviously went to the point where you knew whether
19 he had annual leave or sick leave.

20 A That's right, because I am responsible for managing that
21 for the employees in my branch. And if an employee is
22 on extensive leave I should know about that. I should
23 know how their leave balances are.

24 Q And all this being the case, if he wasn't costing the
25 Government anything by just being on the rolls, would

1 his being on the rolls have been the sole preventative
2 for your getting another person into his position?

3 A No.

4 Q Could you have gotten an additional person in your branch
5 even with Mr. Pletten on the rolls?

6 A Possibly.

7 Q Possibly. You seem hesitant.

8 Why would it be possible as opposed to
9 definite?

A Well, I just can't remember all the details about when
things happened.

Yes, I could have gotten someone. I could
have justified it by Mr. Pletten's not being there, okay?

Q All right. Did you attempt to do so?

A Yes.

Q Do you have documents to support that?

A Probably not.

Q Did you write something to somebody saying, "I've got this
guy who is out forever and I need somebody"?

A No.

Q Why not?

A I just didn't.

Q You just didn't. Did you discuss it with Mr. Hoover?

24 A Yes. I discuss my staffing problems with Mr. Hoover.

25 Q And what did Mr. Hoover say?

1 A I don't remember. You act as if all of our discussions
2 centered around Leroy Pletten.

3 Q No. I know that you have been called for testimony on
4 Mr. Pletten's matter and have been alerted that you are
5 going to be discussing Mr. Pletten. And I expect that
6 some of the memories will come flooding back to you.

7 A Well, I am doing the best I can.

8 Q I understand.

9 But it seems ludicrous to me that the
10 Command would not -- that you would not have made a
11 request for an additional person if your need was so
12 large and explained the circumstances regarding
13 Mr. Pletten.

14 Do you understand my question?

15 A I understand your statement.

16 Q All right. Why didn't you do it if you were so pressed?

17 A I don't know if I can put this into context but, in
18 assessing my staffing needs, I look at a lot of things
19 and I have prepared all sorts of budget justifications
20 and staffing justifications; almost on a quarterly basis.

21 Mr. Pletten's absence was one of the
22 factors that entered into this but I didn't prepare
23 anything that solely centered around replacing Mr. Pletten

24 Q What position did Mr. Pletten have, if any, with regard to
25 your budgetary considerations?

1 A Well, when he was on the rolls he was being paid.

2 Q But at the time you made the decision to apply for
3 disability retirement he had been off the rolls for five
4 months.

5 A He was on the rolls but --

6 Q But he was off the payroll.

7 A -- he was off of leave. Right, he was out of leave.

8 Q He wasn't getting paid was he?

9 A Right. And he didn't appear to be coming back to work.

10 Q Well, if that was the case, why didn't you just indicate
11 or why didn't you ask somebody, "Give me somebody owing
12 to the circumstance"?

13 Why did you recommend this disability
14 retirement?

15 A I don't know if you've ever been a manager but it is
16 poor management to have somebody just sitting out here in
17 limbo neither returning nor being separated. I mean,
18 they are just sort of there. They are not working but
19 they are just over there.

20 Q If a person is disabled for an extended period of time
21 are you telling me that you'd do something with them one
22 way or the other? You would either get rid of them or
23 do something with them?

24 A I am saying normally the physicians provide you some
25 prognosis on when they are going to be able to return and

if they are going to be able to return.

And, based on Mr. Pletten's physicians' statements that he had to have an absolutely smoke-free work environment and based on the information I received from our industrial hygienist and the Command medical officer that we could not meet those requirements, it did not appear that he would be returning.

Q What information did you get from the Command medical officer?

19 A That Mr. Pletten was not fit for duty until he could be
20 cleared by his personal physician to work in our
21 environment.

22 Q Did you read doctors' records from Mr. Pletten?

23 A No. What do you mean by doctors' records?

24 Q I'm sorry. Mr. Pletten's doctors' letters.

25 A Yes, I have received some copies of his doctors' records.

26 Q Did you receive all the letters?

27 A I have no idea.

28 Q Did you ask Dr. Holt if you had received all of the
29 communications?

30 A I contacted the dispensary at various periods of times
31 to try to be sure that I had all the information. But
32 I can't say that I personally talked to Dr. Holt to say,
33 "Did you give me everything?"

34 Q Did you talk with any of the doctors that signed the

letters for Mr. Pletten?

A No.

Q Why not?

A Because I rely on the Command medical officer to make that kind of determination.

Q And to make that kind of contact?

A Well, whoever. I don't make the contact with Mr. Pletten's physicians.

Q Does anybody? Do you know?

A I have no idea.

Q I mean, in your position, aside from dealing with management problems concerning Leroy Pletten, what is it that your branch does?

A We are responsible for making sure that employees' positions are accurately classified and that organizations are properly structured.

Q In order to do that don't you sometimes have to go do the legwork yourself?

A We go out and visit the organizations, yes.

Q To make sure what they are telling you is accurate; is that correct?

A Yes.

Q If there is a conflict in statements from somebody in one of the organizations, you resolve the conflict?

A We try to get enough information, yes.

Q So if you had the responsibility of resolving a conflict between two doctors' letters I presume you would investigate further and contact them?

A No. I don't see that I can resolve a conflict between two doctors.

Q No, I am not saying that you could. But, if you were in a position where you were trained in that area with regard to medicine, that would be good management?

A I don't know. I don't know what I would do in another area.

Q All right. Would it be good management to make thorough investigations of any conflict that comes before a manager?

A It would depend on what the conflict consisted of.

Q Would you agree with the statement that the most information is always the best for a decision maker?

A I would agree that the most pertinent information is the best. A lot of information is irrelevant.

Q Are you familiar with Army Regulation 1-8?

A Is that the one on smoking in occupied buildings?

Q I don't know, is it?

A I think that's the one.

Q All right. And you are familiar with that?

A If that's what it is.

Q That is what it is. When did you review it first?

A I have no idea.

Q Did you know about it before Mr. Pletten's case came up?

A No.

Q Had you ever been briefed as a supervisor about it?

A I was not a supervisor before Mr. Pletten's case came up.

Q When you were made a supervisor did the Command give you any direction as to smoking inside the buildings?

A Again, this is another area where I am not sure what happened first. I had begun to get involved in Mr. Pletten's case as an Acting Supervisor and I became aware of the regulation somewhere in the first part of 1980.

Q Did you seek additional guidance from anybody else within the Command Personnel Office as to those regulations?

A Yes.

Q From whom?

A From Mr. Hoover.

Q Anybody besides Mr. Hoover?

A I probably talked with Mrs. Bertram about it too.

Q Basically they found whatever information you needed?

A Well, they provided the regulation. I don't know what other information you are talking about.

Q Do you know what the definitions of smoke are, for example?

A Of smoke?

Q Cigarette smoke and the contents of cigarette smoke?

A The only definition I am aware of is what I would consider an ordinary definition of cigarette smoke.

Q All right?

A When you smoke a cigarette it produces smoke.

Q But you didn't go into the details of any toxic nature of the smoke?

A No.

Q Did you seek guidance from the medical staff with regard to cigarette smoking?

A I don't know what kind of guidance you mean.

Q Did you ask them for information about cigarette smoking and its effect on employees?

A No.

Q Did you take a poll or a survey of your employees to determine if cigarette smoking bothered them?

A No.

Q Do you yourself smoke?

A Occasionally.

Q Occasionally. How long have you smoked for?

MS. BACON: Objection for the record as irrelevant. Go ahead.

THE WITNESS: Oh, I don't know. Off and on for a couple of years; three years, four years. I

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don't know. I smoke very seldom.

Q If it bothers somebody I take it you put it out?

A Normally I would ask someone before I smoked if it would bother them.

Q And if it did bother them what would you do?

A I wouldn't smoke.

Q Did you have the power in your branch, the authority as the Chief, to ban smoking in the branch?

A That would normally not be a branch level decision.

Q I had testimony from Mr. Kator, your predecessor, who indicates that he had such power. Do you still agree with that?

A He could have had such power. But at the time I became Chief, Leroy's cases had started and, at that time, I would not have made a branch level decision like that.

Q Do you have the power now to ban smoking now that Mr. Pletten is removed?

A I really don't know. I haven't thought about it in terms of a power.

Q Do you have any objections to banning smoking in the branch?

A I don't have any reason to ban smoking in the branch right now.

Q Presuming Mr. Pletten were reinstated, would you have any problems banning smoking in the branch?

A If it were required I suppose I could do that.

Q What if it were not required per se?

A Then I would have to think about it.

Q Have you thought about it?

A No.

Q You haven't surveyed any of the employees as to their positions on the issue, have you?

A No.

Q Has anybody else complained to you about the circumstances?

A No.

Q How many people in your branch smoke?

A I don't know. Maybe four or five.

Q Out of five or six?

A Well, the branch has grown since Mr. Pletten left.

Q Since the time you took this action with regard to retirement?

A Yes.

Q In other words, you got replacements?

A Yes.

Q How many replacements did you get?

A I didn't get replacements. The program has changed and we have more people now.

Q Your staffing crisis is over?

A No, because we have more to do.

Q How many people do you still need?

A I don't know.

Q Well, your position is management. Do you need one person more or two persons more?

A I don't know.

Q Have you made requests for staffing?

A No, not lately.

Q I thought you said you always made them?

A I continually make requests but I have not made a recent request for "X" number of people.

Q When was the last time you made a request?

A Right now I am working on a request to get outside assistance, not to hire people.

Q Is there any reason you haven't made a request to hire people inside?

A There are not a lot of people who are qualified for the job.

Q If Mr. Pletten were available would you hire him?

A If Mr. Pletten's physician said he could work, yes, I would consider him.

Q And it was your impression from reading the letters from his doctors that he was denied the ability to work?

A It was my impression, based on his doctors' letters and our Command medical officer, that he could only work in a smoke-free environment.

And it was my understanding that limiting

smoking in one branch would not meet his requirements.

Q Did you ever consider directing him to come back to work?

A No.

Q Why not?

A Because if it is a health problem I am not going to ask someone to come to work whose doctor says they can't work in that environment.

Q And has Mr. Pletten stated to you that the doctor did not say that he couldn't come back to work?

A I don't know if he ever phrased it that way. Mr. Pletten has said that he is ready to come back to work but he has not been cleared by his physician or the Command medical officer as far as I know.

Q I just asked you, "Did Mr. Pletten ever tell you that he had doctor's clearance to go back?" And you stated that you don't remember him saying that?

A I don't think that is exactly what you said.

Q All right. What did I say then?

A I don't know. But I don't know if that's exactly what you said.

MR. COHEN: Can we have that read back?

(Question read back.)

Q (By Mr. Cohen) I understand your confusion now. It is not exactly what I asked.

I asked you earlier if Mr. Pletten had

told you that the doctors did not say that he couldn't go back to work and you said that you didn't remember that.

And I now note in Agency No. 9 that what you said was "Mr. Pletten appeared and said that he could report for duty."

A Okay.

Q Now, did you ask him anything further than that which is contained in document Agency No. 9?

A No. This summarizes what happened that day.

Q With Mr. Pletten stating that he had a doctor's clearance and you having based previous conclusions on the basis of letters that say he could not return, did that point out to you the concept that there may now be a change in status?

A Well, that is why I asked him to get a doctor's statement and take it to the dispensary so that he could be cleared to return for duty.

Q Owing to the fact that he didn't, -- I understand that he did not, based on your statement -- did you then write to his doctors?

A No.

Q Did you ask Mr. Pletten to write to his doctors?

A No.

Q You didn't? Why not?

A I told him to get a doctor's statement.

Q Now that you had a clearer understanding that there was other information why didn't you seek it?

A It didn't sound to me as if there was other information. Leroy was saying the same thing he's been saying all along.

Q Well, Leroy said that he had a doctor's clearance in order to return to duty.

A No. Leroy said he didn't need a doctor's statement since he wasn't sick.

Q Your testimony here in Agency No. 9 says at paragraph 2, sentence 2:

"He stated that he had a doctor's certificate from 20 January, and that it cleared him for duty."

A I'm sorry, you're right. And I told him to take his certificate to the dispensary.

Q Assuming that he did not, did you inquire further from his doctors?

A No.

Q Didn't you have a conflict as to what the circumstances were with regard to his condition?

A No. It was my understanding that if Mr. Pletten was able to return to work he knew the procedures. He knew that he had to get a doctor's statement and that he had to be cleared by the dispensary:

Q When did you make the application for disability retirement? Was that in April?

A I guess it was April.

Q That means that some three months after this memorandum for the record you made an application for disability retirement for Mr. Pletten; is that true?

A Yes. The Agency did.

Q At your direction?

A At my request.

Q With the knowledge that he had a doctor's certificate or the knowledge that he had represented that he had a doctor's certificate indicating that he was healthy? And you applied nonetheless?

A Mr. Pletten did not take a certificate, if he had it, to the dispensary.

Q I didn't ask you that. You made a statement to the Office of Personnel Management applying for Pletten's disability retirement when you had reason to believe, at least from his mouth and that you had not verified, that he indeed could work and was not disabled?

A Well, if he had such a certificate I assumed he would go to the dispensary with it.

Q You made the application for him, he did not, why didn't you check?

A I had told Leroy what he had to do and he chose not to

do it.

Q You told me previously what you had to do, and that is overturn every last shread. Before we separate we have to try "everything possible." And you have obviously not done everything possible; isn't that correct?

A Well, I suppose it would depend on how you interpret everything possible. I told Leroy specifically what he had to do and he did not do it.

Q I ask you to look at Tab 2-D, plus a couple, at a notation from Bruce Dubin, D.O. It is typed out at the bottom. Are you familiar with that?

A I don't know if I've seen that or not.

Q You've never seen it?

A I don't recall seeing this.

Q Now that you've seen it, doesn't it do something to your opinion as to whether he needed a reasonably free area or an absolutely smoke-free area?

A It doesn't do anything to me because I had to rely on the Command medical officer to say whether or not that cleared him to return to duty.

Q But, Ms. Averhard, knowing now that that exist, wouldn't it put some doubt in your mind as to whether he needed a reasonably free or an absolutely smoke-free area?

A I don't know what he needs. His doctor says that he needs a smoke-free environment.

A To the best of my knowledge at the time I requested it, Mr. Pletten's doctor had said that he could not work in the environment that we had. Now whether it was reasonably or another word, I don't know. As far as I knew he could not work in our office.

Q You indicated in Agency No. 9 that you contacted the dispensary to determine if it had been brought there and you were under the belief that it had not.

A That's true.

Q If I were to tell you that Mr. Pletten would testify that that had already been brought to the dispensary, what would that do?

A I don't know what you mean. What would it do?

Q I mean, would that change your position? Would that note have changed your position had you had it on January 20, some four months before you applied for his disability retirement?

A If the dispensary had received that and had cleared him as a result of it, I am assuming I would have been notified.

Q In other words, the whole problem I have then is with the dispensary? I guess you are telling me that I have to direct my questions to the dispensary?

A I guess you will.

Q Okay. In that regard I guess I will. Let me go on to

some other areas.

In your opinion or impression now, is the only thing stopping Mr. Pletten from coming back to work -- aside from the adverse action taken -- a note clearing him by the medical facility at the Command?

A I don't know what the procedures are after an employee has been separated.

Q Let's say it's proven that the medical officer didn't really do a complete job and let's assume I win on Mr. Pletten's behalf, would you take him back? Right now, if he were clear, would you take him back?

MS. BACON: I think that is an improper question. If actions are taken either way as a result of a decision then certain actions will be directed --

MR. COHEN: All right. Let me rephrase it then, Ms. Bacon.

Q (By Mr. Cohen) Would you mind having him back as an employee?

A I don't have any personal negative feelings about Mr. Pletten.

Q Do you have any misgivings about him coming back if that would be the case?

A If Mr. Pletten is told or whatever the circumstances are that he comes back, he comes back. I don't look on this as a personal issue so I don't really know what you are

getting at.

Q No. I just wanted to make sure that there was no animosity.

A No, I have no animosity toward him.

Q Do you have any medical knowledge yourself?

A No.

Q Is anybody in the family a physician?

A My husband.

MS. BACON: Objection. Irrelevant.

Q (By Mr. Cohen) Have you discussed this with him?

A No.

Q At any time?

A No.

Q Have there been any other incidents within your branch to your knowledge concerning smoking on the job?

A Not to my knowledge.

Q Now, you wrote a series of documents, in particular the document proposing removal of Mr. Pletten, is that correct?

A I didn't actually draft that.

Q You didn't?

A No.

Q Did you sign it?

A Yes.

Q Who drafted it for you?

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A The Management-Employee Relations Branch.

Q I guess there are so many layers of command that I am forever confused by that.

Why didn't you draft it?

A Because we rely on the Management-Employee Relations Branch to provide technical advice on these kinds of actions.

Q The statement that "your personal physicians have indicated that your condition requires an absolutely smoke-free work environment, free of any smoke particulates," you signed that statement, did you not?

A Yes.

Q In view of the evidence I have just shown you are you sure that that's true?

A I don't know. I don't know what that means, what reasonable means. Based on my knowledge at the time of this letter that was my understanding.

Q But now there is at least a question, is there not?

A I don't have a question because I don't know what it means.

Q The document I have shown you -- it's also in the record from Dr. Dubin -- does not require absolutely smoke free. It says "reasonably free of contaminants," does it not?

A Yes.

Q Would you feel more comfortable with this statement if you have further information? This statement you have

signed?

1 A I'm not really that much into clarifying what Dr. Dubin
said. As I told you before, I would rely on our Command
medical officer to handle that portion of it.

2 Q I understand. But as an individual decision maker you
are the one who is putting your name to the end of this
man's career. Do you understand that?

A Yes.

4 Q Are you standing behind this statement you made on
November 27, 1981, when you signed that document?

A At the time I signed that document that was the best
information I had.

6 Q What about now?

7 A I don't have anything that contradicts it because I
don't know what Dr. Dubin means by reasonable.

8 Q And do you know if the medical staff contacted Dr. Dubin?

9 A I don't know.

10 Q When was it established the working conditions at TARCOM
-- excuse me, TACOM, T-A-C-O-M -- met OSHA requirements?

11 A I was advised of it by either the industrial hygienist
or the safety officer. I am not sure.

12 Q When were those studies taken?

13 A I don't remember.

14 Q So you don't have any independent knowledge of what they
have established?

A I have the information that they provided me. I did not conduct the studies myself, if that's what you mean.

Q Did you read the studies?

A I read their report that said that we met the requirements.

Q How frequently were those reports done?

A I don't know.

Q Was there one report or two reports?

A I don't know.

Q You don't know?

A I don't know.

Q What are the OSHA requirements?

A I don't know.

Q You've told me that you have looked at the Department of Army Requirements?

A I've looked at the Department of Army Regulation that you mentioned.

Q Yes. Did you ask for guidance as to what the requirements are in interpreting that regulation?

A The regulation is relatively straightforward, if I recall.

Q So you've stated that it was established that you had complied with OSHA requirements even though you don't know what those requirements are?

MS. BACON: I object. She just stated

that she doesn't know what they are.

MR. COHEN: I am asking, so I get to ask.
It's cross-examination, Counselor.

MS. BACON: How many times are you going
to ask the same question?

MR. COHEN: Until I get the answers I
need.

Q (By Mr. Cohen) Now, I am trying to understand this. You
signed a letter saying that it was established that the
working conditions met OSHA requirements, yet you didn't
know what those requirements were?

A That's true.

Q You took the word of a hygienist?

A That's true.

Q You didn't try and interpolate the statute did you?

A No, I did not.

Q You didn't even ask what the regs were?

A No, I did not.

Q Who directed you to file for disability retirement for
Mr. Pletten?

A I discussed it with Mr. Hoover.

Q Did he suggest it?

A I can't remember how the conversation went, whether it
was a matter of suggesting it or trying to find out what
my next step should be.

Q Who is your direct supervisor?

A Mr. Hoover.

Q You indicated in your letter that you advised Mr. Pletten to furnish additional medical information to the Civilian Health Clinic on November 2; is that correct?

A I'm sorry, which letter is this?

Q This is the removal letter, the proposal, the 27th. You are looking at it.

A Yes.

Q You wrote him by letter November 2.

A I don't know if I wrote him that letter or not on the 2nd of November. It says "you were requested to furnish this information."

Q Okay. Who wrote it?

A I don't know if that was my letter or not. I just know that with all the dates I am not sure which letter you're talking about.

MR. COHEN: May we go off the record for a second.

(Off the record.)

(Back on the record.)

Q (By Mr. Cohen) I direct you to Mr. O'Connor's letter that you referenced in your proposed removal letter.

"The Office of Personnel Management has disapproved the disability retirement for which this

office applied."

Do you have it?

A Yes.

Q "You are requested to provide an updated physician's statement concerning your current medical status."

All right?

A Okay.

Q Now, in your letter of proposed removal you stated that you had requested revised medical information, not updated medical information.

Isn't there a difference between the two?

A I didn't draft this letter.

Q I know. Did you see the letter before you drafted the proposal to remove?

A I really can't remember.

Q I mean, you didn't draft the proposal to remove, did you?

A No. I said that already.

Q All right. And that was by somebody in the Personnel Branch?

A Management-Employee Relations Branch.

Q Mrs. Bertram?

A Right.

Q Mrs. Bertram probably did it. Do you agree that there is a difference between revised medical information in

the November 27 removal and updated information?

A They are different words, yes.

Q Mr. Pletten had already provided a revised physician statement of January 20, 1981, had he not? The one that I have shown you from Dr. Dubin.

A Yes.

Q This isn't at all referenced is it?

A Are you talking about a letter from January?

Q Yes.

A Right. It's not referenced in this letter from November.

Q And you say in the next line,

"Inasmuch as nothing was received from you by the due date of 10 November there is no basis for returning you to duty at this installation."

Is that correct? That is in the letter, isn't it?

A Where were you? I'm sorry.

Q Paragraph 3, sentence 2.

"Inasmuch as nothing was received from you . . ."

A Yes.

Q So the reference to that January 20 letter may have changed the whole complexion of this letter, might it not have?

A Well, when I read this it says that they were asking for

something in November. And he didn't provide anything in November.

Q But in the November 2 letter that I have shown you from Mr. O'Connor it indicates that what he wanted is something revised, a revised physician statement. And, indeed, the January 20 letter from Dr. Dubin is revised from his former position as expressed in his other letters.

A When I read Mr. O'Connor's letter, it says,

"You are requested to provide an updated physician statement."

Q All right. An updated statement.

A Which to me would be current, not January.

Q How many days did they give him to do this?

A The letter is dated the 2nd and they asked to have it by the 10th.

Q When did he receive it?

A When did he receive what?

Q The letter, the November 2 letter.

A I don't know.

Q Is it possible that he received it --

MS. BACON: I want to interject an objection here that Ms. Averhart is testifying to a letter that she doesn't even remember seeing before and in terms of having anything to do with it I would suggest that she is not competent to --

MR. COHEN: What letter are you referring to, Counsel?

MS. BACON: I am referring to the November 2 letter sent by O'Connor.

MR. COHEN: But she referenced it in her letter of proposed removal, Counsel, and that is her responsibility, not mine.

MS. BACON: I submit to you though that any of the statements made in that letter would be more properly testified to by Mr. O'Connor.

MR. COHEN: In response to the objection I might make the following statement.

I am almost sick to death of the layers of bureaucracy that come between somebody and the responsibility for a letter. I know that Ms. Averhart had to go through certain chains. I don't think Ms. Averhart, given the proper opportunity to do it herself, would have done this in the fashion it has been done.

I am just astounded that we have to keep going through layers of people. It's like Tinkers, to Evers, to Chance and nobody knows what the other person is doing.

There is a letter that she never saw and yet she's got the responsibility and I have to cross-

examine her as to the actions she takes. She's on the hook.

MS. BACON: That's very true. But I would point out that if this were a regular hearing we were doing I would be allowed to place the witnesses in the order that I think that their testimony would be most consistent.

But because we have agreed to do this by deposition here, due to the availability of the witnesses, it has more or less had to be kind of on a scrambling basis that it is being presented this way.

MR. COHEN: Regardless, Counselor, she signed the letter and she takes responsibility.

MS. BACON: That's very true.

MR. COHEN: Even if we had Mrs. Bertram in here beforehand it wouldn't have made a difference. She signed it and she should know the contents.

MS. BACON: That's very true.

Q (By Mr. Cohen) You have no idea when Mr. O'Connor's letter got to Mr. Pletten?

A No.

Q When you write a letter in the course of your business when does it get out of your office if it is dated let's say today? When would it get out of the office?

A Today.

Q It would get out today?

A Yes.

Q But you have no idea where it goes? From your office where does it go, to the mail room?

A Yes.

Q And then it is a question of how long it takes to get out of there, is it not?

A It usually goes out the same day.

Q But it may take another day?

A It may.

Q In other words, if it is typed at about 4:00 it is certainly going to go out the next morning?

A I would assume.

Q Because of the time and everything at the end of the day, 4:00 or 5:00, it probably gets put over until the next day?

A That's a reasonable assumption.

Q And this was not sent certified. There is no marking on the letter of November 2 to indicate certified or special delivery, is there?

A No, there is no marking on the copy I see here.

Q And it's possible with the vicissitudes of the Post Office Service that it may have taken a couple of days to get to him?

A I have no idea when Mr. Pletten received the letter.

Q If I were to tell you that Mr. Pletten received it on November 8 or thereabouts would it surprise you?

A Yes.

Q Have you ever tried to get a letter from a doctor before?

A Pardon?

Q Have you ever tried to get a letter of medical opinion or a letter regarding medical records from a physician?

A I suppose.

Q How long does it take?

A It didn't take me but about 10 minutes.

Q Was it from your husband?

A No.

Q To make the request or to receive the letter?

A To receive the letter.

Q I commend you on dealing with a doctor who deals in short order.

It is a difficult construct for me to believe that you could only give eight days at best to Mr. Pletten to make this response.

Why so short a time?

A I can't address that.

Q In other words that is Mrs. Bertram's problem? She is the one who put the time limits on it?

A You are talking about Mr. O'Connor's letter?

Q Yes. I mean, Mr. O'Connor writes the letter the 2nd and

gives him until the 10th. Is that Mr. O'Connor's fault or Mrs. Bertram's fault?

A I have no idea.

Q If you had been aware of Dr. Dubin's letter of the 20th of January saying relatively smoke free you would have sent around another letter asking for other placements based on that opinion, would you not?

A If I had been advised by Dr. Holt that there were certain areas of the Command that Mr. Pletten could work in, possibly I would have started looking for something again.

Q And if the coordination with regard to the January 20 letter had been better and more prompt there might not have been any need for the removal letter, isn't that true?

A I don't know. I have told you several times that I don't know what his doctor meant.

Q And you never questioned the Command doctor as to what he meant?

A The Command doctor was relatively clear to understand.

Q Dr. Holt was?

A Yes. He told me that he had to be cleared. He was not fit for duty pending clearance by his personal physician.

Q Well, he was direct about that but do you know if Dr. Holt saw the January 20 letter?

A I have no idea.

Q Procedurally do they have to be cleared for return?

A It is my understanding of the procedure that employees who have been out for a certain amount of time -- and I am not exactly sure on the amount of time -- has to clear through the dispensary when they return to work.

Q Who informed you of that procedure?

A It's in our regulations.

Q Do you know which one?

A No, I don't remember the number offhand.

Q I note your Agency Submission No. 14, which is a February 24 letter. Will you look at that.

You reference the most recent, apparently, letters from the various doctors.

Is that correct?

A I would assume. I don't know.

Q If there had been a more recent doctor's statement would you have included it? Is it your typical nature to include the most recent documents?

A Yes. But it would depend on what the statement might have said too.

Q Well, you have seen Dr. Dubin's statement. Would you have referenced that if you had had it?

A Probably.

MR. COHEN: Let's take a break for about

a minute so that I may see Mr. Pletten.

(Off the record.)

(Back on the record.)

Q (By Mr. Cohen) Ms. Averhart, let me ask you a few more questions.

In the letter you indicate -- now this is the 27th letter again, the proposed removal. It says at paragraph 3 in the third or fourth sentence:

"However, because the Command is not able to provide a smoke-free work environment placement is not possible."

Why is the Command not able to provide a smoke-free work environment?

A It was my understanding that the Command was not able to do that.

Q Was not able to?

A Right.

Q Didn't you tell me that the Command has the power to do it?

A No, I didn't tell you that.

Q I'm sorry. We've had testimony from Col. Benacquista that the Command does indeed have the authority to do it and the power to do it but it chose not to do it.

MS. BACON: I would object to that as representative of Col. Benacquista's testimony. I don't

exactly remember what it was but the record will have to speak for itself as to what his testimony was.

Q (By Mr. Cohen) Well, if I were to tell you that Col. Benacquista said that he had the authority to ban smoking but has chosen not to and that he didn't feel it was necessary -- I think those are almost his exact words -- then this statement would be incorrect; is that true?

A It was my understanding that the Command could not provide Mr. Pletten a smoke-free work environment.

Q By those words "smoke-free work environment," what did you understand that to mean?

A Free of smoke.

Q Is that just cigarette smoke or all smoke or what?

A Smoke free means free of all smoke to my understanding, particularly tobacco smoke.

Q Did you inquire as to whether the Command could ban tobacco smoke?

A I was under the impression that the Command could not provide the environment that Mr. Pletten's physician said he required.

Q Who fed you with that impression?

A Pardon?

Q How did you arrive at that impression?

A In discussions with Mr. Hoover.

Q So Mr. Hoover would more properly have drafted the letter? He would be the one who had the personal knowledge in this area; would he not?

A I don't know what his personal knowledge is. You asked me where I got the information.

Q He asked you where you got the information?

A You asked me where I got the information.

Q Were there other alternatives to separation from Federal Service suggested?

A We had exhausted the other alternatives, which were to provide Mr. Pletten with sufficient time to recover, if that's what he was going to do or to have a change in his condition or have him return to work and nothing had happened along those lines.

Q Did you seek a prognosis from his doctors?

A I asked him to provide a doctor's statement, yes.

Q You told me you weren't involved in the preliminary stuff, only when it got down to your concern over your own command and then you went to Mr. Hoover and said, "I need more staffing."

Did you seek to establish a hazard-free environment for Mr. Pletten within your branch?

A It was my understanding that it was Mr. Pletten's condition that was the problem. Our environment did meet the requirements for a safe working environment.

Q Did you ask Mr. Pletten?

A Ask him what?

Q If that met the requirements? Or ask his doctors if the circumstance you described would meet the requirements?

A Mr. Pletten, as far as I know, was asked to provide information on whether or not he could work in the environment of our office. And it was my understanding that his doctors said that it did not meet his requirements.

Q Did the doctors see the office?

A The doctors, as I understand it, were provided information on the conditions in the office.

Q But you don't have any personal knowledge of those things? Those were all subordinate tasks?

A Somebody else did those, yes.

Q When you sent out a letter asking people if they had an environment suitable, I notice you didn't send a letter to anybody saying, "Could we make such an environment," as opposed to you know -- Well, your letters -- and I think they are Exhibits 10 and 11 -- you sent out to the safety office saying, "See if there is anyplace we can put Pletten." Do you remember those?

A I know which ones you are referring to.

Q You asked them to see if there was anyplace available. Why didn't you ask them if they could make an environment like that?

A Well, I don't believe the question was what can we create but that it is what can we work with that exists here.

Q Well, how do you define reasonable accommodation?

A I haven't really thought about defining reasonable accommodation.

Q Do you know when that is used, when that term is used?

A I've heard the term.

Q Have you heard the term used in conjunction with disability and/or disabled persons, handicaps?

A Yes.

Q Did you consider Mr. Pletten handicapped?

A I don't know. I don't really think of it in that sense. He had a condition that said he couldn't work in our office environment.

Q Were you aware that Mr. Pletten had made claims that he was so handicapped?

A Yes.

Q And you still didn't think of it in those terms?

A You asked me if I thought of him as handicapped.

Q Yes.

A And I said that when I think of him I don't think, "Mr. Pletten, handicapped." I knew him for many years before this condition became known.

Q Even in view of his protestations that he is handicapped

you still don't think he's handicapped?

A I'm not saying I don't think he is handicapped. You asked me if I thought of him as handicapped.

I think of him as Leroy Pletten.

Q The statements within the record indicate that -- and this is at Tab 14. I'm sorry, it's at Tab 13. It indicates in "Agency Response to Issues" -- and this is the third paragraph from the bottom. It says:

"The grievance to which Mr. Pletten refers relating to smoking, was resolved by a USACARA report dated 25 January 1980. The Agency though not agreeing with all the findings of fact accepted the recommendations in said report, thereby bringing the grievance to an end."

First of all, did you read that report?

A I could have, I don't know. I'm not sure which report this is.

Q Look at Tab 3 because that report is contained in Tab 3. It is just a summary but a portion of it is in there.

Had you ever seen that before?

A Yes, I've seen it.

Q And if you will note the recommendations. Have you seen those?

A Yes, I've seen them.

Q And you will note at "B" that it says that the Commander take further action necessary to provide Mr. Pletten

with an immediate work area which is "reasonably free of contamination." Do you recognize that?

A Yes.

Q And in view of Dr. Dubin's letter of January 20, 1981, that seems to jog with that, does it not?

A Well, they both used the word "reasonably."

Q That's right. And they both used contamination, didn't they?

A I don't remember about contamination.

Q My question then I guess, if you are familiar with this and you have seen it before, is what didn't the Agency agree with in terms of the findings of fact by the report?

A I don't know..

Q Who would know?

A Mrs. Bertram.

Q Mrs. Bertram?

A Yes.

Q Well, I will get to her on Monday.

Did Mr. Pletten leave anything behind him when he left?

A I don't know.

Q Personal papers or a calander pad or any property from his desk?

A I don't know. If he did he didn't let me know that he

did.

Q Where would it be if it had been left?

A I don't know that he did leave anything.

Q Presume for argument sake that he did, who would have control?

A I don't know what it is or who would have control of it.

Q If any property is found in a desk that is unoccupied what happens to it? Would the cleaning staff have it?

A I don't know. I don't know who finds it.

Q What portions of the USACARA report did the Agency agree with as opposed to disagree with?

A I don't know.

Q That would be a question for Mrs. Bertram also?

A Yes.

Q Let me ask you this.

In your interpretations or in your readings of Army Regulation 1-8 regarding smoking in a hazardous environment -- did you read it well enough to make an interpretation or make some conclusions with regard to it?

A I read it, yes.

Q Doesn't it state something about the discomfort of the individual being the determinant of what has to be done for compliance? Do you remember that?

A I remember something about discomfort, yes.

MR. COHEN: Do we have a copy in the record at this point?

MS. BACON: Not yet.

MR. COHEN: Maybe we should instead of referring her to --

MS. BACON: I was going to submit it via Lang.

MR. COHEN: Hold on for a minute.

MS. BACON: Do you wish to go off the record while you search?

MR. COHEN: Yes.

(Off the record.)

(Back on the record.)

Q (By Mr. Cohen) Ms. Averhart, there are certain people who are sensitive to cigarette smoke; do you agree?

A Yes, I would agree.

Q And Mr. Pletten is one who is sensitive to it?

A Yes.

Q And I presume there are other people, correct?

A That's a reasonable assumption.

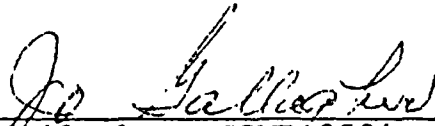
Q A reasonable assumption. And some people are also discomforted by smoking, correct?

A I would assume.

Q Which is why you testified earlier that you ask people before you start to smoke.

this is a true and correct transcription of my said stenomask recording notes so taken.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at Livonia, Michigan, County of Wayne and State of Michigan, this 11th day of May, 1982.


Jo Gallagher, CSMR-2584
Notary Public, Wayne County,
Michigan
My Commission Expires: 2/21/83