

1 UNITED STATES OF AMERICA
2 MERIT SYSTEMS PROTECTION BOARD
3 CHICAGO REGIONAL OFFICE

4 LEROY J. Pletten,

5 Appellant,

6 vs.

7 DEPARTMENT OF THE ARMY,

8 Agency.

9 _____
10 Transcript of the Deposition of EDWARD

11 HOOVER taken in the above-entitled cause, before TAMARA A.
12 O'CONNOR, Notary Public in and for the County of Oakland and
13 State of Michigan, at 3000 Town Center, Suite 1105,
14 Southfield, Michigan, on Wednesday, April 28, 1982,
15 commencing at or about 9:00 a.m.

16 APPEARANCES:

17 COHEN & COOPER, 3000 Town Center, Suite 1105, Southfield,
18 Michigan 48075, Appearing on Behalf of the Appellant.
19 BY: STEVEN Z. COHEN, ESQ.

20 DEPARTMENT OF THE ARMY, U. S. ARMY, TACOM, DRSTA-LA, Warren,
21 Michigan 48090, Appearing on Behalf of the Agency.
22 BY: EMILY SEVALD BACON, ESQ.
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I N D E X

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WITNESS:

PAGE

EDWARD HOOVER

Examination by Ms. Bacon

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Examination by Mr. Cohen

13

EXHIBITS:

MARKED

Appellant's Exhibit No. 4

51

Appellant's Exhibit No. 5

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Southfield, Michigan

Wednesday, April 28, 1982

9:00 a.m.

P R O C E E D I N G S

E D W A R D E. H O O V E R

having been first duly sworn, was examined and testified on his oath as follows:

EXAMINATION

BY MS. BACON:

Q Mr. Hoover, would you state your name for the record, please?

A Edward E. Hoover.

Q What is your position?

A Civilian Personnel Officer, TACOM.

Q How long have you held that position?

A Slightly over a year.

Q What was your position previous to the one you are presently holding?

A Deputy Civilian Personnel Officer.

Q How long did you hold that position?

A From June of 1978.

Q What are the duties and responsibilities involved in being a Civilian Personnel Officer?

A To carry out the civilian personnel management program of the Tank Automotive Command for the command, and

1 servicing activities, and serve as the office manager
2 for the division, and serve in the absence of the
3 Director of Personnel Training and Force Development
4 as the Director.

5 Q Are you acquainted with the Appellant in this case, Mr.
6 Pletten?

7 A I am.

8 Q How did you become acquainted with Mr. Pletten?

9 A Mr. Pletten is employed as a position classification
10 specialist in the civilian personnel office when I
11 arrived in June of 1978.

12 Q Were you in his line of supervision?

13 A Yes.

14 Q How were you involved in his supervision?

15 A The second layer of supervision, above his immediate
16 supervisor.

17 Q We have had previous testimony that Mr. Pletten did
18 file numerous grievances, and that he has complained
19 about smoking and smoking policy in the office. Are you
20 aware of this?

21 A I am.

22 Q You are aware of Mr. Pletten's objections to smoking
23 at TACOM?

24 A Yes, I was.

25 Q Were you involved in any grievances relating to the

1 subject matter?

2 A Yes, I have been.

3 Q What has been the extent of your involvement?

4 A It has been one of escalating involvement. Initially,
5 when I was the Deputy, I was involved only in a
6 peripheral manner. However, after the departure of Mr.
7 Grimmatt, I obtained the job as the personnel officer,
8 and I became more directly involved. I have been
9 intimately involved since.

10 Q Are you aware of any attempts that have been made to
11 accommodate Mr. Pletten's sensitivity?

12 A Yes, I am. There have been numerous attempts, both
13 with regard to no smoking areas within his office,
14 providing him with a semi-private office where smoking
15 was prohibited and the offer to give him an additional
16 or a different room which would be semi-private also,
17 which had the capacity to be air conditioned.

18 Q Was Mr. Pletten amenable to that offer?

19 A No. He was not amenable to the final offer, the
20 second offer I should say, which was to go into the
21 room which could be air conditioned.

22 Q Did he say why he was not amenable to that?

23 MR. COHEN: Objection. It calls for a
24 conclusion outside of the knowledge of the witness.

25 BY MS. BACON:

1 Q Did he state anything to you?

2 A Yes. He said it was discriminatory because it isolated
3 him.

4 Q We have had previous testimony in this case, and you
5 of course are aware that this case involves the
6 action to separate Mr. Pletten for medical
7 disqualification. Is that true?

8 A True.

9 Q And you have been involved in events and steps which
10 led up to this action? Is that correct?

11 A Yes.

12 Q We have had previous testimony that Ms. Averheart,
13 who is Mr. Pletten's immediate supervisor, that she
14 tried to find a way or she was kind of in the position
15 of trying to find something to do with him after his
16 leave without pay ran out, that she was exploring the
17 possibilities, and that after a discussion with you,
18 a disability retirement was filed for. Could you
19 perhaps fill us in a bit about the discussions that
20 led to the filing for disability retirement for him?

21 A Yes. The doctor's statement was received by our
22 physician, Dr. Holt. Dr. Holt had indicated that Mr.
23 Pletten was not fit for duty because of physical--

24 MR. COHEN: Objection. The response calls
25 for a hearsay response with regard to Dr. Holt, but

1 go ahead.

2 MS. BACON: The objection is noted.

3 BY MS. BACON:

4 Q Go ahead.

5 A Mr. Pletten could not come to duty. Consequently, when
6 the leave ran out there was an Agency initiated
7 disability filed because we did not have any jobs to
8 which Mr. Pletten could be assigned based on the needed
9 environment or required environment by his physician.
10 Subsequently, we filed an application for disability
11 retirement.

12 Q What were you told in terms of environment that Mr.
13 Pletten needed?

14 A I was told that he needed a smoke-free environment.

15 Q You were involved with the decision to file a
16 disability retirement for him you stated. Was a
17 disability retirement approved by OPM, to your knowledge?

18 A The disability retiremenet was initiated on behalf of
19 Mr. Pletten by the Agency. It was denied by OPM.

20 Q After the disability retirement was denied, what action
21 did you take or did you dictate be taken or were you
22 involved in?

23 A I was involved in the following action. The follow up
24 action was to initiate separation because of medical
25 disqualification, even though the Office of Personnel

1 Management had decided that Mr. Pletten did not meet
2 the criteria of the disability annuity. We still had
3 no recourse. We could not bring him back to work based
4 on his physician's statement.

5 Our only alternative in accordance with
6 the regulations was to initiate action and separate
7 him based on physical disqualification and that is
8 what we did.

9 Q The record indicates that Ms. Averheart sent a DF
10 to the Management Employee Relations Branch requesting
11 him to initiate a separation for medical disqualification.
12 At Agency's Exhibit No. 17, it is noted that she did
13 that on October 19, 1981.

14 Ms. Bertram has testified that she in her
15 function as a Management Employee Relations Specialist
16 felt that Mr. Pletten ought to be given another
17 opportunity to bring in a medical note indicating that
18 he could work in that kind of environment that it has.

19 MR. COHEN: Objection. Counsel is
20 characterizing testimony. I believe it is a somewhat
21 weighted characterization. I think if you just refer
22 to the fact that Ms. Bertram made such a request
23 pursuant to Mr. O'Connor's letter, I think it would be
24 more accurate.

25 MS. BACON: Objection noted.

1 BY MS. BACON:

2 Q I ask if you can identify that document at tab eight
3 of the Agency's response.

4 A Yes. It is a letter signed by my deputy, which as I
5 recall, was signed in my absence notifying Mr. Pletten
6 of the OPM decision to disapprove disability retirement,
7 and it is also our request that he provide an updated
8 physician's statement to verify his ability to return
9 to work.

10 Q So you were aware that this letter was being signed,
11 even though you weren't physically there to sign
12 this?

13 A Yes.

14 Q To the best of your knowledge, did Mr. Pletten provide
15 anything that he could work in the environment as we
16 have it?

17 A As I recall, I don't believe Mr. Pletten directly
18 replied to our request at all. Specifically, we did
19 not get and have not received any medical evidence
20 that would say that he is physically fit for return
21 to duty.

22 Q Ms. Averheart has testified that she sent out a letter
23 proposing removal, located at tab seven of the Agency's
24 response. In the content of the letter, it indicates
25 that he may respond to the proposed separation by

1 providing something to you. Did Mr. Pletten ever
2 respond, to your knowledge, to that offer?

3 A No.

4 Q He never responded directly to you?

5 A There was one response. Mr. Pletten had arranged or
6 requested a meeting. I can't recall if it was a result
7 of this letter or not, but he had established a meeting
8 and he did not keep the appointment. I don't recall
9 whether it was in connection with this letter or not.
10 Subsequently, Mr. O'Connor called to see if he was
11 going to keep the appointment. There was no answer

12 He left a message with Mr. Pletten's
13 answering service, but we never heard back from him.
14 I believe it may be that letter but I can't be
15 certain.

16 Q I refer you to tab nine of the Agency's response, which
17 are identified as disposition forms submitted by Mr.
18 Pletten making reference to various letters that have
19 been sent out.

20 A I recall the memos.

21 Q What is the procedure after any proposed removal letter
22 is sent out by a first line supervisor in your
23 division?

24 A The normal procedure is that they give the individual
25 the opportunity to reply to the next higher level of

1 supervision who can adjudicate the case. That data is
2 taken into consideration with all the data that is
3 developed as a result of the previous actions in the
4 case, and a decision is normally made to take, modify,
5 or eliminate the action that was proposed.

6 Q You would be the one who would be making that kind of
7 review?

8 A Correct.

9 Q Did you make that kind of review in this case?

10 A I did.

11 Q I refer you to tab ten of the Agency's response, and
12 ask you if you can identify that?

13 A Yes. This is the decision letter on Mr. Pletten's
14 separation.

15 Q And who is it signed by?

16 A General Stallings.

17 Q Did you have any discussion or brief General Stallings
18 on this matter?

19 A Yes. As a matter of fact, since the action was
20 involving an employee in my organization, I personally
21 took the letter to General Stallings, discussed it
22 with him, answered any questions he may have had on
23 it, and told him that it was my opinion and my judgment
24 and that of my MER and legal staff that it was in
25 accordance with the rules and regulations, and he

1 should sign it.

2 Q In terms of Mr. Pletten's duty status, at the time that
3 the word was received from Dr. Holt that he was not
4 fit for duty, what status was Mr. Pletten in at that
5 point?

6 A As I recall, sick leave.

7 Q And you previously testified that Dr. Holt is the one
8 who determines whether or not an employee is not fit
9 for duty? Correct?

10 A That is correct.

11 Q Would it have to be Dr. Holt who would determine
12 whether an employee was fit for duty after placing
13 an employee in a not fit for duty status?

14 A Yes. Dr. Holt would have his own evaluation criteria,
15 and/or that of any practitioner that the employee might
16 choose to refer. Excuse me. I got that backwards.
17 I guess any data a private practitioner might supply
18 Dr. Holt. The final decision is Dr. Holt's.

19 Q So if any employee brought you a doctor's note, what
20 would be your next action with that note? Would it
21 be to send it to Dr. Holt?

22 A Yes it would.

23 Q So that you would not be able to, by accepting a
24 doctor's note, put an employee back in duty status
25 stating that such employee was fit for duty?

1 A No. I don't have that authority. That is a medical
2 determination, and only an appropriate authorized
3 physician can make that determination. In our case,
4 it would have to be Dr. Holt.

5 MS. BACON: I have no further questions at
6 this time.

7 MR. COHEN: Could we go off the record,
8 for a minute.

9 (Discussion off the record.)

10 MR. COHEN: On the record.

11 EXAMINATION

12 BY MR. COHEN:

13 Q Mr. Hoover, as you know, I represent Mr. Pletten. If
14 you have any questions about the questions that I
15 ask, if you don't understand stop me, and have them
16 clarified. I don't want you to give inprecise answers
17 to inprecise questions.

18 A Okay.

19 Q You indicated in direct testimony that Mr. Pletten had
20 rejected offers made by the command to mitigate or
21 comply with his specific circumstances. Is that true?

22 A Yes, sir.

23 Q And that was your attempt at reasonable accommodation,
24 is it not?

25 A It was.

1 Q Is reasonable accommodation required?

2 A It is.

3 Q Under what statute, sir?

4 A I don't know the statute.

5 Q You don't know the statute?

6 A No.

7 Q What regulation then?

8 A I don't know the name of the regulation or the number.

9 I am not an expert at regulation numbers. There is a
10 regulation governing health standards, Department of
11 Army regulation. I believe it is AR 8-1, which deals
12 with smoking specifically. I believe that is the
13 number.

14 Q But the reasonable accommodation, does that come into
15 it? You are real close. It is 1-8.

16 A I don't know. I don't profess to be an expert in that
17 area. It is a regulation that is implemented by our
18 safety staff.

19 Q But you did decide Mr. Pletten's case with knowledge
20 of that regulation, did you not?

21 A I decided the action to take in compliance with the
22 regulations governing employees' attendance at work
23 and so on, which are CPR's. The decisions relative to
24 compliance with air quality standards, et cetera, are
25 things that are totally beyond my technical area and

1 are decided by the safety office, Dr. Holt, and so on,
2 not by me or my staff.

3 Q But you took those safety determinations into
4 consideration in what actions you took, did you not?

5 A I did.

6 Q Did you review as the Civilian Personnel Officer other
7 actions for compliance with regulation?

8 A No, I did not. That is not my function. I reviewed
9 the data that they gave me, and I took the advice that
10 they gave me, as did Ms. Averheart, for example. I
11 have no way of evaluating safety air quality content
12 standards. I don't know anything about those kinds of
13 things.

14 Q Let me understand. Is there no final check and balance
15 to all of these pieces of input to you?

16 A Oh, sure.

17 Q Who is that?

18 A In the area of air quality studies, et cetera, the
19 safety office, Dr. Holt. They are the technical
20 experts. That is what they are paid for. That is
21 what they do. In terms of compliance with the
22 civilian personnel regs, relative to our application
23 for his disability retirement, our application for
24 his separation by physical disqualification, the
25 Management Employee Relations Branch provides that

1 technical expertise.

2 Q But ultimately there is no one person that looks over
3 everybodys' shoulder? For example, if Dr. Holt were
4 wrong, if he had made an error, who would follow up
5 to make sure he had not, or at least have a final
6 view of his work in conjunction with yours?

7 A I think the individual who reviewed Dr. Holt's work
8 was the Office of Personnel Management. They had a
9 medical determination. What they said relative to Mr.
10 Pletten's disability or his physical condition, I
11 don't know because that is not my business. That is
12 between Mr. Pletten, his physician, and Dr. Holt,
13 and I am not privy to the details of that information
14 and I am not concerned with it because it is not my
15 business. I couldn't make a medical determination
16 anyway.

17 Q Owing to the fact that Dr. Holt ruled him unfit for
18 duty, and owing to the further fact that the disability
19 retirement from the Office of Personnel Management has
20 concluded that he is not disabled for purposes of
21 disability retirement, isn't that a conflict, and
22 wouldn't that point you to a circumstance which
23 required further investigation?

24 A No. I don't consider it a conflict at all. Number
25 one, the Office of Personnel Management has said that

1 Mr. Pletten's disabling condition is not sufficient
2 to warrant a disability retirement. Dr. Holt, to the
3 best of my knowledge, has never made a comprehensive
4 or complete medical determination on Mr. Pletten.

5 What he has done is, he has taken the
6 restrictions in the medical evaluation provided by Mr.
7 Pletten's physician and said that the organization,
8 TACOM, cannot comply with the standards established as
9 a result of that evaluation provided him. Consequently,
10 he is not fit for duty at TACOM because potentially
11 it would be injurious to him to be at work.

12 Q Let me understand this. You mean Dr. Holt never did
13 any independent investigation to your knowledge?

14 A I didn't say that. I said I don't know that he did
15 a comprehensive physical exam of Mr. Pletten. He has
16 had numerous contacts with several different physicians,
17 the names of which I cannot tell you. I know that we
18 have a substantial volume of material that has gone
19 back and forth between Dr. Holt and several physicians
20 that have established--

21 Q Did you personally review the letters from the doctors?

22 A No. I did not personally review the letters from the
23 doctors. Normally the data provided from one physician
24 to another is not open to general review. Some of them
25 have been sent directly to our office by Mr. Pletten.

1 I have seen them. For example, I recall seeing a
2 letter signed by a Dr. Dubin. They don't routinely
3 send us that information. It should be physician to
4 physician, not physician to the whole world or to the
5 personnel office perse.

6 Q Were you in receipt of a letter from Dr. Holt or a
7 memorandum indicating that Mr. Pletten was unfit for
8 duty?

9 A Yes. I think there were several memorandums, probably
10 DF's, saying he was not fit for duty.

11 Q I don't see any in the Agency file. Do you have copies
12 of them?

13 A The Agency file is my file. I do not keep a separate
14 file. I do not have any file on Mr. Pletten.

15 Q In other words, these tabs that were provided to the
16 Merit Systems is the entire file?

17 MS. BACON: I think Mr. Hoover just testified
18 that was his file.

19 BY MR. COHEN:

20 Q I will clarify it. This submission with the tabs to
21 the MSPB is your file?

22 A I can't testify totally as to what is in there.

23 Q Look.

24 A This is the file that we provided to MSPB, yes.

25 Q Show me in that file, if you could, where there is a

1 letter from Dr. Holt indicating that he is unfit.

2 A I presume based on your question there is none here,
3 but this file is in response to a specific request
4 from the organization to provide certain data.

5 Q You indicated that in your estimation there were
6 DF's or memoranda from Dr. Holt indicating his lack of
7 fitness for duty. If that be the case, I would like to
8 see one of them. If it is not in that file which
9 represents your file, I would like you to tell me where
10 I can find such memoranda.

11 A Perhaps there is one here. I think we have a DF from
12 Dr. Holt saying that. If it is not in this file, I
13 couldn't tell you where it is.

14 MS. BACON: The Agency will provide you
15 with a copy of that if you want one.

16 MR. COHEN: I would very much like one.

17 MS. BACON: I think Dr. Holt's file will
18 indicate that he has kept copies of the DF's that he
19 sent out relating to Mr. Pletten.

20 MR. COHEN: The reason I am so concerned
21 Mr. Hoover and Ms. Bacon for your information is,
22 it seems that we are playing a show game with
23 fragmented authority. Mr. Hoover, you have testified
24 your only involvement is compliance with CPR
25 regulations and the MER reports which you supervise.

1 You say you don't have any involvement in the medical
2 aspect or medical decision, and there is a seeming
3 lack of overall accountability for the action. Each
4 person is claiming only a portion of responsibility
5 and that is why I have got to know who told you that
6 he was unfit for duty.

7 BY MR. COHEN:

8 Q As I understand it, the lack of fitness for duty is
9 a prerequisite to any action taken by your office.
10 Is that correct?

11 A You made an assumption in your statement there which
12 I would like to correct because you are saying that I
13 said something which I don't believe I said, and if
14 I did, I certainly want the record to be correct.

15 Q Please go ahead then.

16 A I said that I don't have any responsibility for making
17 a medical determination, and I am certainly not
18 qualified for making a medical determination. You
19 intimated that because of that, there is a lack of
20 overall control of the action that is being taken
21 and that is far from an accurate statement.

22 We have several people who have very
23 positive responsibilities relative to the propriety
24 of a case. Legal and regulatory compliance with the
25 CPR's happens to be an MER responsibility. Bob

1 Shirock, the safety officer, has some very positive
2 responsibilities. Dr. Holt has some very positive
3 responsibilities. When those are all carried out
4 appropriately, there is no reason to assume that Dr.
5 Holt is saying Mr. Pletten is physically disqualified
6 for his position when we have physician statements
7 that essentially say he has got to have a clean room,
8 if you will.

9 That is a pretty well established fact.
10 The air content studies are well established scientific
11 fact. I can't dispute that. I accept those as
12 being accurate and I have no choice because they are
13 a matter of fact, and I think that puts together a
14 very comprehensive record that is accurate. I don't
15 think it is splintered at all.

16 Q Do you question any of the people who perform these
17 varied functions? For example, safety people?

18 A Of course.

19 Q You do? You talk to Mr. Braun about his circumstances
20 and his review of the safety factors?

21 A I did not talk to Mr. Braun, but that is why the
22 organization had more than one air quality content
23 study. That is why we have asked for more than one
24 medical statement from Mr. Pletten's physician.

25 Q Would it surprise you to find out that Mr. Braun has

1 testified that building 230 where Mr. Pletten was at
2 work did not comply between seventy and ninety percent
3 of the time with AR 1-8?

4 MS. BACON: I will object to that question
5 as being perhaps not a completely accurate statement of
6 Mr. Braun's testimony. I would submit that Mr. Braun's
7 testimony will speak for itself.

8 MR. COHEN: Noted.

9 BY MR. COHEN:

10 Q Would that surprise you, sir?

11 A Inasmuch as the air quality content studies done
12 exceeded the requirements of the AR according to Mr.
13 Shirock by a factor of two, I would be more than
14 slightly surprised if Mr. Braun's statements were
15 accurate, yes.

16 Q But Mr. Braun was one of the gentlemen that did the
17 testing, was he not?

18 A Yes he is.

19 Q He is your industrial hygienist?

20 A He is.

21 Q He is not related to the safety office, is he?

22 A He is connected with the medical office.

23 Q He is connected with the medical office but not with the
24 safety office?

25 A Correct.

1 Q So theoretically if my recollection of Mr. Braun's
2 testimony is accurate, we have a conflict within the
3 command as to whether it is safe or not, do we not?

4 A No, we do not.

5 Q Why not? Mr. Braun says it does not meet requirements
6 and everybody else seems to. Do we not have one office
7 saying one thing and one office saying another?

8 A No, because I have in the past talked to Braun and
9 he had indicated to me it is within the standards,
10 so I am presuming at this stage that what he said is
11 inaccurate. We have done enough air quality content
12 surveys within that organization that I have every
13 confidence that it is within the standard.

14 Q The air content notwithstanding, did you also look at
15 the air flow studies? That is what Mr. Braun was
16 testifying to.

17 A The air content and the air flow studies are connected.

18 Q And Mr. Braun, I am telling you, said under oath that
19 there are times when building 230 due to the six
20 ventilation systems in the building does not meet AR
21 1-8 requirements.

22 MS. BACON: I will object to the question.
23 Same objection as I previously made.

24 BY MR. COHEN:

25 Q Are you familiar with that?

1 A With his statement?

2 Q Yes.

3 A Only that you have just now told me.

4 Q Owing to the concept that Mr. Braun's statement may
5 now be accurate, would it change your attitude or
6 opinion with regard to Mr. Pletten's removal?

7 MS. BACON: I would object to any statement
8 calling for any kind of speculation, Mr. Cohen.

9 MR. COHEN: It is a hypothetical, if it is
10 not an accurate assessment of the question, and I am
11 entitled to get an answer.

12 BY MR. COHEN:

13 Q Would it change your attitude or opinion with regard to
14 his removal if Mr. Braun's statement is as I represent
15 it?

16 A If the air quality content surveys in the organization
17 did not meet the standards, I would certainly take
18 every action available to me to insure that they do
19 meet the standard. I don't think a statement by Mr.
20 Braun relative to the air quality has any impact on
21 what Mr. Pletten's physician has stated.

22 Q I didn't ask you that. If Mr. Braun's statement was
23 true as I have described it to you, would you remove
24 Leroy Pletten or would you review it?

25 A Mr. Braun's air quality studies have nothing to do with

1 Mr. Pletten's removal. His action was taken based on
2 the fact that his physician would not allow him to
3 return to duty.

4 Q Mr. Hoover, are you now recanting on behalf of the
5 command Mr. Braun's involvement?

6 A I am not. The question to me was, "Would you have
7 removed Mr. Pletten if Mr. Braun had said this earlier?"
8 I am saying I didn't remove Mr. Pletten because of an
9 air quality study. Mr. Pletten was separated for
10 disability for disqualification based on his physician's
11 requirements for a work environment.

12 Q And the only basis for that conclusion is what Dr.
13 Holt has told you? Isn't that correct?

14 A I think we have a rather substantial record as to what
15 the doctor said. Dr. Holt tells me he is not
16 qualified.

17 Q But you are only going according to Dr. Holt because
18 you don't have ability to make medical determinations?
19 Correct?

20 A That is correct.

21 Q So if Dr. Holt is wrong, then the whole adverse action
22 is thrown out essentially? If his analysis of the
23 doctor reports are inaccurate or weighted or has any
24 downside to them that they are not right, then the
25 entire basis for the action is undermined? Isn't that

1 correct?

2 A If Mr. Pletten is fit for duty, he should be returned
3 to duty.

4 Q And if there is a doubt as to whether he is fit for
5 duty, that should be resolved?

6 A That is correct.

7 Q Who ordered Mr. Pletten to undergo a psychiatric
8 evaluation, a fitness for duty test?

9 A Dr. Holt.

10 Q Do you know why he did, if information like that has
11 come to you?

12 A Of course I do.

13 Q Why?

14 A I know it was recommended.

15 Q By whom?

16 A In part, by me.

17 Q Why did you recommend a fitness for duty test for Mr.
18 Pletten?

19 A Because I was concerned about his personal well being.
20 It had been brought to my attention by several people
21 that they were concerned about him.

22 Q Who were those people?

23 A One was David Smith, the chief of the Alcohol and Drug
24 Abuse Office at TACOM, whose knowledge in this area I
25 feel is, although not professional, he certainly has

1 experience in this area. Members of the union--

2 Q Who?

3 A Mr. Osgood and--

4 Q Osgood recommend a fitness for duty test?

5 A Osgood did not recommend a fitness for duty test. Mr.

6 Osgood expressed a concern to me about Mr. Pletten's

7 well being, and I had several other people do the same

8 thing, the names of which I can't remember.

9 Q In what nature did Mr. Osgood express his concern for
10 Mr. Pletten's well being?

11 A Some time ago Mr. Pletten had informally, as I
12 understand it, requested the union to represent him
13 in his case, and apparently he was concerned about his
14 well being and I won't try to judge Mr. Osgood's
15 motivation, but apparently he was concerned about his
16 well being. He mentioned it to me as did David Smith.

17 Q When you mention well being, what are you talking
18 about specifically?

19 A His emotional well being.

20 Q Did they think he was crazy?

21 A They didn't say that.

22 Q What did you surmise from the nature of the conversation?

23 Do you feel he was due for a psychiatric evaluation?

24 A I felt personally based on what I considered fairly
25 substantial changes in his behavior that it was in his

1 best interest to have a psychiatric evaluation, yes.

2 Q Did you direct that that be done?

3 A I didn't direct that it be done. I made a recommendation
4 to Dr. Holt and it was concurred in, and it was done.

5 Q So Dr. Holt went out and got a doctor to look at Mr.
6 Pletten?

7 A Yes.

8 Q Did Mr. Pletten comply with the evaluation?

9 A Yes.

10 Q Did he go?

11 A Yes. I believe he did.

12 Q What was the result of the report?

13 A That he was fine, that he did not have a psychiatric
14 problem.

15 Q Did you recommend that Dr. Holt send him to an
16 independent physician for evaluation of his ability
17 to work?

18 A You mean from a psychiatric standpoint?

19 Q No. I mean from a smoke related standpoint.

20 A I did not recommend Dr. Holt send him to anybody for
21 an exam related to his ability to work from a smoking
22 standpoint.

23 Q You who are so concerned with Mr. Pletten's well being
24 have decided that he needed a psychiatric evaluation,
25 but you who also knew that he was concerned with a

1 smoke related management problem did not so recommend
2 that he be evaluated by a physician for his ability
3 to work in a smoke-free environment, or a smoke
4 encumbered environment?

5 A I did not direct he be given a psychiatric evaluation.
6 I recommend it be considered.

7 Q Did you make a similar recommendation with regard to an
8 evaluation by a inhalation therapist or by a doctor
9 trained with regard to smoke related matters?

10 A I did not.

11 Q Did you recommend he go to a doctor or be sent to a
12 doctor regarding his asthmatic condition?

13 A I did not.

14 Q Why not?

15 A Because he already had provided substantial data
16 regarding these conditions. They were, as I recall,
17 from specialists in the field, and I did not feel that
18 there was any rational reason for me to do so since
19 we had a number of evaluations.

20 Q Were you aware of a conflict within the doctor's
21 reports?

22 A I guess you would have to be more specific.

23 Q Why don't you take the Agency's documents here, and I
24 will refer you to tab 2(d). Are you familiar with that,
25 Mr. Hoover? I refer you to Dr. Dubin's note of 1-20-81

1 which states in pertinent part:

2 "To Whom It May Concern, that there is not
3 and has not been any medical reason for
4 denying Mr. Pletten's ability to work and
5 for denying him an environment reasonably
6 free of contamination." Signed, Bruce
7 Dubin.

8 A I can't honestly say that i was familiar with that.

9 Q Knowing now that Dr. Dubin says by this note that Mr.
10 Pletten can work and that he can work in a place
11 reasonably free of contamination, which is what the
12 regulation states, doesn't this present a conflict
13 with Dr. Holt's conclusion?

14 A It doesn't present a conflict because the statement
15 here says that he needs an environment reasonably
16 free of contamination. From my standpoint, I have
17 difficulty dealing with that. The previous statement
18 said he needed a smoke-free environment.

19 Q Let me interrupt you, Mr. Hoover. Show me within tab
20 two or any other tab within that document, and I
21 inform you that most of the doctor's letters are in
22 tab 2(d), where any doctor has insisted that Mr.
23 Pletten cannot work unless there is a smoke-free
24 environment. Show me one letter where that is said.

25 A Perhaps we won't find the direct quotation, but on

1 7 January, 1980 a statement from Dr. Dubin it says
2 specifically:

3 "We find it extremely important in the course
4 of his therapy that he avoid cigarette smoke
5 at all costs."

6 That is just an out of context quote from
7 Dr. Dubin.

8 Q Fine, but does it say that he cannot work, that he is
9 disabled from working unless--

10 A We hear from Dr. Salomon. It says:

11 "This patient needs a smoke-free environment
12 to avoid ambient tobacco smoke at all costs.
13 This includes a smoke-free eating area, rest
14 room facilities, and work areas where his job
15 takes him throughout the day."

16 To me, that is smoke-free.

17 Q Does it say he can't work absent that condition?

18 A No. It establishes the criteria upon which he can,
19 in my opinion, and that is smoke-free.

20 Q How does it say that? I don't understand how you can
21 categorize this letter as requiring it? It says that
22 if the patient is to be put in the best circumstances
23 for his condition, that he should have a smoke-free
24 work environment. I suggest to you, Mr. Hoover,
25 it is best for all human beings to be in a smoke-free

1 work environment, but it does not anywhere in this
2 March 17, 1980 letter from Dr. Salomon indicate that
3 is a prerequisite to his working or his ability to work.
4 Does it say specifically that that is the case?

5 A Excuse me, but in the March 24, 1980 letter again from
6 Dr. Dubin, I will refer you to the third paragraph
7 about halfway through. It does say that as soon as
8 we can provide a smoke-free environment, Mr. Pletten
9 should be returned to duty.

10 Q And then Dr. Dubin on 1-20-81 responded to Mr. Pletten's
11 request for an update allowing him to return to work.
12 That was from Ms. Averheart, and he provides a note
13 saying that he needs an area reasonably free of
14 contamination. Mr. Hoover, I am not going to blame
15 you for the inconsistency in Dr. Dubin's letter.

16 You have told me that you have reviewed,
17 at least in part, the determinations here. Now, the
18 adverse action was taken against Mr. Pletten subsequent
19 to all of these. As a reasonable person, isn't there
20 a conflict between the letters or at least a question
21 as to whether he can return to work, particularly in
22 view of the disability retirement office's denial of
23 his application on your behalf?

24 A In my opinion, no. I think the medical evidence or the
25 medical statements consistently say that he needs a

1 smoke-free environment. Our command cannot provide
2 a smoke-free environment. The Office of Personnel
3 Management, Bureau of Employee Compensation made a
4 medical determination based on incapacitation. In
5 their opinion, his incapacitation was not sufficient
6 to warrant payment of a disability annuity. He was
7 not cleared for return to duty medically speaking,
8 and so in fairness to him as well as the organization,
9 the action was initiated to separate him.

10 It is strictly, in my opinion, an
11 appropriate action.

12 Q Mr. Hoover, you have testified that you recommended to
13 Dr. Holt that a fitness for duty examination be
14 conducted for Mr. Pletten, and I agree at least in
15 concept that you are an honorable man and you were
16 really looking out for Mr. Pletten's well being. I
17 know you well enough to know that.

18 A Thank you.

19 Q That being the case, and there being conflict, don't
20 you think it would have been more appropriate or at
21 least the best possible determination for the government
22 to have sent him to a doctor to resolve any potential
23 conflicts within his own physician's statements?

24 A He was reviewed by a Board physician when the OPM
25 review was done. His case was reviewed.

1 Q Did OPM review it based on only the letters?

2 MS. BACON: I would object. This witness
3 cannot testify what OPM did and what they knew.

4 MR. COHEN: I agree, but the witness also
5 stated that OPM had a Board certified physician look
6 it over. Counsel, you can't have it both ways. Either
7 he can testify to what they did or he can't. If it is
8 within his knowledge, I suggest he answer it. That's
9 all.

10 THE WITNESS: The standard practice by the
11 Bureau of Compensation is to have a Board physician
12 review a disability request. I am presuming they
13 followed that standard practice in Mr. Pletten's case.

14 BY MR. COHEN:

15 Q Mr. Hoover, did they do an independent examination
16 of Mr. Pletten, to your knowledge?

17 A I can't tell you whether they did or not. I can't
18 recall.

19 Q Is it usually their practice to rely on the media
20 submitted to the Office of Personnel Management
21 strictly?

22 A No. They are very independent in that area. Depending
23 on the data they have available, they make the
24 independent decision as to whether the individual
25 requires an additional exam or not, and if they say he

1 does, the individual must have one. Whether Mr.
2 Pletten was required to get one or not--

3 Q I will inform you he was not for your information, and
4 I am sure Mr. Pletten so testified, or will so testify
5 when it is his turn to take the witness stand.

6 Mr. Hoover, I guess the reason I am asking
7 all these questions about fitness for duty is, I think
8 there was one last stone to be overturned that wasn't
9 overturned on Mr. Pletten's behalf. A statement was
10 made earlier in testimony that the Civilian Personnel
11 Office tries everything, has to try everything to get
12 a person back to work or to accommodate that is possible
13 before they take removal action. Is that true?

14 A They must provide reasonable accommodation, yes.

15 Q And they must try and find out the facts, shouldn't
16 they?

17 A That is correct.

18 Q And with this, I asked Ms. Averheart if she was aware
19 of Dr. Dubin's 1-20-81 letter and she said she was not.
20 Is that normally the case where the person proposing
21 a removal does not have full knowledge of the
22 circumstances?

23 A I would say again going back to the doctor's statement,
24 it may have been a statement provided directly to Dr.
25 Holt. Because of the voluminous amount of paper that

1 flowed on this case, there is no one, even the most
2 intimately involved people such as Mr. Pletten, who can
3 have total recall of every piece of paper that has
4 flowed in this case.

5 Q She testified that she had never seen it and that had
6 never been presented to her, and that if it had been
7 she would have been concerned and made further inquiry.
8 Is that the normal way a person proposing an official--

9 MS. BACON: I would object. You are
10 couching her testimony in those terms. I think her
11 testimony speaks for itself.

12 MR. COHEN: I am sure it will.

13 BY MR. COHEN:

14 Q If I were to tell you that was her testimony, isn't
15 that the normal thing when you are the proposing
16 official as far as removal action that you go and look
17 if there is an inconsistency?

18 A I guess I really don't know how to respond to your
19 question other than to say in my opinion, Ms. Averheart,
20 Ms. Rager who was an interim supervisor, and Jerry
21 Kator, all followed this case as closely as they could
22 to insure that the rights of Mr. Pletten were protected.
23 I don't believe that any of his rights were denied
24 and they gave every consideration they could to the
25 accommodation aspect. Yes. If Ms. Averheart was aware

1 of it, I suspect she would have gone back to Dr. Holt
2 and said, "Hey, does this have any affect on your
3 medical certification of him as an employee of this
4 organization?"

5 Q Are you aware whether anybody called the doctors involved
6 at anytime, either from the Civilian Personnel Office
7 or from Dr. Holt's office, if you are aware?

8 A I am aware, not by firsthand knowledge but by hearsay,
9 that Dr. Holt has had conversations with the physicians
10 in question. Which ones, I don't know. To the best
11 of my knowledge, no one in the Civilian Personnel
12 Division has made personal contact with the physicians.

13 Q Could Dr. Holt have ordered a fitness for duty
14 examination with regard to Mr. Pletten's smoke related
15 problems?

16 A Yes. What he would typically do is allow Mr. Pletten
17 to go to a physician of his choice, which in fact is
18 what Mr. Pletten did on at least several occasions
19 because we have several different physicians involved.

20 Q You allowed him to go to one of his choice for the
21 psychiatric?

22 A Yes. The only criteria we place on it is it must be a
23 Board certified physician. In that case, a Board
24 certified psychiatrist. He is allowed his choice.

25 Q You say you made various offers to Mr. Pletten for

1 accommodation?

2 A Correct.

3 Q Were they in writing?

4 A I don't really recall. I think some of them were,
5 yes. Of course, the original accommodation was to go
6 into the semi-private room which he was in where there
7 was no smoking permitted.

8 Q And there is a written document that indicates that that
9 is his accommodation?

10 A As I said earlier, because of the voluminous data that
11 has flowed on this case, I can't specifically answer
12 that. I don't know.

13 Q If that were important for the Merit Systems Protection
14 Board to review, we are not sure we can get it to them?

15 A I think we can certainly provide statements that Mr.
16 Pletten was provided a semi-private office where there
17 was no smoking permitted.

18 Q What other accommodations did you offer him?

19 A We offered him the opportunity to move to a different
20 room which had immediate access to outside ventilation.
21 Our facility's engineering people, Mr. Lang who was
22 the chief of the division, offered to air condition that
23 room with a window unit. That was the area which Mr.
24 Pletten declined to go.

25 Q Did you ever try or did you ever offer any accommodations

1 once the new buildings at the facility had opened?

2 I am referring to Building 229 and 231 which were far
3 more advanced in terms of their air flow and air
4 quality.

5 A No, for a couple of reasons. Number one, the mission
6 of the organization of the Civilian Personnel Division
7 was located in Building 230, not any of the new
8 buildings. Again, the air quality content studies,
9 although the new buildings are air conditioned, the
10 230 headquarters building is not. Again, the air
11 quality surveys show that the air quality was
12 sufficient for anyone, including Mr. Pletten.

13 Consequently, no offer was made to go to
14 one of the new buildings. Originally when most of
15 this was precipitated, the two buildings were not in
16 use.

17 Q The quality of air in those buildings, in particular
18 Building 230 though, is an analysis of yours based on
19 the information provided by the various organizations
20 like Safety and Health? Is that correct?

21 A That is correct.

22 Q You didn't probe beyond the cover conclusions of those
23 studies, did you?

24 A I have no information relative to the comparative
25 analysis of Building 230 and 229.

1 Q So basically your conclusions as to the quality of air
2 is based solely upon the conclusions in the documents
3 you received from those organizations?

4 A On the advice I received from those people, yes.

5 Q Further inquiry or uncovering deficiencies in those
6 studies wouldn't have been available to you then?

7 A That is correct, unless they found an error in the
8 study which they had not notified me of.

9 Q Mr. Pletten indicated to you, you testified earlier,
10 that he would not be in a position to accept an
11 accommodation due to the discriminatory nature of
12 segregation of him. Is that correct?

13 A That is not correct.

14 Q Tell me what you said so I can ask you a question about
15 it.

16 A I said that an offer was made to Mr. Pletten to go
17 into that separate room which would be utilized by
18 several non-smoking people. That offer was made by Mr.
19 Kator, not by me. It was during Mr. Grimmett's tenure
20 and it was declined at that time as being discriminatory.
21 I believe there is a record of that.

22 Q Did you research to find out whether or not Mr. Pletten's
23 contention as to discrimination were accurate under law?

24 A I have an opinion of it.

25 Q Let's set it up. Did you research it first? Did you

1 look at the law?

2 A No, I did not.

3 Q Did you contact any experts in discrimination, for
4 example the Command Equal Employment Officer?

5 A I found no reason to. Mr. Pletten declined to relocate
6 to that. That is a voluntary action on his part.

7 There is no reason for me to go see if his reasons for
8 not wanting to relocate are legally valid.

9 Q But assuming, Mr. Hoover, that his reasons were
10 legally valid and to so relocate would have been
11 discriminatory and against law, would it be reasonable
12 to presume that that offer was not in fact an
13 accommodation?

14 MS. BACON: I object to the question as
15 asked. You are making a statement that this was an
16 illegal move and asking Mr. Hoover to testify on that.
17 I don't think you have established that that was a
18 discriminatory move.

19 MR. COHEN: I concur with you that we have
20 not established that it was discrimination, but I am
21 asking Mr. Hoover if he looked to find out if it was
22 because if it turned out that it was or was not
23 discrimination, that would bear on whether or not the
24 offer was a valid accommodation. That is what I am
25 asking him.

1 THE WITNESS: I did not look to see if it
2 was a matter of discrimination, and I did not feel
3 it was necessary to do that because the individual was
4 given the opportunity on a voluntary basis and declined
5 it on a voluntary basis. I don't think it had
6 anything to do with a matter of law. It was Mr.
7 Pletten's personal work preference and we respected
8 that preference and we did not require him to relocate.

9 I would add that at the time he worked in
10 a semi-private office occupied by non-smokers with a
11 no smoking sign exhibited, so I see no difference
12 except physical location as to the office he already
13 had.

14 BY MR. COHEN:

15 Q Mr. Hoover, you understand the thrust of my question.
16 You are arguing and you have testified earlier that
17 that was one of the accommodation attempts that the
18 command made. Is that correct?

19 A That is correct.

20 Q If that accommodation attempt was in fact a request for
21 him to submit to an illegal act of discrimination,
22 would you agree with me that that would not have been
23 an accommodation?

24 A No. I don't agree with you.

25 Q You are asking him to do something that is in essence

1 discrimination against him? That would still be an
2 accommodation in your view?

3 A In my view, if an individual has a physical limiting
4 condition that requires special, as you say,
5 accommodation, and you provide that accommoation on a
6 voluntary basis by the organization, that is certainly
7 not, in my opinion, discriminatory to be located in an
8 office where smoking is not permitted because the
9 individual in that office may have a physically limiting
10 condition or an allergy to cigarette smoke.

11 It is not a discriminatory practice, in my
12 opinion.

13 Q Did you contact the legal office to get an opinion as
14 to whether it was discriminatory?

15 A I am not concerned as to whether it was discriminatory.

16 Q That seems obvious, but how can you make a conclusion
17 it was not discriminatory unless you have a legal
18 basis?

19 A Because that is my judgment of the offer made by Mr.
20 Kator.

21 Q You didn't check on your judgment to see if it comported
22 with existing law?

23 A I did not.

24 Q Do you smoke, Mr. Hoover?

25 A I do.

1 MS. BACON: Objection. That is irrelevant.

2 MR. COHEN: I think it is highly relevant.

3 BY MR. COHEN:

4 Q How frequently or how heavily do you smoke?

5 A It varies. Sometimes as few as three or four cigarettes
6 a day, and sometimes as many as a pack a day.

7 Q Do you feel that your smoking made you unable or less
8 able to deal with Mr. Pletten's complaints or affecting
9 your judgment?

10 A Not at all.

11 Q Did you ever ban smoking in the Civilian Personnel
12 Office?

13 A I did not.

14 Q I inform you that Mr. Wertheimer of the Merit Systems
15 Protection Board is under that misapprehension.

16 A I don't think he probably really is since we have
17 corrected their error in their transcript of the case.
18 What he had reference to was a proposed memorandum
19 prepared by Mr. Pletten for Mr. Grimmett's signature
20 which was never signed, never implemented. He
21 apparently was mistaken that it was, and that correction
22 was made by our legal staff immediately upon receipt
23 of the case record.

24 Q And the case order that said that part of the
25 determination was based on that part of the record?

1 Correct?

2 A It referred to that as being part of the record, yes.

3 Q That has been corrected and there is a document from
4 the legal office reflecting that?

5 A I believe that is correct.

6 MR. COHEN: Can I have it?

7 MS. BACON: Yes.

8 BY MR. COHEN:

9 Q You indicated earlier in your testimony that a request
10 for disability retirement was filed when Mr. Pletten's
11 leave ran out. Is that correct?

12 A I said we requested disability retirement. I don't know
13 if it was exactly coinciding with his leave running
14 out. Again, so many things have transpired in this
15 case, I don't know that they exactly coincided with
16 his sick leave expiration.

17 Q If I were to tell you that there was a long gap between
18 the expiration of the sick leave and the application,
19 would it surprise you?

20 A No.

21 Q I guess what I am getting at is, it seems everything
22 was in a status quo with him on a leave without pay
23 status. Why shake the boat by trying to remove him?

24 A I didn't try to remove him first of all. We initiated
25 a request for disability retirement in his behalf

1 because he had not done so, to clear the record to
2 provide him with the annuity should he be unable to
3 return to work, should his disability be such that
4 OPM would pay for it, or to establish the fact that
5 he would return to duty or be separated for physical
6 disqualification if he was unable to return to duty.

7 Q Was it your direction as to this course of action as
8 to Ms. Averheart?

9 A Yes.

10 Q In other words, let me see if I can categorize this
11 properly. You said to Ms. Averheart something to the
12 nature of; apply for disability retirement, check
13 with the command to see if there is any place he can
14 work, and that if all that fails, remove him? Is that
15 correct?

16 A No. That is not correct at all.

17 Q What was the pattern?

18 A There was a whole sequence of events. The way you are
19 phrasing it, you said that Ed Hoover said to Carmen
20 Averheart, "Initiate a disability retirement on him,
21 and if that doesn't work we will do something else",
22 and that wasn't it at all. In due consideration of
23 Mr. Pletten's rights, we initiated an Agency disability
24 because he failed to do so.

25 Q In other words, Ms. Averheart's categorization of your

1 conversation which I recall as being that you discussed
2 the matter and discussed taking alternate means before
3 removing, would be inaccurate? In other words, you
4 didn't discuss removal at the time you discussed
5 disability retirement?

6 A We never discussed removal because Leroy has never been
7 subject to removal action. He has been subject to
8 separation for physical disability as an ultimate
9 action.

10 Q Isn't that removal, Mr. Hoover? Aren't we being
11 semantical about it?

12 A Perhaps we are, but I think it is a very important
13 semantical difference. A removal would have the
14 connotation that there is a potential that there was
15 some kind of an adverse action. A removal or
16 separation for physical disqualification does not give
17 that connotation.

18 Q I direct you to tab seven. Can you tell me what the
19 subject of that letter is?

20 A Removal of Mr. Leroy Pletten.

21 Q If that carries a connotation or subliminal affect,
22 how come it says removal?

23 A It says:

24 "This is to advise you this is a proposal to
25 separate you from the federal service due to

1 medical disqualification."

2 The action would be removal. The reason is
3 medical disqualification. In the first two lines of
4 the letter it clearly establishes that. Anyone that
5 would pick up that letter would say on an immediate
6 basis there is no adverse action intended. It was not
7 for performance or lack thereof. It was for medical
8 disqualification.

9 Q In other words, the subject should be modified to
10 removal for medical disqualification?

11 A No.

12 Q Why not?

13 A It is completely clear to me. You can't get through
14 two lines of the letter, Mr. Cohen, without knowing
15 specifically that the individual was being relieved
16 from his position.

17 Q And if you decided not to read the letter and just
18 looked at the subject where it says "removal", there
19 might be an inference? Correct?

20 A You can assume that. I don't.

21 Q You just indicated earlier that the reason you call it
22 separation for medical disqualification is so that
23 there won't be an inference.

24 A Because that is the reason. We would say it is not for
25 performance.

1 Q Are you familiar with a memo you wrote to Mr. Pletten
2 on June 27, 1980?

3 A I don't know. I would have to see it. Yes.

4 Q You wrote that?

5 A I signed it. I wouldn't attest to the fact that I
6 wrote it.

7 Q And you stated if I may read to you, and the document
8 that I am holding is dated 27 June, 1980. It states
9 with reference to one of the grievances Mr. Pletten
10 had filed:

11 "Since your presence on this installation would
12 be contrary to the decision of the TARCOM
13 Medical Officer that you must be provided a
14 smoke-free environment" . . .

15 Then it talks about not being able to
16 schedule a meeting at a location in the building. Is
17 that correct?

18 A That is correct.

19 Q Then you have also indicated in the letter:

20 "Neither is it possible to direct personnel
21 concerned with your grievances to meet with
22 you at any location other than their work
23 site."

24 A Correct.

25 Q And then at the bottom it says:

1 "Accordingly, these grievances are being
2 processed based on data available."

3 Is that also correct?

4 A Yes.

5 Q Would that deny Mr. Pletten the ability to speak with
6 people handling his grievances?

7 A He had requested that an individual meet him outside
8 the confines of the organization and I was not about to
9 do that. That is why we had the grievance hearings,
10 for example, at the Holiday Inn.

11 Q You didn't send people out of the command to talk with
12 him or meet with him before the grievance hearings?

13 A No, I did not.

14 Q Why not?

15 A I was never requested to.

16 Q Mr. Pletten obviously requested that you meet or you
17 and/or your staff meet with him. That is what this
18 letter is about, I presume.

19 A The letter is that I am not going to set up any
20 meetings with him at TACOM. I don't recall any request
21 from Mr. Pletten to meet with any members of my staff
22 or with me outside TACOM.

23 Q Mr. Hoover, isn't the second part of this note, and
24 I will provide this for the record as proposed
25 Appellant's Exhibit No. 4, without the analysis at the

1 bottom provided by my client.

2 (The document above referred
3 to, was marked as Appellant's
4 Exhibit No. 4 for identification.)

4 BY MR. COHEN:

5 Q Isn't it true that this also states that you will not
6 direct personnel of your organization to meet with Mr.
7 Pletten at any other organization besides their offices
8 at TACOM?

9 A In individual sessions, yes.

10 Q If that is the case, aren't you saying that Mr. Pletten
11 can't meet with them on the base and you won't allow
12 them to meet with him off the base prior to the
13 grievance hearings?

14 MS. BACON: I would object to this whole
15 line of testimony as being in reference to grievance
16 hearings which have not been raised or are properly
17 raised within the context of a separation for medical
18 disqualification.

19 MR. COHEN: I am bringing this up for
20 purposes of showing Mr. Hoover's actions and his
21 intentions with regard to Mr. Pletten.

22 BY MR. COHEN:

23 Q Isn't that the case, Mr. Hoover?

24 A I said that I would not direct my people to meet
25 outside the command facility on an informal meeting

1 with Mr. Pletten.

2 Q And this was a gratuitous statement? It didn't come
3 in response to a request to meet?

4 A I don't recall a response for a request to meet.

5 Q Is it possible there was such a request and that you
6 wrote the letter in response?

7 A To the best of my knowledge, no.

8 Q But it is possible although you don't think it is the
9 case?

10 A I said I don't think so. No.

11 Q Did you contact any higher headquarters with regard to
12 smoking and regulations and regulatory requirements?

13 A Did I personally? No.

14 Q Did you have discussions with anybody?

15 A I did.

16 Q Who was that?

17 A I have had several calls from DARCOM Headquarters, the
18 names of which I can't recall, call regarding the
19 status of processing complaints. Specifically the one
20 I recall is when Leroy filed a grievance against the
21 Atlanta field office of the Deputy Chief of Staff for
22 the Personnel Department of the Army as a result of
23 his attendance at a training course where apparently
24 smoking was permitted in the classroom. I have had a
25 call or two on occasion relative to the status of

1 processing complaints that are going through the
2 USACARA system or the E.E.O. System. Just general
3 things. Nothing of a specific nature. Nothing ever
4 to the best of my recollection in writing from
5 headquarters.

6 Q You don't have memoranda reflecting your conversations
7 with these people?

8 A No, not that I recall.

9 Q Was there ever any discussion of banning smoking at the
10 Tank Command?

11 A Yes.

12 Q With who?

13 A I have had discussion on it with a number of people,
14 including the Chief of Staff, the President of Local
15 1658 of AFGE, a member of the Civilian Personnel
16 Division staff and representatives of the legal office.

17 Q What were the nature of the conversations with the
18 union?

19 A Their attitude towards banning smoking?

20 Q Yes. Did they express an attitude?

21 A Yes they did.

22 Q Which was?

23 A They were not in agreement with the concept, and they
24 were aware it was strictly a negotiable item in terms
25 of personnel policies and practices, and that if the

1 Agency initiated any such thing, they would want to
2 negotiate and have informal discussions.

3 Q Did you undertake any negotiations on that topic?

4 A We did not.

5 Q In discussions with the Chief of Staff, which was who
6 at that time--

7 A Colonel Buenaquesta, I believe.

8 Q Did he concur on the ban?

9 A No, he did not.

10 Q Did you suggest or make a recommendation?

11 A I did not because it was not a viable option. The
12 Command could not unilaterally place a ban on smoking.

13 Q Why not?

14 A Because it is a negotiable item. It is a bilateral
15 decision which required negotiation with the union.

16 Q Under what provision?

17 A Under the provision of the law.

18 Q What law?

19 A Title 7.

20 Q Title 7?

21 A CSRA, Civil Service Reform Act.

22 Q It says that smoking on the Command--

23 A It doesn't say smoking on the Command, Steve. You
24 know what it says. It says that personnel policies,
25 practices, and procedures when changed are subject to

1 challenge by the union and are negotiable items.

2 Q That being the case, what effect does the Army
3 regulation have? Assuming the Army regulation
4 requiring a ban--

5 A The Army regulation is in compliance with the law,
6 OSHA, most state laws, and is accepted by the union.
7 If it were not, they could ask for a specific
8 opportunity to negotiate the implementation of the AR,
9 or under CSRA they could challenge the compelling
10 need for the AR, neither of which they had elected to
11 do at this time and they support the Command position
12 that provide no smoking areas in the restaurants on
13 post and the limitations of other no smoking areas
14 based on the requirements.

15 Q And you reviewed AR 1-8?

16 A I reviewed it sometime ago, but I certainly don't
17 profess to be an expert on it.

18 Q Let me give you a copy of it so you can look at it.
19 This is Agency's No. 18. I would like you to look
20 with particularly at Section 2.

21 A I see.

22 Q Based on your reading of the regulation now and your
23 recollection of prior contact, what is the requirement
24 under the regulation with regard to the rights of
25 smokers versus non-smokers?

1 A It is fairly well stated here. Would you like me to
2 read it?

3 Q Please.

4 A The whole thing or just part of it?

5 Q The whole thing.

6 A (Reading):

7 "The Surgeon General, United States Public Health
8 Service has determined that the smoking of
9 tobacco can constitute a hazard to health.
10 Department of Army recognizes the right of
11 individuals working in Department of Army
12 occupied buildings to an environment reasonably
13 free of contamination. D. A. also recognizes
14 the right of individuals to smoke in certain
15 buildings, provided such action does not endanger
16 life or property, cause discomfort or unreasonable
17 annoyance to non-smokers or infringe upon their
18 rights."

19 Q Mr. Hoover, that being the case, isn't it true then
20 that smoking is a conditional right in the regulation
21 where it says people certainly have the right to smoke
22 provided that it doesn't discomfort or annoy anybody?

23 A It says:

24 ". . .provided such action does not endanger
25 life or property, cause discomfort or unreasonable

1 annoyance to non-smokers or infringe upon their
2 rights."

3 Q Therefore, if I am reading it correctly, isn't it
4 Mr. Pletten's objective analysis if he says I am
5 discomforted by cigarette smoking? Then it would seem
6 that the AR dictates that the people smoking around him
7 don't have the right to smoke. Correct?

8 A That is what you say.

9 Q I am asking you. Is that your reading of the
10 regulation?

11 A No.

12 Q Why not? Where am I misguided?

13 A I don't know that you are misguided, Mr. Cohen. All
14 I am saying is that I disagree with what you say. It
15 says:

16 ". . .does not endanger life or property, cause
17 discomfort or unreasonable annoyance to non-
18 smokers or infringe upon their rights."

19 Q What does that mean? Mr. Pletten says I am discomforted
20 and I am annoyed by the cigarette smoke. Does that
21 mean the people still have a right to smoke?

22 A It means that people around him, in my opinion, should
23 not. Inasmuch as we offered Mr. Pletten an environment
24 where no smoking would be permitted, I feel that we
25 met the requirement of that regulation. We provide

1 no smoking areas in our cafeteria. We offered him an
2 office where smoking was prohibited. He has
3 effectively demanded that smoking be banned from the
4 organization totally.

5 Even if we did that, we could not control
6 the environment to insure Mr. Pletten's criteria.

7 Q How do you know that?

8 A How do I know that? Because his job takes from him
9 organization to organization, location to location,
10 inside the Command Headquarter's Building, outside the
11 Command Headquarter's Building, to buildings on
12 different locations of the Command, to buildings at
13 physical facilities dislocated from TACOM, such as the
14 Lima Army Tank Plant, and every place in between.

15 There is absolutely no way that I can
16 control or anyone can control that which Mr. Pletten
17 may be subjected to in any of those areas anymore
18 than they can control it for me if I have hay fever.

19 Q Did you inform Mr. Pletten of those circumstances
20 and that you could not guarantee him the same
21 wonderful environment that you are offering him when
22 he went out and did his job? Did you tell him that?

23 A Mr. Pletten was aware that we could provide him with
24 an office that had air conditioning that was a no
25 smoking office. He declined that offer, as I testified

1 earlier, and he knows of course that we cannot control
2 the environment and his transportation in, to, and
3 around his other activities for which he would have
4 been responsible.

5 Q Was there any discussion about shifting his job
6 responsibilities?

7 A Yes.

8 Q Was it suggested to him?

9 A Not specifically, no, because the criteria that was
10 placed on the organization for meeting the minimum
11 environmental factors that were acceptable in Mr.
12 Pletten's case, we had no jobs.

13 Q Assuming arguendo that the doctors did not say what
14 you believe they said through Dr. Holt's interpretation,
15 let's assume that I am right and the doctors did not
16 require smoke-free. They just required reasonably
17 free as Dr. Dubin stated in his January 20th letter.
18 That being the case, were there other jobs you could
19 have put Mr. Pletten in that did not require him going
20 out of his office, for example?

21 A Not at his current grade, not in his current occupational
22 field, and certainly nowhere near his grade level in
23 his occupational area within the organization that he
24 was employing.

25 Q There was no way to restructure his job in the Civilian

1 Personnel Office to allow him to do that?

2 A That is correct, not at his current grade.

3 Q Is there a higher level available that would have put
4 him in the office predominantly?

5 A No.

6 Q Is there just an immediate lower level that could have
7 been used as the pay circumstance where he continued
8 at his present pay and had a lower circumstance?

9 A A clerical level perhaps.

10 Q But that is about it?

11 A Correct.

12 Q So even if the criteria had been reasonably free of
13 contamination which you felt you had accommodated by
14 offering a separate office, you couldn't guarantee
15 him reasonably free of contamination elsewhere in the
16 Command?

17 A I can't control the environment outside the door. I
18 can't control the environment as you are well aware.

19 Q But the Command was saying their putting him in that
20 office with non-smokers is what would make it reasonably
21 free from smoke contamination? Is that correct?

22 A That is where he would spend the majority of his time.

23 Q The majority but not the totality?

24 A Not at his grade level.

25 Q So the requirement or the regulation that he be provided

1 an environmental reasonably free of contamination was
2 not completely possible in the Command?

3 A I disagree entirely with that statement. Again, going
4 back to the air quality content studies without going
5 into the second room, in the opinion of me, the air
6 quality studies say that it meets the standard of the
7 regulation.

8 Q I told you about Mr. Braun's testimony. It disagrees
9 with that. Where are we at with this? You relied
10 very heavily it seems on those studies, and Mr. Braun
11 seems to disagree with you.

12 A I have not heard on a firsthand basis any of Mr.
13 Braun's testimony. I wouldn't know how to interpret
14 it at this stage.

15 Q If Mr. Braun's testimony were as I have described it,
16 then would it be your conclusion that the Command was
17 not reasonably free of contamination?

18 A I can't really honestly answer that question. I don't
19 know.

20 Q Are you familiar with Appellant's Exhibit No. 1?

21 MS. BACON: Let the record show that is
22 Appellant's proposed Exhibit No. 1.

23 MR. COHEN: Let the record reflect that
24 all of these exhibits until accepted into evidence by
25 the Presiding Official are proposed.

1 THE WITNESS: Am I familiar with this?

2 BY MR. COHEN:

3 Q Yes.

4 A No. I can't say that I am.

5 Q This was signed by, if you can indicate for the record?

6 A I presume Archie Grimmett. It is not indicated that
7 it has been signed.

8 Q Mr. Grimmett was your predecessor? Is that correct?

9 A Correct.

10 Q He was also your boss for a while?

11 A Correct.

12 Q This is a memorandum for a Colonel Phillips regarding
13 non-smoker's rights clauses in labor management
14 contracts? Correct?

15 A That is what it says.

16 Q And indicated within the text of it, it says that
17 several employees have filed claims stemming from
18 smoking related conditions. Do you know whether that
19 is true?

20 A No.

21 Q Do you know of any other smoking related complaints
22 besides Mr. Pletten's?

23 A Within the Personnel Division, or within the Command?

24 Q Within the Command?

25 A There was an individual in the Controller organization

1 who had a complaint about smoking. I can't remember
2 the individual's name. I believe she was a secretary.

3 Q Are you familiar with Ms. Bertram's circumstances with
4 regard to smoking? She had a workers' compensation
5 case. Are you familiar with that?

6 A No, I am not.

7 Q Are you familiar with Mrs. Mary Ellen Dukes who is
8 referenced by the Agency in their submissions?

9 A I am very familiar with Mary Ellen Dukes.

10 Q Are you familiar with May Lony Sweeney, recently
11 deceased, who was an employee of TACOM having made a
12 smoking related complaint?

13 A I am familiar with the name. I don't know the
14 particulars about any case. Sweeney may have been
15 the one that worked in the Controller's office.

16 Q Other than that, no other knowledge of smoking
17 complaints?

18 A None.

19 Q Are you familiar with proposed Appellant's No. 3?

20 A Yes.

21 Q What is it please, for the record?

22 A It is a response to the Bureau of Employee Compensation,
23 Cleveland, Ohio.

24 Q Did you write it?

25 A No, I did not.

1 Q How is it that you are familiar with it?

2 A Because it was prepared for my signature and I
3 received it.

4 Q And you signed it?

5 A Yes.

6 Q At tab 1(b) of that letter it says:

7 "No information is available on the fumes to
8 which Mr. Pletten may have been exposed."

9 This is as of August 19, 1980. You
10 indicated to me there were studies done. Why is it
11 there was no information?

12 A The statement in subelement (b) is in direct response
13 to question number one which requests a detailed
14 description of the duties performed by the employee,
15 including all of the fumes to which exposed, the dates
16 of such exposure, et cetera, et cetera, et cetera.
17 I have no and my organization has no capability or
18 information on all the fumes to which Mr. Pletten may
19 or may not have been exposed in the routine execution
20 of his duties.

21 Consequently, we did not try to answer that.
22 However, if you go in the memorandum to question three:
23 full details of any tests made to determine concentration
24 of fumes in the air, et cetera, we did provide a copy
25 of the Safety Office's evaluation of the Civilian

1 Personnel Office. So they are really two different
2 things. Paragraph one, tell us everything that this
3 employee is exposed to on a day to day basis. I am
4 saying there is absolutely no way we can do that.
5 However, in paragraph three or four, whatever it was,
6 we did provide them with a copy, as I recall, of the
7 air content study of the organization which is obviously
8 all we can do.

9 Q Let me ask you from a Civilian Personnel standpoint.
10 Could you have ordered Mr. Pletten back to work
11 notwithstanding what you presume to be the risk to him?

12 A No.

13 Q Why not?

14 A Because the doctor's certification says he is not fit
15 for duty, and had I attempted to do that, I would have
16 been in violation of the rules and regulations.

17 Q Okay. That being the case, if the doctor had not
18 specifically found him not fit for duty, he could have
19 directed him even if he thought there was a hazard?
20 Correct?

21 A No.

22 Q You mean if Mr. Pletten thinks it is a problem for him,
23 you can't direct him to go to work?

24 A If Mr. Pletten thinks it is a problem is one thing.
25 I have to have a specific medical clearance or denial

1 thereof from the physician. What Mr. Pletten says
2 really is immaterial. It is a medical opinion. I don't
3 go on what he says, nor do I do what I would prefer to
4 do in the case. I go based on the medical requirements.
5 Q Did you have any conversation with anybody regarding
6 Mr. Pletten's status as a handicapped person?
7 A I can't really answer that question.
8 Q You don't remember?
9 A The case is long and voluminous and we have gone
10 through many reviews, et cetera, and I at this stage
11 don't recall.
12 Q Are you familiar with anybody having made application
13 for Mr. Pletten to be a handicapped person or be
14 classified as such? If you don't remember--
15 A I don't recall.
16 Q Are you familiar with the USACARA report of January
17 25, 1980?
18 A Not by just identifying it as that, no.
19 Q If I were to show you in the Command submission,
20 Agency's documents tab three which is the conclusion
21 section and recommendation section of the USACARA
22 report dated 25 January, 1980. Have you seen that
23 before?
24 A Yes.
25 Q You have?

1 A Yes.

2 Q Did you adopt the recommendations?

3 A As I recall, yes.

4 Q At tab thirteen, the Agency made a response to issues.
5 In that response as prepared by Ms. Bertram, I believe--
6 is that true? Did Ms. Bertram prepare this?

7 A I don't know, Steve. I haven't seen it. I don't know
8 what it is.

9 Q Did she prepare the whole packet?

10 A I don't know. Someone from MER probably put it together.
11 Ms. Bertram was probably the MER that was assigned to
12 the Pletten case.

13 Q She so testified she has.

14 A I will accept her word on it.

15 Q It says here:

16 "The grievance to which Mr. Pletten refers
17 relating to smoking was resolved by a
18 USACARA report dated 25 January, 1980
19 at tab three. The Agency though not
20 agreeing with all the findings of fact
21 accepted the recommendations in said report."

22 What findings of fact, if you know of any,
23 did the Agency not accept?

24 A I don't recall right off the top. I would have to go
25 through and read the whole report. I don't even know

1 et cetera covers an awful lot of territory, and
2 certainly the individual might have remembered her
3 name. Norma Kennedy who prepared this report would not
4 necessarily be an expert in labor relations, but I am
5 glad she did tack on a little extra statement because
6 the Commander does not have the authority to unilaterally
7 ban smoking.

8 Q But with reference to the response to the issues, you
9 don't know what else it specifically referred to as
10 to the facts they didn't agree with?

11 A If it says the facts, there might be a lot of facts
12 that are woven in here that do not appear in the
13 conclusions A through F, so I really couldn't answer
14 that.

15 Specifically at this stage right now,
16 today, reviewing this, I would not accept conclusion
17 C for sure because it is not totally accurate.

18 Q You are referring to the second part which deals with
19 the Commander's authority, or are you dealing with the
20 first part which says:

21 "The regulations as written do not require
22 an absolute ban on smoking in DODI occupied
23 buildings and facilities."

24 A I think both statements are accurate. The regulation
25 does not require that, and the Commander, in my opinion,

1 does not have that authority that she says they have
2 which she places a caveat on later with her little
3 reference to negotiations, et cetera. I have a little
4 difficulty in the recommendation portion of her report
5 relating to what et cetera covers.

6 Q Mr. Kator made a reference in one of his notations to
7 Mr. Pletten with regard to the psychiatric examination
8 that we talked about earlier that an Agency panel
9 review of your doctor's letter had been made. Who was
10 on this Agency panel?

11 A That reviews the doctor's statement?

12 Q Yes.

13 A We don't have an Agency panel. An Agency panel is
14 initiated to recommend to the physician whether a
15 psychiatric is or is not in order based on whatever job
16 related information they have. I am not aware of any
17 panel being established to review the results of the
18 psychiatric exam when it is returned to the Command
19 physician.

20 Q Let me show you this document and see if you can identify
21 it. Can you identify that for me, please?

22 A Yes. This is obviously a letter to Mr. Pletten signed
23 by Mr. Kator telling him essentially that he is going
24 to be required because it is felt that it is still
25 warranted that he have a psychiatric exam. It is not

1 an evaluation of a psychiatric exam, Steve.

2 MR. COHEN: I am going to make this
3 Appellant's proposed No. 5, and move for its admission
4 subject to further clarification from Mr. Pletten as
5 to its authenticity.

6 (The document above referred
7 to, was marked as Appellant's
8 Exhibit No. 5 for identification.)

9 MS. BACON: I note this has Jerry Kator's
10 name on it. Were you aware of this document or have
11 you ever seen this document before today?

12 THE WITNESS: No. I don't recall ever having
13 seen it before. It does look like Mr. Kator's
14 signature.

15 MR. COHEN: Subject to being linked up, I
16 move its admission.

17 MS. BACON: I have an objection subject to
18 that. I would ask at the time why it was not
19 authenticated by Mr. Kator who had the opportunity of
20 testifying?

21 MR. COHEN: Because it was not. I believe
22 Mr. Hoover has testified to the voluminous stage of
23 the litigation and as such, the document was not
24 discovered until my most recent review which was last
25 night in preparation for this morning, so that is why.

BY MR. COHEN:

1 Q It says here and I quote:

2 "Based on an Agency panel review of your
3 doctor's letter, dated 28 April 1980, it
4 has been determined that a psychiatric
5 examination is still warranted."

6 What panel is he talking about, if you know?

7 A For each fitness for duty psychiatric, we do convene
8 a panel of which Dr. Holt is a member, and it is the
9 recommendation to Dr. Holt, and Dr. Holt then makes
10 the decision as to whether the exam is in fact
11 warranted or not. That particular panel, I believe,
12 was comprised of Dr. Holt, David Smith from our Alcohol
13 and Drug Abuse office, and Mr. Kator as the immediate
14 responsible supervisor.

15 All that is saying to me is, it probably
16 had some kind of a doctor's certificate regarding his
17 limitation and they said notwithstanding it we
18 recommend a psychiatric evaluation. The only way I
19 presume you can get any direct information on that is
20 by asking Jerry Kator.

21 Q Or ask Dr. Holt? He was part of the panel?

22 A If he was in fact part of the panel and if he recalls
23 it.

24 Q So I will ask Dr. Holt about the particulars, but this
25 is always done? There is a panel of three?

1 A Normally.

2 Q In this non-smoking area that was set aside for Mr.
3 Pletten, did you allow other people to smoke in it?

4 A No.

5 Q Were people allowed to come to that area that were
6 smoking?

7 A Smokers were allowed to go to that area, but it was
8 posted no smoking.

9 Q Did anyone ever walk in the office with a cigarette?

10 A I can't answer that question. I didn't stand out there
11 and monitor his office. I can't answer the question.
12 It was a no smoking area.

13 Q If I recall, Mr. Kator testified that he still smoked
14 in the immediate vicinity but not directly in front of
15 Mr. Pletten but in the same office as Mr. Pletten.

16 Q He did not work in the same office as Mr. Pletten. Mr.
17 Kator had a private office.

18 Q But when he went into the office. I asked him generally
19 when you went out did you smoke and he said yes.

20 A Out of the office I presume he did. Mr. Kator was a
21 smoker, and if you are asking me if he ever smoked in
22 Mr. Pletten's office, I can't answer that question. I
23 never observed him smoking in Mr. Pletten's office.

24 Q Did you have discussions with the Commander, General
25 Decker, regarding this matter?

1 A No.

2 Q Just the Chief of Staff?

3 A Deputy Commander Stallings, the previous Chief of
4 Staff Buenaquesta. There have been any number of
5 actors involved in various positions. I believe Colonel
6 Thomas was the Chief of Staff at one time, a number
7 of chiefs of staff, but no I don't believe I have ever
8 discussed the case with General Decker personally.

9 Q Are there any other studies presently pending with the
10 Agency or the Tank Command with regard to smoking or
11 any other things in the works?

12 A We have the reoccurring task evaluations in our
13 organization, smoke studies.

14 Q Are there any directives from higher headquarters or
15 evaluations by DARCOM, for example, with regard to
16 smoking in buildings? Are those still pending?

17 A I am not aware of any change in regulations coming
18 down from higher headquarters.

19 Q Are you familiar with the most recent Surgeon General
20 of the United States report indicating the smoking
21 or smoke in an area even though you are not a smoker
22 can cause a hazard?

23 A I haven't personally read it, but I have had excerpts
24 of the Surgeon General's report.

25 Q Are you aware of any higher command consideration of

1 that report?

2 A No, I am not.

3 Q Are you aware of any parts of the Command that may
4 have contact with higher command with regard to smoking?
5 For example, Mr. Braun?

6 A I would presume if there is any contact of that nature,
7 it would be out of the Safety Office.

8 Q You know he is in charge of air flow studies?

9 A Yes. Mr. Shirock is in charge of environmental
10 health and safety programs.

11 MR. COHEN: Nothing further.

12 MS. BACON: I have nothing further.

13 (Deposition concluded.)

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