Federal Employees for Non-Smokers' Rights (FENSR) v. U. S., 446 F.Supp. 181 (1978), aff'd 598 F.2d 310 (1979), cert. denied, 100 S.Ct. 265 (1979), provides insight into the current situation. It confirmed the obvious fact described in "Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions," 64 Cal. Law Review 702, at 703, that "OSHA does not create a federal cause of action by which a worker may enforce its provisions against an employer." OSHA also does not "foreclose private actions under state law," or in my situation, under federal laws such as on discrimination, adverse action, etc. Indeed, at 720, citing OSHA Section 4(b)(4), "any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment" can serve as a vehicle for redress.

This is akin to use of grievance or EEO procedures to enforce multiple other laws, on promotions, on training, on securing clean floors, or on any other matter within their sweeping purview. While rules on specific matters do not generally spell out how they are to be enforced, there are many channels or vehicles by which this may be done. In courts, this may be by injunctions or court orders, for example. In the FENSR case, at 184, footnote 1 refers to use of the handicapper and adverse action laws as having potential application, though not "properly pleaded" or otherwise inapplicable in that case. These points were also cited at 182. The Court also noted that FENSR had "failed to state claim upon which relief can be granted under" the Constitution. It is obvious that FENSR failed to plead the right to work under Yick Wo, Truax, and other Supreme Court decisions, and the "right to remain at work under safe conditions," since they had obviously not been forced off-duty based on harm caused by co-workers and management arising from a "safety hazard" admitted to exist, as in the 25 January 1980 Grievance Report, at 7.

It is obvious that "environmental concerns are not constitutionally protected, as p. 184 notes. Such protections arise from statute and regulation. In this case, the protection for the right to work arises from constitutional, statutory, and regulatory protections. The Army does not even condone mere "discomfort" or "unreasonable annoyance." Local officials simply insubordinately do not agree with obeying the regulation or implementing the Grievance Report, and have on occasion ridiculed both. At 185, the Court deferred to "the legislative or administrative process." In this case, the legislative and administrative processes, as extant in multiple guidance, including a Grievance Report, are in place; enforcement of such guidance is all that is needed. Enforcement is a normal function of Courts.

It is evident from 185 in reference to the Gasper case, that (at least in FENSR) there was apparently yet another failure by FENSR to have "properly pleaded" the facts. See the reference to "social habits." In NIDA Research Monograph 17, December 1977, by the Public Health Service, the obsolescence of thinking of smoking as merely a social habit is already evident. That volume is replete with references to smoking in addiction and mental disorder terms. Indeed, one paper is entitled, "Tobacco Use as a Mental Disorder: The Rediscovery of a Medical Problem." Whatever protection "social habits" may have (and re smoking, it is quite little considering the authority of the Command to ban all smoking to achieve the regulatory goals), it is clear that mental disorders have even less protection. There is no right to be mentally disordered--no right to be a danger to others. The FENSR case clearly did not involve pleadings on the mental disorder aspects, or cite multiple symptoms of mental disorder extant in various governmental officials.

Stanley v. Illinois, 405 US 645 (1972), 92 S.Ct 1208, provides insight on the situation. A basic constitutional right warrants deference and comes before deciding officials with a momentum for respect.

The deciding officials in this case have treated that principle with contempt, and have not even displayed the minimal courtesy of responding to the issue of the right to remain at work in safe conditions, particularly concerning a non-necessary toxic substance. The questions from Mosely v. Department of the Navy and from the 29 April 1980 management letter do not have even de minimis relevance to non-necessary toxic substances. A goal of discouraging smoking within the general workforce is enunciated; my right to work has its momentum in that direction. There is not even de minimis evidence of a "powerful countervailing interest" by the local officials whose use of their positions for personal reasons is so intensely defended.

The "presumption" of unfitness for duty is violative of due process. The presumption is directly contrary to the evidence from multiple examining physicians. The Army doctor who did not examine me is obsessed with protecting his own smoking behavior. His "irritability" at my complaints concerning him is clear. His pretenses that the Grievance Report assessment of the Commander's authority is wrong reflect the delusion that he has legal authority to overrule professionals providing guidance in their own field. He has ridiculed the DSM-III guidance. Yet a hearing to show any of these facts, and many others, is summarily denied. There is not even a de minimis pretense of "prompt efficacious procedures" to justify running roughshod over the right to a hearing. Even the decision concedes that "some analysis of the merits of the agency action is necessary to determine the threshold jurisdictional issue." This overturns the wrongful 23 July 1980 rejection of my 21 May 1980 materials sent as fast as possible by me on receipt of fallacious agency allegations. (Reference to "agency action" is misleading; what is involved is personal actions stemming from personal acts to endanger, discomfort, and unreasonably annoy.) MSPB chose to run roughshod over the right to show that agency claims of actions taken have not in fact happened.

The intentionally false claims of taking corrective action which local insubordinate deviant officials know not to have happened, yet are falsely alleged, reflect "overbearing concern" not for efficiency (violated by refusing to provide safe conditions for others, not just me), but for their own personal behavior expressly disallowed in the regulation and in the Grievance Report of 25 January 1980. Parenthood is a basic constitutional right. So are the rights of freedom of expression, due process, the right to work, equal protection of the laws, freedom of movement and of travel, etc. Re any one of them, a person is constitutionally entitled to due process and a hearing before being taken away. The "overbearing" MSPB action to rubberstamp the "overbearing" personal actions of insubordinate local officials presumes that I "can prove no set of facts" or law or regulation "in support of" the contention that the charge to involuntary sick leave is inappropriate, and on the other allegations as well. The MSPB footnote 6 confesses MSPB refusal to consider the issue of reprisal; whereas reprisal is obviously the reason for management claims of having taken actions that in fact have not been taken. The "overbearing" disregard of the truth or falsity of the management claims is tantamount to a reckless disregard for truth, warranting review under 18 USC 1001 and other laws.

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It is clear that MSPB ignored the information cited in the 1 December 1980 letter, which called attention to the fact that a supportable medical opinion is needed to justify involuntary sick leave. When someone put me on sick leave, it was for purely personal reasons. Sick leave is not appropriate in lieu of enforcing rules against endangerment, discomfort, and unreasonable annoyance, and other rules, especially not in a common situation about which others are also complaining. It is particularly not proper in dealing with a nonnecessary toxic substance. It is even more inappropriate when one considers the alleged source, Dr. Holt. It is Dr. Holt who pretended on 17 January 1980 that "Army Standards regarding air changes and ventilation in Mr. Pletten's work area are being complied with at this time." Its falsity was obvious, for only eight (8) days later, the Army's own Examiner found no evidence for that claim. It was not true at the time, and Dr. Holt undoubtedly knew (and knows) that it was untrue. A person who would fabricate a falsehood once, would certainly do it again, and again, especially when challenged, and take reprisal on the person who so vigorously shows the falsehood up for the falsehood it was (and is).

Doing studies might involve work, but "working and smoking don't mix." On 14 July 1981, Dr. Holt was continuing to do his bit to lend credence to that known fact. He was sitting, just sitting, puffing along, puffing on his pipe, reading his newspaper, not working, just puffing and reading. In the real world, private doctors are busy working at 10:30 in the morning. Real doctors examine their patients before making decisions on their fitness. Real doctors don't have an MSPB to say that examinations are not necessary or relevant. (It is of course admitted that Dr. Holt may not have significant control over the number of patients who go to the Dispensary.) Real doctors don't have MSPB to say they can ignore examination results or overrule Grievance Reports by professionals. Real doctors don't have MSPB to confirm that compliance with rules and medical norms is not needed.

On 10 March 1981, Dr. Holt's supervisor, Col. Edward F. Cole, M. D., called to his attention my complaint that not even minimal compliance with AR 1-8 is taking place. Col. Cole instructed Dr. Holt very specifically that "you should insure that you are in strict compliance with AR 1-8." Dr. Holt took no action; why should he? MSPB will protect him!! MSPB simply pretends the rules are already obeyed, and thereby refuses to either order compliance, or enforce the orders of others to begin compliance. The MSPB decision thus contributes to the breakdown of discipline, since officials are aware that they can ignore orders with impunity. When MSPB bases its decisions on management insubordination, it rests them on a shaky foundation indeed. MSPB rested its wrongful claim of "undue hardship" on the false statements that a proper environment "cannot" be provided. On the same day as Col. Cole's instructions were issued, a notice was sent me showing that the claim a proper environment "cannot" be provided had been retracted months before by Dr. Holt. In response to a 25 August 1980 grievance from me, the change was made, but not provided in a timely manner. There is no reason for a 19 Sep 1980 notice to be delayed six (6) months in being made available. This is simply another example of the local legal office concealing relevant and petinent material.

As the installation keeps changing its position, and issuing retractions, it becomes evident that MSPB is defending <u>personal</u> actions that each individual official later does not "defend on the ground that his own word should not have been believed," Bishop v. E. A. Strout Realty Agency, Inc., 182 F.2d 503 at 505 (4th Cir., 1950).

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"If we allow perjury, we destroy the validity of a judicial proceeding," notes Robert J. Kutak, chairman of the American Bar Association ethics commission, quoted in Detroit Free Press, 3 June 1981, p. 8D. 18 USC 1001 forbids falsification. So does Civilian Personnel Regulation 700, 751.A.7. and 14. Tobacco organic mental disorder withdrawal syndrome involves "difficulty concentrating." The decision on tobacco use as a mental disorder "should have a profound effect upon the reputation of this behavior in the community," Public Health Service NIDA Research Monograph 17. "Slow-motion suicide" describes smoking, Monograph 23. Employers "who don't want to have alcoholics working for them should get rid of smokers, it is as simple as that," Dr. Forest Tenant advised a National Alcohol and Drug Coalition conference. Tobacco use "causes insanity," Dr. Matthew Woods wrote in the Journal of the American Medical Association. This information provides insight for the situation. In this context, the allegations of what the agency officials claim has been done can undoubtedly be more readily understood.

(2) "Prohibiting smoking in the entire Civilian Personnel Division." This claim is not based on evidence in the record and thus arises as an ex parte communication. The evidence of record shows the contrary; see 18 April 1980 management letter, tab 8, p. 2, item 3.f. Management unwillingness to do this is what helped trigger the 28 June 1979 grievance. Such has not been done since. The claim is a fabrication or hallucination. A study cited in Aviation Consumer, 15 May 1981, p. 7, shows smoker mortality rates from "mental disorders and diseases of the central nervous system" at "2.4" times that of nonsmokers, and mortality rates from "suicide" at "9.0" times that of nonsmokers. There is thus reason to believe that smokers tend to have other mental disorders in addition to or in lieu of the one cited in the DSM-III at 159-160. Classification of mental disorders shows that it is essentially at the psychotic level that persons would have such severe difficulty grasping reality around them that they would not be mentally competent to even grasp such a simple fact as whether or not there is smoking in an "entire" division or not. Psychosis would, of course, be a potential defense on a charge of falsification under 18 USC 1001; being psychotic would be an extenuating circumstance for which a person must show compassion.

(3) "Relocating his office to improve air quality." This is clearly inconsistent with the foregoing. If smoking had in fact been banned in the Division, "relocating" would not be needful. The MSPB reference to "relocating" with apparent approval connotes disagreement with the Grievance Report, 25 Jan 80, assessment at p. 11. AR 1-8 is an Army Regulation, not a relocated room regulation. Any such limiting of AR 1-8 goals against endangerment, discomfort, and/or unreasonable annoyance is tantamount to unlawful repeal of the regulation; for information on use of the word "repeal," see helpful information in 64 Cal. Law Review 702, at 712. Going or being sent "elsewhere" for benefits of rule enforcement is not proper in accordance with Supreme Court decisions such as Missouri ex rel. Gaines v. S. W. Canada, 305 US 337 (1938). The move was clearly reprisal in violation of principles protecting freedom of expression seeking enforcement of agency-wide/civil service wide rules; see Pilarowski v. Brown, 257 N. W.2d 211. The word improve is contrary to fact; the record submitted by management shows that before the move, I was able to work; thereafter management says to the contrary. There have been no studies on air quality; thus results speak for themselves. The phraseology appears to impute motives to the management action that are contrary to fact. Smoking that assaults and batters and harms a person to the point of being disabling for months is purely personal and certainly is not an improvement. The "relocating" was clearly to avoid compliance and repealed AR 1-8.

Multiple court decisions reflect judicial dissatisfaction with delay. The time frame taken in this situation is outrageous. The rules on resolving matters are clear. The initial grievance was not processed in a timely manner; the "90 days" period cited in FPM 771.1-11 and the specific time frames for "avoidance of delay" cited in Army CPR 700, 771.3-4a were ignored, despite my complaints. None of my grievances to resolve the matter were processed in a timely manner. Management has no intent of ever honoring its own legal office guidance that "action to ban smoking should be undertaken" under AR 1-8 anytime that "smoking is found to endanger life or property, cause discomfort or unreasonable annoyance to non-smokers, or infringe upon their rights," quoted from 19 June 1979 DRSTA-LA installation legal office guidance to management, paragraph 1. Management uses delay to refuse to enforce AR 1-8.

The Merit Systems Protection Board clearly disregarded 5 CFR 1201.155 and 156. The words "in no instance shall that time period exceed 120 days" have meaning. "The Board shall decide . . . within 120 days." Such words have cogent legal significance. In Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (1961), the Court pointed out multiple obvious facts against delay. Note 1 observed that the "section of Administrative Procedure Act to effect that every agency shall proceed with reasonable dispatch to conclude any matter presented to it is mandatory." Moreover, the intent of the 90, 120, and other day guidance is obvious. It has a purpose. Note 3 said "Courts may prohibit administrative agency action in violation of statutory requirement, if failure of enforcement would defeat apparent congressional purpose." The work to work is not merely a congressional purpose; it is a constitutional purpose as Supreme Court decisions such as in Yick Wo and Truax make clear. 64 Cal. Law Review 702, at 706, cites "administrative ineffectiveness" by agencies in doing their duty under both civil rights and safety principles. These congressional purposes buttress Constitutional purposes on providing for the right to work.

The delay has, moreover, involved refusal to protect my right to due process, to a hearing for showing some set of facts in support of the claims made which confer entitlement to relief. MSPB acted arbitrarily in refusing a hearing on whether the alleged accommodations even happened. "Dismissal of a claim on the basis of barebones pleadings is a precarious disposition with a high mortality rate," Madison v. Purdy, 5 Cir., 1969, 410 F.2d 99, 100. This is especially true when management defendants have a record of concealing evidence, and even of trying to deceive the agency's own Examiner, a deception that clearly did not work as intended, based on the 25 Jan 80 Report rejecting multiple agency claims.

Note 4 in the Deering Milliken case observed that "Courts must enforce requirement that" the agency must "proceed with reasonable expedition." The reviewing officials "must" do this, to preserve the multiple rules' intent and purpose in this situation, on delay. The word "must" has "cogent legal significance." Restoration of sick leave "must" be granted based on the delay alone. (Rules concerning default judgments make evident how to proceed, by way of analogy.) Note 6 makes clear that "delay, violating requirement that agency proceed with reasonable dispatch" amounts "to legal wrong." Please correct this "legal wrong."

The "legal wrong" is obvious. Dr. Dubin, the specialist to whom the Army referred me, noted on 3 Feb 81 that "it is extremely important that Mr. Pletten be returned back to work . . . human needs . . . need to work and find fulfillment." In the Truax case, the Supreme Court described this right as "of the very essence of the personal freedom and opportunity" which was purposed to secure. Please correct the "legal wrong" that has been done to me.

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Watson v. City of Memphis, 373 US 526 (1963), provides insight into the principles for this situation. The issue was whether Memphis should be granted more time for desegregating municipal facilities and public parks. Unlike MSPB, the Supreme Court emphasized that "the rights here asserted are, like all such rights, present rights; they are not merely hopes to some future enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled." MSPB disregard for speedy enforcement of AR 1-8 and the 25 January 1980 Grievance Report is obvious. MSPB not only grossly delayed its decision; it refuses to direct compliance, causing yet further delay in enforcement. It condones disregard of all aspects, and misguided disrespect for the guidance about inside contaminants not to be "present in amounts exceeding those in the air outside," about which there is a "great void" of evidence. The outside air poses no problem; it is this fact the installation and Ms. Bacon want so desperately to conceal, so they denounce any hearing on the merits. Even though non-compliance is obvious even without a hearing, MSPB is clearly unwilling or unable to comprehend that detail. The "great void" in the "Opinion and Order" confirms that MSPB did not read the Grievance Report.

"The rights here asserted" include "management officials to exercise reasonable diligence in enforcing" (Report language, p. 10) inside/outside air quality, AR 1-8, safety rules, mental health rules, alcoholism rules, courtesy rules, littering rules, and any other rules whose effect would be to protect the right to remain at work under conditions as described in AR 1-8 and other guidance. The Grievance Report never speaks in terms of removing the complainant, only the hazard. The record is devoid of evidence of such enforcement, for the reason that there has been none. The "reasonable accommodation" process has thus not even started, as a competent footnote 5 would have observed; that process presupposes that other rules are enforced. Enforcement of regular rules could easily preclude alleged need for "reasonable accommodation." Yet MSPB has refused to support either aspect. The suggestions I made were ridiculed; the agency has made none since local officials disagree with AR 1-8. (The last discussion was before the grievance began.)

Management has no call to disagree disagreeably as by reprisal of a psychiatric exam and false claims of "unfit for duty." There is no call for management to disagree disagreeably by making intentionally false claims of compliance. The American Lung Association notes that "there are millions of people, adults as well as children, who are sensitive to tobacco smoke and suffer smoke-caused asthma attacks." There is no call for disagreeing disagreeably by lying or hallucinating that I am somehow unique. My right to protection from such mistreatment is a "present" right. Dr. Holt's supervisor would not have ordered him to have "strict compliance" if there were evidence of compliance with the rules. In a 15 July 81 letter, Ms. Bacon admits that Dr. Holt is "not necessarily the" person who even has information on alleged educational materials, information on other smoke-sensitive persons, and medical data on my case. That is evasive; who is involved in medical matters if not Dr. Holt? As a doctor, he would not pretend I am unique. At a hearing, what will Dr. Holt say? What is management afraid of that management so clearly does not want Dr. Holt on the stand? Will he be management's witness, or mine?

It is clear that management has no supportable medical basis for singling me out. A favorable ruling can be made on my behalf without a hearing; and management is taking that risk by its obstinacy.

"Relocating" my office was not accepted by the 25 January 1980 Grievance Report, p. 11. Continued insistence on relocation helps confirm that, clearly, that Report has not been implemented to this very day. The Army Examiner reminded the installation that "it is clearly stated that officials must strive to maintain an equitable balance between the rights of nonsmokers and those of smokers. This cannot be accomplished by relocating one nonsmoker." The Grievance Report makes that fact clear enough to be obvious to any reader. On page 12, the Report explained why (under AR 1-8) "relocating" a nonsmoker is improper; the reason is that "the rights of smokers exist only insofar as discomfort or unreasonable annoyance is not caused to nonsmokers." AR 1-8 is an Army regulation, applicable Army-wide, not just to one relocated room. But let me emphasize, the medical evidence shows that I am able to work regardless of whether or not this Report is implemented. It is improper for management to react to my insistence on compliance with this aspect of the Grievance Report by claiming that, after all these years, I am suddenly unable to work, once an Examiner supports the view that "relocating" is not proper. (Of course, AR 1-8 does not allow the "non-necessary toxic substance" to even "discomfort" or unreasonably annoy a person, and certainly not to "endanger" anobody, and certainly not to "endanger" a person to the point of being (or potentially being) "not fit for duty.")

Multiple Court decisions support freedom of expression, including but not limited to Pilarowski v Brown, 76 Mich App 666 (1977), 257 N. W.2d 211. Freedom of expression can not reasonably be deemed to exclude demands that a Grievance Report be implemented in whole or in part, and particularly not when management is paying lip service to the pretense that it has been implemented. (In that case, note how fast relief was granted, from 9 March 1977 to 7 July 1977; that employee was not even seeking to have a Grievance Report implemented, leading to the conclusion that my situation should have been resolved in an even faster time frame.) Considering the management pretense of having done what has been sought by me, a favorable ruling in my behalf is warranted, on both freedom of expression grounds, and on delay grounds, even without the federal precedents such as in Deering Milliken, Inc., Watson, etc.

The Grievance Report rejected "relocating" a person seeking his freedom of expression rights, under AR 1-8, because the regulation says the ventilation is be adequate throughout the place, not just in one room, in order to protect the "rights of all nonsmokers," so they are not endangered, discomforted, or unreasonably annoyed anywhere on-post. Protecting other nonsmokers would make my case moot; but the installation refuses to protect any nonsmokers or conduct any air content studies anywhere on-post. Ousting me is clear warning to other nonsmokers not to demand enforcement of the protective rules. The Examiner's findings are on firm legal ground. Nonsmokers have a right to travel anywhere on-post without being endangered, discomforted, or unreasonably annoyed, just as blacks have the right to be free from harm by KKK behavior wherever they travel. It is improper to say to a person, go elsewhere for your rights to be protected. An offer or action to protect a person's rights elsewhere "cannot serve to validate" those rights, Missouri ex rel. Gaines v. S. W. Canada, 305 US 337 at 350 (1938). In rejecting action to protect rights elsewhere, the Supreme Court emphasized that "we find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere. That resort may mitigate the inconvenience of the discrimination but cannot serve to validate it." In the situation at hand, the situation was worsened; before the act of "relocating," I could work; now the installation says I cannot work.

The 25 January 1980 Grievance Report found that "an equitable balance between the rights of nonsmokers and those of smokers . . . cannot be accomplished by relocating one nonsmoker." Blacks used to be "relocated" to the back of buses, lest "a safety hazard" come upon them. Management and Dr. Holt were content to allege lip service "smoke-free" protection for me in writing as long as nothing need be done by them; "relocating" me avoided solution and achieving the legal and regulatory goals. For personal reasons, management officials want AR 1-8 goals to apply, <u>at most</u>, to one relocated room only.

Venturing out of the relocated room (cell) would result in potential harm, just as when a black would venture out of his back-of-the-bus confinement would result in potential harm. The harm need not occur each time to be an effective threat of harm; the mere threat assaults the dignity of man. It is cruel and unusual punishment to be subjected to such, particularly when neither accused nor convicted of crime, but simply wanting rules enforced (as job duties have involved for years.) In Trop v. Dulles, 356 US 86 (1958), the Supreme Court rightly observed that "the exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court . . . . The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." It noted that the government "has the power to punish," inapplicable in this situation considering the alleged concern "to protect his health," 15 Jul 80 memo by Dr. Holt. The Court noted that governmental power must "be exercised within the limits of civilized standards." The threat of continued harm is not "civilized." Refusing to provide a hearing and due process for challenge whether the alleged accommodations have occurred at all is not "civilized." The multiple reprisals and refusals to act in a proper and timely manner are not "civilized." Allowing mentally ill dangerous people to run loose is not "civilized," for either them or others such as me.

Society is becoming more cognizant of the harm from smoking, just as it became more alert to injustices in the civil rights area. The Army has rightly made clear that it does not want people endangered, discomforted, or unreasonably annoyed by second hand smoke. We have an important job to do; and smoking can impair efficiency in various ways, one of which is harm causing the use of sick leave. The eminent General Creighton W. Abrams, former Chief of Staff, had to leave office partway through his term; that is a loss of valuable experience as well as a personal tragedy. Smoking is not to harm people. This is an evolving recognition of decency, which the Army recognized back in 1977. The refusal to achieve the goals set by the Army is improper. In the Trop case, the Supreme Court understood "that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." The Army has done this; yet some officials for personal reasons refuse to obey. These insubordinate persons cannot plead that the guidance given them is "not precise." The Grievance Report makes precise that "it is clear that the rights of smokers exist only insofar as discomfort or unreasonable annoyance is not caused to nonsmokers," p. 12. "It is clear." It is "precise." The evolving standard has already been set; all that is necessary is to obey it.

The situation has punished me wrongfully, and indeed prematurely, for "the statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort . . . ," Hudson v. Parker, 156 US 277 at 285 (1895), be punished.

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"Relocating one nonsmoker" is simply not proper, 25 January 1980 Grievance Report, p. 11. Its basis is threat of harm, not protection, not achievement of the Army-wide goals that make "relocating" unnecessary. The threat of harm (of being poisoned by gas) may be proper for convicted criminals, but that is not the present situation. The need to move about freely is needed to do a proper job for adequate performance of my assigned duties, just as other personnel specialists do. "This traditional right to freedom before conviction permits the unhampered preparation of a defense," Stack v. Boyle, 342 US 1 (1951); this traditional way of performing personnel duties permits their unhampered accomplishment. The Supreme Court noted that "unless this right . . . is preserved," the fact is that it "would lose its meaning." This is a right above and beyond the right to travel, which was fully recognized as a fundamental right only recently in 1966, United States v. Guest, 383 US 745 (1966). (The Supreme Court has not expressly settled which clause of the Constitution protects travel.) The other right, "this traditional right to freedom" of Stack v. Boyle of not being improperly or prematurely locked in a relocated room or in a jail cell has long been recognized as "secured only after centuries of struggle." Protection from second hand smoke has been considered more and more appropriate since at least the year 1642 when Pope Urban VIII found it bothersome to many persons, as noted in the Public Health Service publication, Research Monograph 17, December 1977, p. 235.

The MSPB decision implies that enforcement of the rules against endangerment, discomfort, and unreasonable annoyance, and concerning littering, courtesy, safety, leave status when a safety hazard is extant, "injurious" persons, and/or any one rule or principle would constitute an "undue hardship" for the local installation. The "requested conditions" alluded to were never made, and are not, a condition for working (particularly considering that they were developed in June 1979, and local officials did not find such condition in them), and thus the reference to them by MSPB is irrelevant and not the real reason for alleging "undue hardship." The legal opinion of an installation smoker doctor purporting to overrule the experienced judgment of a trained Grievance Examiner and her supervisor on the authority of what the Commander "can" do is arbitrary as it is not a reason for the MSPB finding. The cited 29 CFR 1613.704 charges the agency to "demonstrate" what MSPB has blithely presumed; no hardship on "operation of" the agency "program" exists or was cited. MSPB clearly cites, and has, no standards for its allegation. When "no standards govern," decisions wrongfully become "dependent of the whim of" deciding persons. Such decisions "are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments," Furman v. Georgia, 408 US 238 at 253, 256-257 (1972). The Grievance Report of 25 January 1980, p. 12, and the Handbook of Reasonable Accommodation, shows the fallacy of such third-party decisions. Third parties cannot decide such matters as when a person is discomforted or unreasonably annoyed; such "is a personal determination to be made by that individual" affected, not an inflexible third-party. The individual can use flexibility and discriminating precision as circumstances change; a decision by outsiders "cannot be made with such flexibility or discriminating precision," Furman v. Georgia, 408 US 238 at 404 (1972).

Refusal to enforce rules for any reason, including alleged "undue hardship," is improper. Limiting enforcement to one relocated room is not adequate; it is unlawfully "requiring resort to opportunities elsewhere," Missouri ex rel. Gaines v. S. W. Canada, 305 US 337 at 349 (1938).

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(4) "Initiating an educational program to discourage smoking within the general workforce." This is false or misleading to the extent that it does not deserve the dignity of a response. (However, be advised that the Army Examiner was not fooled by pretenses that such a program was initiated. The regulation referring to such programs was issued in 1977, almost two (2) years before my June 1979 grievance. In its 1 Aug 79 legal opinion, the installation's own legal office suggested that such a program should begin. Such a claim of "initiating" something sounds good, so management pretended it did so in a letter from a ranking official. The Grievance Report, p. 7 and 12, found "no information" that such was happening. Without specifics, letters from high ranking officials alleging the initiation of something are meaningless. Additionally, such a program is not "personal relief," and there is no evidence such alleged programs, if occurring at all, are having any effect whatever to achieve the goals. Considering the fact that 90% of smokers want to quit but are unable to do so despite information in the public domain on the harm of smoking, achieving the regulatory goals is clearly unlikely by this route.)

(5) "Posting notices banning smoking in areas such as elevators, auditoriums, appellant's office and cafeterias." Reference to "cafeterias" is ex parte, as no evidence in the record shows this. The regulation was issued in 1977; it will undoubtedly come as a surprise to the author(s) of AR 1-8 that guidance on smoking in elevators and auditoriums was for the MSPB-alleged purpose of accommodating me! To use an arbitrator's word, the MSPB claim is "ridiculous," especially considering the fact that during my entire time on-post, there has been no time when the use of an elevator ever occurred!! It is FALSE that management posted "notices banning smoking in" my office. Management fears a precedent lest others want similar protection. (It is noted that there is no claim of enforcement action in any such areas, or in shuttle vehicles, or conference and classrooms; there is no enforcement worth mentioning. Management has admitted its deficiencies in, for example, classrooms.) It is, of course, unclear why signs would be posted in my office, if it were true there was a ban on smoking in the "entire" Division. It is evident that the fabrications were so carelessly strung together that these slipshod inconsistencies are the result. Management has refused to ban smoking in cafeterias and in my office, as the record would show if MSPB had allowed a hearing "of the merits of the agency action" (lack of merits) before summarily dismissing the "threshold jurisdictional issue." (Does "some" mean "inept"?!!)

It is evident thus far that what MSPB did was the simple clerical act of copying the management position, thereby displaying an "overbearing" disregard for their truth or falsity by simply ignoring the denials that the allegations referred to events that had not happened, and still have not happened. If they had happened, I would have been "delighted" as indicated in my 7 July 1981 notice of return to duty, when the MSPB unsupported assertions are "treated most favorably" to the pretense that some such actions are necessary to substantiate ability to work. (Ability to work includes both short and long term ability to work; any sincere management inability to understand this simple distinction connotes the tragic TOMD symptom "difficulty concentrating" that so many smokers clearly have.)

The Public Health Service noted that information on tobacco use as a mental disorder "should have a profound effect upon the reputation of this behavior." The reputation of people who engage in known mentally disordered behavior is, of course, linked to that mentally disordered behavior. People whose pattern of behavior is linked to mental disorder can hardly expect otherwise.

(6) "Conducting periodic air quality surveys of appellant's immediate work area to insure compliance with health standards." This is the same false claim that management has been making all along; see 9 May 1980 letter, p. 15, referring to false pretense of study in a letter 16 August 1979, by the COMMANDING GENERAL personally. When local smokers give wrong information to our own Commander with disciplinary power over them, it is no surprise that such false information would be provided to MSPB. The 25 January 1980 Grievance Report is replete with repudiation of the management position that studies under AR 1-8 (or any of the regulations cited in the grievance) had been done. Claims of studies of the nature such as at tab 5 with Mr. Hoover's 18 April 1980 were utterly immaterial and irrelevant as not having any relationship whatsoever to AR 1-8 or the other rules. As far as studies under the relevant rules were concerned, the Examiner bluntly said there was "no evidence" that management had done any such studies or had considered the rights of nonsmokers in any way whatsoever by studies or other actions. P. 14 says "management has not provided information" relevant under AR 1-8 and the other rules; see III.B. The detail that no studies had been done that were relevant or material was repeated on that page, item III.D., "no evidence that an analysis of the air content was made to show" compliance with the AR 1-8 and other rules' guidance.

Since no studies had been done (except of the tab 5 type rejected by the Grievance Report as so irrelevant and immaterial as to constitute "no evidence" at all of compliance with civil service and Army rules), the Examiner said to do studies, including of the outside air, repeat, the "outside" air. Management simply refuses to do that; tab 5 is the same kind of thing that has already been rejected. The Grievance Report found absolutely no relevancy whatsoever of "TLV" materials; they provide "no evidence" at all of compliance, and the Grievance Report dismissed them as the irrelevancies they are. Management absolutely refuses to do studies under AR 1-8, for fear of the precedent that compliance in even one room would involve. The outside air does not endanger, discomfort, or unreasonably annoy anybody on post (to my knowledge). The multiple complaints by various employees in more than one building on post show that the problem is the indoor air.

Management defies p. 12 of the Grievance Report, which informs smokers that "it is clear that the rights of smokers exist only insofar as discomfort or unreasonable annoyance is not caused to nonsmokers." Anybody who is willing to read AR 1-8 will find absolutely no reference to TLV's as management continues to use to bluff "overbearing" MSPB reviewers who display disregard for the naivety or falsity of the management claims that studies have been done. AR 1-8 does not have even de minimis reference to such; the relevance of TLV's to AR 1-8 is not even as much as de minimis; it is less than de minimis. The insubordinate management claims reflect continued defiance of AR 1-8 and the other rules cited, and "overbearing" defiance of the 25 January 1980 Grievance Report.

In the period since 17 March 1980, I have talked to many employees on-post. It has been repeatedly confirmed that management has conducted absolutely no such studies whatsoever. (Incidently, the purported information on alleged studies as cited by the Commander, per 9 May 1980 letter, covers a period of a weekend, when employees are not normally on-post! The evidence that the study, if done at all, happened on Saturday and Sunday, 16-17 June 1979, has never been disputed by management! If such a study occurred, and it is doubtful, it is clearly a sham; it thus came as no surprise to some management officials when the 25 January 1980 Grievance Report noted "no evidence" of any proper studies.)

(7) "Advising fellow workers and visitors not to smoke in appellant's presence." Most smokers are not mentally self-disciplined enough to protect themselves from their own smoking; even when 90% of them indicate they do not want to smoke, they are not in fact stopping. Even a de minimis willingness to draw the obvious inference from that public domain fact would have resulted in immediate rejection of the allegation of the claim as self-serving and unsupported by evidence. In a 30 May 1980 letter to Mrs. Shimp, Dr. Pollin of NIDA indicates that among teenagers, "in 85 percent of this group, more than one or two casual cigarettes escalate to a lifetime of regular smoking." In Public Health Service NIDA Monograph 23, January 1979, it is noted that "of those teenagers who smoke more than a single cigarette, only 15 percent avoid going on to become regular dependent smokers," at 105. This fact has been cited in the 53 S Cal Law Review 1423 at 1430 (1980) professional legal article. It is thus simple to take judicial notice of the tragic fact that most smokers are so tragically mentally out of control that they do not even protect themselves, and thus 2/3 of them (as a minimum) die of their suicidal behavior; it is thus absurd in the extreme to think that persons who are not able to help themselves helped a third party (me), contrary to the results of such refusal, which are so obvious; the results speak for themselves.

Smokers are not able to restrain their urges even to protect their own wives, as studies of lung cancer in wives of smokers show, in studies in Japan and Greece. The insatiable infantile sucking reflex that so rapidly becomes addicted to tobacco and then "causes insanity" as Dr. Matthew Woods indicated becomes highly, repeat "highly overlearned," as the DSM-III notes. Even if smokers wanted to cooperate, which many do not, they would be overcome by the "highly overlearned" urge. Since they were not told, what was operational in fact was the smoker mental attitude found by a Nebraska psychologist. Persons most likely to urge sick and old people to kill themselves were profiled as smokers, poor drivers, unhappy, low in self-esteem, and suicide-prone themselves. (The smoker link with poor driving undoubtedly links with Dr. Tenant's finding that on resolving alcoholism, "get rid of smokers." Alcoholism is normally linked to a high percentage of national traffic deaths; it is the alcoholic smokers who are doubly distracted.)

The false claim evidently based on Mr. Hoover's 18 April 1980 letter ignores the Grievance Report, tab 7, with that letter. See page 10, item 15, wherein it is evident the grievance sought what management now pretends to have happened, and that management was objecting. Management did not even have the courtesy to respond to the request; and the Examiner suggested other methods of achieving the regulatory goals. It was thus absurd for MSPB to have ignored the evidence and honored Mr. Hoover's false and self-serving claim. Management may now realize, after the fact, that it should have done what it claims to do. An easy test for MSPB would be to simply order management to do what it claims it is doing! MSPB seems to prefer to refuse evidence; a second examiner looked at the facts. A summary of that report was provided with my 5 November 1980 letter, at enclosure 5. Mr. Hoover's false claim was unsupported. So why does MSPB honor an unsupported claim and defy constitutional rights that warrant deference and come with a momentum for respect? MSPB even ignored the 5 Nov 80 reminder that people are to have equal rights with property under AR 1-8; is it not absurd to put a machine on leave by a pretense that keeping the machine operational would somehow be "an undue hardship." Would private enterprise tolerate such waste?

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Dayton Board of Education v. Mark Brinkman, 433 US 406 (1977), 97 S. Ct 2766, provides insight into the situation. It refers to the well-known principle that when there is "a systemwide impact" or pattern of violations, then "a systemwide remedy" may well be appropriate. In this situation, there have been multiple violations, refusal to enforce safety, courtesy, littering, "injurious" employee, mental health, assault and battery, smoking, and/or other rules or laws and of course, refusal to implement the 25 January 1980 Grievance Report. The right to work, to stand one's ground, to due process, to equal protection, to freedom of movement, to freedom of expression, and/or other constitutional guarantees have been spurned in an "overbearing" manner. Tracing the pattern of even one, any one, of these principles being violated in a multiple way would justify relief, even if I were unique, which I am not. AR 1-8 reference to "high risk personnel" alone makes this fact obvious.

However, there are many other persons who also want or need the rules enforced. Installation officials understand this fact very well indeed. It is for that reason that they have made clear that they see compliance with the rules as a precedent to be avoided, and not a goal to be achieved. When Mrs. Shimp won the case in New Jersey, others wanted the same benefits. Public Health Service data shows that 2/3 of people are annoyed by smoking. Smoke-sensitive persons number 10 - 15% of the population. On an installation of 5,500 or so employees, this could easily be 550 to 825 persons. The installation does not have that many rooms; and a Division-wide ban on smoking for each such person would involve such massive system-wide duplication and extensiveness as to wipe smoking off the base. (The evidence of this nature prompted the class action cases filed by me; the class actions would protect everybody.)

Management officials have made clear their fear of a precedent in protecting even one person such as me. The precedent is scary to the 10% minority of smokers who do not want to quit, and perhaps to others as well. This explains management refusal to protect me in my "relocated" room. This explains the refusal to do any air quality studies. (Admission of this would be devastating to the action against me, so management coldly calculated the pretense that is evident in the record.) The pretense of studies and protection via "relocating" me had not deceived the Army Examiner in the slightest; witness the 25 January 1980 Grievance Report. Management officials using their jobs for their personal behavior fear a hearing; if even one management official under cross-examination blurts out the admission of no protection or no surveys, the reprisal aginst me to conceal the facts and to punish the freedom of expression to seek enforcement of rules (as is the custom in enforcement jobs such as I have had) utterly collapses.

At 413, the Supreme Court noted the use of ambiguous phraseology in the record. Lawyers are trained, as are personnel specialists, to note the difference between conclusions, and the facts that do/do not support conclusions. Ambiguous claims alleging studies are meaningless when supported by nothing specific--dates, places, standards used, equipment used, etc. The Army personnel examiner observed the lacking, as can any personnel specialist or lawyer. If management has any evidence that the environment is safe, it would let me return. If management has any evidence that the environment meets the AR 1-8 criteria, it would produce that evidence. If management has any evidence that its smokers are somehow not included in the "obviously widespread" smoker disorder cited in the DSM-III, it would say so.

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SIX ALLEGATIONS OF WHAT WAS ALLEGEDLY REQUESTED

MSPB provided a summary of what purports to be a listing of actions required for me to be "ready, willing, and able" to work. Does the list reflect a grasp of main points, details, and inferences? Does it reflect a lacking in any area? Does it even reflect grasp of simple reality such as time? (This is not here referring to speed of decision.) MSPB cites 17 March 1980 advice from a physician; then in clear distortion of time sequence, MSPB cites intentional misrepresentations of grievance requests of eight (8) months before, 28 June 1979. This is clearly not good faith. Has MSPB grasped the main point, that the management reprisal arises from the mere fact of the grievance? Has MSPB grasped the inference of the 31 March 1980 appeal, that it did not include request for the actions alleged to be my requests? And that they are not necessary just for me? (Of course, quotes from regulations should be done regardless of any request from any employee.)

(1) "A continuing anti-smoking campaign featuring lectures, films, pamphlets and posters." Has MSPB recognized any words directly quoted from AR 1-8, 4b? Are those words an inference from "educational programs to discourage smoking?" Is mental capacity to recognize that management alleges it is doing this evident? If so, why is it alleged "that performance of the requested conditions would constitute an 'undue hardship' not legally required to be provided by the agency"? How can something be part of an alleged "undue hardship" when the agency says it is doing what is requested, but which MSPB thinks would be part of an "undue hardship" to do? This raises the question of whether MSPB is in fact aware that educational programs to discourage smoking are in fact not being done? Is that another ex parte communication?

(6) "An adequate ventilation system." Has MSPB been able to grasp the detail of words drawn from AR 1-8? Does MSPB grasp that ventilation is to be "adequate to remove smoke from a work area and provide an environment that is healthful"? Did MSPB read AR 1-8? Has MSPB been able to draw any inferences about whether ventilation achieves goals such as not endangering, discomforting, or unreasonably annoying smokers? Did MSPB even consider that management alleges ventilation meets some unspecified "health standards"? If so, how can something be part of alleged "undue hardship" when the installation pretends it is providing what I requested?

It is clear that ventilation is inadequate to achieve the AR 1-8 goals on removing smoke, preventing endangerment, avoiding discomfort and unreasonable annoyance, and providing a healthful environment. MSPB makes this clear by asserting that providing such is not "legally" required! AR 1-8 is a requirement that the agency has imposed on itself. MSPB should have told the agency to at least provide ventilation to achieve the enumerated goals in AR 1-8. It is completely unreasonable of MSPB to assume, without evidence, that the installation cannot comply with AR 1-8. "Even if the" installation's "argument of impossibility of" compliance is true, it is up to the installation to obtain approval for a waiver of the regulation; keeping me off-post on involuntary sick leave while the installation ignores the goals instead of applying for a waiver is wrongful. My leave should be restored, and pay status resumed, until the installation decides what it wants to do, comply or obtain a waiver.

(2) "The suspension and removal of all smokers." Again the MSPB trait of distorting a matter is evident. It is evident that MSPB is not even willing to display intellectual honesty in simply repeating a request as written and then ruling pro or con on the merits (if fitness for duty were contingent on this aspect, which it is not). Any MSPB official familiar with FPM Supplement 752-1, S1-6d(3), would have recognized the fact the concept has been lifted in toto from that regulation. That regulation refers to authorization for suspending or removing an employee if behavior or actions "may result in damage to Government property or may be detrimental to the interests of the Government or injurious to the employee, his fellow workers, or the general public." This regulation clearly relates to the legal distinction between active rights and passive rights. The regulation is not applicable to the victims of harm inflicted by the endangering acts of coworkers, particularly not when regulations prohibit those endangering acts from occurring.

Had MSPB officials read AR 1-8 before writing the decision in this case, such officials would have noted that AR 1-8 indicates that "the smoking of tobacco can constitute a hazard to health." The act of smoking, the active act of smoking may be "injurious to the employee, his fellow workers, or the general public." The act of smoking is so obviously likely to cause harm that it has been singled out for a special one-issue regulation. Smoking is commonly sufficiently dangerous that smoking is also "controlled because of fire, explosive, or other safety considerations." Whenever smokers violate any of these many restrictions, they are clearly subject to the potential for penalties under FPM Supplement 752-1, S1-6d(3). When smokers cause fires or explosions, it is the smokers who are to be suspended or removed, not their victims. Enforcing the regulation is not "an undue hardship" to any rational personnel specialist or lawyer; it is simply a tool for protecting people from fires, explosions, or other harm smokers have a tendency to cause. Smokers also have a tendency for their own mental and physical disabilities. The eminent Dr. Alton Ochsner has indicated that 360,000 deaths a year are due to smoking. Smokers use significantly more sick leave than nonsmokers and thus impair productivity. For details, see such references as Hedrick, "The Economic Costs of Cigarette Smoking," 86 HSMHA Health Rep. 179-82 (1971); Holcomb & Meigs, "Medical Absenteeism Among Cigarette, and Cigar and Pipe Smokers," 25 Archives Envt'l Health 295 (1972); Oakes, Friedman, Seltzer, Siegelaub, & Collen, "Health Service Utilization by Smokers and Nonsmokers," 12 Med. Care 958-66 (1974); Garner, "Cigarettes and Welfare Reform," 26 Emory Law Journal 269-335 (1977); the various Public Health Service and Surgeon General publications, etc.

The harm caused by smokers is readily available as personnel information for personnel officials who choose to follow the professional literature. See Personnel Journal, March 1981, at 162, indicating, for example, that "absenteeism is higher for smokers than for nonsmokers: 57% higher among men and 45% higher among women." It also cites higher smoker mortality rates and higher disability and early retirement payments: "the propensity for smokers to become disabled and retire early is almost six times greater than for nonsmokers." Smokers make messes and cause higher cleaning bills; there is also a propensity for being lazy; "working and smoking don't mix." Mentally disordered smokers also interfere with others' productivity as this case shows. Since "working and smoking don't mix," that helps to explain why management chooses not to do studies under AR 1-8. It is irritating to smokers when others want to work, and they don't.

(3) "Instructions to the on-base deputy marshal to arrest all smokers on the installation." It is incredible how MSPB has botched up a simple two-page appeal. The words of dissenting remarks in Stanley v. Illinois, 405 US 645 (1972), come to mind. "Not only does the Court today use dubious reasoning in dealing with limitations upon its jurisdiction, it proceeds as well . . . by 'answering' arguments that are nowhere to be found in the record or in the State's brief--or indeed in the . . . argument." No competent personnel specialist would think requests from a closed grievance provide for subsequent sick leave. The record shows that emphasis has changed to securing management compliance with the Grievance Report and rules; the previous information has served its purpose in showing the perspective and how mild AR 1-8 is, by merely forbidding smoking when it endangers, discomforts, or annoys others. AR 1-8 does not provide for waiting until such harm occurs, for then penalties would fall on the culprits. AR 1-8 provides for preventive protection, such that after-the-fact penalties need not be invoked.

The Stanley language continued at 661-662, ". . . the arguments actually advanced . . . are largely ignored." MSPB contemptuously disregarded the duty to provide protection as AR 1-8 prescribes, the whole thrust of the appeal, and focused on arguments used to seek to spur the agency to begin compliance. MSPB lack of operating experience in field personnel offices is evident. Even de minimis competence by MSPB would have recognized that my management idea of a grievance is to simply copy rules and ask that they be obeyed; that is the basic principle my case follows. Even de minimis competence would have recognized my employee relations experience in dealing with the on-base deputy marshal by simply repeating in the grievance what I have seen take place. MSPB simply flouts the "arguments actually advanced" to focus on matters that do not even appear in the initial appeal. The initial appeal is based on management refusal to act on the Grievance Report, and to refuse to act on AR 1-8 and other administrative rules such as courtesy, etc.

The Stanley language continued: ". . . those persons . . . who may have followed the progress of this case will . . . experience no little surprise at the . . . opinion handed down . . . ." The Army "will undoubtedly be surprised to find that" the Army "has prevailed on an issue never advanced by" it. I surely was surprised to find my claim rejected on an issue never advanced by me. It is clear that MSPB is aware of the falsehood it has used; it clearly does not believe the false ex parte pretense of "prohibiting smoking in the entire Civilian Personnel Division," "advising fellow workers and visitors not to smoke in appellant's presence," etc. Those claims are, of course, intentionally false as MSPB clearly recognizes that request for arrests would be moot otherwise. After-the-fact rules only apply when before-the-fact protection is refused. MSPB is obviously unable to grasp main points, details, and inferences.

MSPB obviously is unwilling or unable to grasp the distinction between what an employee requests as relief, and what an employee provides as evidence to refute management statements. MSPB has now challenged the validity of criminal aspects; and refutation of the MSPB unsupported presumption is accordingly a logical reaction. (However, to assure that if any person with a learning disability or other health problem reads this, and has difficulty comprehending the English language, be advised of the distinction between remedies after-the-fact for harm done, and remedies before-the-fact to prevent harm. Courts are familiar with the "injunction" concept; it is suggested that MSPB obtain the services of an attorney to explain this simple detail as a legal concept.)

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(5) "A request by the Commanding Officer to all area police departments and prosecutors for assistance in arresting smokers." It is evident that MSPB did not read the Grievance Report. It is thus evident that MSPB did not apply the simple distinction the Examiner applied, between before-the-fact and after-the-fact relief. "Assurance" of arrests for past harm "is not appropriate relief in a grievance," particularly not when the guidance of that Report was to provide before-the-fact relief. If management would ever choose to enforce protection from endangerment, discomfort, and unreasonable annoyance, the question of penalties after-the-fact of harm would be moot. MSPB should have read p. 9 of the Report and noted the "in a grievance" language. Civil rights cases such as the nation has had have often involved arrests of violent bigots who hurt others. The Examiner was not repealing criminal law; she hoped to preclude the need by citing administrative relief. MSPB is supposedly at the pinnacle of relief; it should display at least the competence of agency examiners.

The Examiner did not conclude that I would be unable to work based on my requests. There is no rational basis for that preposterous absurdity. No competent personnel specialist would ever dream of saying that because of what a person said in a grievance months or years before, he is then unfit for duty!!

Freedom of expression is not a medical reason for sick leave. The foolish MSPB remarks confirm that there is no supportable medical basis for the management action, just as was pointed out in the 1 December 1980 letter. Had MSPB found the slightest medical basis, it would have cited such, not gone way out on a limb. What MSPB has done simply confirms that there is absolutely no medical basis for what the agency has done.

MSPB clearly despises AR 1-8 as much as local officials have made clear they do. They refuse to provide before-the-fact relief, so they resort in desperation to ridiculing requests for after-the-fact relief, taken out of context, and given pretended weight far more than either the grievance or the Grievance Report did.

Refusal to provide before-the-fact relief, and charging leave for <u>personal</u> reasons of the cluprits, raises new questions of criminal culpability. This includes issues of falsification of records, embezzlement, conversion, etc. Again, whether or not criminal relief may also be warranted, has no bearing on fitness for duty. Victims of white collar crime are not generally placed on sick leave! Moreover, actual or supposed requests for criminal law relief do not serve to confer an exemption to the obligation to enforce administrative rules.

The Grievance Report noted the authority "to ban all smoking" or do whatever is necessary to assure that nobody is endangered, discomforted, or unreasonably annoyed. About 10-15% of the population is normally endangered; about 2/3 are normally annoyed, according to government data. Thus, in offices where people are not annoyed or discomforted, "the regulations, as written, do not require an absolute ban on smoking." Insubordinate officials pretend this means that nothing need be done for anybody; they defy and flout the context. It is needed to protect those who do report endangerment or unreasonable annoyance. The regulation does not say to put people on sick leave; it says to "remove smoke," not people. There is no local "affirmative action" to identify the hundreds or thousands with similar or greater desires than mine. I am being singled out solely because I have used my expertise in quoting regulations (and laws) as a freedom of expression matter for myself and in class actions. Management is intentionally and falsely portraying me as unique.

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People v. Carmichael provides insight into the situation, and on "intent." In that case (5 Mich. 10), it was ruled that "the defendant may not have known that the effect would be produced which actually occurred; but it does not follow that he might not have known it, or that he should be excused for using the poison, without knowing it." The harm from second-hand smoke is in the public domain body of knowledge; ignorance is no excuse. The Court continued, "Where an unlawful act is done, the law presumes it was done with an unlawful intent . . . ." Harming a handicapper to the point of forcing him off-post is clearly not allowed; the persons whose actions have had this result have intended those actions. Clearly, smokers smoke intentionally. The poisons in tobacco smoke are listed in the public domain body of knowledge; ignorance is no excuse.

The Court explored the question of ignorance even further, "the unlawful act of administering it raised the legal inference that he did it with the intention of producing such effects as would naturally result from its reception. It is unnecessary to decide how far even positive proof that a man was misinformed as to the degree of injury likely to arise from the use of any substance would avail him in defense, where he used it designedly for any unlawful purpose." Smokers are aware there is some harm to me, especially since the Army physician has sent me off-post on several occasions, even if those smokers do not know the "degree" of such harm. Even the agency legal office (in a 1 August 1979 opinion) agreed that

> "Smokers may technically be guilty of assault and battery insofar as a smoker may intentionally cause an individual to be placed in fear of imminent peril of injury from the smoke and the smoke may touch that individual, thus fulfilling the definition of assault and battery."

Even if Courts would not impose criminal penalties (and we do not know that they would not unless we ask), Courts can clearly grant civil relief. This is particularly so when a person is ordered off-post because of the actual and potential harm from smokers. A ban on sale has already been upheld, Austin v. Tennessee, 179 US 343 (1900). A ban on sale clearly involves a ban on use!

The Michigan Supreme Court also noted that "there can be no doubt that if the direct tendency of any man's willful act is to produce injury, and that injury is in fact produced, the intention is in law deducible from the act itself; and something more than mere ignorance must be shown to relieve him from liability for all the consequences attending an act which he knows to be unlawful."

The Court also wisely considered variations in amounts and different susceptibilities of people. This is particularly important with ambient tobacco smoke, since it is common knowledge that millions of persons are sensitive to even the most minute quantities. The Michigan Supreme Court said:

> "In looking into the subject under consideration, we are bound to take notice of such matters as belong to the common stock of ordinary human knowledge and experience, and can not shut our eyes to the current of events about us. There is no need of entering into any scientific discussion upon poisons, but there are facts relative to their use which are familiar to every man of common intelligence. Poisons are very often administered to produce death; and it is this class of poisoning which is most often brought to the notice of courts. But it is safe to say that poison is given in smaller quantities much oftener than in deadly doses. . . . The greater susceptibility of some persons over others, to be affected by it, renders it still more dangerous."

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The State Court noted that "a mere absence of guilty intent" is not sufficient for the "administration of poison" to be "excused." The Court cited an example that "it has been held that if a slave, without authority, and with a design to produce harmless sleep, administers laudanum to an infant, and, contrary to her expectations, it causes death, she is guilty of manslaughter: 11 Humph., 159." The Court even analyzed "innocent use by physicians and other authorized persons." The Court noted that "a person assuming to act as a physician, who obstinately or rashly administers a remedy which he knows, or has reason to believe, is a dangerous one, is liable, however little he may have intended to harm the patient" and cited several cases to this effect: Rice v. The State, 8 Missouri, 561; Rex v. Long, 4 C. & P., 398, 423; Rex v. Spiller, 5 C. & P., 333. Smokers do not have even such innocent intent; they are not trying to administer a "remedy" to me. Instead, they are "obstinately or rashly" using a product labelled dangerous by law, 15 USC 1333. The danger is common knowledge in the public domain; the danger to me is so apparent that a smoker "knows, or has reason to believe" that such is the case. The Michigan Supreme Court made the point even stronger when it noted that "our statute makes it a punishable offense for a physician, or any one else, to prescribe any poisonous drug or medicine, while intoxicated . . . ." In a classic of understatement, the Michigan Court said that "it is obvious that the law does not encourage tampering with such matters, even by physicians and nurses."

The Michigan Supreme Court further noted that "Wherever, therefore, there is a positive physical effect produced, and the poison administered operates to derange the healthy organization of the system, temporarily or permanently, we think there is an injury which, whenever it is reasonably appreciable, may be regarded as within the statute. The circumstances of each case will, of course, throw light on the criminality of intent, and govern the courts in trial and punishment. The law takes no heed of insignificant trifles, but, above and beyond those, it extends its protection and its penalties." When I am forced off-post repeatedly because of the far more than "appreciable" effects, I need the "protection" of the law. Whether it is this, or more recent laws, or regulations, I claim their "protection." I claim "reasonable diligence" by "management officials" in securing such "protection." Such claim is not unique to asthmatics; it is a claim hoary with age.

I am not citing new principles. They are old, long-standing, honorable principles. The Carmichael case cited above was decided 11 January 1858. That is over 120 years ago. The danger from smoking has also been long known. The TARCOM drug control office has provided me a pamphlet ("Tobacco Abuse") which indicates the dangers to smokers have been known since the 1650's. The Surgeon General is merely repeating what has long been known, and providing additional corroborative evidence. The American Lung Association says "There is no controversy about the facts. Thousands of careful studies have documented them. No major medical or health agency questions them." But TARCOM management refuses to act. Such refusal to act is intentional; management officials know when they are refusing to act. Management even refuses to maintain records of the incidents involving me. I have made several requests, including by DF 7 September 1979 to the TARCOM Security Division. That request was not even answered. No request for management action in this regard has been honored. Refusing requests for criminal law protection is "classic discrimination." It is intentional discrimination. When management refuses to act, management becomes a party to the offense. Of course, some management officials have themselves engaged in the prohibited conduct. Management officials are not only condoning wrongdoing by others, but also they are condoning their own wrongdoing.

In cases such as Robinson v. California, 370 US 660 (1962), and Powell v. Texas, 392 US 514 (1968), the Supreme Court has specified pertinent principles dealing with the arrest of drug addicts. The Robinson case rightly notes that drug addicts cannot be prosecuted for no reason. The Supreme Court rightly noted that the improper California law "is not one which punishes a person for the sale of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration." It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the 'status' of narcotic addiction a criminal offense." MSPB did not properly summarize my request, by its ignoring the limitation re "endangering others and particularly, the grievant."

My request carefully conformed to the principle that, as the Court held, "it is unlikely that any State . . . would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease . . . in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." The addiction and mental disorder problems of smokers are recognized by the medical profession, the Public Health Service, and (indeed) in the legal profession as per the discussion of cigarette dependency in 53 S Cal Law Review 1423 (1980). That data, and the data by authorities such as Desmond Morris and Alton Ochsner is within "contemporary human knowledge."

It was clearly not an "undue hardship" for the government (California) to have enforced its unconstitutional law. The MSPB pretense that enforcement of rules is an "undue hardship" is thus clearly false and unsupportable and/or unsupported. This is especially true when enforcement of civil service and/or Army administrative rules would obviate need for use of criminal processes, and would have not even led me to doing the research to identify such aspects. (Of course, enforcement of protective rules is not "mandatory" or "ordered" considering the obvious fact that persons, including me, can (and have) worked in unsafe and/or unlawful conditions.)

The Supreme Court clearly upheld the principle(s) I have so carefully followed, in the Powell case, at 532. The Court carefully distinguished the law in the Powell case from the one in the Robinson case. In the Powell case, the Court noted that "appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion." (Note that I am not asking that chronic smokers be arrested simply for being on-post, but for when harming others. My request notes that rules in employment relations can and are more strict than in merely "public" places.) The Supreme Court continued, "The State of Texas thus has not sought to punish a mere status, as California did in Robinson; nor has it attempted to regulate appellant's behavior in the privacy of his home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community."

In this case, the harm is not merely "may" occur; management makes evident it has occurred since at least 17 March 1980. It is a most severe "behavior" that "disables" and renders "not fit for duty" for over 15 months. Moreover, most smokers want to quit; and 2/3 of the population find smoking annoying. And the relapse rate for smokers is worse than that of alcoholics.

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(4) "The exclusion from the installation of all smokers and cigarettes." Consider it. The Commander has the authority to ban items from being brought on-post. This is undoubtedly so when the property can be a safety or health hazard. Tobacco products that produce ambient tobacco smoke are a clear hazard to me as a handicapper. The hazard is not unique to me; the hazard to smoke-sensitive individuals is common knowledge in the public domain. A ban on such property is authorized under safety, health, personnel, security, and property control regulations. Yet TARCOM fails to act. Let us consider, for example, TARCOM Regulation 190-4, a "Military Security" regulation entitled "Removal and Introduction of Property." Particularly helpful provisions are included in paragraphs 3d, 7a(2), 7b, and 7c. Per these criteria, tobacco products (cigars, cigarettes, pipes, etc.) must be denied entry onto the installation. See Grievance Report, p. 9.

By that regulation, "drugs" are not allowed on-post except for "medical purposes" and then only when "prescribed by a physician" and even then, only if the prescription was issued "in the course of professional practice." Finally, "said drug" must then be "contained in the original container . . . ." To learn the definition of "drug," we look to paragraph 3d. "Drugs" are defined as "any drug" including those cited in AR 600-50, which regulation further references the Controlled Substances Act, 21 USC 801, et seq. While tobacco products may not be considered drugs within the meaning of that law, the paragraph 3d definition is more comprehensive. It is not limited to merely those drugs. It goes beyond the DARCOM Supplement 1 as well, based on the fact the Command does indeed have "the authority to ban items from being brought on-post." It refers to the intent to include items "which have been found to be habit forming." The "any drug" clause including those drugs defined in other regulations or in law is a comprehensive phraseology. There is no exclusion clause. This again relates to the Commander's full authority; TARCOM has a sensitive mission, and a firm control on drug use is undoubtedly needed to accomplish that mission. If a substance is not needed for proper medical use on our property, we do not want it. Tobacco products meet the stated criteria for prohibition since their use has "been found to be habit forming." Indeed, "the latest available medical research information on smoking" cites it as an "addictive disorder," and stating that therefore, "once a person starts to smoke, future choices are less freely made." So by the criteria of TARCOM Regulation 190-4, tobacco products must be excluded.

Introduction of such tobacco products on-post also violates a second set of restrictions and prhibitions in TARCOM-R 190-4. These relate to property in general and emphasize that "the introduction of personal property to TARCOM installations is discouraged." Tobacco products are personal property. With few exceptions, such property is not allowed on-post except with a property pass or "only after approval by the supervisor of the individual who desires to introduce such property." Tobacco is not listed as one of the exceptions; but even if it were, even exceptions are not allowed to "contain any unauthorized items." Tobacco contains numerous substances hurtful to smoke-sensitive handicappers. In context, considering the many other rules and laws cited herein, tobacco contains "unauthorized items" and so must be banned under this clause of the regulation as well as under the "drug" clauses. An item whose use "causes insanity" is not welcome.

The regulation bans tobacco already as written. The problem arises solely from the failure to enforce it. Such failure has a discriminatory effect. Moreover, once the harm to handicappers is known (as it is), interpretation of the regulation as inapplicable is intentionally discriminatory. When there is both a discriminatory intent and a discriminatory result, the impropriety of not banning tobacco products under TARCOM-R 190-4 is obvious.

The clear thrust of the MSPB is focusing on the nature of the environment external to me. While pretending to ask the question of whether I am "able to perform the duties of his position with reasonable accommodation," the pages subsequent to that purported issue clearly relate to an analysis, albeit de minimis and without regard for facts, on whether the environment is safe. An appeal proceeding is not the place to do that; the agency deviants responsible for ousting me are manipulating the system to have the question of whether the environment is safe answered only in the hardship of an appeal proceeding. The agency offenders have clearly, intentionally, for personal reasons, ignored every vestige of fairness that due process and equal protection of the law provides.

It is clear that the culpable smokers have done this solely for continuing their smoking behavior, and in the process, they have run roughshod over numerous rules, including obligation to fairness and the appearance of fairness. This Nation does not allow something so minor as a traffic fine to be imposed when "the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in this case," Tumey v. Ohio, 273 US 510 at 523 (1927). Here we are dealing with constitutional rights which warrant deference and come with a momentum for respect. Here we are dealing with established laws and rules which are being ignored. Here we are dealing with out-of-control addicts. Their pretense of inability to work contravenes numerous medical statements emphasizing the lack of medical basis for what has transpired. MSPB has clearly, blatantly ignored the information in the record, including the 2 Jan 81 reminder that I am not unique; the 9 Jan 81 reminder of lack of medical reasons; the 4 Feb 81 reminder; and the 20 Apr 81 information on a recent federal court decision on a person ousted for no reason but re smoking. None of the significant and relevant information provided MSPB was treated; instead of deference, a summary denial distorting my position and reality was issued in a grossly untimely fashion.

We are not dealing with something as minor as a "mere" traffic ticket as in Tumey v. Ohio. In the event of any inconsistency between an examining doctor, and a doctor with an axe to grind such as Dr. Holt has, deference should be given the information from the examining physicians. On 7 Jan 80, "he is quite capable of returning to work." On 17 Mar 80, "clearly ready, willing, able and eager to work." On 24 Mar 80, "clearly ready, willing, able, and eager to work, and is fit for duty in a safe work environment," On 28 Mar 80, "this patient is able to work." On 28 Apr 80, Dr. Holt's 24 Mar 80 allegation "is not a medical opinion;" (Even the local Inspector General called Dr. Holt's statement "unwittingly . . . erroneous impression.") On 7 Jun 80, "he should return to work immediately." On 22 Sep 80, "inadviseable" to be subjected to a safety hazard "does not mean 'cannot'" work in it as such has been done for a long time. On 22 Oct 80, "free from any endangerment or discomfort . . . consistent with the ability, readiness and willingness of Mr. Pletten to work; no contradiction or inconsistencies should be read into the repeated advice" which Dr. Holt had previously concurred in while he still thought nobody would have to honor his concurrence until the 25 Jan 80 Report said otherwise. On 7 Jan 81, "the protracted nature of the situation does not arise from any medical considerations . . . ." On 3 Feb 81, "there is no basis for the employer's allegation that Mr. Leroy Pletten is unable to work." On 1 Jun 81, "recommend that there be no delay in allowing him to return to work." On 8 Jul 81, "erroneous presumption confirms that there is no medical basis for the duration of the absence." Whether the environment is or is not what was recommended, it is clear that Dr. Holt's reaction is disruptive of the context.

Industrial Union Department, AFL-CIO v. American Petroleum Institute, 100 S.Ct 2844 (1980), provides insight on the situation. Rules must conform to facts lest they be struck down. Dr. Holt's behavior is what is at issue. Is what he is doing conforming to facts? Do competent doctors agree that the solution to hazards is to remove the victims? Is that what any regulations say to do? Am I somehow unique? Is there any professional support whatever for Dr. Holt's behavior, or is what he has done purely personal on his part?

AR 1-8 evidences that the number of people like me is such a significant number as to warrant "educational programs to discourage smoking." Dr. Holt's own office table provides literature such as from the American Lung Association warning of the dangers of second-hand smoke. It specifically says that "there are millions of people, adults as well as children, who are sensitive to tobacco smoke and suffer smoke-caused asthma attacks." The recommended solution from literature at Dr. Holt's office is "to help provide a smokeless environment for most people, who do not smoke." Does Dr. Holt read the literature in his office? Does he have "difficulty concentrating" on it? Does he have a tobacco-induced memory problem? Why does he say that what is professionally recommended "cannot" be done? Would the Supreme Court sustain a regulation contrary to professional guidance?

The HEW Regulation 1-60 cited in my grievance at p. 6 also confirms that the number of people adversely affected is a significant number. All that is needed to secure protection from tobacco smoke under the HEW guidance is "if an employee objects in writing." Medical proof is not cited as needed; nor is there any connotation that objection is to be followed by declaring the person "not fit for duty." The Army regulation does not even ask for objection "in writing"; a verbal objection is adequate. The Army chooses to be the employer that sets the best example. Why doesn't Dr. Holt get on the team?

Dr. Bernard Zussman suggests solution as "avoidance of exposure to tobacco smoke whenever possible," for "relief of these symptoms when the offending agent is removed." See "Tobacco Sensitivity in the Allergic Population," Ann Allerg 45: 304-309, 1980.

The legal office at the installation recognized the commonality of the problem, as did Dr. Holt, on 1 August 1979, and thereafter. The sudden change occurred only after personnel turnover when attorney Susan Lewandowski was replaced on my situation by Emily Bacon; when personnel officer Archie Grimmett was replaced by E. E. Hoover; when immediate supervisor J. H. Kator was temporarily replaced in March 1980 by a series of acting chiefs; and when the Grievance Report sustained my position on the full authority of the Command, and the mandatory necessity to achieve the goals. Back before that period, Dr. Holt seemed not to have such difficulty understanding; once full authority was confirmed, he suddenly claims the opposite is true, when before it had only been a small group of persons who had denied authority to enforce the rules and achieve the goals. The pretense that achieving the goals against endangerment, discomfort, and unreasonable annoyance somehow "cannot" be done or would pose inexplicably "an undue hardship" is contrary to the principle cited in Goosby v. Oser, 409 US 512, 93 S.Ct 854, note 3, "finding of absence of case or controversy could not be rested on alleged difficulty in formulating remedy." This is clearly true when constitutional rights warrant deference and come before deciding officials with a momentum for respect.

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Various Supreme Court decisions help to provide insight into other details of the situation. For example, when smoker memory is impaired, or when mental disorder produces "difficulty concentrating" on facts, such as word meaning, Lau v. Nichols, 414 US 563 (1974) may provide pertinent guidance. Deciding officials should make an effort to ensure that smoker readers are equipped with necessary language skills necessary to profit from the guidance in the rules and in the 25 January 1980 Grievance Report. Simple information such as on "the authority . . . to ban all smoking or take whatever action is necessary" conveys the point or inference that achieving goals against endangerment, discomfort, etc., is required, not optional, and thus not only can but must be done. Persons who are not suffering from significant mental disorder or retardation no doubt easily comprehend that the regulations must be obeyed, regardless of any additional requests that an employee may make. Requests for allegedly additional actions do not serve to confer an exemption from achieving regulatory goals.

The mental capacity to understand when one is dealing with a situation common to millions, and not something unique to one person, is commonly understood in American jurisprudence; courts have understood it for centuries. Rogers v. Paul, 382 US 198 (1965) is but one of numerous instances when a Court grasped this simple principle. In that case, the Supreme Court not only comprehended the need for "immediate" action on a person, it mentally grasped the non-unique aspects by reference to "those similarly situated" as well. At least 10-15% percent of the installation workforce want protection from "endangerment"; undoubtedly 2/3 want protection from unreasonable annoyance. Of course, everybody wants the "injurious" employee rule enforced, except for the "injurious" persons themselves, particularly the smokers who have provided so much false information in this situation.

Constitutional rights warrant deference; they come before deciding officials with a momentum for respect. The "overbearing" installation smoker contempt for these rights, coupled with "overbearing" MSPB disregard for the truth or falsity of smoker claims asserted for their purely personal reasons makes it "readily apparent" that the plan to disregard AR 1-8 goals will continue, that protection from endangerment, discomfort, and unreasonable annoyance is not forthcoming, and that respect for simple rules such as on due process is unlikely. Hence, the action to date is unconstitutional, and warrants relief including punitive relief, even if correction occurs hereafter. The delay has already been excessive; normal correction of a safety hazard-caused absence occurs in under 24 hours. The violations are at least as "readily apparent" as the "readily apparent" violations giving rise to that phraseology in Goss v. Board of Education of Knoxville, 373 US 683 (1963). The Surgeon General has given his advice since 1964; the AR 1-8 guidance has existed since 1977; the dangers of second hand smoke have been progressively recognized since 1642; that smoking "causes insanity" has been observed since at least 1899; the preliminary orders in the Shimp case began in 1976; the Grievance Report called the facts to local attention in January 1980; the "injurious" employee rule has been on the books for a long, long time. The Goss ruling was hardly nine (9) years after the 1954 Brown ruling; and already non-compliance was "readily apparent." The Courts are impatient with delays, evasions, and dilatory tactics. There are no official reasons for endangering, discomforting, and annoying nonsmokers. There are none. There are only personal reasons. The normal presumption of governmental good faith applies only to official reasons for supposedly official actions; the presumption does not apply to personal reasons. Court cases have made clear, for example, that there is no official color to misconduct such as speeding in the course of official business.

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For personal reasons, local persons do continue to fabricate any number of allegations of what they claim to have done. They do continue to play games of pretending they have done this, then deny it, and say that they have done some other thing. MSPB has encouraged this game playing by its "overbearing" refusal to even consider naivety or falsity of the local claims, and the fact the reprisal consists (in whole or in part) of local false statements of what has been done. MSPB grossly violated/ignored the time frame for its action; continued pretended review of the evidence while refusing to allow the evidence to be considered has gone on far too long. It is clear that "there has been entirely too much deliberation and not enough speed in enforcing the constitutional rights" that are involved, Griffin v. County School Board of Prince Edward County, 377 US 218 at 229 (1964). Of course, there has not even been "deliberation" in this situation; MSPB refused the evidence.

At 231, that case provided helpful phraseology in another way, saying that "whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race or opposition to desegregation do not qualify as constitutional." Clearly, whatever supposedly "due hardship" reasons might support denying specific requests, the object must be constitutional, and grounds of opposition to achieving regulatory goals do not qualify. Likewise, whatever personal reasons for smoking might support failing to provide protection from endangerment, the object must be constitutional, and denying the right to work (in safety) does not qualify. Indeed, whatever supposedly medical reasons might purportedly justify protecting a person by invoking rules not pertinent to non-necessary toxic substances, the object must be constitutional and in conformity to safety principles; and grounds of pretended desire to "protect" the person while refusing to make corrective efforts (even acceptable to the agency's own Examiner, which they were not) do not qualify.

Constitutional rights warrant deference; they come before deciding officials with a momentum for respect. Efforts to protect those rights must continue until the rights are vindicated. Action cannot be halted (two years or more previously) on a truncated basis. Of course, false claims pretending action has been taken do not count. Nor does action short of obeying agency rules, civil service rules, and law. (Indeed, even obeying such rules may not in itself be acceptable, in the event the rules themselves are inadequate to protect the constitutional rights involved. In this case, the rules against hazards, the full authority to deal with hazards, the Grievance Report information against discomfort, etc. only need to be enforced. The question of their constitutionality would arise if they insisted that hazards, discomfort, etc., are allowed; or if authority to achieve the mandatory goals did not exist.)

It is the intentionally false claim by Dr. Holt acting on his own for personal reasons to pretend that the goals cannot be achieved that is unconstitutional. It is the intentionally false implication that the mandatory goals do not have to be achieved that is unconstitutional. It was no oversight that MSPB did not tell the agency to obey its own goals, its own Grievance Report it has purportedly accepted (but refused to implement), etc. It was not an oversight; the MSPB omission was intentional. "Intention is in law deducible from the act itself," People v. Carmichael, 5 Mich 10 at 17 (1858). Also, "where an unlawful act is done, the law presumes it was done with an unlawful intent." This situation also involves unconstitutional acts, and acts of violation of multiple regulations, as well as unlawful acts.

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A hearing is imperative. In this case, much of the wrong information still being insisted upon by management has already been repudiated by the agency's own Examiner, in a Report management insists it has "accepted." Management claims are so blatantly erroneous that management could not persuade a professional. The Supreme Court has defined the logical basis for hearings: "The primary object . . . was to prevent depositions or ex parte affidavits . . . being used . . . in lieu of a personal examination and cross examination of the witness." One purpose is for "opportunity . . . of testing the recollection and sifting the conscience of the witness." Another purpose is that deciding officials "judge by his demeanor upon the stand and manner in which he gives his testimony whether he is worthy of belief." See Mattox v. U.S., 156 US 237 at 242-243 (1895). MSPB acceptance of unsupported and unsupportable input from officials acting for purely personal reasons is clearly a deliberate slap in the face of truth.

The page 5 reference to vague "compliance with health standards" that are not identified reflects intentional contempt for AR 1-8 and the Grievance Report. AR 1-8 is an additional regulation which must also be complied with. In addition to compliance with health standards, which is required anyway, the Grievance Report expressly stated that "it is clear that the rights of smokers exist only insofar as discomfort or unreasonable annoyance is not caused to nonsmokers." The Report expressly emphasized that decision on whether such is happening "is a personal determination to be made by that individual." TLV's do not exist for "discomfort" and "unreasonable annoyance." A 27 Aug 79 letter from the Public Health Service advised me that "the number of compounds found in tobacco smoke is currently estimated to be over 4,000." The entire list of TLV's as cited in OSHA Regulation 1910.1000, Subpart Z, through Change 6, contains well under 1,000 entries. The molecular complexity of tobacco smoke makes clear that there is not, and undoubtedly practically cannot be, a TLV for tobacco smoke. There clearly is no TLV for tobacco smoke on the list.

The 18 April 1980 letter from Mr. Hoover pretended that "air content studies performed in the immediate work area of Mr. Pletten's employment, TAB 5, indicate that the air contaminates do not exceed that which are acceptable/prescribed by AR 1-8, TAB A. AR 1-8 is a regulation on tobacco smoke; yet had MSPB read TAB 5, it would have found alleged results for "Carbon Monoxide" and for "Nitrogen Dioxide." Mr. Hoover's allegation is thus false/misleading. AR 1-8 does not even make de minimis reference to any tobacco chemicals, much less single out those two items from among the 4,000 involved. There is also an apparent second falsehood in Mr. Hoover's letter; I continue to deny that such study occurred—no such study was apparent to me. Had such a study occurred, I would have immediately substituted my "personal determination" as indicated in the Grievance Report at p. 12. Dr. Holt and Mr. Braun cannot be trusted to make my "personal determination" for me; and they are not authorized to do so. Yet they arrogantly make my "personal determination" and all the others for other nonsmokers at the installation, in their continued defiance of the Report's observations on p. 11.

Has management provided false or misleading information? The Grievance Report has given notice of what AR 1-8 provides—remove discomfort, not the victims of discomfort. Guidance need only be "sufficiently definite to give notice of the required conduct to one who would avoid its penalties . . . . No more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line," Boyce Motor Lines, Inc., v. U. S., 342 US 337 at 340 (1952). Management has crossed the line in endangering and discomforting me, and in ignoring the rights of nonsmokers.

A basic question of why the Grievance Report, 25 January 1980, was not implemented was not addressed. As a simple matter of competence, it is easy to note that the Report is replete with information on the equitable balance relationship the Army itself has defined. Unlike what is evident from the MSPB decision, the Army Examiner is familiar with the nature and functioning of an operating civilian personnel office. Competent personnel specialists are routinely aware of the range of potential actions open to management; alternatives often exist. The Examiner held discussions with me. The Examiner noted the thrust of the grievance as seeking delineation of the equitable balance defined by the agency. The Examiner sustained the major points exactly confirming the major thrust of the grievance. Competent people quickly grasp the main point of a matter. Competent people see the full range. The local installation was, and is, refusing action except on a minimal level and essentially only when a complaint arises. Such is clearly not the "affirmative action" specified by AR 1-8.

Competent and reasonable people do not always agree on just what is reasonable. However, unlike MSPB, the competent Examiner did not take out of content the high range of compliance actions cited in the grievance as illustrative examples of the high range. Unlike MSPB, the competent Examiner did not focus on such peripheral matters. No competent person even questions that severe action can and would be taken against a person whose misconduct caused a fire or explosion. Yet MSPB deliberately distorts the emphasis and pretends that the authority for dealing with severe violations somehow inexplicably poses "an undue hardship." MSPB obviously does not demonstrate even a de minimis understanding of the distinction between "undue hardship" and "personal relief." Action against a person whose misconduct causes a fire, explosion, or other severe endangerment is obviously not "personal relief" to any victim, but such action is not at all "an undue hardship." MSPB has inexplicably focused major attention on the high range of the case, essentially disregarding all aspects of the equitable balance guidance which were the major thrust of both the grievance and the Grievance Report. Competent personnel specialists with operating, or field, experience easily grasp our continuing balancing role. Management officials may want a disciplinary action too severe, while union officials may want it too low; our competent advice is to deal with both and recommend an optimal course of action. Some people want grade classifications set too high; rollbacks of average grades produce pressures in the other direction. We personnel specialists in the middle are responsible for balancing. The competent Army Examiner immediately grasped the levels, low, medium, and high involved. Management was insisting on doing almost nothing; I countered with the major thrust at the equitable balance, but with some high range points drawn from experience of what has been done, generally in cooperation with the legal office.

The legal office representatives then handling the situation immediately understood the source(s) to be cases drawn from experience. On 19 June 1979, the legal office immediately supported the equitable balance guidance against any discomfort, endangerment, or unreasonable annoyance, and advised management to act on the facts of whether or not such was happening. Since it was, and is, management should have acted, and undoubtedly would have. However, persons such as Messrs. Shirock and Braun provided false information connoting that air speed was the key, and their wrongful input essentially "repealed" the equitable balance guidelines set by the agency. The Examiner overruled their wrong emphasis on such irrelevancies and confirmed that their reliance on TLV's was "no evidence" at all of compliance with the relevant rules such as AR 1-8. Unfortunately, their insubordinate behavior has continued to the present. Their insubordination has been abetted by the turnover in the legal and personnel offices.

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The 25 January 1980 Grievance Report has not been implemented; the reason is that persons such as Messrs. Braun and Shirock insubordinately oppose the AR 1-8 factors identified in the Report. They therefore insist on using the irrelevant factors the Report overruled as "no evidence" at all of compliance with AR 1-8. The harm of second hand smoke has been progressively understood since long before the 1970 OSHA law, and long before TLV's. The difference between a competent examiner and MSPB is that a competent Examiner does not rubberstamp whatever a party chooses to say; competent people ask for proof, evidence, and documentation--the details that some people with learning disability may have difficulty grasping. When people ignore details, proper inferences are not drawn, and the main point(s) become garbled.

It is interesting that among management's concealments of evidence, the full 25 January 1980 Grievance Report was not provided to MSPB. The management attitude against AR 1-8 is seen, for example, in an 8 August 1979 memo from Dr. Holt and Mr. Braun objecting to effecting educational programs of the scope contemplated by AR 1-8. That memo said "Conducting such public relations instructions however is not considered part of the medical function and or mission at this facility." Imagine that! Dr. Holt does not want to be involved with the No. 1 health problem! He is a smoker who clearly does not want to set the kind of example that is medically recommended; see Stellman and Stellman, "Women's Occupations, Smoking, and Cancer and Other Diseases," 31 CA-A Cancer Journal for Clinicians 29-43 (1981), at 40, "Set an example for your patients and your staff: don't smoke. Encourage others not to smoke." Dr. Holt sets a terrible example, and for his own personal reasons in reprisal for my pointing such facts out, pretends that my condition has somehow suddenly changed on 17 March 1980 precluding me from working. I question whether Dr. Holt knows the difference between asthma, which is episodic, and (e. g.) emphysema, a permanent condition. Dr. Holt clearly does not display a grasp of the range of medical reality, of conditions that are intrinsically different though affecting the same organ.

Though the installation Medical Office had confessed, the installation pretended educational programs were occurring, then and now. The difference between a competent Examiner and MSPB is that a competent Examiner asks to see the proof. Yet MSPB refused to have even the courtesy to ask, to even act on the 25 August 1980 motion submitted to obtain information to back up the supposed management actions. Mr. Hoover's 18 April 1980 letter made the same pretenses of action that had not fooled the agency's own Examiner.

People acting in good faith do not need to be guided by the hand like a little child. The 25 Jan 80 Report, p. 11, noted that "no evidence was offered to indicate that the Command had considered the rights of all nonsmokers." The Examiner was aware of my class actions in EEO to induce such recognition; management pretends to have taken the hint on no educational programs, but management has not even pretended to have taken the hint on this aspect. In a recent hearing, Mr. Hoover (who replaced Mr. Grimmett) admitted he was more opposed to actions sought by me than Mr. Grimmett had been. It is hard to believe that the range of action goes below low, but clearly reprisal for seeking compliance is worse than merely minimal compliance. Presumably had Mr. Grimmett remained, effort may have been started to to act on the rights of nonsmokers in order to begin the equitable balance process specified by AR 1-8. As it is, management refuses to begin, and punishes me because of my class action efforts. Protecting others' rights by initiating the required equitable balance could render my situation moot; but management fears a precedent of compliance.

Page 13 of the 25 January 1980 USACARA Report noted my indication that there are a number of poisons in the air. A proper study could have helped. Even the study allegedly performed by TARCOM did find poisons. The alleged study is summarized in a 20 February 1980 statement by the Industrial Hygienist, E. F. Braun, and the Medical Officer, Dr. Francis J. Holt. The alleged study looked only for two (2) items of the more than 4,000 substances in tobacco smoke. It was not "worst case," and it was inadequate. It reflects the TARCOM attitude of not wanting to get rid of the poisons; TARCOM would rather get rid of the victims. Witness the remarkable confession: "Persons with chronic lung and chest conditions should be cleared by their personal physician to work in these areas." That is not an indication of "affirmative action" to solve a problem and get rid of the "safety hazard." The attitude is further evident in the fact that "high risk personnel" have not been informed of the need for such clearance. The solution is to prevent the hazard, not to try to evade a solution. When page 13 repeats the fact of Command authority, it means it is important. TARCOM had denied authority; but the Report comes down on TARCOM for saying that. When a safe environment is mandatory, an employer of course has authority to provide it.

Page 14 is particularly strong. TARCOM had not proven a work area "reasonably free of contamination." "There is no evidence that an analysis of the air content was made." That is a particularly significant finding by the Examiner. The TARCOM Safety Officer had assured me in writing on 18 June 1979 that a "survey" had been done and "that a hazardous condition does not exist." I questioned the accuracy of the allegation that a "survey" had been done. I had not seen any "survey" personnel. I wrote to the Commanding General and asked. By letter 16 August 1979, Major General Oscar C. Decker, Jr., assured me that "the survey was conducted . . . over a four day period, beginning at about 0900 hours, stopping at lunch, and then from 1300 to 1500 hours . . . the core hours of flextime when most employees are on the installation. Smokers were present in the area. . . . Building 1 had been previously surveyed . . . The Post Industrial Hygienist and a professional safety engineer conducted the survey. . . . Readings and calculations were verified by both personnel . . . you have been given a private office and appropriate checks have been made to verify a proper clean air supply." When the General says something, I normally assume it is true. But violations were clear; so when a professional Examiner months later finds "no evidence" despite such alleged thorough "survey" and "appropriate checks," the question of Command credibility and truthfulness becomes very serious. I saw no such "survey" and "appropriate checks." I saw no study as alleged by the 20 February 1980 document. So based on the TARCOM record, it is my position that there were no such surveys made, and this will continue to be my position until acceptable proof other than the 16 August 1979 letter and the 20 February 1980 statement is provided. (Even if such studies were made, the results differed; the first study alleged no hazard even to "persons with chronic lung and chest conditions.) Some people will say anything.

Page 14 again noted TARCOM authority to control smoking, even "to ban all smoking . . . ." Smokers would react to that factual observation like an alcoholic to Prohibition! The idea of "less smoking or more ventilation" must terrify them. The ventilation system cannot "remove smoke" or prevent "endanger," "discomfort," "unreasonable annoyance," or "infringe" even when it is on, much less when off. Even presumably at full power, it is not enough. If "more ventilation" is not possible, the only solution would be "less smoking."

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Gasper v. Louisiana Stadium & Exposition, 577 F.2d 897 (1978) provides insight into the current situation. The Circuit Court noted that the "plaintiffs had no constitutional right to stop other individuals from smoking in Superdome, operated by Louisiana Stadium and Exposition District, while performance was in progress," at 898. Plaintiffs therein were not employees of the Superdome; the rights of customers are completely distinguishable from those of employees. The Constitution deals with the broad sweep of principle, the right to due process, the right to equal protection of the laws, freedom of expression, etc. The issue of smoking involves specific application of general principles.

General principles are brought to bear on specific facts; my educational and job experience tells me that obvious fact. The suicidal behavior that is smoking was not a big problem in the 1780's in America. The right to work in safe conditions, indeed the right to work itself as the Supreme Court has rightly noted, is protected. In the 25 January 1980 Report, the Examiner boiled down to the matter of how to protect that right to two aspects: "less smoking or more ventilation," p. 7. What is protected, by the Constitution, by law, and by regulations, is that the goal of letting the employee work is to be achieved. The Constitution does not prescribe how; the authors of the Constitution presumed that its readers would possess common sense and not be mentally impaired by reason of mental disorder, learning disability, alcoholism, etc.

The phraseology of 64 Cal. Law Review 702, at 707, sheds light on this aspect. The right to work and legal "duty of the employer to provide a reasonably safe place to work fits comfortably within" Constitutional principles without prescribing a specific methodology. Methodologies change. Moreover, the fact the Gasper "plaintiffs had no constitutional right" to what they asked also "fits comfortably within existing principles" since principles on customers as distinct from principles on employees are separate principles in no way in conflict with each other. They are on different legal planes.

The Circuit Court noted that various authorities could have written rules on the specific subject of smoking, for example, under "police power" or "interstate transportation" principles, but that the cited authorities had not done so. Based on the facts presented to the Court, there was a "great void." In my situation and that of other nonsmoking employees at the installation (especially when their right to work in safety and comfort has been disregarded), there are multiple protivtive rules. These include but are not limited to 5 USC 7902(d); FPM Supplement 752-1,S1-6.d(3); FPM Supplement 532-1,S8-7; the agency 385 series regulations; Civilian Personnel Regulation 700, 751.A.13.b and 4.c; TACOM Regulation 600-5, 5-5.b. (2), (3), (4), (5), (6), (7), and/or (8), and Appendix B. 1-6 and 9-10, among others. Smoking is a personal matter, not an official job responsibility. And, of course, there is AR 1-8.

The Circuit Court also noted what actually happened on the subject of the Prohibition of alcohol, with reference to the public. People who want to drink simply wanted to continue. Rules governing the public are one thing; rules governing employee behavior are quite another. And unlike in Prohibition, "we know from surveys of public opinion and attitudes that the great majority of smokers--90 percent--have either tried to quit smoking or would probably quit," 53 S Cal Law Review 1423, at 1433. Enforcing rules would aid them, and nonsmokers.

The Public Health Service in October 1977 published nationwide a progress report on decrease in smoking, The Smoking Digest. It called national attention to the Shimp case, 368 A2d 408 (1976), wherein judicial notice was taken "of the toxic nature of cigarette smoke," including of the number of persons allergic or sensitive to it. Endangerment and discomfort from smoke was at the same time being banned by the Army. The Shimp decision was not rendered in a corner, unknown to anybody. (The American Lung Association also published the case nationwide.) The Public Health Service stated in The Smoking Digest that, "Nearly two-thirds of the population find it annoying to be near a person who is smoking. Even more than a third of the smokers feel this way. There has been a growing conviction that nonsmokers have the right to breathe air free from cigarette smoke. . . . Three-fourths of adults feel management should have the right to restrict smoking in offices and factories whether or not it poses a safety hazard." Any safety hazard is a hazard to somebody; tobacco smoke is a hazard to at least 10-15% of the population based on 1976-1977 data; and the p. 7 stipulation that others' smoking "does constitute a safety hazard to" me was based on such data. The percentage is not less in 1981, undoubtedly more, based on the studies from lung cancer deaths of nonsmoking women.

Army agrees that when smoking is a safety hazard, safety rules apply. This case concerns insubordinate local officials who are flouting both Army and the Grievance Report. Management agrees that others' smoking endangers, discomforts, and unreasonably annoys me; yet the AR 1-8 guidance is refused to be invoked. Management also refuses to take affirmative action to protect others. Class action relief is obviously authorized under EEO rules; if management were protecting others, this situation would be moot. Relative to protection under rules such as AR 1-8, deciding officials are "to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect," Norris v. Alabama, 294 US 587 at 590 (1935). In that case, no black had served on a jury within the memory of any living person! In this case, no nonsmokers has been protected from being endangered, discomforted, or unreasonably annoyed. No "personal determinations" have been obtained from anybody. No mentally disordered smokers have been identified. The ventilation does not "remove smoke" anywhere on-post. The Command has not "considered the rights of all nonsmokers." No air content studies have been done. No smokers have been told not to smoke in the presence of any sensitive persons, including me. No equitable balance has been achieved. No TLV's are relevant.

Such facts make clear why there have been multiple complaints from others. Mr. Braun, the Industrial Hygienist, has noted that "although Mr. Pletten was bothered by the smoke there were several others at that time who agreed with him." Co-worker Evelyn Bertram complained to OWCP in File No. A9-190131. On the second floor, Mae Sweeney complained, as documented 11 June 1980 by Mr. Braun. The Personnel Officer on 10 Oct 79 admitted several compensation claims, "in fact, at least several employees have filed claims stemming from smoking-related conditions." (I had filed only one claim at that time.) Many other examples of complaints from others could be cited; a hearing is needed. Considering that so many others are being endangered, discomforted, or unreasonably annoyed, with new situations being surfaced to me periodically, and whenever "there has been a systemwide impact may there be a systemwide remedy," indeed, "the remedy must be designed to redress that" fact, Dayton Bd. of Ed. v. Brinkman, 433 us 406 at 420 (1977).

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It is clear that my interest in being provided "an environment reasonably free of contamination," i.e., one that "does not endanger life or property, cause discomfort or unreasonable annoyance to nonsmokers, or infringe upon their rights," is "cognizable and substantial," just as was "Stanley's interest in retaining custody of his children." In my case, it is undoubtedly ever more so; the legal and regulatory guidance already exists providing for a safe work environment. Unlike Stanley, this is not a request for law or regulation to be changed or struck down. Enforcement is what is sought. The "right to remain at work under safe conditions," 64 Cal. Law Review 702 at 714 (1976), has already been judicially recognized. AR 1-8 makes clear that "safety considerations" have priority over smoking. 5 USC 7902(d) uses terminology such as "eliminate work hazards and health risks," without hedging by a "to the extent feasible" phrase as in OSHA.

Thus, "for its part, the" Army and US Government have "made its interest quite plain," just as Illinois had in the Stanley case. Army wants its employees to be protected from endangerment, discomfort, and unreasonable annoyance, and to have an equitable balance such that all its employees work, without some being sent off-post, suffering from the effects of endangerment. The FPM has rules governing potentially "injurious" employees. The State of Michigan has rules to aid the mentally disordered, with MSA 14.800(427) allowing peace officers to "take the individual into protective custody" when appropriate; MSPB insults the State of Michigan when it pretends that helping people is "an undue hardship." Michigan undoubtedly does not feel that helping mentally disordered people is vindictive, harsh, difficult, or improper.

All of "these are legitimate interests, well within the power of the State" and the Army and US Government "to implement. The Supreme Court did "not question the assertion that" rules could be enforced, and that it is not "an undue hardship" to do so. Who is MSPB to question enforcement of rules? Smokers who endanger, discomfort, unreasonably annoy, or pose a safety hazard are to be controlled. Those are the goals to be achieved. Who is MSPB to insist that it is "an undue hardship" to provide ventilation adequate to achieve the goals, when the rules require such ventilation. Who is MSPB to ignore the Grievance Report examples on pages 13-15 for possible solution. To achieve the goals, "less smoking or more ventilation" is what the Army Examiner noted that it all boils down to. The MSPB contempt for the rules is evident in the fact that these examples were not tried; so we are still in the 25 Jan 80 timeframe as far as compliance is concerned. Nothing has happened even yet. In Stanley, the Supreme Court asked some logical questions towards solving the matter. Who is MSPB to think it can obtain facts from hundreds of miles away without even allowing the facts to be entered? (The local judge in the Stanley case was at least near by.) At 652 and 653, the Supreme Court asked, "What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case?" Here, what is the governmental interest in saying I am endangered to the point of unfitness without allowing a hearing to determine whether the environment is in violation of rules; whether mentally disordered smokers have been identified; whether others are protected; whether studies have been done; whether the Grievance Report has been implemented; etc. (Having just lost the Grievance case, it is clear that the installation does not come forward with a presumption of compliance, particularly not when it is using the same claims that had been rejected.) It is obvious, as in Stanley, that the government "registers no gain towards its declared goals when it" ousts fit individuals from non-complying environments. Indeed the government then "spites its own articulated goals." (Of course, I "do not question the assertion that" sick leave is for sick people.)

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It must be emphasized that this is a freedom of expression case. While MSPB simply refuses to consider reprisal contrary to its own rules on when agency actions are to overturned, that refusal tells more about the quality of MSPB competence than about the case. "Working and smoking don't mix." MSPB was clearly disinterested in facts, even little details such as that management has credited me for duty time 19 Aug 80, 2 hours; 8 Sep 80, 4 hrs; 10 Sep 80, 2 hrs; 12 Sep 80, 2 hrs; 3-6 Mar 81, 14 hrs; and 10 Mar 81, 8 hours. Other duty time since 17 Mar 80 has not been credited; some of such time has been in the on-post presence of smokers who later display no recollection of such presence, thereby lending credence to the University of Edinburgh study re adverse effects of smoking on memory by hardening arteries and reducing blood/oxygen flow to the brain. I am, of course, fit for duty and quite able to write just as my job involves writing. My output of writing during my absence met or exceeded the standards of performance considering the within-grade increase that was granted. Since there is no medical reason for the absence, in brief, management credits me with duty time intermittently.

In our area, the electric power company has meter readers who go door to door to read the meter on how much electricity has been used. Dogs may bite meter readers. Meter readers are not declared unfit for duty in advance because dogs may bite them. The British Medical Journal, 14 Jun 80, p. 1422, cites that smokers tend to be anxious, obsessed, depressed, and/or hysterical. No electric company doctor is obsessed with dogs, anxious about controlling them, or hysterical that a meter reader might demand protection. Instead, the company sent its customers a warning to control dogs or risk being sued. No customer according to available information reacted hysterically or seemed obsessed with the idea that controlling his dog might be "an undue hardship." Protecting people from being endangered, discomforted, or unreasonably annoyed is not perceived by normal people as unusual or "an undue hardship." The company does not care how dogs are controlled, but undoubtedly would provide suggestions on techniques. The same is true in my situation. Contrary to the false MSPB claims, management worsened the environment, refused to consider enforcement of AR 1-8, refused to honor the Grievance Report, and has definitely refused to begin even to discuss reasonable accommodation. MSPB footnote 5 is incompetent; the agency has not even started the process. It is not up to handicappers to build ramps, with the agency then "to respond." It is up to the agency to be willing to consider at least to sit down and discuss solution. The agency has refused to start the process. MSPB carefully avoided reference to regulatory compliance, which is required anyway. In this case, regulatory compliance would solve the problem, if tried. Yet we do not know this, since management has refused to try. Like the local electric company, the details of achieving compliance are of no significance. JUST COMPLY with the goal.

Consider the actions supposedly requested or required, and the actions supposedly taken. All are external to me. None addresses my condition. Yet MSPB purportedly is seeking to learn whether I am "able to perform the duties of his position with reasonable accommodation." (That questions arising after pretending my position is the agency position, of inability to work in the current environment, a yet additional error.) Despite the purported question, the "answer" relates only to whether the environment is proper. Instead of allowing a hearing to obtain the facts, MSPB only wanted "some" self-serving information to justify refusing jurisdiction. The tenor of the decision reflects the bias; the selectivity in the "facts" cited confirms that the decision was not "impartial." The MSPB personnel will be queried at a hearing on their preconceived notions.

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