The evidence is mounting that tobacco pushers aim much of their propaganda at children. Gullible children grow up to be suicidal smokers dangerous to themselves and others. The Federal Trade Commission has published a Report on the misleading aspects of tobacco advertising. The report contains both public and "nonpublic" data. The information "has been designated confidential by the submitting companies." The information was "submitted under compulsory process or voluntarily in lieu of compulsory process in an investigation a purpose of which was to determine whether a law violation had occurred." The information is "protected from public disclosure under the terms of a stipulation entered into by the Commission as the result of litigation in FTC v. Carter, No. 77-0168 (D.D.C. Jan. 22, 1980)."

Information concerning children and smoking has been publicized repeatedly, including in 29 Louisiana Law Review 589 (1969). The "nonpublic" FTC information evidently confirms that parental efforts to have their children follow the advice of the Surgeon General are being subverted. It is generally unlawful for children to smoke; unless children are beguiled into smoking, smoking would cease considering the fact that adults generally do not start smoking once reaching adulthood. Aspects of the FTC information were published in June and July 1981, including in the Detroit Free Press, Monday, 6 Jul 81, p. 1A and 6a. The article indicates information such as the following: A Brown and Williamson Tobacco Corporation executive wrote that "Doubt is our product since it is the best means of competing with the body of fact that exists in the minds of the general public." Rational adults are evidently hard to deceive into beginning suicidal behavior. The pushers evidently recognize what would happen if the dangerous aspects were admitted by them: "A likely result of such activity on our part would be escalation of quitting rates among smokers."

An ad agency reportedly developed and recommended a strategy for "attracting" youths whose mind set as described in other literature would make them amenable to suicidal behavior. The ad agency guidance is quoted as including: "Present the cigaret as one of a few initiations into the adult world." "Present the cigaret as part of the illicit-pleasure category of products and activities." "To the best of your ability (considering some legal constraints), relate the cigaret to pot, wine, beer, sex, etc." "Don't communicate health or health-related points."

It is no surprise that smoking is linked to alcoholism, as Dr. Tennant points out. In Pediatric Nursing, January/February 1980, pages 26-27, illuminating data exists concerning these aspects. For example, "Cigarette smoking in children prior to age 12 has been found to particularly be associated with drug abuse and possibly alcohol abuse in later life." A "lack of discipline" is also cited. At the hearing, we will explore the background of the culpable officials in detail. (Maybe I am on sick leave because deciding officials were not spanked enough as children.) Courts make clear that even animals must be controlled (disciplined) so as not to harm people. Children should grow up to be at least that civilized. However, when mistreated or exploited by ruthless pushers, they clearly become willing to hurt others. FTC officials such as James H. Sneed and Ernest J. Isenstadt should be able to testify to most illuminating data.

Smoking that hurts people is not allowed. It is unfair to command a victim such as me to surrender my rights, as to "stand his ground." There is "a difference, a constitutional difference, between voluntary adherence to custom and the perpetuation and enforcement of that custom by law" (or refusal to enforce law), Browder v. Gayle, 142 F.Supp 707 at 711 (1956), cert. den'd 352 US 903, reh den 352 US 950 (1956).

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The purpose of a hearing is not simply to vindicate the individual's rights. Hearings also promote confidence in fairness. Hearings surface facts otherwise concealed. Hearings provide information by which higher-level officials can evaluate managers at a lower level. Hearings promote due process, equal protection of the law, and other basic constitutional rights. In this situation, the government is violating constitutional rights, laws, and regulations; the effects include violation of property rights of employment, liberty protections, and adverse effect on discipline, since officials are being allowed conspicuously to violate rules with impunity.

As a personnel specialist, my requests for relief are crafted as quotations from rules, laws, and applicable facts. Adverse action against a person based on requests for law and rule enforcement is clearly untolerable, unlawful, and bad faith. The intolerable aspect is particularly striking when contrasted with Court guidance. In America, freedom of expression includes more than merely the right to ask that rules be enforced. In Perry v. Sindermann, 408 US 593 (1972), the Supreme Court made clear that the government cannot fire a person in violation of constitutional rights such as freedom of expression. In that case, the employee had been criticizing policies; here, I am seeking enforcement of policies. It is improper to refuse to take testimony on the matter based on the Supreme Court explanation, at 598, that "Plainly these allegations present a bona fide constitutional claim . . . a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment." Requests for law enforcement are entitled to at least the same degree of constitutional protection.

The constitutional rights are not vindicated when the governmental body is allowed to give phony reasons, or no reason, or fabricated disability reasons, without opportunity for such allegations or behavior to be tested. An appeals court in Chitwood v. Feaster, 468 F.2d 359 (1972), observed that the existence of "protected speech" (including undoubtedly a written grievance for which no reprisal is allowed by clear regulatory guidance) is "enough, in the view of the Supreme Court, to occasion inquiry to determine whether or not the" governmental action for supposedly proper reasons "was in fact caused by the protected speech" or grievance, most especially the successful grievance, confirming multiple management deficiencies. (Any lawyer should be able to recognize that the right to freedom from reprisal exists even if the grievance had not been successful and had shown no management errors of any sort whatsoever.) It is not necessary to WIN a prior case in order to have enforceable constitutional rights. Indeed, winning may be more likely to trigger reprisal. (It is clear in this case that the winning, and the efforts to have the Report implemented, triggered the reprisal.)

It is an obvious principle that management and appeals officials ought to know; reprisal is likely to occur soon after some significant event. Courts understand such details. Reprisal can follow being chosen as a union representative, or as a bargaining agent, or as a member of a new union. See such cases as Sarteschi v. Burlein, 508 F.2d 110 (1975) and George v. Conneaut Board of Education, 472 F.2d 132 (1972). Employers are not likely to admit reprisal in their written notices. In my case, management "doth protest too much"; the extreme denial of a hearing speaks for itself. Protection of rights must be "meaningful." To be "meaningful," it must be timely. Time limits were not placed into the regulations for no reason. The authors understand the reasons for time limits. The people that the regulations seek to control and regulate should obey.

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When MSPB distorted statements from my 1979 grievance to allege they somehow rendered me unfit for duty years later, MSPB violated freedom of expression even if I had made the alleged statements and requests. Such action runs afoul of multiple Supreme Court decisions. For example, in NAACP v. Button, 371 US 415 at 429-430 (1963), the Supreme Court emphasized that "abstract discussion is not the only species of communication which the Constitution protects: the First Amendment also protects vigorous advocacy, certainly of lawful ends, against government" behavior. (My "vigorous" requests for enforcement of rules are the obvious target of MSPB wrath.) The Court indicated that "in the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objective of equality of treatment by all government . . . for the members of the Negro community in this country. It is thus a form of political expression." (My grievance is to cause enforcement of rules by asking the government to enforce rules to promote safety, mental health, courtesy, efficiency, etc. My efforts are to help nonsmokers and handicappers discomforted and annoyed by deviant acts of a suicidal nature. My efforts are to help "the Negro community" considering the disproportionate black male death rate from smoking.) The Supreme Court noted that "litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." (The Supreme Court did not say to hold petitioners unable to work! Considering the Command false position, of denial of authority to act, etc., "vigorous" references to law and regulations were a foreseeable result and clearly protected by the Constitution.)

The Supreme Court did not find it hard or an "undue hardship" "to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record." (MSPB contempt for the Constitution is shameful. The MSPB misconduct is gross. A "civilized" person would blush. The record shows that I have been "cooperative" and am willing at any time to sit down to <u>begin</u> discussion on implementing the 25 Jan 80 grievance report, the rules, the handicapper guidance, etc. The record shows that management is not even willing to sit down to discuss the matters with me, despite my many requests and offers to do so.) In the NAACP case, the Supreme Court noted the effort "through lawful means to achieve legitimate political ends." (My ends are not "political" but enforcement of already existing rules in a manner familiar to me as an experienced personnel specialist using previously implemented techniques of counseling, written instructions and orders, verbal guidance, or whatever, whereby management enforces its rules. Discipline such as suspension or removal, or use of arrest power, <u>when</u> used, was against recalcitrant persons. The full power of enforcement has not been considered an "undue hardship." The asinine idea that rule enforcement is so difficult as to be almost "impossible" came as a great shock to me, considering that the 25 Jan 80 grievance report had been so supportive of my position on having the AR 1-8 guidance enforced.)

In re Primus, 436 US 412 at 426 (1978), confirmed that "activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." (My grievance simply wanted "meaningful" enforcement of the rules. Securing such enforcement should be obtainable without recourse to the courts, i.e., without "looking to the eventual institution of litigation"--the NAACP language. In re Primus did not consider it somehow an undue hardship to overturn a reprimand of an attorney. Even the Bar association in the case did not pretend the attorney was somehow physically unfit for duty! There was no claim of "not ready, willing and able to work"--a claim so vague under the circumstances as to be unintelligible.)

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Collins v. Nationwide Life Insurance Company, 90 Mich. App. 399 (1979), 282 N.W.2d 8, provides insight consistent with the People v. Carmichael, 5 Mich. 10 (1858) guidance, at 17, that "intention is in law deducible from the act itself." In Collins, the issue was "whether injury or death resulting from voluntary intoxication can constitute an 'accidental injury or death.'" In my situation, one of the issues is whether management and smoker action(s) that did "endanger . . . discomfort or unreasonably" annoy me are intentional or not. In Collins, the Michigan Appeals Court held, approved, and adopted "the majority rule that a death or injury is accidental only if the agency effecting the death or injury can be termed accidental, that is, unexpected, unanticipated, and unforeseen, irrespective of whether the result so qualifies." Harm from second hand smoke is well known in the public domain; AR 1-8 expressly contemplates the foreseeable likelihood; the 25 Jan 80 Grievance Report expressly confirmed the fact; multiple medical statements called attention to the fact; the agency physician agreed; I emphasized the fact.

In Collins, the Court considered known facts relative to the situation of that case and then applied the law. In my case, I want deciding officials to note the facts, and then to apply the law, i.e., to instruct a halt to the endangerment, discomfort, and unreasonable annoyance. In Collins, the Court noted that in accordance with the facts and law, "decedent's voluntary acts of intoxication which resulted in a reasonably foreseeable consequence was not 'accidental.'" It is clear that smokers' suicidal acts of smoking by which smokers daily kill themselves meet this criteria. Such behavior is not "accidental." This "not 'accidental'" behavior routinely hurts nonsmokers such as me, as is obvious in the public domain data and all the evidence applicable to me.

The majority view of the Collins decision confirmed "not 'accidental.'" The dissenting opinion took note of the "chronic alcoholic's unforeseen death from a single episode of drinking" and said that such "may reasonably be termed an 'accidental bodily injury.'" In this situation, asthma is known to arise over a period of time as a result of multiple exposures in an office setting over a period of years. My situation involved 26 Aug 69 - May 1979, etc. AR 1-8 does not limit itself to prohibiting only "intentional" endangerment, discomfort, and unreasonable annoyance. It prohibits all such. AR 1-8 prohibits smoking when such consequences are merely "not 'accidental'" and even when they are actually "accidental"; AR 1-8 sets goals to be met, and management does not want to meet those goals.

The principle is clearly applicable in this situation. Courts consider principles. But there is a known relationship that is progressively more described in the literature between smoking and alcoholism. Dr. Forest Tennant, Jr. advises that employers "who don't want to have alcoholics working for them should get rid of smokers." NIDA Monograph 23, January 1979, at 189, observed that "anecdotal observations suggest that alcoholics and heroin addicts smoke at a high rate, particularly during periods of abstinence." Dr. Roland Griffiths is finding that drinking smokers smoke more by reducing their "inter-puff and inter-cigarette intervals." Dr. Griffiths states that "the increase in smoking isn't simply an artifact of chaining a puff to a sip" as "even when the drink is taken in one gulp, smoking increases."

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TACOM and MSPB are disregarding the vast literature on the problem of smoking. This public domain literature is hereby incorporated by reference under 5 CFR 1201.67 on "Official notice." There is no cause of action to single me out. The harm to persons such as myself has been known for far too long to justify action against me, on the pretense of protecting me, when others are not so "favored," including people in my very own office. See FPM Suppl. 752-1, S3-2b(3), "Unlike penalties for like offenses." See examples of the medical literature such as on persons with coronary artery disease, as the Surgeon General has noted, and as AR 1-8 recognizes. See the article "The Effect of Smoke on the Nonsmoker," by Dr. Wilfred Aronow, in Family Practice Recertification, Vol. 1, no. 7, Nov. 1979. See the Greek and Japanese studies. See the American Lung Association data on "Second-Hand Smoke." Millions of persons with asthma are adversely affected. Is every one with an episodic condition to be declared disabled? Don't episodes end? Who knows best but the examining doctor--and surely the patient? See 110 Am. J. Epidemiology 15-26 (1979), "Effects of Parental ... Cigarette Smoking on the Pulmonary Function of Children." See 302 N.ENgl.J.Med. 720-723 (1980) "Small-airways Dysfunction in Non-Smokers Chronically Exposed to Tobacco Smoke," by White and Froeb.

For guidance on dealing with mentally ill individuals, see 65 Minn. Law Rev. 927-960 (1981), "The right and responsibility of a court to impose the insanity defense over the defendant's objection." Considering the overwhelming evidence on smoker mental disorder, it is only fair that you protect mentally ill smokers from the consequences of their behavior in disabling me for over a year by their own admission and confession. Upon cross-examination, others injured as well shall also be cited.

Also see the case of Hubbs v. Davidson et al., Mass. Super. Ct. Eq. No. 41971 (1980) (unreported) (granting equitable relief in favor of a C.E.T.A. trainee against administrators of a job training program and against two trainees smoking on the job). It is obvious that smokers, weighing the risks, may decide to take them. If that is a right, it is also a right not to smoke. Yet, the installation forces people to smoke.

Air that is so contaminated as to produce in co-workers multiple symptoms is clearly unsafe and unhealthful. Management knows this, and that explains why management refuses to do studies, despite having conned MSPB into thinking studies are occurring. Air that is so contaminated as to produce headaches, eye irritation even to the point of an OWCP-approved claim, throat irritations, coughs, chest pains, etc. is demonstrably unsafe and unhealthful. The employees who handle local OWCP and retirement cases undoubtedly have information on the names of the others who are suffering. The names of the hundreds of "high risk personnel" will be most illuminating at the hearing in interviewing and examining them on the problems that they are facing. The records of Dr. Holt on other cases will also provide much valuable insight. He will be able to confess information that has already been provided me, on others.

Certainly the air around the smokers and immediately next to them is much higher in contaminants. Somebody has to sit or stand next to the smokers. It is therefore important to find out whether the pretended studies, if happening, are on weekends or otherwise not around smokers. There clearly is no biological monitoring, of smokers or nonsmokers. OSHA rules do not forbid creating dangers to oneself according to the installation; that claim is not valid. But in any case, civil service rules expressly forbid such behavior. Once smokers are required to obey, the pretense of air content studies will be seen as the irrelevancy it is.

The lack of professionalism in the 18 June 1981 MSPB argumentative brief on behalf of the installation behavior is clear. The issues were not addressed. The December 1979 incidents and others before the 25 January 1980 Grievance Report were ignored despite appeals on those aspects. The interval between receipt of the Grievance Report and 17 March 1980 and the events in that time frame were simply ignored. In any competent review of a suspension, the actions that led to the suspension are supposed to be the subject of review. Specific facts with names, dates, times, places, etc., would be considered with the employee having the right to present evidence and cross-examine. Yet in this case, MSPB chooses to disregard its legal duties. Instead of a timely decision on the facts, MSPB chose to ignore the record, fabricate events and allegations of what has not happened, and refuse a hearing to expose those falsifications.

The right to a hearing on fitness is not something new. The Supreme Court has supported that idea for a long time. See Slochower v. Board of Higher Education, 350 US 551 (1956), wherein the Court ruled that an employee could not be discharged without some inquiry into fitness, in that case, fitness to teach. A hearing is even more obvious in this case, where the question is the fitness of the environment. I am fit for duty; it is the environment that is unfit in that it contains "a safety hazard" as admitted in the Grievance Report. A hearing will likely surface other unfitnesses in the environment, e.g., alcoholic and/or mentally disordered employees dangerous to themselves and/or others.

In Roth v. Board of Regents, 408 US 564 (1972), the Supreme Court identified conditions for a hearing (on constitutional rights, property, and liberty), all of which are factors in my situation. A hearing is essential. It is especially needful considering the alleged "stigma or other disability" alleged to render me unable to work for such an extremely protracted period. The lengthy suspension has "foreclosed" realistic "freedom to take advantage of other employment opportunities" under the circumstances. It has clearly impaired promotional opportunities as management has confirmed in writing. The harmful impact is as clear as in any race or sex discrimination case. Indeed, it is worse since in such cases, the victims are not generally denied the opportunity to work at all. "Make whole" in this case must take into account the special circumstances, including the appalling intensity of the discrimination of refusal to enforce rules. The wrongdoing does "foreclose a range of opportunities," including "opportunities" unknown to me, giving added force to the claim for due process via a hearing. Even a simple low performance rating merely hurting chances for promotion but not forcing the employee off the job, warrants a hearing, Bottcher v. Florida Department of Agriculture and Consumer Services, 365 F. Supp. 1123 (1973).

The lack of clarity and precision in the MSPB 18 June 1981 decision can have a "chilling" effect. People will be afraid to seek enforcement of rules. Legal ethics allow a vigorous "claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law"—Canon 7, DR 7-102(A)(2) as "Adopted by order of the Michigan Supreme Court October 4, 1971." Certainly there is no basis for pretending a lawyer or person is unfit for duty when seeking enforcement of current rules. The "stigma or other disability" must be resolved by a hearing to show the falsity of the accusation. Where I "challenge the substantial truth of the material in question" in every pertinent respect, a "hearing would afford a promise of achieving" the "result" of rule enforcement and retraction of the false claims, and other relief, Codd v. Velger, 429 US 624 (1977).

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The MSPB falsification of "prohibiting smoking in the entire Civilian Personnel Division" is particularly striking as a falsehood when juxtaposed with the intentionally misleading MSPB claim that the standard of compliance is merely "a 'reasonable' attempt to accommodate appellant's handicapping condition." MSPB officials know better. Thus, some questions arise, for example: Why did MSPB invent the falsehood? Why did MSPB intentionally use the wrong yardstick for measuring compliance?

The answer(s) become plainer upon review of the legal context. MSPB officials are well aware that such a ban was necessary and is required by both law and regulation. The record clearly showed that management had refused to meet the actual standard, an "unqualified and absolute" duty rather than a merely "reasonable" attempt. MSPB thus simply decided to fabricate that the actual, governing standard had been met. Such falsification by the trier of fact might not be successfully challengeable on further review. MSPB further decided to divert attention from the correct standard, "unqualified and absolute" duty, to the irrelevant, phony, and superficially lesser standard, a merely "reasonable" attempt.

It is no mere casual matter to defy the evidence and pretend happenings that the record explicitly indicates have not happened. The risk of prison under laws such as 18 USC 1001 is simply too great for casual disregard of fact, documented fact. A decision to defy evidence requires premeditation and time to reflect on carrying out the deed. In this case, far longer than the specified 120 days went by. To distract attention from the real standard, a mass of irrelevant words about the inapplicable aspects would be needed. It would be necessary to disregard the events leading up to the situation; simply focusing on the continued absence might divert unwary readers from the intermittent aspects of the months before. It would be necessary to use the false word "improved" to mask the reality of worsened. Adequate falsification would be buttressed by relying on the installation physician's legal opinions, despite the fact they are obviously in error.

But in any unlawful effort, even the best premeditation can go awry. It was simply shoddy to include in both the "undue hardship" and accomplished lists some aspects even copied out of the regulation. The distortions of the grievance requests would be a risk, but MSPB obviously decided to take the risk. Etc., etc.

MSPB intentionally chose to defy law and Supreme Court guidance by its admitted refusal to even consider the reprisal issue. (Of course, since MSPB had itself decided on reprisal.) The command Congress gave MSPB in 5 USC 7701(c)(2) is clear and imperative. MSPB confesses the existence of that command in 5 CFR 1201.56(b). Yet the 18 June 1981 MSPB bill of attainder blatantly flouts the imperative command. In NAACP v. Alabama ex rel. Patterson, 357 US 449 at 460-461 (1958), the Supreme Court emphasized a "closest scrutiny" requirement. (MSPB refuses any scrutiny at all.) The Court said "effective advocacy of both public and private points of view, particularly controversial ones" is protected. (My case is exclusively "public" in limiting itself to seeking enforcement of rules; smokers in contrast exercise a merely "private" view in their statements opposing such enforcement.) The "Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly . . . an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment." (My case noted government disregard of the rights of nonsmokers as well as my own--confirmed by the Examiner. The "liberty" to file a grievance to secure the right to work is also buttressed by the Court decision in Yick Wo v. Hopkins, 118 US 356 (1886).) Contrary government behavior must be and "is subject to the closest scrutiny."

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"Specific Intent" in Situation

Management suspended me for disciplinary reasons. Smokers cause endangerment, discomfort, and unreasonable annoyance. Management does not enforce the protective rules and laws. False information is used. "Intention is in law deducible from the act itself," People v. Carmichael, 5 Mich. 10, at 17 (1858), 71 AD 769.

Clearly the wrongdoing is intentional. (The rules are to be enforced whether or not violation is intentional or accidental; management refuses to enforce them at all.) Is it necessary to show "specific intent" to cause harm, refuse to enforce rules, refuse to obey rules, discipline, etc.? The context in which these management and co-worker violations are taking place is an "immediate threat" situation. An "immediate threat" can result in death for the victim(s). The legal precedents show that "specific intent" is not needed in such situation; their guidance is instructive. The principles are pervasive and encompassing for the many violations that make up the "immediate threat" situation and involve violations of a material or collateral nature, including refusal to obey and enforce rules, the use of false information, marking my time cards for personal reasons, hiring and promoting smokers, etc.

The "immediate threat" allegation of 29 April 1980 must be kept continually in mind sentence by sentence. When death results from an "immediate threat" against a victim, the guidance is instructive. In People v. Barnard, 93 Mich. App. 590 286 N.W.2d 870, the Court observed "the standard criminal jury instructions," and indicated that "Second-degree murder is not a "specific intent" crime. See People v. Garcia, 398 Mich. 250, 259, 247 N.W.2d 547 (1976), distinguishing Wellar v. People, 30 Mich. 16 (1874)." The fact that death did not result in my situation is no credit to the untender mercies of the culpable offenders. It is clear from People v. Carmichael that no credit accrues to the perpetrator merely because his unlawful design is not fully achieved. At 16, the Court wisely held that "A large class of statutory offenses consists of acts done with the ultimate intent to do some mischief, which may or may not be accomplished." The regulations have been violated; unreasonable annoyance has been shown. That is sufficient "mischief" to warrant penalty. Additional charges such as causing discomfort, causing endangerment, falsifications, mental disorder, alcoholism, etc. simply relate to additional "counts," whether under criminal law or as mere administrative matters.

It is essential to remember that the right to protection from safety hazards, endangerment, assault, poisoning, falsifications, etc., include "present rights; they are not merely hopes to some future enjoyment" or enforcement. See Watson v. City of Memphis, 373 US 526 (1963), at 533.

The Michigan Law Review, March 1981, pages 754-756, has interesting data in a book review on "Mental Disabilities and Criminal Responsibility." The review notes that "criminal actions resulting from mental disease are often purposeful, intentional, and ingeniously planned." (This would undoubtedly also be true in the civil and administrative law realm.) The review says "it is irrationality, and not the absence of specific intent, that justifies reducing the defendant's criminal liability." (In my case, the management action is irrational, contrary to stated governmental objectives, and disciplinary.) The review discusses whether accused persons "induce" their own "insanity." (Smokers do their own smoking, though they are evidently beguiled as children to begin smoking.) The real question should be addressed in my question to whether management officials were (and are) capable of forming a disciplinary intent. See also the Comptroller General's guidance.

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The book Smoke Screen; Tobacco and the Public Welfare, by former Senator Maurine B. Neuberger, is illuminating. At 5, she draws an excellent analogy with thalidomide to show the danger, and at 6, with increased tobacco ad expenditures showing their good grasp of "merely statistical" evidence. At 73, she asks, "Who would rely on a narcotics addict to evaluate the hazards of narcotic addiction?" (Does the Command wonder about smokers pretending all is well with the environment?) At 51-52, she cites past century information that "Tobacco was held responsible for many diseases--including cancer and insanity." It is no surprise that "Between 1895 and 1921 a total of 14 States banned the sale of cigarettes." At 50, she notes that "tobacco is listed as a drug in the 1890 edition of the Pharmacopoeia."

At 64, she notes that more reviews and studies are not what is needed (in 1963), but movement "to facilitate the translation of the medical evidence into a program of responsible action." ("Responsible action" to implement the rules and Grievance Report is what the installation and MSPB oppose.) At 85-86, she cites the Air Force Surgeon General in 1962, Maj Gen. Oliver K. Niess, who had the guts to take some action. (Contempt for rules is obvious when the duty to protect from endangerment, etc. is so clear. TACOM and MSPB should take enforcement action to halt the violations, admit my unrestricted ability to work, and command the use of "competent medical evidence" and disregard of Dr. Holt's legal opinions until he can disprove endangerment, discomfort, etc., which he "cannot" do.)

Smoking "causes insanity." So it is no surprise when the book cites (at 117) a pro-tobacco newspaper editorial saying, "'The buyer who does not know of the possible causal chain between cigarettes and cancer . . . is not worth the saving.'" (The pro-pusher view of smoker rights is clearly limited.) At 126, she notes tobacco company concern to induce children to smoking. (Do pushers support child abuse by "cigarette burns" or "slow-motion suicide" as the preferred technique?) At 14, she cites in 1963 smoking as related to "cancer of the bladder, gastric and duodenal ulcers, bronchitis, pneumonia, influenza, pulmonary tuberculosis, thrombo-angiitis-obliterans (a disease of the arteries in which the flow of blood is impaired), tobacco amblyopia (. . . . 'a rare form of blindness affecting heavy smokers') . . . impaired hearing . . . accident-proneness. . . ." (When the body is adversely affected, the mind is disoriented.)

The link with alcoholism is shown at 113 in a smoker comment, "I can't afford both so I've decided on cirrhosis." The pusher view is characterized at 112, "So that's agreed then, we'll drop the sex angle and play up the death wish." In discussing smoker addiction, the idea of a smoker "merely exercising his freedom of choice is unsound." (People who are insane have lost choice; the "right to smoke" is not only a legal myth under Austin v. Tennessee, 179 US 343; it is a medical and factual myth.) The fact that "working and smoking don't mix" is also apparent from information in her book; see 45-46.

Smoker "difficulty concentrating" on reality by unbalanced reaction to information is also apparent in her book. Despite the danger, "smokers rely on the continued existence of cigarette advertisements as proof that 'smoking could not be all that bad.' It is interesting to note, too, that the psychologists of Social Research, Inc., stressed the importance of advertising in allaying the smoker's fears. 'Advertising makes cigarettes respectable, and is thus reassuring,' they stated." (It is no wonder that smoker mental illness is "obviously widespread."

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The Command did not seek additional medical evidence before placing me on sick leave, before making the change to annual leave, or before the change to LWOP. The Command has done nothing to secure verification of Dr. Holt's disregard of the information from the examining physicians--with one exception. Smoking "causes insanity," and so in a classic of projection, smokers accused me (their victim) and sent me to a psychiatrist, though they had absolutely no intention of honoring the results. Because management and MSPB officials have knowledge that my ability to work is unrestricted and that there is not even de minimis truth to the p. 6, 18 Jun 81 fabrication of "not ready, willing and able to work . . . ," they have at no time acted to secure a physical fitness for duty examination. They fear that the results would confirm Dr. Holt's error. They know that MESC and OPM have already rejected Dr. Holt's allegations.

The fact remains that Dr. Holt has not personally examined me. The fact remains that there are no medical reasons for what has transpired. His views are not even medical opinions, but his personal whims opposed to law enforcement. MSPB and the installation undoubtedly realize that while some consideration may be given to a medical opinion of a nonexamining physician, the courts have generally held that they deserve little weight in the overall evaluation of disability. See Veal v. Califano, 610 F.2d 495, 497 (8th Cir. 1979); Allen v. Weinberger, 552 F.2d 781, 786 (7th Cir. 1977); and Landess v. Weinberger, 490 F.2d 1187, 1190 (8th Cir. 1974).

No consideration can be given to the nonmedical opinion of a nonexamining physician when "inadequate physical examinations or none at all"; "ignored the rests of the tests" and the regulations, studies, decisions, medical opinions and other evidence; "took no precautions against" endangering, discomforting, or unhealthful conditions by making recommendations to follow his advice, by advising management of my fitness for duty and of the need to resolve the hazard, or by taking any professional steps to resolve the situation even when the duration was obviously medically impossible; etc. He did no "biological monitoring." He made no "identification" of addicted, mentally disordered, or alcoholic smokers. He insisted on predicating his views on the right to smoke when TACOM-R 600-5, Chapter 27, cites a different approach to be followed. He failed to answer correspondence; he failed to follow up to obtain answers to such correspondence as he did send to management recommending resolution. He failed to advise the safety office to honor medical evidence. He disagreed with the 25 Jan 80 Grievance Report.

MSPB refused to consider the facts and thus refused to apply the law. The fact of my ability to work was obvious and apparent from the first appeal. MSPB had absolutely no medical evidence to the contrary. The extreme errors by MSPB are not sheltered by res judicata, especially when/since no final decision by MSPB on the case has been issued.

All examining physicians agree I am able to work, and that there is a hazard. Dr. Holt has no medical basis for disagreement. Considering the impairment of judgement that smoking "causes," the analogous principle is to exclude such person from judgement as "has a direct, personal, substantial . . . interest in reaching a conclusion against" me, Tumey v. Ohio, 273 US 510 at 523 (1927). The symptom "craving for tobacco" makes any mere "pecuniary" interest a dwarf by contrast.

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The "cannot" claim is false. Not even MSPB sustained it. The reason chosen by the installation to defend its action was not accepted. That should have settled the matter; a decision informing the agency to restore my sick leave should have been issued. That would have motivated the agency to begin rule enforcement, the prerequisite to "reasonable accommodation." The installation does not even try to pretend that the environment is not endangering, discomforting, and/or unreasonably annoying. That fact is simply taken for granted. Instead of halting such under AR 1-8, the installation simply wants MSPB aid in evading the AR 1-8 guidance. The installation does not want to halt the endangering; it wants to charge sick leave because of the endangering.

Reliance on the medical evidence that I need an environment that is not endangering, is reasoning in a circle, when used to justify sick leave. Suppose a doctor advised a black person against returning to a voting place where KKK thugs would beat up attempted black voters. Would any rational person dare to hallucinate, nay, intentionally lie, that he "was not ready, willing and able to" vote. Would not the rational response be to control the KKK, by whatever means necessary? What about calling the police? mobilizing the state national guard? sending in the FBI? sending in federal troops? whatever? It's been done. It is no "undue hardship." No rational person would think the doctor repealed the right to vote. No rational person should think my doctor has repealed the right to work in safe conditions. Considering the Army's long problem with smoking, documented as long ago as in the Austin v. Tennessee case, the installation's disregard for the endangering, discomforting, and unreasonably annoying cause aspects is a tragic symptom and confirmation of the fact that smoking "causes insanity." Indeed, as Ellen Goodman said in Newsday, 9 June 1981, " . . . proves what we already know: Anyone who smokes is nuts." If the 100% view is right, smoker mental illness is more widespread than merely "obviously widespread."

Ockham's razor is instructive. Claims or assumptions such as MSPB asserted to somehow justify endangering me, are inappropriate since they were multiplied beyond necessity, and indeed beyond the evidence of record. Why do smokers endanger? Why does the installation refuse to control endangerment? Why did management decide to discipline me for demanding rule enforcement? The answer: "Anyone who smokes is nuts." That is a full and sufficient answer. That answer does not multiply explanations beyond the necessary number. Any others are details or elaborations or fabrications or whatever.

TACOM-R 600-5, Chapter 27, para. 27-7c., cites an "identification" requirement on "those subordinates who demonstrate evidence of having an alcoholic or drug problem." Has management applied Ockham's razor in identifying mentally disordered smokers? Has it been applied under FPM Suppl. 752-1, S1-6d(3) re smokers as harmful to themselves or others? Using Ockham's razor would avoid the remotest "undue hardship" in suspending or firing mentally ill smokers, by resolving the question of having a psychiatric examination for each smoker, to identify the "obviously widespread" number of installation smokers with mental problems. When "anyone who smokes is nuts," Mr. Wertheim's stated concern is obviated. (Of course, even normal, standard personnel control techniques are not a hardship, and certainly not an "undue" one. Otherwise they would not be used by personnel officials and management.) This will also resolve the "difficulty concentrating" problem of TACOM and MSPB failure to observe that there is no rational nexus between (a) being ready, willing and able to work, and (b) medical guidance to avoid a hazard. There is no rational nexus between medical advice to avoid a KKK thug mob at a polling place, and being ready, willing and able to vote. Let's resolve the "difficulty concentrating" on reality.

MESC v. MSPB: my condition is the same. The difference is that Michigan is willing to honor the facts; MSPB is not.

MSPB intentionally fabricated (or hallucinated) non-medical reasons for pretending what it did. The honest thing to do would be to make the phony, retroactive allegations an "advance notice" of the adverse action that is involved, cancel the current agency conduct, and let me respond to the false MSPB claims, so the case can go through channels properly. MSPB intentionally strayed from the reasons the installation admitted in writing. If the installation agrees that those are the reasons, let it say so. Let it admit that it is mad about what I said in my grievance.

The burden of having to respond to different and contradictory reasons at the highest levels of the appeal process is clearly due exclusively to government misconduct. MSPB obviously did not find the agency reason(s) as alleged supportable. Otherwise, it would have supported them and stopped writing, and not have beat around the bush.

An intellectually honest MSPB decision would have said: the installation claims it "cannot" ban smoking. That claim is contrary to its own Grievance Report it says it accepted. Thus, that claim is not the reason. Reversed.

If an honest decision wanted to elaborate, it could have added: The record shows the installation is making the same claims about authority and studies as its own examiner has already rejected. Such claims are prima facie evidence the 25 Jan 80 Grievance Report has not been implemented. Reversed.

Any additional elaboration would need only to refer to 5 CFR 1201.56(b).

Under the circumstances, a professional decision at this point should include:

There is evidence that MSPB fabricated information, or engaged in ex parte communication. The decisions of 18 Jun 81 and before disregard cause and effect. They disregard the events before 17 Mar 80 and disregard the 25 Jan 80 Grievance Report. The 18 Jun 81 document contains internal inconsistencies and uses the wrong standards for assessing compliance and action to be taken. It contains reprisal based on the employee's freedom of expression to secure rule enforcement. It ignores the non-unique aspects. Etc.

Like the Shimp Court order, the new and corrected decision should order the installation to provide safe working conditions, and should cite specific ways of achieving the "unqualified and absolute" duty. A start would be to order the installation to do what MSPB pretended on 18 Jun 81 has already occurred. (It should also be noted that compliance was due in 1977. Poisoning people has cumulative effects; and those effects must be provided for, to "make whole" the situation.)

Examples for providing for the total situation would include: Guidance to (1) provide sane working conditions by identifying and rehabilitating or controlling mentally disordered employees; (2) provide an environment that does not discomfort or unreasonably annoy; (3) provide sober working conditions; (4) provide lawful working conditions by identifying each falsification, and referring the perpetrator to the Department of Justice; and control (5+) discourtesy, littering, loafing, inefficiency, disregard of time limits, etc.

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MESC understands that I am not "not ready, willing and able to work." Putting a person on sick leave in advance does not come within those criteria. (So MESC authorized unemployment compensation beginning in January 1981, after management had exhausted my sick leave account unlawfully for its personal reasons.)

It is a certainty that management placed me on involuntary sick leave in advance. How is that fact known with "certainty?" It is easy to answer that question. Management told me so!

Of course, that fact is obvious from the record. However, MSPB is not interested in the facts, on or off the record. It is that disinterest which explains the refusal of a hearing contrary to 5 CFR 1201.24(c). It is that refusal which causes the petition to EEOC. A proper decision by Mr. Baumgaertner would have resolved the matter by May 1980 at the latest.

MSPB disinterest in an accurate decision is further evidenced by its disregard of the events prior to 17 March 1980, by its use of irrelevant and inappropriate criteria, by its disregard of the 25 Jan 80 USACARA grievance report, by its use of the amateurish legal opinion of the installation physician, etc. The MSPB attitude is evident in its disregard of the 25 Aug 80 and 22 Sep 80 appeals which are not even referenced in the 18 Jun 81 bill of attainder. The decision also does not reflect concern for the information in my 25 Aug 80 and 29 Oct 80 motions and in my 5 Nov 80, 1 Dec 80, 2 Jan 81, 9 Jan 81, 4 Feb 81, and 20 Apr 81 letters. MSPB has clearly treated with derision the public domain information confirming that I am not unique, and the type of environment routinely needed for protection from endangerment, discomfort, and unreasonable annoyance. "Can a court be blind to what must be necessarily known to every intelligent person. . . ?"—Yick Wo v. Hopkins, 118 US 356 (1886).

The question is, can MSPB not know what every intelligent person knows?

Dr. Matthew Woods' 1899 JAMA information is illuminating. Smoking is "a cause of mental decay" and "obliteration of that faculty that enables man to recognize the rights of others." Can a person really not know what every intelligent person knows? Well, smoking "causes insanity." "It often leads to drink." It "stupefies the moral sense." Dr. Woods also noted that "'Every educated man ought to know the best things.'"

For the sake of discussion, let us theorize that nobody at MSPB smokes. The question arises, is it prudent to copy somebody else's symptoms into your own output? Is it professional? What impression is created?

Doctors are not allowed to ignore evidence, disregard test results, or serve as pushers or rubber stamps. Appeals officials have to meet standards of performance also. Does MSPB think it is exempt from principles others have to obey?

Others are expected to be able to comprehend cause and effect principles. Others are expected to understand and apply regulations in accordance with their purpose. Lay employees can be disciplined when they make erroneous snap decisions. Does MSPB think it is exempt when it errs after long premeditation?

It is becoming apparent that installation and MSPB personnel do have something to hide. Why not have a hearing? Since MSPB disregards the evidence anyway, MSPB could disregard the transcript too, couldn't it? Of course. So what is there to hide? The State of Michigan unemployment compensation commission held a hearing. Since the federal government pretends I am unable to work, I served a subpena on Dr. Holt; if he has nothing to hide, he would certainly show up! But he didn't. Mr. Hoover and Ms. Bacon submitted written statements that tried to divert attention from the real issue, just as MSPB's 18 June 1981 shameless allegations beat around the bush. If Mr. Hoover and Ms. Bacon had anything that they honestly thought would confirm my inability to work, certainly they would come to the unemployment case hearing! I tried to serve a subpena on Mr. Braun, but could not find him, when I was on-post serving the various subpenas. I did succeed in serving Ms. Averhart. But did any of these people who claim I am unable to work show up?

What does the installation so much want to conceal? I attended the hearing. The appropriate evidence including the statements by Mr. Hoover and Ms. Bacon was in the record. The hearing officer asked me questions. He displayed alertness and competence based on an objective search for truth. I testified and answered the questions he raised. The retired personnel official (Mrs. Cochran, a smoker) to whose testimony the installation objected by letter came. She was the installation supervisor of management-employee relations during the entire period May 1979 through December 1980, including since 17 March 1980. She provided the pertinent evidence based on her years of experience, including in leave administration.

The hearing was 20 July. Michigan has much unemployment and many applicants. It set an example of timeliness that MSPB officials obviously care nothing about. Perhaps the standard of competence for Michigan examiners requires ability to grasp <u>main points</u> and <u>details</u> and draw <u>inferences</u> in a timely manner. (As a personnel specialist, I set great store on standards of performance; that helps explain why I repeatedly allude to such standards.) The Michigan decision was issued 30 July. It was in my favor. The installation request for rehearing was denied 2 Sep 81. The installation has filed another appeal!

Michigan took 10 days to decide. On a safety matter, 24 hours would be enough. But compared to the MSPB behavior, Michigan sets a fine example. If Mr. Baumgaertner had been willing to do his job and conduct a hearing, this case could have been settled by May 1980. Then the installation could be the one filing the appeal. Integrity is evidently the difference between who is the appellant and who is the respondent in some cases. (I did not used to realize that.) MSPB standards of performance must be defective if they allow presiding officials to make decisions without "some analysis of the merits of the agency action" or personal behavior purporting to be agency action, or if they permit decisions without allowing "the merits" to be included in the record. With proper standards of performance, each of those <u>two</u> (2) aspects would be taken care of before issuance of a decision.

In the ICD-9-CM, "tobacco use disorder" is listed between "alcohol abuse" and such aspects as "cocaine abuse," "opioid abuse," and illuminating category of "hallucinogen abuse." The latter includes "'bad trips'" and "LSD reaction." This raises questions: Are smoker hallucinations psychedelic? While an "LSD reaction" might be once in a lifetime, are smokers' minds messed up at an equivalent degree of severity <u>every day</u>? If so, such a serious form of insanity would help explain the idea that federal employees can disable a co-worker for over a year with impunity!! Are MSPB decisions "bad trips"? (That might be extenuating.)

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The Supreme Court upholds the right to work in many ways in many cases under more than one constitutional and legal basis. It has even done so under the clauses against bills of attainder and against ex post facto laws. These principles are noteworthy considering the MSPB difficulty concentrating on the installation case as made by the agency. In its disdain for the 25 Jan 80 Grievance Report guidance, and in its effort to sustain Dr. Holt's unsupported and unsupportable legal opinions, MSPB used other reasons than those cited by installation officials. Installation officials are well aware that basing their actions against me due to my grievance would be reprisal for my grievance. Management refuses to confirm that the MSPB allegations of the reasons for my absence are true; as recently as 17 Sep 81, Mr. Hoover does not use even a single one of the 18 June 1981 reasons as the basis for my absence.

When MSPB fabricates (or hallucinates) that 1979 grievance information renders a person unfit for duty a year or two later (inconsistently with agency claims), the bill of attainder and ex post facto principles are seen as a wise control mechanism against "overbearing" government officials. When allegations are fabricated years after the fact, an intolerable burden is placed on the victim of such fabrication. Since I had no way of knowing that MSPB would fabricate different reasons than used by the installation, I could not defend against them in my appeals to MSPB. (It is of course impossible to foresee the content of hallucinations, e.g., how many snakes a victim of delirium tremens will hallucinate; or that a division-wide ban on smoking would be pretended. It is grossly unfair to expect a party to a case to anticipate and defend against non-existent matters, whatever their source--falsification, alcoholism, drug abuse, mental disorder, incompetence, or whatever.)

Whatever the source for retroactive claims, they are unfair. If MSPB were to allege that its 18 June 1981 brief on behalf of the agency were somehow based on law, its retroactive aspects are unconstitutional. (They certainly run afoul of the FPM regulatory guidance that employees be advised of the reasons and given opportunity to reply--in advance, not years after the fact.) But on just the constitutional aspect alone, retroactivity is unacceptable in America. See Constitution, Article I, Section 9, and Ex parte Garland, 4 Wall. 333 (1867). In Garland, the Supreme Court ruled on the right to work in a noteworthy manner. The Court noted that punishing people for past acts not defined as illegal at the time they were committed is improper. (The requests for law enforcement in my 1979 grievance were not illegal at that time; they are not now illegal; it is impossible for requests for law enforcement to be illegal!!) The Court ruled that the governmental action "operates as a legislative decree of perpetual exclusion." (The 18 Jun 81 MSPB argumentative brief excludes me from working perpetually as it does not instruct reasonable accommodation of handicap by enforcement of safety and other rules.) The Court affirmed that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct." (The MSPB decision clearly affirms punishment for my exercising the right to file a grievance. It is clear that a reason why MSPB refused to examine the evidence for reprisal is that MSPB had decided on conducting reprisal of its own! Of course, the reasons by MSPB may be based on ex parte information obtained from agency personnel, or simply on realistic understanding, that the reasons are what local personnel had in mind, though they pretend otherwise.)

Denying a federal employee pay because of past acts is unconstitutional, as confirmed in U.S. v. Lovett, 328 US 303 at 315 (1946), wherein the Supreme Court ruled that "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." Both nonsmokers and asthmatics are a "group" who may want protection from endangerment, discomfort, and unreasonable annoyance under AR 1-8.

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There is no right to smoke on others. The right not to have the body touched is one of the oldest and most basic of rights. The Army expressly sets an "unqualified and absolute" ban on such touching that does endanger, discomfort, or unreasonably annoy. The mere existence of the regulation confirms employer authority to ban all smoking, and that it is not an "undue hardship." Point by point, if MSPB were right in referring to a closed grievance as basis for placing me on sick leave, MSPB should have remanded the case for specific point by point testimony on each item. It should have required the installation to prove "undue hardship" instead of acting on an empty record and making fake and absurd claims denouncing normal techniques that any personnel specialist has undoubtedly seen used time and again.

Austin v. Tennessee makes clear Army problems with smoking that were public domain knowledge. Smoking is smoking, involuntary or otherwise. Both involve exposure to poisons and particulates. Indeed, of all people, MSPB ought to be familiar with personnel rules. There is "No cause because no change in circumstances" as cited in FPM Suppl. 752-1, S3-2b(1). The harm from smoking has been known for centuries, at least since 1642. The installation has known since 1938 the guidance against sending people "elsewhere," the principle against "relocating" as rejected in the Grievance Report. Harm from tobacco is nothing new; AR 1-8 clearly contemplates such, and forbids it. The cited FPM Suppl. is a bar to the installation action; MSPB knows it. MSPB is quite willing to look up rules and cases sua sponte to support its pretense of impartiality. Why is MSPB so one-sided?

My sick leave record was exemplary. A sick leave warning letter is not even issued under TACOM-R 600-5, Chap. 14, except when 40 or more hours of unexplained sick leave occurs within a six month period. Up to 17 Mar 80, I had not used half that much in my entire career. Indeed, I had used none until management worsened the conditions. Moreover, when I returned to duty 19 Mar 80, the normal guidance on merely one's word was all that was required, assuming the employee had been incapacitated during the absence, which I was not. See para. 14-15. Ms. Averhart's pretense that day to the contrary reflects disregard of reality. Sick leave is not allowed except "only for specified purposes," none of which relate to declaring a person incapacitated in advance, especially not due to endangerment resulting from smoking. Such is not one of the "specified purposes." MSPB ignores the one year rule for the Command; the disability retirement decision; the purposes guidance; AR 1-8; etc. How many rules does MSPB intend to unlawfully repeal? Is there any limit? If so, what is the limit?

When regulations such as the FPM Suppl. or qualification standards want to declare people unacceptable for employment, they know how to do so. See the examples in FPM Suppl 752-1, S1-3a(5)(f), on "grand mal seizures" and S1-6d(3) on "strong homicidal tendencies." AR 1-8 recognizes the reality that people may often be sensitive to tobacco smoke. If it intended that such be separated, it would have said so. It does not. Instead, it contemplates enforcement controls on smoking. Defiant smokers are not cited as immune from disciplinary action when causing safety hazards or endangering people. People are to be protected like "property." By analogy, if I were a gas pump, management would protect me. If I were a gas truck moving around on-post, management would protect me. There would be absolutely no fabrications and/or hallucinations of how much an "undue hardhip" it is to protect the pump or truck. Gas is not as mild in its reaction as I have been; it would simply explode. I merely file requests for protection, in reaction to management-caused incidents.

The smoker death rate is discussed in the Transactions of the Society of Actuaries, Vol. XXXII, 1980, at pages 185-261. The Table 9 at p. 200 cites smoker mortality rates for various causes of death. The smoker death rate from "Mental disorders and diseases of the central nervous system" is 2.4 that of nonsmokers. Suicide is 9.0 higher; deaths from motor vehicle accidents, 2.6 higher; and being killed ("homicide") 2.2 higher. The vicious behavior and vile mannerisms of smokers apparently results in more than just grievances about smokers. "The lunatic must bear the loss occasioned by his torts, as he bears his other misfortunes," Baryiski v. Paul, 38 Mich App 614 at 616 (1972). Homicide against out-of-control smokers is evidently just another "loss" that some "lunatic" smokers "must bear." Since smoker mental problems are "obviously widespread" with "irritability" being a symptom, the higher homicide rate for smokers is reasonably foreseeable as another "loss" that their pushers impose by the results.

Dr. Tennant notes that employers "who don't want to have alcoholics working for them should get of smokers." It is also clear from the evidence that employers who don't want insane, suicidal, accident-prone, alcoholics should also get rid of smokers. It may be that MSPB wants insane, suicidal, accident-prone alcoholics on its rolls; but it is official Army policy that we in the Army want to set a good example. To secure Army goals, it is only needed that the local installation begin to comply with its stated objectives. A government is responsible to honor its own "declared goals" and "articulated goals" and not spite them, Stanley v. Illinois, 405 US 645 (1972). The government is to honor what it has "itself defined," American Textile Mfrs. Inst. v. Donovan, 69 L Ed 2d 185 (1981). The local TACOM-R 600-5, Chapter 27, covers both "Alcohol and Drug Abuse." Paragraph 27-3e defines "Drug" as "Any substance which by its nature alters the structure or function in the living organism." MSPB has thus far even refused to consider the facts in the case; without considering the facts, it is impossible to apply the law. Allegations of res judicata are simply premature by far.

What is stated Command policy on alcoholics and addicts? Paragraph 27-6 says that "Alcoholism, problem drinking, mis-use or abuse of drugs is an illness and should be treated as such." MSPB refuses to apply the rule. Smoking that endangers, discomforts, and unreasonably annoys reflects multiple mental disorder symptoms such as "craving for tobacco," "difficulty concentrating" on rules, and "anxiety" and/or "irritability" at the possibility of being controlled. Mentally ill smokers have "an illness and should be treated as such." MSPB refuses. Such mentally ill alcoholics and addicts "will be offered appropriate assistance" for rehabilitation, not for continuing to endanger people to the point of sick leave. Does MSPB comprehend this detail? If so, why isn't it enforced, or even directed to be? If alcoholic or addicted smokers refuse treatment, "appropriate disciplinary action will be taken," says the local policy. It does not say to put co-workers of alcoholic or addicted smokers on sick leave. The local regulation comprehends cause and effect. Does MSPB?

Paragraph 27-7 indicates that even "supervision" may have such problems, and instructs "middle management and staff management" to be "responsible for the identification of and appropriate action taken against those subordinates." My 25 Aug 80 motion asked for identification of mentally ill smokers. Why did MSPB ignore the motion? Why doesn't Dr. Holt identify mentally ill smokers? Why doesn't the personnel office or the legal office ask that such identification occur? What are they afraid of? What is MSPB afraid of? Do they fear the reality that the problem is indeed "obviously widespread" and that some of them will be implicated? The hearing will provide answers.

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The question arises as to why MSPB has not retracted the false statements in the 18 Jun 81 bill of attainder. The installation says it "cannot" ban smoking as has been its position all along, confirming that claims of "acceptance" of the 25 Jan 80 grievance report are shams. Yet Mr. Manrose noticed Mr. Wertheim's claims of smoking bans. So why no retraction? The penalty for falsification under 18 USC 1001 involves 5 years in prison. That penalty is so severe. If MSPB admitted its errors, that would reflect badly on itself. The risk of such a severe penalty is so great MSPB clearly prefers the Nixon approach of stonewalling, of toughing it out. The humiliation of admitting error is what has precluded retraction.

Mr. Shirock thought he could get away with his deceptive claims also. Note his 9 Sep 80 affidavit. It was undoubtedly a big joke for him to pretend relevancy of OSHA standards in the face of the same Examiner as had already rejected his claim! It's a big joke to pretend "random" TLV studies are relevant, when he and Mr. Hoover and others are aware that, even if TLV's were relevant, such studies are unprofessional and incompetent and arguably false under the circumstances. As Mr. Hoover confessed to OWCP 19 Aug 80, "No information is available on the fumes to which Mr. Pletten may have been exposed." But with the possibility of prison hanging over Mr. Shirock's head, he is backpedaling. His 2 Nov 81 notice to the personnel office carefully limits his claims of safety to the four "contaminants surveyed for in the areas surveyed." He no longer pretends deceptively that TLV's relate to tobacco smoke contamination, but only for "overall quality of the air," per his 18 Nov 81 notice. Overall, an industrial complex may be safe; but that does not mean there aren't any broken windows, backed up sewers, protruding telephone plugs, electrical shorts, dangerous animals, etc. Under pressure and the potential for criminal prosecution, Mr. Shirock is edging towards the truth. With MSPB power to compel him to attend a hearing, he'll likely admit what he clearly knows, TLV's are not relevant.

Mr. Shirock vs. Mr. Wertheim. Of course, Mr. Wertheim has the "full equivalence of knowledge" of the false statements in his 18 Jun 81 brief for installation personal behavior. At the hearing, the question will be asked, what do local officials think of Mr. Wertheim for believing them? Are they applying the notorious principle, there's a sucker born every minute? At the hearing, witnesses will be asked to judge documents for their grasp of reality. A document to be assessed that way will include the 18 Jun 81 claims. Dr. Holt is so sharp, he can judge whether a person needs psychiatric help just by reading papers without ever so much as a mini-qualm. His assessment of Mr. Wertheim based on Mr. Wertheim's claims will be most illuminating about both of them.

Dr. Holt vs. Mr. Hoover. Mr. Hoover keeps claiming no ban on smoking has happened. He denies a ban in the Personnel Office. He works there. Is he hallucinating that there is no ban when there really is one--Mr. Wertheim's claim? Dr. Holt will be asked to indicate his professional answer on whether there is or is not such a health problem involved. And on the use of normal, standard personnel techniques for controlling people, there will be a lot of questions on who has lost his grip on reality. Does the personnel office still use those techniques with other people? How are standard techniques an "undue hardship"? Has MSPB overturned any suspensions or removals of anybody on such grounds? What about re thousands of air traffic controllers? How does that compare to, at most, 2,000 smokers, at TACOM? Would all 2,000 refuse to cooperate? Doesn't management already claim that some do cooperate, and that some smoking is already banned? Does Mr. Wertheim intend to disrupt the President's program for dealing with the air traffic controllers?