This requests action to cause the Department of the Army to recognize that Leroy J. Pletten, Position Classification Specialist, GS-2221-12, was not lawfully removed, hence remains an employee on the rolls. Its Tank-Automotive Command (TACOM), Warren, MI, ousted Mr. Pletten via "decision to terminate" him in 1979-1980. Same was in violation of laws, regulations, and case law. The agency has both refused and obstructed review on merits ever since.

Mr. Pletten's position at TACOM was as a personnel (human resources) specialist, Position Classification Specialist, GS-221-12, and as a Crime Prevention Officer. I had career tenure, thus was entitled to due process.

Pertinent Precedential / Legal References:

36 Comp. Gen. 779	37 Comp Gen 160	38 Comp Gen 203
39 Comp Gen 154	41 Comp Gen 774	56 Comp Gen 732
5 U.S.C. § 552(a)(1)(C)-(D)	5 U.S.C. § 7513.(b)	

Cited references are pertinent (a) laws, and (b) decisions of the Comptroller General. They reflect that federal agencies must act within their jurisdiction, and that a federal employee subjected to forced leave (whether "annual leave," "sick leave," or "leave without pay" [LWOP]) contrary to the rule of law, is subjected to an "adverse action," i.e., is being disciplined, suspended, without agency compliance with federal and constitutional law, regulations, and pertinent judicial precedents – thus is entitled to his/her back pay. When acting outside the rule of law, the agency acts outside its jurisdiction.

The authorities upon which the cited decisions relied confirm that when a federal agency puts an employee on forced leave (whether sick leave, annual leave, or leave without pay (LWOP)), doing so is an adverse action, e.g., a suspension, and must follow constitutional due process and statutory and regulatory adverse action rules, e.g., thirty (30) days advance notice, right to reply, right to have reply considered, and decision prior to taking the personnel action. When this does not occur, the employee is entitled to his/her back pay.

This request for action is based on the circumstances including enforced leave of the aforesaid types. Same were imposed without giving notice, right to reply, right to have reply considered, and without decision having already been summarily made in advance. See pertinent documents:

a. the "Notification of Personnel Action," Standard Form 50 (SF-50) issued by TACOM officially documenting the enforced LWOP

b. TACOM's Regulation 600-5.14-27 through 29 against forced LWOP.

c. TACOM's Reg. 600-5.14-6 against forced annual leave

d. TACOM's Reg. 600-5.14-12 through 16 against forced sick leave

The ouster process occurred in retaliation against Mr. Pletten's having "blown the whistle" on violations/mismanagement including but not limited to the starter drug relating to the money trail financing terrorists. Col. John J. Benacquista, then in charge of Mr. Pletten's situation, admitted the ouster was to pressure Mr. Pletten to stop said whistle blowing. How many countless lives have been lost as a result?

The ouster process involved imposing forced leave, then using each such leave as basis for additional forced leaves, then for removal. Placing an employee on enforced leave violates laws and regulations including its own. Leave (whether annual, sick, or otherwise) must be consensual by both federal-wide and its own regulations. Case law precludes disciplining employee for approved leave. *Bond* v *Vance [Army]*, 117 US App DC 203, 204; 327 F2d 901, 902 (1964); *Washington* v *Dept of Army*, 813 F2d 390, 394 (CA Fed, 1987).

Please grant this request for action for any or all of the following twenty reasons:

1. THE ENFORCED LWOP IS RETROACTIVE.

The SF-50 "Notification," Box 13, cites effective date of 12-14-80 (14 December 1980). Same is a retroactive date, as the SF-50 is dated, *prima facie*, in Box 34, nine months later, i.e., 08-04-81 (4 August 1981).

2. ENFORCED LWOP VIOLATES TACOM'S OWN REGULATION.

TACOM Regulation 600-5.14-27 & 28 & 29, bans enforced LWOP. Note that in para. 14-27, the local regulation definition of LWOP defines it as "at the employee's request." Note that the SF-50 cites no "request" by "the employee," Mr. Pletten.

The next sentence (para. 14-28.a) says, "Supervisors may not direct the use of leave without pay (LWOP)." The LWOP was directed by supervisor, and the SF-50 is signed by a supervisor (Box 34).

Another sentence (para. 14-28.d.) in the TACOM Regulation says

"Leave without pay will be granted only when there is reasonable assurance of return to duty after the absence."

Here, TACOM intended to not return Mr. Pletten to duty, refused Mr. Pletten's requests to return to duty, and continues currently to refuse to return Mr. Pletten to duty.

Please note that the absence, *prima facie*, was not to extend beyond 12-13-1981 (13 December 1981), says the SF-50, Box 12. TACOM refused and refuses to abide by this date, contrary to the words of its own regulation and SF-50, "Notification."

Another sentence in the Regulation, para. 14-29.a.(1) and (a), provides for the employee to request the LWOP. "The employee will address a request in writing to his/her supervisor, containing: (a) Dates of absence required . . . ." Mr. Pletten did not request and was/is *prima facie* opposing said LWOP.

The Regulation, para. 14-29.a.(1)(b), says the employee gives "Reasons for absence." Not having requested, Mr. Pletten gave no "reasons for absence" he was not requesting.

The Regulation, para. 14-29.a.(1)(c), says the employee provides "Assurance that he/she expects to return to work at the expiration of the absence." Mr. Pletten "expected" "to work" without being absent at all!

The Regulation, para. 14-29.a.(2) says "The supervisor will evaluate the request." There was no "request" to "evaluate."

The Regulation, para. 14-29.a.(3) says "The director or office chief concerned will approve or disapprove the request." Again, there was no "request" to "approve or disapprove."

The Regulation, para. 14-28.c. says, "Requests for leave without pay, particularly for extended periods, will be carefully examined to assure that their values offsets administrative costs and operating inconvenience." Absent request, nothing existed to be "examined," "carefully" or otherwise.

The regulation's effort to discourage LWOP by citing the negatives, is repeated in para. 14-29.a(2), "Consideration will be given to examine whether the value of approval affects administrative costs and operating inconvenience." Since Mr. Pletten did not "request," no such "examination" or "consideration" occurred.

The Regulation, para. 14-29.b.(2), says "No absence from duty will exceed one year. This includes absence chargeable to LWOP plus any other leave." The absence is clearly well beyond that "one year" not to "exceed" limit.

The Regulation, para. 14-29.b.(3), further says, "Any exception to the total one-year limitation requires prior approval of the Chief, Civilian Personnel Division." As no leave was requested by Mr.. Pletten, no "prior approval" occurred. This is especially so in view of the retroactivity cited in Issue 1, *supra*.

The regulation goes on and on in this negative vein, clearly taking an anti-LWOP position. More and more aspects could be cited herein. How many violations need be shown?

TACOM provided a copy of this 18 January 1980 regulation in the months following its 1-18-1980 issuance, to EACH and EVERY TACOM supervisor–to forestall, head-off, preempt, preclude, avoid, disallow in advance, precisely this type LWOP!–LWOP it imposed the very same year, starting 14 December 1980 (SF-50, Box 14).

The SF-50, "Notification of Personnel Action," on its face, *prima facie*, violates TACOM Regulation 600-5.14-27 thru 14-29. It is signed by Agnes Smith, a "Supervisory Personnel Clerk," SF-50, Box 34, clearly *prima facie* not by the "Chief, Civilian Personnel Division." Her position is two administrative levels below his.

3. AGENCIES MUST NOT VIOLATE THEIR OWN REGULATIONS.

In addition to the Regulation ban on forced LWOP, TACOM's own Reg. 600-5.14-6 likewise precluded forced annual leave; and Reg. 600-5.14-12 through 16 preclude forced sick leave. Throughout the entirety of the regulation, it clearly establishes that leave of all such types is requested by the employee, not imposed by management. (Forced leave must follow suspension rules).

Federal agencies are not allowed to violate their own regulations. *Service* v *Dulles*, 354 US 363; 77 S Ct 1152; 1 L Ed 2d 1403 (1957); *Watson* v *Dept of the Army*, 162 F Supp 755 (1958); *Vitarelli* v *Seaton*, 359 US 535, 539-40; 79 S Ct 968, 972; 3 L Ed 2d 1012 (1959); *Piccone* v *U.S.*, 186 Ct Cl 752; 407 F2d 866, 871 (1969); and *U.S.* v *Nixon*, 418 US 683, 695-96, 94 S Ct 3090, 3100-02; 41 L Ed 2d 1039 (1974).

> "It is well settled that an agency is bound by the regulations it has promulgated, even though absent such regulations the agency could have exercised its authority to take the same actions on another basis, and that the agency must abide by its regulations as written until it rescinds or amends them."

4. TACOM CITES NO REASON FOR THE ENFORCED LEAVE.

The SF-50, "Notification of Personnel Action," cites NO reason for its issuance. Even assuming TACOM had complied with its own regulation, which it did not, reasons must be supplied to validate, legitimize, justify and support, such a personnel action.

Under Army (and perhaps all federal agencies') practice, reasons are stated in the "Remarks" section, here, Block 30. Note that while the document cites a number of items, e.g., employee DOB, SSN, FEGLI status, etc., no reasons for imposing LWOP are shown.

5. CITING NO REASON FOR A PERSONNEL ACTION IS INVALID AS REASONS MUST BE PROVIDED IN ADVANCE.

A. THE CONSTITUTION MANDATES REASONS (DUE PROCESS).

Reasons are a part of due process of law. Reasons are needed so as to enable an accused to develop a defense to forestall the pending or proposed action. Reasons must therefore be cited in advance of taking action, as a matter of due process, so the adversely affected employee can offer response to attempt to avert the action, with the view that open-minded deciding official(s) can fairly and impartially decide.

The U.S. Constitution requires this. Note this employee right-to-advance-notice case occurring directly under the U.S. Constitution, *Cleveland Bd of Educ* v *Loudermill*, 470 US 532; 105 S Ct 1467; 64 L Ed 2d 494 (1985). The Supreme Court decision establishes that pre-decision advance notice is a constitutional due process right.

The *Loudermill* decision follows and expands prior case law, e.g., *Goldberg* v. *Kelly*, 397 US 254, 264; 90 S Ct. 1011, 1018; 25 L Ed 2d 287 (1970) (there is a better and perhaps dispositive chance of successfully contesting an action **before**, not after, the action is taken); *Boddie* v *Connecticut*, 401 US 371; 91 S Ct 780, 786; 28 L Ed 2d 113 (1971) (due process must occur in advance at the meaningful time, i.e., pre-decision).

Here, the agency, as its own documentation shows, did not do this. Indeed, the agency issued the SF-50 retroactively, clearly without advance notice (see Block 34, 4 August 1981 signature date, vs. Block 13, 14 December 1980, i.e., retroactive).

No advance opportunity for Mr. Pletten to have filed a response in advance to attempt to head this off, had been provided. And the agency has provided no such opportunity since. Agency management has a closed mind, no willingness to listen, nor to comply with the rule of law including due process of law as per law, rules, and precedents.

B. FEDERAL AND CONSTITUTIONAL LAW AND PRECEDENTS MANDATE ADVANCE NOTICE OF REASONS.

Federal law 5 U.S.C. § 7513.(b) and case law pursuant thereto jointly and severally preclude agencies from taking such actions absent reasons cited of record with advance opportunity for employee to respond.

> "(b) An employee against whom an action is proposed is entitled to–
>
> "(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
>
> "(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer . . .
>
> "(4) a written decision and the specific reasons therefor at the earliest practicable date."

The law is clear and self-explanatory in and of itself, *prima facie*. Nonetheless, federal agencies have a pattern of ignoring such basic principles, as precedents reveal. For example:

Reasons cannot be so obscure as to enable the employee only "general denials," *Deak* v *Pace*, 88 US App DC 50, 52; 185 F2d 997, 999 (1950). (This parallels Pletten's case).

Reasons to be adequate must specify not only the incidents but also "names . . . places . . . dates" of the employee's alleged misdeeds and witnesses thereto, *Money* v *Anderson*, 93 US App DC 130, 134; 208 F2d 34, 38 (1953). (In Pletten's case, neither alleged incidents nor any such specificity was cited by the agency).

Reasons cannot be merely conclusory, *Mulligan* v *Andrews*, 93 US App DC 375, 377; 211 F2d 28, 30 (1954). (Here, no reasons are shown in the controlling document of record, the SF-50, "Notification of Personnel Action.")

The above shows bad examples by agencies. Courts have also had agency cases without proper notice having been issued. Here are some good examples:

One case found the reasons were both "lengthy and detailed," to which the employee could respond, *Baughman* v *Green*, 97 US App DC 150; 229 F2d 331 (1956).

Another proper case had "numerous examples of specific errors," vs citing nothing to which employee could respond, *Long* v *Air Force*, 683 F2d 301 (CA 9, 1982).

Another proper case, significantly, at the very same Army base, found reasons stated "item by item," *Mandel* v *Army TACOM*, 509 F2d 1031, 1032 (CA 6) cert den 422 US 1008 (1975). (In Pletten's situation, none were provided, neither generally nor "item by item.")

As the SF-50 of record shows, no reasons were given by the agency. In law, it is well established that when no reasons are given, the action is deemed "arbitrary" and "capricious," *McNutt* v *Hills*, 426 F Supp 990, 1004 (D DC, 1977).

This omission of stating any reasons is clearly deliberate, intended, not done in ignorance. The aforesaid *Mandel* case establishes the agency as knowing how to do "reasons" correctly, in advance, and with specificity. The agency acted willfully contrary to both lines of precedents, both those lines of cases rejecting inadequate reasons, and those citing examples of what proper notices contain in terms of specificity.

C. FEDERAL REG. 5 C.F.R.§ 752 MANDATES NOTICE SPECIFICITY

5 C.F.R.§ 752 in the Code of Federal Regulations implements and details the federal discipline system established by the foregoing law, 5 U.S.C. § 7513.(b). It carries on the Federal Personnel Manual 752-1 material. Again, these many pages of regulatory material – adhering to the federal and constitutional law and your and others' precedent–mandates advance notice and specificity. The length precludes quoting in depth.

The rules are a matter of common knowledge among all federal agency Human Resources staff responsible for leave and discipline matters. Trainees in Human Resources learn this. They are a basic. Nobody who is a professional in the leave and discipline offices don't know them. Reasons with specificity are notoriously mandatory in advance.

Here, TACOM did not provide specificity, neither in advance, nor afterwards on the SF-50 documenting the forced LWOP.

6. CASE LAW PRECLUDES IMPOSED ENFORCED LEAVE.

Despite the foregoing legal mandates, nonetheless a pattern of federal agency disregard occurred, so an additional long line of precedents have had to come into existence. This additional line of precedents verifies and upholds the concept that agencies must follow the rule of law, in terms of due process of law and procedurally, with respect to what has been styled as "enforced leave" (whether such leave has been styled "sick leave," "annual leave," or "leave without pay").

Here TACOM violated with forced leave of all three types, notwithstanding its own regulation to the contrary.

See such cases, e.g., *Hart* v *U.S. Dept of Justice*, 148 Ct Cl 10, 16-17; 284 F2d 2d 682, 686-687 (Ct Cl, 1960); *Smith* v *Dept of Interior*, 9 MSPR 342 (1981); *Heikken* v *D.O.T.*, 18 MSPR 439 (1983); *Van Skiver* v *Postal Service*, 25 MSPR 66 (1984); *Thomas* v *General Services Admin*, 756 F2d 86, 89-90 (CA Fed,1985) cert den 474 US 843; 106 S Ct 129; 88 L Ed 2d 106 (1985); *Woodall* v *FERC*, 28 MSPR 192 (1985); *Mercer* v *Dept. of Health & Human Services*, 772 F2d 856 (CA Fed, 1985); *Passmore* v *DOT, FAA*, 31 MSPR 65 (1986); *Valentine* v *Dept of Transportation*, 31 MSPB 358 (1986); *Pittman* v *Army and MSPB*, 832 F2d 598 (CA Fed, 1987); *Childers* v *Dept of Air Force*, 36 MSPR 486 (1988); *Bivens* v *Dept of Navy*, 38 MSPR 67 (1988); *Brown* v *Dept of Navy*, 49 MSPR 277 (1991), etc.

As stated in the aforesaid *Mercer* v *Dept. of HHS*, 772 F2d 856, at 860: "A person has a better and perhaps dispositive chance of successfully contesting termination of benefits before, not after, the benefits are terminated. See *Goldberg* v. *Kelly*, 397 U.S. 254, 264, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970)."

As case precedents can be the proverbial "tip of the iceberg," there may well be other incidents of enforced leaves being committed by federal agencies against employees, case which did not reach the publication stage in law books of record.

7. NO OTHER REASONS THAN THOSE CITED MAY BE CONSIDERED.

In addition, 5 C.F.R.§ 752.404(f) (which in essence implements constitutional due process) says *inter alia*: "In arriving at its decision, the agency shall not consider any reasons for action other than those specified in the notice of proposed action. . . ."

The mere fact the agency gave no reasons, any it may come up with (if any) now after the fact, are inherently in non-compliance.

When changes in reason(s) become evident, as would be inherent in such a situation, should it occur, reversal and starting anew is to occur. *Shelton* v *EEOC*, 357 F Supp 3, 8 (D. Wash, 1973) affirmed 416 US 976 (1974).

8. WHEN NOTICE IS NOT PROVIDED, THE AGENCY LACKS JURISDICTION TO TAKE THE ACTION, AND THE ACTION IS VOID AND CANNOT BE RATIFIED.

Federal law 5 U.S.C. § 552(a)(1)(C)-(D) bans agencies from adversely affecting persons by actions outside the rule of published law. Others have had actions taken against them canceled when there was action outside the rule of law, e.g., apart from published regulation. See, e.g., *Hotch* v *U.S.*, 212 F2d 280 (1954); *Morton* v *Ruiz*, 415 US 199, 231; 94 S Ct 1055, 1072; 39 L Ed 2d 270 (1974); *W. G. Cosby Transfer & Storage Corp* v *Dept of Army*, 480 F2d 498, 503 (CA 4, 1973) (Army has done this type outside-the-rule-of-law violation before); *Onweiler* v *U.S.*, 432 F Supp 1226, 1229 (D ID, 1977); *Berends* v *Butz*, 357 F Supp 143, 154-158 (D Minn, 1973); *Anderson* v *Butz, 550 F2d 459 (CA 9, 1977); Dean* v *Butz*, 428 F Supp 477, 480 (D HAW, 28 Feb 1977); *St. Elizabeth Hospital* v *U.S.*, 558 F2d 8, 13-14 (CA 9, 1977); *Aiken* v *Obledo*, 442 F Supp 628, 654 (D ED Cal, 1977); *Historic Green Springs, Inc* v *Bergland*, 497 F Supp 839, 854-857 (D ED Va, 1980); *Vigil* v *Andrus*, 667 F2d 931, 936-939 (CA 10, 1982); and *Bowen* v *City of New York*, 476 US 467;106 S Ct 2022; 90 L Ed 2d 462 (1986).

The law and case law is clear, that for jurisdiction to act, federal agencies must act within, not outside of, the rule of law and published regulations.

9. WHEN AN AGENCY ACTS OUTSIDE ITS JURISDICTION, ITS ACTION IS VOID, AND CANNOT BE RATIFIED.

Outside-the-law actions without jurisdiction are "void" and cannot be ratified, as per definition of the legal term "*void*," see *Black's Law Dictionary* (6th ed, 1990), p 1573.

Clearly, in view of the multiplicity of laws and precedents, when no notice is provided, and an agency imposes enforced leave as here, and worse, contrary to its own regulation, "jurisdiction" for the action is clearly lacking.

Federal subject matter jurisdiction presents an issue which [is] raiseable by a party or adjudicator **at any time**. *Enrich* v *Touche Ross & Co.*, 846 F2d 1190 (CA 9, 1988); Fed. R. Civ. P. 12(h)(3).

A challenge to subject matter jurisdiction **may be made at any time**, even after disposition, and even collaterally. Fed.R.Civ.P. 12(h) and 60(b)(4); *Taubman Co* v *Webfeats*, 319 F3d 770, 773 (CA 6, 2003).

The LWOP action shown by the SF-50, "Notification of Personnel Action," is clearly outside agency jurisdiction, is void, and cannot be ratified, as per the aforesaid definition of "*void*," Black's Law Dictionary (6th ed, 1990), p 1573.

10. THE MOTIVE FOR THE FORCED LEAVE WAS PERSONAL.

TACOM subjected Mr. Pletten to the foregoing actions outside the rule of law, as already shown. No reasons, even if official, would suffice to warrant doing that.

But, in fact agency managers verified to Pletten that the ouster, the enforced leaves, was personally motivated on their part. When an action is taken for managers' personal reasons, it is error. Pursuant to the enforced leaves being for personal reasons, no job requirement, no job description, basis for it was cited for it, as the document itself, the SF-50, "Notification," verifies *prima facie* by its not citing any reasons, much less, stated official reasons. Action for personal vs. official reasons is contrary to basic civil service case law, e.g., *Knotts v U.S.*, 128 Ct Cl 489; 121 F Supp 630 (1954).

11. TACOM CONDUCTED NO INVESTIGATION PRIOR TO ACTING.

No investigation was conducted prior to TACOM initiating the enforced leave. In law, the absence of pre-decision investigation is legally unacceptable, *NAACP v Levi*, 418 F Supp 1109, 1114-1117 (D DC, 1976) (not investigating before acting); *Boddie v Connecticut*, 401 US 371; 91 S Ct 780, 786; 28 L Ed 2d 113 (1971) (must be due process in advance at the crucial meaningful time); *Cleveland Bd of Educ* v *Loudermill*, 470 US 532; 105 S Ct 1467; 64 L Ed 2d 494 (1985) (saying likewise). EEOC's position is that an agency failure to adequately develop the record subjects the agency to adverse inference. *Hashimoto* v *Dept of Housing and Urban Development*, EEOC Appeal No. 01A24642 (May 11, 2004).

Here, none of the various employee investigation standards or criteria were met:

(i) neither the seven point private sector criteria of *Grief Bros Coop Corp*, 42 Lab Arb (BNA) 555 (1964) and *Combustion Eng, Inc*, 42 Lab Arb (BNA) 806 (1964),

(ii) nor the twelve point civil service criteria of *Douglas v Veterans Admin*, 5 MSPR 280, 305-306 (1981),

(iii) nor the five point civil service criteria of *Yorkshire v MSPB*, 746 F2d 1454, 1456 (CA Fed, 1984). (The latter case also notes that when contradictions exist in the record, as here, the employee is to be sustained).

12. AGENCY INCONSISTENCY MEANS AN EMPLOYEE IS TO PREVAIL.

In view of the inconsistency (forced LWOP vs ban on forced LWOP), case law shows that the employee is to prevail in the face of agency inconsistency. See the aforesaid *Yorkshire* v *MSPB*, 746 F2d 1454, 1457 n 4-5 (CA Fed, 1984).

13. USING APPROVED LAW AS BASIS FOR DISCIPLINE IS INVALID.

Case law forbids disciplining an employee for approved leave. *Bond* v *Vance [Army]*, 117 US App DC 203, 204; 327 F2d 901, 902 (1964); *Washington* v *Dept of Army*, 813 F2d 390, 394 (CA Fed, 1987).

14. SUCH VIOLATIONS DIVEST FORCED LEAVES OF LEGALITY.

Absent compliance with the rules of law and precedents above-cited, that fact "divests the [forced leave] of legality [so Pletten remains] on the rolls . . . entitled to his pay," so the agency must reinstate him forthwith, says *Sullivan* v *Navy*, 720 F2d 1266, 1274 (CA Fed, 1983). An employee remains on the rolls until proper administrative steps effecting ouster are taken. *Hanifan* v *U.S.*, 173 Ct Cl 1053; 354 F2d 358, 364 (1965).

Note similar general case law, e.g., *New Orleans* v *Texas & P Ry Co*, 171 US 312 (1898), "the obligation is suspended until" (the ouster effort "is suspended until" notice actually is issued, which it has not been as of now some 29 years later), and *Siemering* v *Siemering*, 95 Wis 2d 111, 115; 288 NW2d 881, 883 (Wis App, 1980), the "condition precedent not having been met, the action was never commenced."

Here, the "condition precedent" is notice of charges. Absent same, the ouster "was never commenced." Just as a divorce does not go in effect unless/until done correctly, likewise an ouster does not go into effect unless/until effected properly. The spouse remains married; the employee remains an employee. Here, Mr. Pletten remains likewise an employee "entitled to his pay."

15. THE ACTION STYLED AS "REMOVAL" IS OUTSIDE JURISDICTION.

As an affirmative defense, the agency may argue that it took subsequent action it styled as "removal." In law, a "removal" is defined as "[a] disciplinary separation action, other than for inefficiency or unacceptable performance . . . where the employee is at fault." Federal Personnel Manual Supplement 296-33, Subchapter 35, Glossary, page 35-11.

Any such "employee . . . at fault" reason must be established pursuant to 5 U.S.C. § 7513.(b) via pre-identified (30 days prior) written notice of charges of violating conduct rules or performance standards, citing the rules and/or performance standards involved as allegedly having been violated, citing incidents, dates, witness names, etc., and typically citing prior corrective action (warnings, unsatisfactory ratings, reprimands, suspensions, etc.) having failed to secure improvement in performance and/or conduct.

In rebuttal of such an agency affirmative defense, if any should be forthcoming, it must be noted that

> (a) such action would contradict its own SF-50 citing the forced LWOP as NTE 13 December 1980, Box 12. Re agency inconsistency, the employee is to prevail, *Yorkshire* v *MSPB*, 746 F2d 1454, 1457 n 4-5 (CA Fed, 1984).
>
> (b) the agency cited no such disciplinary reasons. Instead, it alleged "medical disqualification," i.e., not a matter of behavioral "fault." It cited no specifics of same notwithstanding the duty to statement of alleged incidents, dates, witness names, etc., prior corrective action, if any, so as to enable defense by the accused employee, Mr. Pletten.

The omission of citing (b) data thus fails to comply with constitutional due process, 5 U.S.C. § 552(a)(1)(C)-(D) (jurisdiction) and 5 U.S.C. § 7513.(b) (notice), and the pertinent case law pursuant to said due process and statutory mandates as heretofore cited and elaborated.

16. TACOM'S ACTION DOES NOT MEET THE TWO-PRONG TEST.

The Seventh Circuit, in *Young* v *Hampton*, 568 F2d 1253 (CA 7, 1977), established a two-prong test governing review of agency actions adversely affecting government employees. This test is based on 5 U.S.C. § 7513(a) (1976 & Supp. V 1981), which requires that agency action be taken "only for such cause as will promote the efficiency of the service."

An agency must first determine that the employee actually committed the conduct complained of, and second, that removal based on the misconduct will promote the efficiency of the service. *Young*, 568 F.2d at 1257; *D.E.* v. *Dept. of the Navy*, 707 F2d 1049, 1050 (CA 9, 1983). The agency may not rely on a presumption. *D.E.*, 707 at 1052. Evidence on the nexus requirement must be introduced; and conclusionary statements are insufficient. Id. at 1053-54.

TACOM shows nothing meeting either test. It cites and has introduced no evidence of any misconduct on Pletten's part, nor any on how ousting him would promote the efficiency of the federal service. Even if TACOM had tried to show, for example, some illegal conduct on Pletten's part (which it did not), even a criminal conviction does not automatically supply nexus. Instead, a connection to job performance must be demonstrated. *Young*, 568 F.2d at 1262; *Phillips* v. *Bergland*, 586 F.2d 1007, 1011 (CA 4, 1978). TACOM has made no such showings. But it has nonetheless reacted to Pletten with more harshness than with employees accused of crime. With such, they are generally placed on administrative leave during investigation. (With me, there was no investigation either).

17. TACOM FAILED TO CONSIDER RELEVANT FACTORS.

TACOM failed to consider several factors which are relevant in determining the appropriateness of a penalty. See *Weiss* v *United States Postal Service*, 700 F2d 754, 756 (CA 1, 1983); *Douglas* v *Veterans Administration*, MSPB N. AtO75299006 at 31-32 (April 10, 1981). Foremost is the consistency of the penalty imposed with the agency's table of penalties. *Gipson* v *Veterans Administration*, 682 F2d 1004, 1011 (CA DC, 1982); *McLeod* v *Dept of the Army*, 714 F2d 918, 922 (CA 9, 1983).

TACOM conspicuously does not cite any Table of Penalties matter. It certainly does not reference the Tables Pertaining to the Penalties of Various Offenses, CPR 700 (C 14) 751.A, March 2, 1973. Absent TACOM even mentioning what Pletten supposedly violated, what clause(s) it relies on, it has not even begun to develop its case. Even personnel/human resources trainees are taught that the use of the Table of Penalties is a starting point before even beginning writing a notice of discipline.

A. TACOM FAILED TO CONSIDER PLETTEN'S PERFECT DISCIPLINE RECORD.

Mr. Pletten was not an offender at all, much less, an habitual offender. Pletten accordingly has no discipline record at all. Had Pletten been an offender, the agency should have considered whether a lesser penalty may have been sufficient. Cf. *McKowen* v. *Merit Systems Protection Board*, 703 F.2d 14, 17 (CA 1, 1983) (lesser sanctions were ineffective in stopping repeated violations). Here, Pletten committed no violations at all, and TACOM cites none. Wherefore, no penalty at all should have been imposed, much less, the severest. It is known in human resources that even a mere "involuntary transfer seriously disrupts the lives of the employee and his family," *Curran* v. *Dept of Treasury*, 714 F2d 913, 918 (1983). Here, in contrast, TACOM imposed "the most serious sanction an employer can impose," *Tenorio* v *N.L.R.B.*, 680 F2d 598, 602 (CA 9, 1982), notwithstanding the lack of notice of any basis for so doing. Thus impact goes beyond "seriously disrupts" to "destroys."

B. TACOM FAILED TO CONSIDER PLETTEN'S EXCELLENT WORK RECORD.

An agency is to take note of an employee's work record. See *D.E.*, 707 F2d, 1054, *McLeod*, 714 F2d 918, 922. TACOM never alleged performance deficiency. Indeed, Pletten's supervisor's recommendations both before and after the forced leave began are uniformly good. Pletten indeed has a lengthy record of awards for his good work record.

18. TACOM ABUSED ITS DISCRETION.

An agency's choice of penalty is entitled to deference unless the agency abuses its discretion. *Brewer* v. *United States Postal Service*, 647 F2d 1093, 1098; 227 Ct Cl 276 (1981) cert denied 454 US 1144, 102 S Ct 1005, 71 LEd2d 296 (1982). Such abuse occurs when the discipline imposed is harsh and disproportionate in comparison to the misconduct. *Francisco* v. *Campbell*, 625 F2d 266, 269 (CA 9,1980). Here, TACOM has shown no offense at all having been committed by Mr. Pletten. So no penalty at all is authorized.

19. ABSENT PERFORMANCE OR CONDUCT REASONS, TACOM'S ACTIONS AGAINST PLETTEN ARE ARBITRARY AND CAPRICIOUS.

Absent reasons being stated, an agency action is deemed "arbitrary" and "capricious," *McNutt* v *Hills*, 426 F Supp 990, 1004 (D DC, 1977). This is clearly the case with TACOM's actions against Pletten.

20. TACOM IS VIOLATING THE DUTY TO CORRECT ERROR.

In law, "A tortfeasor has a duty to assist his victim. The initial injury creates a duty of aid and the breach of the duty is an independent tort. See Restatement (Second) of Torts, § 322, Comment c (1965)"), *Taylor v Meirick*, 712 F2d 1112, 1117 (CA 7, 1983).

There is precedent for the U.S. government to admit its own error, see, e.g., *U.S.* v *Graham*, 688 F2d 746 (CA 11, 1982) (government via Department of Justice admitting error in view of precedent). Such precedent is not being followed here.

TACOM has a duty to correct its errors and misconduct of violating so many laws, rules, etc., including its own, but refuses, notwithstanding its duty to correct, its duty to aid its victim of the violations, Leroy J. Pletten.

Conclusion and Requested Remedial Actions

The evidence in the file is easily analyzed material. Mr. Pletten had previously served as employee in and supervisor over the responsible personnel / human resources offices issuing such documents. Mr. Pletten thus recognizes the simplicity of same, having himself signed a number of such SF-50 actions for other employees and written regulations. These documents are clear and straight forward: a regulation that bans enforced leave, and an SF-50 "Notification" imposing same in violation thereof.

Wherefore, this requests action be taken pursuant to the rules of law and precedents cited herein, to have the Agency, the Department of the Army, TACOM, comply with the herein cited rules of law and precedents, thus to recognize that Mr. Pletten was not lawfully removed, and that he therefore remains on employee on the rolls.