

UNITED STATES OF AMERICA  
BEFORE THE MERIT SYSTEMS PROTECTION BOARD

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NO. CH07528010099

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LERROY J. PLETTEN,

Petitioner,

v.

DEPARTMENT OF THE ARMY,

Respondent.

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ON PETITION FOR REVIEW OF DECISION OF  
MERIT SYSTEM PROTECTION BOARD'S CHICAGO FIELD OFFICE

---

BRIEF OF  
ACTION ON SMOKING AND HEALTH (ASH)  
AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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PRINCIPAL SECTIONS OF THE UNITED STATES CODE  
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5 U.S.C. §5596(b), which reads in pertinent part as follows:

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination ... is found by appropriate authority under applicable law, rule, regulation, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee --

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect --

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; ...

5 U.S.C. §7203, which reads as follows:

The President may prescribe rules which shall prohibit, as nearly as conditions of good administration warrant, discrimination because of handicapping condition in an Executive agency or in the competitive service with respect to a position the duties of which, in the opinion of the Office of Personnel Management, can be performed efficiently by an individual with a handicapping condition, except that the employment may not endanger the health or safety of the individual or others.

5 U.S.C. §7501, which reads in pertinent part as follows:

For the purpose of this subchapter [5 U.S.C. §§7501, et seq.]

(1) ....

(2) "suspension" means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay ....

5 U.S.C. §7511(a), which reads in pertinent part as follows:

(a) For the purpose of this subchapter —

(1) "employee" means --

(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; ...

5 U.S.C. §7512, which reads in pertinent part as follows:

This subchapter applies to --

(1) ....

(2) a suspension for more than 14 days; ...

5 U.S.C. §7513, which reads in pertinent part as follows:

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(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;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

5 U.S.C. §7702(a), which reads in pertinent part as follows:

(a)(1) Notwithstanding any other provision of law, ...  
in the case of any employee or applicant for employment who --

(A) has been effected by an action which the employee  
or applicant may appeal to the Merit Systems Protection  
Board, and

(B) alleges that a basis for the action was discrimi-  
nation prohibited by --

(i) ....

(ii) ....

(iii) section 501 of the Rehabilitation Act of  
1973 (29 U.S.C. 791),

(iv) ....

(v) any rule, regulation, or policy directive  
prescribed under any provision of law described in  
clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the  
appeal, decide both the issue of discrimination and the  
appealable action in accordance with the Board's appel-  
late procedures under section 7701 of this title and  
this section.

29 U.S.C. §791, which reads, in pertinent part, as follows:

(a) ....

(b) Federal agencies -- Affirmative action program plans.  
Each department, agency, and instrumentality (including the United  
States Postal Service and the Postal Rate Commission) in the execu-  
tive branch shall, [with] one hundred and eighty days after the  
date of enactment of this Act [enacted Sept. 26, 1973], submit to  
the Civil Service Commission and to the Committee an affirmative  
action program plan for the hiring, placement, and advancement of  
handicapped individuals in such department, agency, or instrumen-  
tality. Such plan shall include a description of the extent to  
which and methods whereby the special needs of handicapped employees  
are being met. Such plan shall be updated annually, and shall be  
reviewed annually and approved by the Commission, if the Commission  
determines, after consultation with the Committee, that such plan  
provides sufficient assurances, procedures and commitments to pro-  
vide adequate hiring, placement, and advancement opportunities for  
handicapped individuals.



PRINCIPAL SECTIONS OF THE CODE OF FEDERAL REGULATIONS  
WHICH ARE MENTIONED IN THIS BRIEF

5 C.F.R. §550.802(c), which reads as follows:

(c) An unjustified or unwarranted personnel action means an act of commission (i.e., an action taken under authority granted to an authorized official) or of omission (i.e., nonexercise of proper authority by an authorized official) which it is subsequently determined violated or improperly applied the requirements of a nondiscretionary provision, as defined herein, and thereby resulted in the withdrawal, reduction, or denial of all or any part of the pay, allowances, or differential, as used here, otherwise due an employee. The words "personnel action" include personnel actions and pay actions (alone or in combination).

5 C.F.R. §550.802(d), which reads as follows:

(d) "Nondiscretionary provision" means any provision of law, Executive order, regulation, personnel policy issued by an agency, or collective bargaining agreement that requires an agency to take a prescribed action under stated conditions or criteria.

5 C.F.R. §550.802(e), which reads, in pertinent part,  
as follows:

(e) ... For purposes of this subpart, pay also means annual leave; and sick, home, court, military, and shore leave.

5 C.F.R. §130.401, which reads as follows:

An agency shall grant sick leave to an employee when the employee:

- (a) Receives medical, dental, or optical examination or treatment;
- (b) Is incapacitated for the performance of duties by sickness, injury, or pregnancy and confinement;
- (c) Is required to give care and attendance to a member of his immediate family who is afflicted with a contagious disease; or
- (d) Would jeopardize the health of others by his presence at his post of duty because of exposure to a contagious disease.

5 C.F.R. §1201.3, which reads in pertinent part as follows:

§1201.3 Appellate jurisdiction: Definition and application.

(a) Appellate jurisdiction generally.

The Board has appellate jurisdiction over cases specified in the Act where there have been prior actions within an agency. ...

This appellate jurisdiction includes;

(1) ....

(2) ....

(3) Actions based upon suspension for more than 14 days,

(4) ....

(5) Actions otherwise appealable to the Board involving an allegation of discrimination;

5 C.F.R. §1201.151(a)(2), which reads in pertinent part as follows:

(2) "Prohibited discrimination" as used in this subpart means discrimination prohibited by:

(i) ....

(ii) ....

(iii) Section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791);

....

29 C.F.R. §1613.261, which reads as follows:

(a) Complainants, ... shall be free from ... reprisal at any stage in the presentation and processing of a complaint, including the counseling state under §1613, or any time thereafter.

29 C.F.R. §1613.702, which reads in pertinent part as follows:

(a) "Handicapped person" is defined for this subpart as one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

(b) "Physical or mental impairment" means (1) any physiological disorder or condition, ... affecting one or more of the following body systems: Neurological; musculo-skeletal; special sense organs; ... (2) ....

(c) "Major life activities" means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(d) "Has a record of such an impairment" means has a history of, or has been classified (or misclassified) as having a ... physical impairment that substantially limits one or more major life activities.

(e) "Is regarded as having such an impairment" means (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment, (3) or has none of the impairments defined in (b) of this section but is treated by an employer as having such an impairment.

(f) "Qualified handicapped person" means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others ....

29 C.F.R. §1613.704, which reads in pertinent part as follows:

(a) An agency shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include, but shall not be limited to: (1) .... and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, .... and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.

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## STATEMENT OF THE CASE

This brief is filed by Action on Smoking and Health (ASH) as amicus curiae in support of the Petition of Leroy J. Pletten (Petitioner) for Review of a Decision of the Merit Systems Protection Board's Chicago Field Office (Field Office) in this matter.

Field Office dismissed Petitioner's appeal from an adverse personnel action taken by Petitioner's employer, the Department of the Army (Respondent Army) in placing the Petitioner on involuntary sick leave tantamount to a suspension, on the ground that Field Office did not have jurisdiction to consider the appeal. For the same reason Field Office refused to entertain the Petitioner's allegations that he was, and is, the victim of discrimination on account of his physical handicap -- namely, asthma induced only when Petitioner is exposed to air contaminated by tobacco smoke, which had occurred in his working environment furnished and controlled by Respondent Army.

ASH, a national, nonprofit, scientific, educational, and charitable organization, the goals of which include the protection of the rights of nonsmokers, reduction of the needless toll of smoking, and the education, encouragement and assistance of smokers to discontinue this harmful addiction, moved to file a Brief in this case, because ASH supports the Petitioner's position as a handicapped person who develops asthma when exposed to tobacco-smoke contaminated air in the work place, and who has suffered, and continues to suffer, illegal discrimination on account of his tobacco-smoke induced handicap.

Because of the specialized nature of ASH's interests and activities, this Brief addresses itself substantially only to the arguments that the Merit Systems Protection Board has jurisdiction over the Petition for Review in this case, and that the Petitioner has been, and is, the victim of illegal discrimination because of his tobacco-smoke induced handicap. ASH is not involved in, and has not assessed the merits of, any of the Petitioner's other grievances and complaints against Respondent Army and/or other individuals. While ASH supports Petitioner's claim that the Respondent must make a reasonable accommodation to his handicap, it takes no position as to what specific measures may be necessary to give him effective relief.

The Petitioner is a Position Classification Specialist GS 12 at the United States Army Tank-Automotive Materiel Readiness Command, located at Warren, Michigan. He has been an employee in the Competitive Service for eleven years, and during that period has been regularly promoted, attaining his present grade, GS-221-12, in 1974. Also, the Petitioner was awarded a quality step increase in 1977. Petitioner's promotions and his award reflect the high degree of efficiency and work performance as a government official prior to the onset of his handicap caused by tobacco-smoke induced asthma.

Prior to the incidence of his tobacco-smoke induced asthma (diagnosed in May 1979), Petitioner did not utilize any sick leave in the course of his 11 years in the Federal service -- a circumstance which demonstrates Petitioner's good health, as well as his dedication to the performing of his duties.

In May 1979, Petitioner developed asthma induced by exposure to tobacco-smoke contaminated air, and despite his complaints, no effective measures were taken by Respondent Army to accommodate his handicap.



Petitioner was eventually assigned to an office with incomplete partition walls which left a space between the top of the walls and the ceiling, over which tobacco smoke poured from adjoining areas. The forced-air ventilation system distributed tobacco-smoke contaminated air from other parts of the building. Moreover, Respondent Army declined to order other employees to refrain from smoking in Petitioner's office. Consequently, as a result of Respondent Army's neglect in rectifying the situation, Petitioner's tobacco-smoke induced asthma attacks became more frequent and severe.

On June 28, 1979, Petitioner filed a formal grievance requesting corrective action and on January 25, 1980, the U.S. Army Civilian Appellate Review Agency issued a Report of Findings and Recommendations in Petitioner's favor requesting the initiation of air content studies, and also directing that Respondent Army take further action to provide Petitioner with an immediate work area which is reasonably free of tobacco smoke contamination.

Medical opinions, including those of Francis J. Holt, M.D., a Medical Officer employed by Respondent Army at its Civilian Employee Health Clinic at the Warren installation where the Petitioner is employed, and Jack Solomon, M.D., the Petitioner's personal physician, concur in the view that the Petitioner's asthma attacks result from his exposure to tobacco-smoke contaminated air, and that he requires an environment free of tobacco smoke to prevent such attacks.

Respondent Army failed to implement the Recommendations of the Appellate Review Agency for providing Petitioner with a tobacco smoke free work area and, instead, on or about March 17, 1980, placed Petitioner on involuntary sick leave pending accommodation of his handicap, which action was tantamount to a suspension, despite the facts that (1) Petitioner was not sick, but rather was ready, willing, able and eager to perform his duties in an environment uncontaminated by tobacco smoke, as recommended by the Appellate Review Agency and (2) involuntary sick leave in such circumstances was both illegal and inappropriate.

Petitioner appealed his indefinite suspension to Field Office, which held that the Board did not have jurisdiction to entertain his appeal on the grounds that placement on involuntary sick leave, which Respondent Army alleged was not a disciplinary action, does not constitute a suspension for the purpose of conferring jurisdiction on the Board under 5 C.F.R. §1201.3(a)(3).

Despite the fact that nearly six months have elapsed since Petitioner was placed on involuntary sick leave, while arrangements were to be made for accommodation of his handicap, Respondent Army has reported no progress in this matter, and has not indicated when reasonable accommodation of his handicap will be implemented so that Petitioner may be restored to his gainful occupation.

Moreover, Petitioner has been exhausting, and continues to exhaust his sick leave. If the situation is allowed to continue indefinitely, Petitioner's annual leave may also be exhausted, and Petitioner will be

placed on leave without pay which, in effect, constitutes a termination of his career in the Federal Service. The injustice of this state of affairs is manifest in view of the fact that Petitioner's present situation is due in no way to his fault or to his normal state of health which has been exemplary, as demonstrated by his not having utilized any sick leave in 11 years of Federal Service prior to the onset of his tobacco-smoke induced asthma which has resulted purely from Respondent Army's failure to accommodate his handicap.

In the instant proceeding Petitioner seeks review of Field Office's decision that his placement on involuntary sick leave was not a suspension for disciplinary reasons and that it accordingly lacked jurisdiction to consider the appeal. Petitioner also seeks adjudication of the merits of his claim that he has been subjected to an adverse personnel action tantamount to a suspension, without being afforded the statutory protections to which he is entitled, as a result of which he has suffered detriment in the exhaustion, and continuing exhaustion of his sick leave benefits.

Additionally, Petitioner seeks adjudication of the merits of his allegation that Respondent Army has illegally discriminated against him as a handicapped worker, a subject over which the Board has jurisdiction under 5 C.F.R. §§1201.3(a)(5) and §1201.151(a)(2)(iii). Petitioner further respectfully requests adjudication of his claim that Respondent Army has unlawfully engaged in reprisal against him because of his grievances and complaints relative to his handicap, namely, tobacco-induced asthmatic attacks.

## SUMMARY OF ARGUMENT

Action on Smoking and Health (ASH), as amicus curiae, presents the argument, in support of Leroy J. Pletten, the Petitioner, that the Merit Systems Protection Board's Chicago Field Office (Field Office) erred in holding that it did not have jurisdiction over Petitioner's appeal from the action of his employer (Respondent Army), in placing him on involuntary sick leave.

ASH argues that in the circumstances of this case, Respondent Army's placement of Petitioner on involuntary sick leave was a punitive or disciplinary adverse action which was tantamount to a suspension over which this Board has jurisdiction under the relevant statute (5 U.S.C. §§7511 et seq.) and regulations thereunder. Additionally, Respondent Army's action was illegal in that it suspended Petitioner without observing the statutory procedures prescribed for his protection in such cases.

Moreover, ASH argues that Respondent Army evaded its legal duty to accommodate Petitioner's handicap -- asthma induced by tobacco smoke, and in placing him on sick leave tantamount to a suspension, discriminated against him as a handicapped worker. Finally, ASH contends that Respondent Army's action constituted a reprisal against Petitioner because of his grievances and complaints relative to his handicap.

I. UNDER THE CIRCUMSTANCES OF THIS CASE THE RESPONDENT ARMY'S ACTION IN PLACING THE PETITIONER ON INVOLUNTARY SICK LEAVE WITHOUT OBSERVANCE OF THE PRESCRIBED STATUTORY AND REGULATORY PROCEDURES TO WHICH HE WAS ENTITLED CONSTITUTED AND CONTINUES TO CONSTITUTE ADVERSE ACTION WHICH IS TANTAMOUNT TO A SUSPENSION, AND THE MERIT SYSTEMS PROTECTION BOARD'S CHICAGO FIELD OFFICE ERRED IN HOLDING THAT IT DID NOT HAVE JURISDICTION TO HEAR THE PETITIONER'S APPEAL AGAINST SUCH ACTION.

A. Placement of the Petitioner on involuntary sick leave constituted and continues to constitute adverse action which is tantamount to a suspension.

(1) The Petitioner is a government employee entitled to the protection of the procedures prescribed by 5 U.S.C. §§7511 et. seq.

The Petitioner is an "employee" for the purposes of Subchapter II of the Civil Service Reform Act of 1978, Public Law 95-454 - Oct. 13, 1978, 92 Stat. 1111, which is codified at 5 U.S.C. §§7511 et seq., being "an individual in the competitive service who is not serving a probationary or trial period under an initial appointment," as defined by 5 U.S.C. §7511(a)(1)(A), and having, in fact, completed eleven years of continuous employment in the service, in the course of which he has received regular promotions.

Pursuant to 5 U.S.C. §7513 and regulations prescribed by the Office of Personnel Management, an agency may take an action covered by Subchapter II against an employee "only for such cause as will promote the efficiency of the service," (5 U.S.C. §7513(a)).

An employee against whom such an action is proposed is entitled to the benefit of procedures prescribed by 5 U.S.C. §7513 guaranteeing the employee's rights to (1) at least 30 days' advance written notice 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;

(3) be represented by an attorney or other representative; (4) a written decision and the specific reasons therefor at the earliest practicable date; and (5) an appeal to the Merit Systems Protection Board.

In the instant case, the Respondent Army has not alleged that the action in relation to the Petitioner, in placing him on involuntary sick leave, was taken "for such cause as will promote the efficiency of the service," but had it done so, it would have been obligated to accord the Petitioner the protection of the procedures prescribed by 5 U.S.C. §§7511 et seq.

It is, however, respectfully submitted that the Respondent Army in fact took adverse action against the Petitioner in placing him on involuntary sick leave tantamount to a suspension, and that it did so without observing the procedures prescribed by 5 U.S.C. §7511 et seq. and the regulations made thereunder (5 C.F.R. §§752.301 et seq.).

(2) Placement of an employee in the Petitioner's circumstances on involuntary sick leave is adverse action tantamount to a suspension as appears from consideration of (a) the disciplinary nature of the Respondent Army's adverse action; (b) regulations; (c) case law; and (d) sections of the Federal Personnel Manual upon which the Respondent Army and the Merit Systems Protection Board's Chicago Field Office rely.

(a) The disciplinary nature of the Respondent Army's adverse action.

Among actions to which the procedures in 5 U.S.C. §7513 apply is "a suspension for more than 14 days" (5 U.S.C. §7512(2)), and "suspension" is defined in 5 U.S.C. §7501(2) as "the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay."

The Respondent Army does not deny that in placing the Petitioner on enforced sick leave it has put him "in a temporary status without duties and pay," but it alleges that this does not constitute a "suspension" under 5 U.S.C. §7501(2) because the action was not taken "for disciplinary reasons."

In accordance with general principles of interpretation, it is necessary to give effect to the essential meaning of a statute or regulation, and in the instant use it is submitted that the Respondent Army's action in ordering the Petitioner on involuntary sick leave, and in keeping him in such status, was disciplinary in nature in that (a) it was imposed following a period during which the Petitioner actively pursued a course of intra-agency activity designed to secure his accommodation as a handicapped person - suffering from asthma caused by tobacco smoke - with what may well have been misinterpreted by the Respondent Army to be excessive zeal; (b) the Petitioner's pressure for action to be taken to accommodate his handicap no doubt caused the Respondent Army inconvenience; (c) the Respondent Army may have been embarrassed by a Report of Findings and Recommendations of the U.S. Army Civilian Appellate Review Agency which, in response to a formal grievance filed by the Petitioner, recommended that the Respondent Army take action necessary to accommodate the Petitioner's handicap; (d) the Respondent Army did not implement the Review Agency's recommendations, and in order to punish the Petitioner for the inconvenience caused by his exercise of his statutory rights, the Respondent Army ordered him to go on involuntary sick leave which, as discussed in Part I,A,2(b), *infra*, was

both inapplicable and illegal in the circumstances, instead of following the proper course of placing him on paid leave until the question of accommodating his handicap could be resolved; and (e) the punishment or penalty imposed involved loss of pay, continuing exhaustion of the Petitioner's sick leave, and exhaustion of annual leave if the situation is allowed to continue with the inevitable result that the Petitioner will eventually be in the position of being on leave without pay, in effect, a termination of his services to the Respondent Army. It should also be noted that this is clearly not the ordinary, usual or customary type of sick leave contemplated by the statute and regulations since: (a) Petitioner is not "sick" in any way during his suspension while at home or otherwise away from his duties, and is not "sick" even while on the base performing his duties except when exposed to specific irritants which are in no way necessary for the carrying out of the office functions and may be easily eliminated; (b) the action was taken without Petitioner's request or concurrence and indeed contrary to his wishes; (c) his "sick leave" will in no way help him to recover from his alleged sickness.

Instead of treating the handicapped Petitioner with consideration - as a person suffering from asthma when exposed to tobacco smoke in the workplace - the Respondent Army retaliated against his attempts to obtain accommodation of his handicap by imposing disciplinary action.

It is respectfully submitted that the punitive nature and effect of the Respondent Army's action in this case renders it a "disciplinary" action, and consequently the placement of the Petitioner on



involuntary sick leave under these circumstances is tantamount to a "suspension" which falls within the jurisdiction of the Merit Systems Protection Board under 5 C.F.R. §1201.3(a)(3).

(b) Regulations.

It is clear from the regulations of the Office of Personnel Management that involuntary sick leave may not appropriately be ordered in the Petitioner's circumstances. Under 5 C.F.R. §630.401 an agency shall grant sick leave to an employee when the employee: "(a) receives medical, dental, or optical examination or treatment; (b) is incapacitated for the performance of duties by sickness, injury, or pregnancy and confinement; (c) is required to give care and attendance to a member of his immediate family who is afflicted with a contagious disease; or (d) would jeopardize the health of others by his presence at his post of duty because of exposure to a contagious disease."

The regulation makes no provision for a direction to take sick leave in any other circumstances, and no part of the regulation is applicable in the case of the Petitioner. Subparagraphs (a), (c) and (d) are obviously inapposite in the circumstances, and subparagraph (b) is also irrelevant as the Petitioner was not and is not incapacitated by sickness, other than that caused by Respondent's failure to protect him from the toxic effects of ambient tobacco smoke, but is ready, willing, able and eager to perform his duties provided that Respondent carries out its legal duty to accommodate his handicap.

An agency has no authority to direct involuntary sick leave except, if any, pursuant to the applicable regulatory framework, and it

may not employ sick leave inappropriately as a disciplinary and adverse action, in circumstances in which sick leave is not authorized. It is therefore respectfully submitted that the Respondent Army's action in improperly placing the Petitioner on involuntary sick leave in this case is an adverse action which is tantamount to a suspension.

(c) Case Law.

In addition to the arguments based upon statutory interpretation and governing regulations, there is case law authority to the effect that placement of an individual in the Petitioner's circumstances on involuntary sick leave constitutes an adverse action which is tantamount to a suspension. In United States v. Abbett (1967) 381 F.2d 609, the United States Court of Appeals for the Fifth Circuit affirmed a money judgment for the value of sick and annual leave expended by a government employee while awaiting determination of her involuntary application for civil service disability retirement filed on her behalf by the Veterans Administration. The employee underwent two examinations, physical and psychiatric, at the request of her supervisor, as a result of which she was placed on involuntary sick leave from her civil service job, pending grant of the retirement application. An allowance of disability retirement was later reversed, and following the employee's return to work, the court held that placing the employee in an involuntary leave status pending determination of the application for involuntary retirement constituted a suspension without pay within the purview of the Lloyd - La Follette Act, former 5 U.S.C. §652(a), (now codified at 5 U.S.C. §§7501 et seq.). The court also observed that, although the employee had received compensation during the period of her forced absence from work,

she was deprived of her pay by means of charging the compensation against her accumulated annual and sick leave, adding that the hours of leave which she had been forced to use had been earned in years of government service for her use when she so desired. This benefit was, in the court's opinion, in no way intended to become a device whereby a supervisor could, with impunity, separate an employee from the payroll.

In an analogous case involving annual leave, Hart v. United States (1960, Ct. Cl.) 284 F.2d 682, a government employee was put on involuntary annual leave without providing her with the procedural steps guaranteed by the Lloyd - La Follette Act, and the court held that the employee had been unlawfully suspended and deprived of her pay, although she had received compensation during the period of enforced absence through the device of charging the check against her annual leave account. The court said that the employee had earned this annual leave to be applied for her benefit when and where necessary, no part of this leave was designed to enable her agency superiors to summarily separate her from the payroll with impunity, and added that the fact that the employee continued to accrue sick leave and annual leave during the period of involuntary leave did not change the fact that she was unlawfully suspended and deprived of her pay. She was accordingly entitled to have the expended amount of annual leave credited to her and to recover accordingly.

The same court also noted, with approval, a decision of the Comptroller General, 37 Comp. Gen. 160, which ruled that federal employees placed on enforced leave incident to their contemplated removal are

entitled to credit to annual leave because such action is suspension, and another such decision, 38 Comp. Gen. 203, which is relied upon by the Respondent Army, and which is discussed more fully in Part I,A,(2)(d), *infra*, in which the Comptroller General held that, except in cases where an employee's presence on the job constituted a threat to government property, his co-workers, himself or the public (a situation which the Petitioner contends does not exist in this case) enforced annual leave could be effected only in compliance with the Lloyd - La Follette Act; that is, an immediate relief from duty would be permitted only if the employee were continued in a full pay status during the period necessary to effect a suspension under that Act.

The policy of the former United States Civil Service Commission, Federal Employee Appeals Authority, the predecessor of the Merit Systems Protection Board, as expressed in a decision of that Authority, has also held that placing an employee on leave without his consent when he otherwise was ready, willing, and able to work, constituted the involuntary adverse action of suspension, and that such action would then be subject to the appellate jurisdiction of the Appeals Authority as a suspension action under the provisions of 5 C.F.R. Part 752. Appeal of -, Jan. 12, 1977, PH 752B70091.

In the same decision the Commission stated that in order to establish a period of involuntary leave as tantamount to the adverse action of suspension, the following factual findings must be made first and all must be present to constitute a suspension (1) the employee must have been placed on leave without his consent; (2) the employee must have been ready,

willing and able to work during all, or a part of, the period of enforced leave; and (3) the enforced leave must have been used in a personal disciplinary-type situation.

Since, in the present case, the Petitioner has been placed on leave without his consent, he has been ready, willing and able to work during all of the enforced leave, the enforced leave has been used in a personal, disciplinary-type situation and, additionally, he has been accorded none of the statutory protections under 5 U.S.C. §7513 to which he is entitled, it is respectfully submitted that the Respondent Army's action constituted and continues to constitute an adverse action in the nature of a suspension.

(d) Sections of the Federal Personnel Manual upon which the Respondent Army and the Merit Systems Protection Board's Chicago Field Office rely.

It appears from Subchapter 1-3b of Chapter 751 of the Federal Personnel Manual that in "a personal, disciplinary-type situation, the placing of an employee on leave without his consent constitutes a suspension," and an "agency must observe the appropriate procedures of Part 752 when using enforced leave as a disciplinary action, as part of a disciplinary action, or as a prelude to a possible disciplinary action, such as a pending investigation or injury" - procedures which the agency has failed to follow in this case.

The sections of the Federal Personnel Manual relied upon by the Respondent Army in arguing that its placement of the Petitioner on involuntary sick leave was and is not a suspension - sections which were

also relied upon by the Merit Systems Protection Board's Chicago Field Office when it declined to exercise the Board's jurisdiction - are inapplicable in that they are both inappropriate in the circumstances, and are contradictory inter se.

Federal Personnel Manual, Chapter 751, Subchapter 1-3c

provides that:

In a nondisciplinary situation, when an employee is not "ready, willing, and able to work," he may be placed on annual or sick leave or in a non-duty, non-pay status, as the circumstances and the status of his leave account require, and this action will not be considered a suspension. As long as the enforced absence was not disciplinary in nature, it would not be considered a suspension. For example, an employee who reported to work without his safety equipment would not be ready to work. He could be placed on annual leave or in a non-duty, non-pay status until he reported to work with his safety equipment. As long as the enforced absence was not disciplinary in nature it would not be considered a suspension.

As this provision is applicable only in "a non-disciplinary situation, when the employee is not ready, willing and able to work," it is obviously not in point in either (a) a disciplinary situation or (b) a non-disciplinary situation in which an employee is "ready, willing and able to work." As it is respectfully submitted that the Petitioner has been placed in a disciplinary situation, Subchapter 1-3c is inapplicable. Even if the situation were non-disciplinary, however, Subchapter 1-3c would, nevertheless, be inapplicable in this case as the Petitioner is "ready, willing, and able to work" at his job so long as he is reasonably protected from the adverse effect of toxics in ambient tobacco smoke.

The example contained in Subchapter 1-3c envisages, moreover, a situation in which inability to work arises from the fault of the

employee - failure to report to work with his safety equipment. In the present case, however, difficulties have not arisen from the failure on the part of the Petitioner to be prepared to perform his duties but, as will be discussed in Part III,D, infra, from the failure of the Respondent Army to carry out its legal duty to accommodate the Petitioner's handicap.

Federal Personnel Manual, Chapter 751, Subchapter 1-3a, upon which the Respondent agency and the Board's Chicago Field Office also rely, is expressed to govern emergency "situations involving the need to get the employee off the premises immediately" which "sometimes develop before any sort of disciplinary action has been initiated or even decided upon," and cites a decision of the Comptroller General, 38 Comp. Gen. 203, as illustrating the latitude which agencies have to cope with non-disciplinary situations. Inasmuch as the Petitioner alleges that his agency's action is disciplinary, the cited decision is irrelevant, but, even if the action were non-disciplinary, the decision would not support the agency's contention that its placement of the Respondent on involuntary sick leave did and does not, in the circumstances, constitute an adverse action which is tantamount to a suspension.

In 38 Comp. Gen. 203 (1958) the Comptroller General decided that the Lloyd - La Follette Act, former 5 U.S.C. §652(a), (now codified at 5 U.S.C. §§7501 et seq.) and the regulations made thereunder, former 5 C.F.R. §9.102 (now 5 C.F.R. §§752.301 et seq.) permitted an agency to relieve an employee from duty and charge his absence from work to leave "when the employee's conduct or his physical or mental

condition creates an emergency situation in which his presence at the place of employment constitutes an immediate threat to government property or to the well-being of the employee himself, his fellow workers and the general public." The opinion goes on to state that:

We are of the further opinion that when the immediate emergency shall have been relieved and there has been an opportunity to evaluate the circumstances of the incident, with the result that disciplinary measures (suspension without pay or removal) are decided upon, the procedural steps required by the Lloyd - La Follette Act may follow in due course.

It is clear from the wording of this decision that "emergency situation" action would not be available to the agency in the present case because (1) it was not the Petitioner's conduct or his physical or mental condition which constituted an immediate threat to Government property, or to the well-being of the Petitioner, his fellow workers, or the public, but the situation arose because of the Respondent Army's failure to carry out its duty to accommodate the Petitioner's handicap, as will be discussed in Part III, D, *infra*, and (2) the situation in the present case can hardly be categorized as an "emergency" or an "incident" when it has been protracted for over six months because of the agency's action in continuing the Petitioner's involuntary sick leave.

It may also be noted that the Comptroller General's decision, 38 Comp. Gen. 203, appears to envisage a situation in which the "incident" concerned will give rise to disciplinary measures (suspension without pay or removal) subject to the procedural steps required by the Lloyd - La Follette Act.

The Comptroller General's decision, 38 Comp. Gen. 203, was interpreted by the Court of Claims in Hart v. United States (1960,



Ct. Ct. Cl.) 284 F.2d 682, a case involving involuntary annual leave, to mean that a government employee might be removed pending actual separation only in such cases where his presence on the job constituted a threat to government property, his co-workers, himself or the public - a situation which does not exist in this case. Absent such unusual circumstances, enforced leave could be effected only in compliance with the Lloyd - La Follette Act; that is, an immediate relief from duty would be permitted only if the employee were continued in a full pay status during the period necessary to effect a suspension under Act.

B. The Merit System Protection Board's Chicago Field Office erred in holding that it did not have jurisdiction to hear the Petitioner's appeal against the Respondent Army's adverse action.

Since it is respectfully submitted that the Respondent Army's adverse action in placing the Petitioner on involuntary sick leave, without observing the required statutory procedures, was and is tantamount to a suspension, and there were prior actions within the Respondent Army - the Petitioner having exhausted his intra-agency grievance procedures - the Merit Systems Protection Board had and has appellate jurisdiction under 5 C.F.R. §1201.3(a)(3) conferring jurisdiction over, inter alia, actions "based upon removal, suspension for more than 14 days ---." The Board's Chicago Field Office therefore erred in refusing to exercise such jurisdiction in the Petitioner's case.

Petitioner's position and arguments may perhaps best be understood by comparing his situation with that of workers with other more familiar handicaps to which reasonable accommodations must also be made. Suppose, for example, that Petitioner were a blind person who despite his

handicap could perform all of his required duties. However, to permit him to work in an office environment without the risk of tripping over or bumping into furniture and similar objects, it was necessary that furniture not be moved about without telling him, and that objects, such as boxes, files, etc. not be left on the floor in areas where employees worked. It seems abundantly clear that a reasonable accommodation to the Petitioner's handicap, which the agency is required by statute to make, would be to instruct his fellow employees not to move furniture without advising the Petitioner and not to leave boxes and other items lying where people normally walk.

Suppose, however, that the employer did not take this action, and that fellow employees persisted in moving furniture and leaving boxes in the aisles, thus causing the Petitioner to suffer various injuries. If the employer were now to order the employee not to come to the office and to be placed on involuntary sick leave because of his alleged "sickness," the foolishness of the Respondent's position would become apparent. The blind Petitioner, like the allergic Petitioner in the instant case, is a handicapped person who is entitled to reasonable accommodation to prevent illness or injury to himself. The employer cannot be permitted to require the employee to exhaust his sick leave benefit against his will because of the employer's failure to take reasonable steps to protect the handicapped person.

Similar situations involving persons with other handicaps can easily be imagined. The floors in areas where a person confined to a wheelchair works must be kept reasonably free from substances which

might cause the wheelchair to slip and injure the handicapped person. If fellow workers were chewing tobacco and spitting onto the floor of the work area, or if they left chewing gum or dropped oil onto the floor so as to create a hazard for the handicapped worker, it is inconceivable that a court would sanction sending the handicapped individual home on involuntary sick leave. Likewise, persons who are deaf, persons who must use crutches, and persons with other health problems may require special protection in the office area, but it is the obligation of the employer to provide those protections (provided that they are reasonable) and he cannot avoid it by sending the worker away under one guise or another.

Additionally, as will be discussed in greater detail in Part III,C, *infra*, since the instant matter concerns an action "otherwise appealable to the Board involving an allegation of discrimination," the Board's Chicago Field Office had jurisdiction under 5 C.F.R. §1201.3(a)(5), which it erred in refusing to exercise.

II. THE RESPONDENT ARMY'S PLACEMENT OF THE PETITIONER ON INVOLUNTARY SICK LEAVE TANTAMOUNT TO A SUSPENSION IS AN UNJUSTIFIED OR UNWARRANTED PERSONNEL ACTION UNDER THE BACK PAY ACT (5 U.S.C. §5596).

A. Statutory and regulatory prohibition of an "unjustified or unwarranted personnel action" applies to involuntary sick leave tantamount to a suspension.

It is respectfully submitted that the Respondent Army's action in placing the Petitioner on illegal sick leave which is tantamount to a suspension constitutes "an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances or differentials of the employee" within

the meaning of the Back Pay Act (5 U.S.C. §5596(b)(1), and the regulations made thereunder (5 C.F.R. §§550.801 et seq.).

The Merit Systems Protection Board as an "appropriate authority" under §5596(b)(1) and 5 C.F.R. §550.803(d)(7) is empowered to correct such action if it finds that "the withdrawal, reduction, or denial of all or part of the pay, allowances, or differential due an employee was the clear and direct result of, and would not have occurred, but for the unjustified or unwarranted personnel action." (5 C.F.R. §550.803(a)).

Under the applicable regulation, "pay" means not only the rate of basic pay, but "also means annual leave, and sick, home, court, military and shore leave." (5 C.F.R. §550.802(e)).

In the instant case, the Secretary of the Army exercises the functions of an executive agency for the purpose of 5 U.S.C. §5596(a)(1), the Petitioner is an employee under 5 U.S.C. §5596(b)(1), and it is submitted that the Petitioner is therefore entitled to seek an administrative determination in writing from the Merit Systems Protection Board under 5 C.F.R. §550.803(b) that the Respondent agency, in contravention of 5 C.F.R. §550.803(b), wrongfully (i) took personnel action it was prohibited from taking in placing the Petitioner on involuntary sick leave which was tantamount to a suspension, without observing the procedures required under 5 U.S.C. §7513; and (ii) took personnel action not authorized by law or regulation in placing the Petitioner on sick leave which was unauthorized by either regulation 5 C.F.R. §§630.501 et seq., (see Part I,A,(2),(b), supra), or the Federal

Personnel Manual, Chapter 751, Subchapters 1-3a, 1-3b, and 1-3c (see Part I,A,(2),(d), supra).

The placement of the Petitioner on illegal sick leave being adverse action tantamount to suspension, without observance of the applicable statutory procedures violated or improperly applied the non-discretionary provisions of 5 C.F.R. §§630.401 et seq., and 5 U.S.C. §7513, and were "acts of commission" within the meaning of 5 C.F.R. §550.802.(c), which resulted "in the withdrawal, reduction, or denial of all or any part of the pay --- otherwise due an employee" and constituted "unjustified or unwarranted personnel" actions under 5 C.F.R. §550.802(c).

The Respondent Army's action in placing the Petitioner on involuntary sick leave in circumstances tantamount to a suspension was improper or erroneous on the basis of substantive merit, and also on the basis of procedural defects, therefore coming within the classification of an unjustified or unwarranted personnel action under 5 C.F.R. §550.803(e).

Attention is respectfully drawn to the final sentence in 5 U.S.C. §550.802(c) which defines the words "personnel action" to include personnel actions and pay actions (alone or in combination).

B. Recovery under the Back Pay Act (5 U.S.C. §5596) and predecessor statutes for improper placement on leave.

The Back Pay Act (5 U.S.C. §5596(b)) authorizes retroactive recovery whenever an employee has undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or part of the compensation to which the employee is otherwise entitled.

Jarecki v. United States (1979, CA. 7 Ill.) 590 F.2d 670.

The United States Court of Claims has stated in Morris v. United States (1979, Ct. Cl.) 595 F.2d 591 that the intent of the Back Pay Act (5 U.S.C. §5596) is to restore to government employees, who have been subjected to improper adverse personnel actions, the amount of pay, allowances, differentials, and leave, the employee would have earned if the unjustified or unwarranted personnel action had not occurred.

A decision of the Comptroller General (1977) 56 Comp. Gen. 732, has emphasized that a finding is required that withdrawal, reduction or denial of pay, which by regulatory definition includes "leave," (5 C.F.R. §550.802(c)) would not have occurred but for unwarranted personnel action before any remedy may be applied under the provisions of the Back Pay Act (5 U.S.C. §5596) and regulations made thereunder (5 C.F.R. §660.801 et seq.). As has been discussed in Part II, A, supra, the detriment suffered by the Petitioner in relation to his pay and leave situation in the instant case was and is the direct result of the Respondent Army's unwarranted personnel action in placing the Petitioner on illegal sick leave.

The United States Court of Claims has held that an employee seeking restitution under 5 U.S.C. §5596 must also establish violation of the departmental regulations concerned. Kirschner v. United States 172 Ct. Cl. 526. In the instant case it is respectfully submitted that the Respondent Army has violated the statute guaranteeing the Petitioner procedural rights (5 U.S.C. §7513), the regulations issued thereunder

governing adverse actions (5 C.F.R. §§752.301 et seq.), the regulations governing sick leave (5 C.F.R. §630.401), and has misapplied Chapter 751 of the Federal Personnel Manual entitled "Discipline," (See Part I,A,(2)(d)).

The Petitioner has remained ready, willing, able and eager to return to work, and was therefore not unavailable for performance of his job for any reason other than the Respondent Army's unwarranted personnel action. The Petitioner therefore complied with this prerequisite to restitution which was held to be required by the Sixth Circuit Court of Appeals in Sexton v. Kennedy (1975, CA. 6 Ohio) 523 F.2d 1311, cert. den. 425 U.S. 973, 48 L.Ed.2d 796, 96 S. Ct. 2171, reh. den. 429 U.S. 873 50 L.Ed.2d 156, 97 S. Ct. 192, reh. den. 439 U.S. 1104, 59 L.Ed.2d 66, 99 S. Ct. 886.

A number of court decisions have upheld the right of a government employee, on his restoration to duty, to recover back pay and/or credit for leave used as a result of wrongful placement on leave, under the Back Pay Act (5 U.S.C. §5596), and predecessor legislation.

The United States Court of Claims in Seebach v. United States (1968, 182 Ct. Cl. 353) held that the Government had made a mistake and must bear its lawful consequences where the Government had used up an employee's sick and annual leave, and had then placed her on leave without pay under the mistaken assumption that she was mentally ill. Once the employee was found not to be sick she was entitled to back pay for the periods of enforced leave.

Similarly, in Kleinfelter v. United States (1963, Ct. Cl. 162 Ct. Cl. 88, 318 F.2d 929) the Court of Claims held that a veteran preference eligible employee who was placed on involuntary annual and sick leave during proceedings for involuntary retirement for physical disability was entitled to recover the monetary value of the sick and annual leave which he had been forced to use where the proceedings had been resisted by the employee, and the Civil Service Commission had held that the proceedings were unwarranted, and had reinstated him to his position.

There is also a decision of the Comptroller General under the predecessor legislation (former 5 U.S.C. §652(b)) to the Back Pay Act, to the same effect. Thus, it was decided in 36 Comp. Gen. 779 (1957) that an employee who had competitive civil service status and veterans preference was entitled to back pay for the period during which he had been placed on involuntary annual leave, less the amount received in payment for annual leave and amounts earned through other employment. The employee was also entitled to a recredit of annual leave on his restoration to duty. The employee had written charges preferred against him and was placed on annual leave pending a final decision in his case. By the date of his restoration to duty, because of dismissal of the charges, the employee had taken over 3 months' annual leave and 1 year's leave-without-pay in respect of both of which he was entitled to compensation under former 5 U.S.C. §652(b)(2).

In the instant case it is, accordingly, respectfully, submitted that (1) the Respondent Army's conduct in placing the Petitioner on illegal sick leave tantamount to a suspension constitutes unjustified and unwarranted personnel actions under the Back Pay Act; (2) that the Petitioner is entitled to findings to that effect, and restoration to duty; and (3) the Petitioner is also entitled to reimbursement



for any difference between his pay and his compensation on sick leave, and a recredit of the sick leave which he has been forced to take.

III. THE RESPONDENT ARMY'S ACTION IN PLACING THE PETITIONER ON INVOLUNTARY SICK LEAVE TANTAMOUNT TO A SUSPENSION - WHICH IS AN ADVERSE PERSONNEL ACTION APPEALABLE TO THE MERIT SYSTEMS PROTECTION BOARD - WAS TAKEN IN WHOLE OR IN PART ON THE BASIS OF PROHIBITED DISCRIMINATION IN VIOLATION OF SECTION 501 OF THE REHABILITATION ACT OF 1973 (29 U.S.C. §791) AND THE REGULATIONS (29 C.F.R. §§1613.701 et seq.) MADE PURSUANT TO THAT ACT AND TO 5 U.S.C. §7203 (FORMERLY 5 U.S.C. §7153) PROHIBITING DISCRIMINATION BECAUSE OF A PHYSICAL OR MENTAL HANDICAP.

A. The Merit Systems Protection Board has jurisdiction over the Petitioner's allegation of prohibited discrimination by the Respondent Army on the grounds of the Petitioner's physical handicap, on the basis of which the Petitioner was placed on unlawful sick leave tantamount to a suspension.

The Merit Systems Protection Board has jurisdiction under 5 U.S.C. §7702(a)(1)(A), and 5 C.F.R. §1201.3(a)(5) over actions:

otherwise appealable to the Board involving an allegation of discrimination.

The Board has emphasized in an earlier case involving an allegation of discrimination based on a physical handicap that §7702 is applicable only to those cases where the action to which the allegation of discrimination attaches is appealable, and does not serve to grant jurisdiction to the Board where the action is not appealable. Hadley v. Department of the Army, PH315H99039 (August 12, 1980).

In the instant case, it is respectfully submitted, the Petitioner's allegations come within the jurisdiction of the Board. As has been discussed in Part I,B, supra, the Respondent Army's illegal action in placing the Petitioner on involuntary sick leave tantamount to a suspension is appealable to the Board under 5 C.F.R. §1201.3(a)(3), and the Board therefore has jurisdiction over the Petitioner's allegation that this appealable personnel action was taken, in whole or in part, on the basis of

prohibited discrimination.

In this case the discrimination involved is prohibited by Section 501 of the Rehabilitation Act of 1973, as amended [29 U.S.C. §791]. It is discrimination by the Respondent Army on the grounds of the Petitioner's physical handicap in that as an asthmatic he is unable to work effectively in a tobacco-smoke contaminated environment, and thus comes within the scope and policy of 5 C.F.R. §§1201.151(a)(1) and (2)(iii).

The Board is empowered, pursuant to 5 C.F.R. §1201.151(b), to adjudicate impartially, thoroughly and fairly all issues raised in eligible cases involving allegations of discrimination in the course of an action brought before the Board, and it is respectfully submitted that the Petitioner is entitled to a decision dealing with the merits of his claim of unlawful discrimination on the basis of which the appealable adverse personnel action was and is being taken.

The Petitioner has raised allegations of illegal discrimination in his petitions to the Board, but he is, in any event, permitted to raise allegations of discrimination during the appeals process (5 C.F.R. §1201.151(b)) and to otherwise avail himself of the procedures prescribed by 5 C.F.R. §§1201.151 et seq..

B. The Petitioner is a "handicapped person" within the protection of the regulations (29 C.F.R. §§1613.701 et seq.) made under former 5 U.S.C. §7153 (now codified at 5 U.S.C. §7203) and 29 U.S.C. §791, and is a "qualified handicapped person" under 29 C.F.R. §1613.702(f).

It is respectfully submitted that the Petitioner comes within the definition in 29 C.F.R. §1613.702(a) which states that a "handicapped person" is one who:

(1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

The term "physical ... impairment" is defined, in relevant part, in 29 C.F.R. §1613.702(b) to mean:

(1) Any physiological disorder or condition ... affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs ...

According to 29 C.F.R. §1613.702(c) "major life activities" means, in relevant part:

functions, such as ... breathing ... working

The Petitioner's tobacco-smoke induced asthma attacks constitute a "physical impairment" within the meaning of 29 C.F.R. §1613.702 (a). Such attacks are "physiological disorders," under 29 U.S.C. 1613.702(b)(1), which affect the neurological, musculoskeletal, and special sense organs, and in his case they limit at least two of the major life activities specified in 29 C.F.R. §1613.702(c) - breathing and working.

Additionally, the Petitioner has a record of impairment of the sort referred to in 29 C.F.R. §1613.702(a)(2) beginning on or about December 21, 1979, when he was first sent home from work by the Respondent Army because of an asthma attack induced by tobacco smoke in his working environment, and continuing until he was placed on involuntary indefinite sick leave tantamount to a suspension on or about March 17, 1980.

Also, the Petitioner is obviously "regarded as having such an impairment" for the purposes of 29 C.F.R. §1613.702(a)(3), as such

impairment has allegedly provided the basis for his placement on 11-legal sick leave. It may, however, be noted that according to 29 C.F.R. §1613.702(e)(2), the phrase "is regarded as having such an impairment" may be applied to a physical impairment that substantially limits major life activities only as a result of an employer's attitude to such impairment. This, it is submitted, is the situation in the instant case, since the Petitioner's major life activities, breathing and working, have been limited as a result of the Respondent Army's failure to make reasonable accommodation for his handicap.

Administrative documents support the view that asthma is a "physical impairment," and that the Petitioner is accordingly a "handicapped person" for the purposes of the definition in 29 C.F.R. §1613.702(a). For example, the United States Government's Standard Form 256 (1-77), issued pursuant to the Federal Personnel Manual, Chapter 290, for Self-Identification of Medical Disability classifies under the heading "Other Impairments":

Pulmonary or respiratory disorders (e.g., tuberculosis, emphysema, asthma, etc.) ----- Code 86.

The Petitioner's status as a handicapped person has also been recognized by the issuance of an undated Certificate of Identification as a Handicapper, Certificate Number 58309, by Richard H. Austin, the Secretary of State for the State of Michigan, which accords the Petitioner special parking privileges as provided by Michigan Vehicle Code. The certificate expires February 1, 1984.

It is respectfully submitted that, in view of the foregoing considerations, the Petitioner is a "handicapped person" under 29 C.F.R. §1613.702(a).

The Petitioner is also a "qualified handicapped person" for the purposes of 29 C.F.R. §1613.702(f) which defines, in relevant part, such person as:

A handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others ...

The Petitioner is a handicapped person who "with ... reasonable accommodation" can perform the essential functions of his position. The fact that he has not, in fact, been accorded reasonable accommodation does not affect his status as a "qualified handicapped person."

C. The Petitioner suffered prohibited discrimination on grounds of physical handicap, in violation of 5 U.S.C. §7203 (formerly 5 U.S.C. §7153), 29 U.S.C. §791, and regulations made thereunder (29 C.F.R. §§1613.701 et seq.), on the basis of which appealable personnel action - placement on involuntary sick leave tantamount to a suspension - was taken.

Under 5 U.S.C. §7203 (formerly 5 U.S.C. §7153), Section 501 of the Rehabilitation Act of 1973 (29 U.S.C. §791), and regulations made thereunder (29 C.F.R. §§1613.701 et seq.) discrimination against a qualified handicapped person, because of a physical handicap, is forbidden.

The Merit Systems Protection Board's predecessor, the United States Civil Service Commission's Federal Employee Appeals Authority, promulgated criteria for establishment of a valid case of discrimination because of handicap in a number of decisions. The Authority stated in

Appeal of -, January 16, 1976, that:

In order to establish a valid claim of discrimination because of a physical handicap it is incumbent upon the employee to show that (1) a physical handicap exists, (2) despite the handicap he is ready, willing and able to perform the full range of duties required by his position, and (3) the employing agency prevented him from so performing.

These criteria were restated by the Authority in subsequent decisions including Appeal of Mrs. -, November 1, 1977 and Appeal of -, April 7, 1978.

In the instant case, the Petitioner has established the existence of a physical handicap (see Part III,B, supra), he is ready, willing and able to perform the duties required by his position subject only to the Respondent Army's duty to make reasonable accommodation for his handicap (see Part III,D, infra); and he has been prevented from carrying out his duties by the Respondent Army's failure to make reasonable accommodation and, instead, placing him on illegal, involuntary sick leave tantamount to a suspension.

It is, accordingly, respectfully submitted that the Petitioner has satisfied the criteria necessary to establish a valid claim of discrimination because of physical handicap.

D. The Respondent Army has failed to make reasonable accommodation to the known physical limitations of the Petitioner as a qualified handicapped employee in violation of 29 C.F.R. §§1613.704 et seq.

The Merit Systems Protection Board has held that once an individual has shown that he is a "handicapped person" under 29 C.F.R. 1613.702(a) by virtue of the fact that he "is regarded as having ... an impairment which substantially limits one or more of such person's

major life activities," he is then entitled to "reasonable accommodation" under 29 C.F.R. §1613.704. Lindberg v. U. S. Department of the Navy AT070209069-80-114, March 25, 1980.

In the instant case, the Petitioner is a "qualified handicapped employee" (See Part III, B, supra) and the Respondent Army is, accordingly, under an obligation under 29 C.F.R. §1613.704(a) to make reasonable accommodation to his known physical limitations unless the agency can demonstrate that the accommodation would impose an undue hardship.

As a result of the Petitioner filing a formal grievance on June 28, 1979, complaining about tobacco smoking in his working area which created a hazard to his health, the United States Army Civilian Appellate Review Office issued a Report of Findings and Recommendations on January 25, 1980.

Among the Conclusions contained in that Report were: (A) The smoking of tobacco can be a hazard to health, and the Petitioner had provided medical certification that his health is adversely affected by tobacco smoke; (B) The Petitioner is entitled to a work area reasonably free of contamination. (The Report commented that Management had not provided information which proved that the air in the Petitioner's work area was reasonably free of contamination so as to constitute a healthy environment); (C) Although Department of Army Regulations do not require an absolute ban on smoking in Department of Defense occupied buildings and facilities, the Commander has the authority to ban all smoking or take whatever action is necessary to control smoking in areas

under his jurisdiction, subject to factors such as consideration of union negotiation rights, etc. as appropriate; (D) Although the ventilation system in the building occupied by the Civilian Personnel Division, to which the Petitioner belongs, may provide the recommended minimum of ten cubic feet of fresh air per minute per person, there was no evidence that an analysis of the air content was made to show that the Petitioner's work area was reasonably free of toxic substances such as those resulting from tobacco smoking; and (E) Consideration should be given to the Petitioner's health problem as it may warrant more accommodation (e.g., less smoking or more ventilation) in assuring that his work area is reasonably free of smoke contamination and other toxic substances.

The Report also mentioned that although Department of the Army Regulations A.R. 1-8, permit individuals to smoke in buildings occupied by that Department, such action must not endanger life or property, cause discomfort or unreasonable annoyance to nonsmokers or infringe upon their rights. The Report went on to state that it is clear that the rights of smokers exist only insofar as discomfort or unreasonable annoyance is not caused to nonsmokers, and since "discomfort" is a highly subjective term, whether or not an individual is discomforted by smoke is a personal determination to be made by that individual.

The Report noted that the Petitioner had vehemently declared that he is caused discomfort by smoke, and that he had provided medical certificates verifying that he has asthma and should not be subjected to any smoke.

The Report recommended (A) That the Commander of the United States Army Tank-Automotive Materiel Readiness Command initiate an



air content study of the Petitioner's immediate work area to determine if toxic substances are present in amounts exceeding those in the air outside his building of assignment; (B) That the Commander take further action necessary to provide the Petitioner with an immediate work area which is reasonably free of contamination; and (C) That ventilation in the Respondent's immediate work area be evaluated periodically to assure continuing maintenance of minimal healthful environmental standards.

The Recommendations contained in the Report were accepted by the Respondent Army and by a letter dated 15 February, 1980, the Petitioner was informed by John T. Benacquista, Colonel, GS, Chief of Staff of the United States Army Tank-Automotive Materiel Readiness Command, Warren, Michigan, that air content studies of the Petitioner's work area would be conducted by an Industrial Hygienist, and that after analysis of the data, a determination would be made as to whether the Petitioner's immediate work area constitutes an environment which is reasonably free of contamination.

In the period between January 25, 1980, the date of the Report, and March 17, 1980, the date upon which the Petitioner was placed on illegal enforced sick leave, tantamount to a suspension, the Respondent Army failed to implement the Report's recommendations in the following respects:

(1) It did not provide the Petitioner with an immediate work area which was reasonably free of contamination, but instead placed him in a room with partition walls, with space between the top of the partition and the ceiling, over which tobacco smoke poured from sur-

rounding areas;

(2) It did not prohibit smoking by other employees in, or in the area of, the Petitioner's room;

(3) It did not attempt to provide the Petitioner with a "clean room," described in the Report by Mr. Lang (a consultant who provided data mentioned in the Report) as a room "specially constructed with equipment to filter air electronically," this being, in Mr. Lang's opinion, the only way to completely eliminate smoke and the odor of smoke.

Because of the Respondent Army's failure to implement the Report's recommendation to provide the Petitioner with an immediate work area reasonably free from contamination, the Petitioner suffered repeated, tobacco-smoke induced asthma attacks.

It is respectfully submitted that the Respondent Army illegally discriminated against the Petitioner on the grounds of his handicap, on the basis of which he was wrongfully placed on sick leave tantamount to a suspension, and that thereby the Respondent Army evaded its duty to make reasonable accommodation for the Petitioner's physical limitations.

E. Reasonable accommodation of the Petitioner's physical limitations - asthma induced by tobacco-smoke contaminated air - would not impose an undue hardship on the operation of the Respondent Army's program under C.F.R. §1613.704(a).

(1) Reasonable accommodation generally.

Under 29 C.F.R. §1613.704(a) an agency is required to make reasonable accommodation to the known physical limitations of a qualified handicapped employee unless the agency can demonstrate that the

accommodation would impose an undue hardship on the operation of its program.

In determining whether an accommodation would impose undue hardship on the operation of the agency in question, factors to be considered include (1) the overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and cost of the accommodation. (29 C.F.R. §1613.704(c)).

It may be initially observed that the Petitioner's handicap is not an unusual one in the Civil Service. According to a Statistical Profile of Handicapped Federal Civilian Employees published by the United States Office of Personnel Management, OPM Document - 128-06-6 (February, 1980), Appendix B, P. 23, no less than 12,557 persons with Pulmonary/Respiratory impairment under Handicap Code 86 (including e.g., tuberculosis, emphysema, asthma, etc.) were employed in government service in December, 1978. These represented 0.60% of all employees, and 8.97% of employees reporting a handicap.

Many Federal agencies must therefore be concerned with the question of reasonable accommodation in relation to such handicapped persons, and the Petitioner's request for such accommodation can hardly be considered unusual.

According to the Handbook of Reasonable Accommodation (HRA) prepared recently in the Office of Selective Placement Programs of the Office of Affirmative Employment Programs (U.S. Government Printing Office: 1980 0-318-947) P. 3, although most accommodations need not be costly or adversely affect the operation of an agency program, all alternatives should be explored to determine that the reasonable accommodation proposed is the most effective one for both the employee and the agency.

The HRA specifies types of actions which can be taken in connection with reasonable accommodation, and those include three which could be utilized in the Petitioner's case -- modifying worksites, restructuring jobs and reassigning and retraining employees.

(2) Modifying worksites

As regards modifying worksites, the HRA, P. 5, states that work locations should be reviewed with supervisors, vocational rehabilitation counselors and disabled persons to spot worksite modifications which can be made. Among examples of simple alterations is the provision of "special heating or air conditioning units for persons who are sensitive to environmental temperature."

It is respectfully submitted that the "clean room" unit suggested by the expert witness Lang in the Appellate Review Agency's Report could and should have been provided under the Respondent Army's power to modify worksites to enable handicapped persons to more effectively perform their duties. The HRA observes that the investment involved in such cases

can yield tremendous returns in competent and efficient job performance. It would not, therefore, be capable of adversely affecting the operation of the Respondent Army's program.

Additionally, since the majority of employees are nonsmokers, other employees would benefit, both in comfort and health, from the elimination of ambient tobacco smoke from their working environment, thereby saving the Respondent Army working time and money lost through voluntary sick leave incident to illness caused by pulmonary and respiratory afflictions.

It may be noted that in Shimp v. New Jersey Bell Telephone Co., (1976) 145 N.J. Super. 516; 386 A2d 408, the Superior Court of New Jersey, Chancery Division held that an employee has a common law right to a safe working environment, since inhaling sidestream or second-hand smoke in the workplace can be injurious to the health of a significant percentage of the working population.

The Court considered a wealth of expert evidence on the contaminating presence of cigarette smoke as not only contributing to the discomfort of nonsmokers, but also increasing the carbon monoxide level, and adding tar, nicotine and oxides of nitrogen to the available air supply, which are harmful to the health of an exposed person, particularly to those persons who have chronic coronary heart or bronchopulmonary disease.

Stating that the right of an individual to risk his or her own health does not include the right to jeopardize the health of those who must remain around him or her in order to properly perform the duties of their jobs, the Court held that it is reasonable to expect an employer to foresee health consequences and to impose upon the employer a duty to abate the hazard which caused the discomfort. The Court accordingly held that smoking must be forbidden in the working area and be restricted to such places as the employees' lunch room and lounge.

It is respectfully submitted that in the matter of air purity, it cannot be intended that a Government employee should be excluded from the benefit of this common law right enjoyed by employees in general. In the present case, therefore, a "clean room" should have been provided Petitioner and, pursuant to Shimp, supra, a "no-smoking" rule imposed in all working areas, or at the very least, in those working areas frequented by Petitioner.

(3) Restructuring jobs

According to the HRA, job restructuring is one of the proposed means by which qualified handicapped workers can be accommodated. The idea behind restructuring is to locate which factors make a job incompatible with a worker's handicap and, if possible, eliminate them so that the capabilities of the person may be used to the best advantage. Job restructuring may involve changing job content, or slightly altering the method of task accomplishment.

The HRA emphasizes, however, that ascertaining the capabilities of individuals and identifying limitations must precede job restructuring, and that the first person to be consulted is the handicapped individual to be accommodated. Careful job analysis to determine the exact demands of positions must also precede job restructuring.

In the instant case, the Respondent Army has made no attempt to consider job restructuring possibilities, although such arrangements might go a long way towards solving any problems of accommodation. The Petitioner's duties before his placement on sick leave involved the work assignments of technical workers, which required the Petitioner to go to all parts of the Command and exposing him to tobacco-smoke pollution in many different locations. If his duties could be restricted to working with office workers in a building free of tobacco smoke contamination, or if the employees with whom he works could be required to come to his office and to refrain from smoking during the brief period they are there, reasonable accommodation could fairly be attained.

(4) Reassigning and Retraining Employees

The HRA stresses that in cases of current Federal employees who become disabled after employment, agencies have a responsibility to make every effort for their continued utilization, and an employee who, because of illness or injury, is unable to continue to perform the duties of his or her current position should not be automatically retired on disability. Alternatives include (a) retraining the disabled employees for positions for which they have the basic qualifications and capabilities; and (b) reassignment to another position.

The Respondent Army has not, however, considered such possibilities as a means of accommodating the Petitioner's handicap, although there is no indication that any or all of them would impose undue hardship on the Respondent Army. Respondent has therefore failed to carry out its obligations under 29 C.F.R §1613.704.

IV. THE PETITIONER HAS BEEN WRONGFULLY SUBJECTED TO REPRISAL FOR FILING GRIEVANCES ALLEGING UNLAWFUL DISCRIMINATION AGAINST HIS HANDICAP IN VIOLATION OF 29 C.F.R. §§1613.261, et seq.

Under 29 C.F.R. §1613.261, complainants, alleging illegal discrimination, must be free from reprisal at any stage in the presentation and processing of a complaint, including the counseling state, or at any time thereafter.

The Petitioner's grievances alleging, in effect, unlawful handicap discrimination on the grounds of the Respondent Army's failure to accommodate his handicap led to the United States Army Civilian Appellate Review Agency's Report issued January 25, 1980, with Findings and Recommendations in the Petitioner's favor.

The Respondent Army made no serious attempt to implement the Recommendations of the Report, and as a result of its total failure to accommodate the Petitioner's handicap, he developed increasingly serious attacks of tobacco-smoke induced asthma.

Instead of expediting accommodation of the Petitioner's handicap, the Respondent Army subjected him to punitive, disciplinary action by placing him, on March 17, 1980, on involuntary, and illegal sick



leave, tantamount to a suspension, without according him any of the statutory procedural protections to which he was, and is, entitled. The effect of this was that he was forced to exhaust, and continues to exhaust, his sick leave allowance, to his detriment, when he should properly have been placed upon administrative leave pending arrangements for the reasonable accommodation of his handicap.

The Petitioner, presently a Position Classification Specialist, has been a member of the Competitive Service for over 11 years. Since his entry into the Service in August 1969, he has regularly received promotions to his present grade, GS 12, which he attained in 1974. His efficiency as a diligent worker is demonstrated by the fact that he also received a Quality Step Increase in April 1977. Until development of his tobacco-smoke induced asthma in 1979, Petitioner did not take any sick leave in the course of his 11 years of service.

The Petitioner is therefore, demonstrably, a competent, conscientious and devoted official whose treatment by the Respondent Army was, and is, totally unjustifiable, and is explicable only on the basis of retaliation for his zealous pursuit of his legal rights. Moreover, the vindication of his position by the Army Appellate Review Agency's Findings and Recommendations in his favor may have been an additional circumstance which the Respondent Army may have found inconvenient and embarrassing, impelling it to attempt a reprisal.

It is accordingly submitted, with respect, that the Petitioner's right to freedom from reprisal under 29 C.F.R. §1613.261 has been, and continues to be, violated.

CONCLUSION

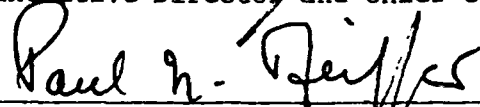
For the foregoing reasons, it is respectfully submitted that the decision of the Merit Systems Protection Board's Chicago Field Office in this matter should be vacated and reversed and that the Board should exercise its jurisdiction herein:


1. to direct that the Petitioner be returned to duty, subject to accommodation being made for his handicap, with appropriate orders as to crediting to his account the number of days of sick leave he was required unlawfully to expend;

2. to direct that the Respondent Army make reasonable accommodation for the Petitioner's handicap by installing a "clean room," restructuring his job, retraining or reassigning him, so as not to require him to come into contact with tobacco smokers, or by taking such combined action, after consultation with the Petitioner, as may be in the best interest of the Petitioner and the Respondent Army, and to set forth a schedule for these steps without further unreasonable delay.

Respectfully submitted,

  
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DATED: October 6, 1980

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that true copies of the foregoing Brief, filed by Action on Smoking and Health (ASH) as Amicus Curiae, have been served upon the parties herein by certified mail, receipt requested, postage prepaid, on this 6th day of October, 1980. Service was made upon:

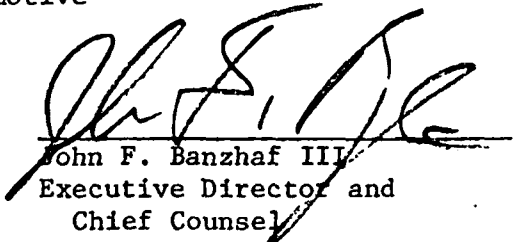
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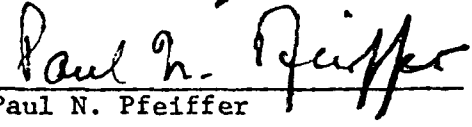
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