

UNITED STATES OF AMERICA
TACOM HEARING
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:

LEROY J. PLETTEN

vs.

UNITED STATES DEPARTMENT
OF THE ARMY

Transcript of the Deposition of JOHN J. BENACQUISTA, a witness in the above-entitled cause, taken before Jo Gallagher, Notary Public in and for the County of Wayne and State of Michigan, at 3000 Town Center, Suite 1150, Southfield, Michigan, on Friday, April 23, 1982, commencing at or about 12:48 p.m.

APPEARANCES:

COOPER & COHEN, 3000 Town Center, Suite 1150, Southfield, Michigan 48075; Appearing on Behalf of Leroy J. Pletten.
BY: STEVEN Z. COHEN, ESQ.

DEPARTMENT OF THE ARMY, TACOM LEGAL OFFICE, DRSTA-LA, Warren, Michigan 48090; Appearing on Behalf of United States Department of the Army.
BY: EMILY SEVALD BACON, ESQ.

Also Present: Leroy J. Pletten

I N D E XWITNESS:PAGEJOHN J. BENACQUISTA

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Southfield, Michigan

Friday, April 23, 1982

12:48 p.m.

P R O C E E D I N G S

J O H N J. B E N A C Q U I S T A,

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

DIRECT EXAMINATION

BY MS. BACON:

Q Colonel Benacquista, what is your position at the present time?

A At the present time I am Deputy Commander of the Army Logistics Center at Fort Lee, Virginia.

Q What was your position prior to the one you presently hold?

A Prior to that I was at the Tank Automotive Command; first as Chief of Staff, from about December of 1979 until October of 1980, and then Acting Deputy Commander for Readiness, from October of 1980 until April of 1981. Then I was on a special assignment for the Commanding General for about two months and then I left Detroit in June of 1981.

Q What were your responsibilities as Chief of Staff?

A The Chief of Staff is responsible to the Commanding General for the proper operation of his staff; its coordination; its activity. One of the duties was the

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1 handling of grievances and EEO complaints and acting for
2 the Command in those matters.

3 Q Are you acquainted with the appellant in this case,
4 Mr. Pletten?

5 A Yes.

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

7 A Through matters of grievances which had started before I
8 arrived as Chief of Staff. I would say that within the
9 first 30 to 60 days, which would have been February or
10 January of 1980, was my first association with these
11 complaints.

12 Q Did you have an occasion to meet with Mr. Pletten
13 personally?

14 A Yes, I did.

15 Q Do you remember what the subject matter of the grievances
16 was or the discussions that you had with him?

17 A There were a variety. Generally they all centered around
18 the request that smoking be banned in the buildings of
19 the Tank Automotive Command.

20 Q How were his grievances resolved to the best of your
21 recollection?

22 A I don't know that they were resolved at all or not
23 totally. We would go through the normal grievance
24 procedure at the Command and if that was unsatisfactory
25 the case would be referred to the U.S. Army Civilian

1 Appellant Review Activity -- I think that was the title
2 of it -- for an independent evaluation and then it would
3 come back to us with recommendations for us to either
4 accept or reject.

5 Q When USACARA would come back with recommendations and, if
6 you accepted them, what happened to the grievance then?

7 A It is my understanding that if we accepted those recom-
8 mendations then that particular grievance was closed. It
9 was a completed action.

10 Q Did you accept the recommendations that USACARA made for
11 the most part?

12 A To my knowledge we accepted all of the recommendations.
13 I don't recall exactly how many I was involved in but I
14 don't recall having rejected any.

15 Q Did you deal with Mr. Pletten only concerning his
16 grievances?

17 A Well, no. The grievances were one matter. There were other
18 matters that were involved regarding questions and things
19 that were happening that were not directly related to a
20 grievance. But they were all indirectly related to
21 grievances.

22 Q After Mr. Pletten was placed on sick leave in March of
23 1980 did you have any contact with him either in person
24 or in writing?

25 A In writing a number of times, responding to certain paper

1 work that was in process, and on one occasion personally
2 that I recall.

3 Q Did you ever discuss with him the conditions under which
4 he could come back to work?

5 A Yes.

6 Q What were those conditions to the best of your recollec-
7 tion?

8 A In summary the major stumbling block with him coming
9 back to work was the requirement that said that he had
10 to have a smoke-free environment.

11 Our position was that if his physical
12 condition was such that his doctor could certify that he
13 could work in other than that kind of an environment, the
14 environment that was provided there, he could come back
15 to work.

16 Q I would ask if you can identify this particular letter?

17 A Yes. This was a letter that was initiated in a draft
18 form for my signature. When it was completed and ready
19 to go I was gone away. Colonel Wigner was the Acting
20 Chief of Staff and he signed it.

21 MS. BACON: I would move to submit this
22 letter at this time.

23 MR. COHEN: I have to voir dire a little
24 bit on this.

25 MS. BACON: Okay.

VOIR DIRE EXAMINATION

1 BY MR. COHEN:

2 Q Let me understand something, Colonel Benacquista, did
3 you draft this?
4

5 A Part of it, yes. It was in a rough draft and I went on
6 leave and it was probably edited.

7 Q Who made the rough draft?

8 A I made part of it, I know that.

9 Q Who made the other part of it?

10 A I am sure we coordinated it with probably myself and
11 probably the legal office.

12 Q Would it say Mrs. Bacon in the upper right-hand corner?

13 A Yes.

14 Q Would that indicate she had some input into the construc-
15 tion of the letter?

16 A Yes, it would.

17 Q Do you have any notes concerning what parts of the letter
18 you wrote?

19 A No.

20 Q And you didn't sign this letter at all?

21 A No, I did not.

22 Q But you recognize it?

23 A Yes.

24 Q And that's independent of any other refreshing of your
25 memory? You just know that this is the letter?

1 A Yes, the general content. And, of course, I saw it a
2 number of times after I got back. I just wasn't there
3 the day it was prepared and signed.

4 MR. COHEN: Okay. No objection.

5 MS. BACON: Agency Exhibit 4 then is
6 submitted, being a letter signed by Lt. Col. Larry Wigner
7 dated 24 July 1980.

8 (Agency Exhibit 4 marked for
9 identification.)

10 DIRECT EXAMINATION (Continuing)

11 BY MS. BACON:

12 Q Does that letter reflect your position in regard to
13 Mr. Pletten at that time?

14 A Yes.

15 Q What prompted you to write that letter and to send it
16 to Mr. Pletten?

17 A What prompted -- and you say me -- us, the Command was
18 that there was really no progress being made on grievances.
19 We were going around in circles and it all came back to
20 the central issue.

21 Although a number of grievances were
22 submitted each one was a separate piece of paper and
23 supposedly a separate grievance but they all related to
24 the same matter and we weren't getting anywhere.

25 The purpose of this letter was an attempt

1 to summarize all that information and to get something
2 moving.

3 Q Subsequent to this July letter going out did Mr. Pletten
4 bring in a note from his doctor indicating that he could
5 work in our environment or something less than a smoke-
6 free environment?

7 A No.

8 Q Did you take any further action in trying to resolve
9 Mr. Pletten's problems?

10 A Well, a few months later, this was in July -- I referred
11 earlier to an October meeting where I met personally
12 with him -- we decided we would attempt again to have a
13 face-to-face meeting and wrote another letter proposing
14 that meeting.

15 Q I would ask if you recognize that letter?

16 I apologize for the form it is in.

17 A That's a letter we sent in an attempt to again get some
18 resolution, to get the matter resolved.

19 MS. BACON: I would submit this as
20 Agency's Exhibit 5 at this time.

21 (Agency Exhibit 5 marked for
22 identification.)

23 MR. COHEN: No objection.

24 Q (By Ms. Bacon) Did Mr. Pletten respond to your letter?

25 A He did.

1 Q I ask you if you can identify this document?

2 A Yes.

3 MS. BACON: I would move to submit this
4 as Agency Exhibit 6 at this time.

5 MR. COHEN: No objection.

6 (Agency Exhibit 6 marked for
7 identification.)

8 Q I ask you if you can identify this document?

9 A Yes, that is our letter agreeing to the meeting and
10 setting up a time and place.

11 MS. BACON: I would move to submit that
12 as Agency Exhibit 7.

13 MR. COHEN: No objection.

14 (Agency Exhibit 7 marked for
15 identification.)

16 Q (By Ms. Bacon) This letter refers to a meeting and a
17 time being set up.

18 Was the meeting ever held with Mr. Pletten?

19 A Yes, it was.

20 Q To the best of your recollection what occurred at that
21 meeting?

22 A We discussed the matter, you know, back and forth. What
23 we were attempting to do was to get some reasonable
24 accommodation -- either by location in the building or
25 restructuring the job -- in placing certain out of the

1 ordinary requirements for the job so that Mr. Pletten
2 could come back to work.

3 General Decker had been gone and near the end
4 of that meeting and I had sent someone -- Capt. Coady was
5 in the room also I think -- to see if the General was
6 back. He had indicated that if he did get back he would
7 like to spend a few minutes with Mr. Pletten. And that
8 did happen.

9 Q Did you indicate to Mr. Pletten at that time that you were
10 going to ban smoking?

11 A No. We were not going to ban smoking. We considered,
12 by measurements, the environment and work offices to be
13 reasonably free of contaminants and our measurements
14 showed no significant difference between indoors and
15 outdoors. And banning smoking, we would not do it and
16 even if we did it would not significantly change the
17 environment inside the building.

18 The main impediment to him coming back to
19 work was that requirement specified by his doctor which
20 said he required a smoke-free environment.

21 Q In your own opinion did you feel like the meeting had been
22 successful?

23 A I did. I thought at the end of that meeting we were coming
24 to a point where there would be some change in that speci-
25 fication of a smoke-free environment. I anticipated that

1 what we would get after that was some statement that
2 described that kind of an environment where he could be
3 allowed to come back to work.

4 Q To your knowledge did Mr. Pletten bring in a doctor's
5 note indicating that he could work in something other
6 than a smoke-free work environment?

7 A No.

8 MS. BACON: I have no further questions
9 at this time.

10 MR. COHEN: Thank you.

11 Colonel, it has been a long time since
12 we've met and I am glad to see you.

13 I have a number of questions about this
14 smoke-free term.

15 CROSS-EXAMINATION

16 BY MR. COHEN:

17 Q Who coined the phrase "smoke-free environment" to your
18 knowledge?

19 A To my knowledge it came either from Mr. Pletten or from
20 his doctor.

21 Q You are not sure which though?

22 A No.

23 Q Is it possible that it came from Dr. Holt?

24 A I don't know. I know it came up a number of times in
25 the grievances.

1 Q Did you read any of the letters from Mr. Pletten's
2 doctors?

3 A Some I guess. I don't know if I saw -- yes, I saw some
4 letters that were signed by doctors and some that were
5 signed by somebody else in the doctor's office without
6 the doctor's signature.

7 Q Did you ever see a doctor's letter that stated that
8 Mr. Pletten could only work in a smoke-free environment?

9 A I couldn't say here that those specific words were used,
10 only smoke free.

11 Q Is it possible that semantically the letters -- I mean,
12 you don't recall the letters and I don't expect you to
13 after these numbers of months and years as passed. But
14 did you ever ask the doctors? As Chief of Staff did you
15 ever call the doctors and say, "Can the guy work without
16 it being smoke free"?

17 A No.

18 Q Why not?

19 A I did not.

20 Q Did any of your staff?

21 A That was a matter really between Mr. Pletten and his
22 doctors. Not me.

23 Q But you had made a determination that the doctors had
24 required a smoke-free environment; is that true?

25 A I had made that determination. I think that if you go

1 back through the numerous grievances you will find that
2 that is really the premise that Mr. Pletten was taking;
3 that he required a smoke-free environment.

4 And that was the description, you know, of
5 his own of the kind of environment he needed. And all
6 we were saying is that we cannot provide that sort of
7 environment. It doesn't exist in or outside the building.

8 Q Colonel, is it possible -- if I might categorize
9 Mr. Pletten's comment -- that that's what he would have
10 wanted in the ultimate situation but not necessarily
11 what he needed.

12 A Well, we offered for him to come back to work as the
13 building existed, which in our case there was no
14 significant difference indoors and outdoors.

15 Q You offered him to come back to work?

16 A Yes, we did.

17 Q Despite his leave status, his enforced leave status?

18 A He was told that if he would come in with a statement
19 stating that he could work in that environment then we
20 would let him come back to work, yes.

21 Q But to your knowledge was there any statement saying
22 that he could not work in that environment?

23 A Yes. I think his doctor's statements did say that he
24 could not work in that environment and in Mr. Pletten's
25 grievances he did state numerous times that he considered

1 that a hazardous environment.

2 Q Have you had a chance, Colonel, to review the tabulated
3 record in this file?

4 A No.

5 Q You have not? You haven't seen the evidence package?

6 A No.

7 Q Before I go into the package, do you consider a
8 hazard to be -- well, do you do hazardous duty sometimes?
9 Did you, in your career?

10 A Certainly.

11 Q In other words, going into combat you know it is
12 hazardous but you do it anyhow.

13 A It's part of my job.

14 Q That's what I expect. And if Mr. Pletten expressed a
15 hazard it didn't mean necessarily that he wouldn't do
16 the work or wouldn't be willing to, would it?

17 A Oh, I think it was implied. If you go through certain
18 of the grievances which specified that he considered
19 those duties so hazardous that he required hazardous duty
20 pay. And I think that was extrapolating a simple
21 problem; a gross exaggeration.

22 Q Perhaps in your view but you can't hurt a guy for trying
23 to get hazardous pay if he thinks it's a hazard, can you?

24 A Well, I can. You know, this all has to be taken in
25 relationship to something and I keep relating it back to

1 the fact that the survey showed that whether he was out-
2 side the building coming to work or inside the building
3 the environment was not any different. So that's not
4 hazardous.

5 Q Did they do specific studies on the outside of the
6 building?

7 A They took the same kinds of samples outside and inside.

8 Q That's funny. I haven't been provided any copies of
9 any records of the outside studies but I have seen the
10 inside studies.

11 MS. BACON: I would suggest that perhaps
12 this witness is not the one who would testify to --

13 MR. COHEN: I would suggest, Counsel,
14 that this witness decided based on the evidence and I
15 am asking him whether he saw it. And if he didn't see
16 it then he made his decision based upon either hearsay
17 or what somebody else told him and I would like to know
18 about that.

19 Q (By Mr. Cohen) Now, Colonel, if you didn't have it I
20 can't fault you for it. You dealt with the best informa-
21 tion you had.

22 A There were samples that were taken outside and inside
23 during the same period of time and they showed no
24 significant difference.

25 Q Do you know where they were taken in relationship to the

1 Command?

2 A No. I think you will find that they are probably
3 designated somewhere, still in the files somewhere.

4 Q Wasn't the Command, building 230 in particularly, just
5 adjacent to a construction site for the entire duration
6 of your presence?

7 A No.

8 Q There wasn't an expressway being built just at Mound
9 Road, which is right near building 230?

10 A Oh, yes. I thought you were referring to the two new
11 buildings.

12 Q Oh, no. I am referring to the construction of the
13 expressway. And there was dust in the air from that?

14 A Yes.

15 Q A lot?

16 A I don't think much different than what you would find
17 right out here or anywhere else in the city to be honest
18 with you.

19 Q Well, in a construction zone do you tend to get dust on
20 your cars from it and stuff like that?

21 A Well, certainly.

22 Q And there are places, for example, in Michigan where it
23 is cleaner, perhaps, in the air?

24 MS. BACON: Cleaner than what, please?

25 Q (By Mr. Cohen) Cleaner than that area. I mean, if you

1 go up to a lake where there is nothing but trout and
2 a nice rowboat.

3 A Well, that can be very deceptive. I submit that the air
4 there could be much worse from the standpoint of a health
5 hazard than next to a construction site. I think we are
6 getting into a lot of speculation.

7 MS. BACON: Yes, I think so too.

8 MR. COHEN: Well, I agree.

9 Q (By Mr. Cohen) Then the question is what were the
10 quantifications of the study? Do you recall any
11 specifics?

12 A No, I don't remember any numbers.

13 Q You don't remember any of the numbers?

14 A No.

15 Q Do you remember if there was a wide diversion, a
16 significant amount?

17 A I would say there was not a significant amount.

18 Q What is significant?

19 A Significant -- if you want to run enough samples you'll
20 do it statistically.

21 Q Were there any quantifications of what significant meant
22 given to you? Were you told?

23 A That's my term; significant. What I would say is that
24 obviously the data would not be exactly the same but
25 within the realm that the average person would say that

1 there was no difference inside and outside; detectable
2 by the average.

3 Q But we weren't dealing with an average person. We were
4 dealing with Mr. Pletten who had a hypersensitivity to
5 smoke; isn't that correct?

6 A That statement has been made. I don't know that.

7 Q You didn't look at any of the doctors' reports?

8 A I did not. I didn't feel that those were releasable to
9 me without Mr. Pletten's approval.

10 What I saw were those which were
11 voluntarily submitted to me. Those were really not
12 doctors' reports. They were generally letters. I saw
13 no technical data.

14 Q Did you request that the medical officer of the Command
15 give you technical data?

16 A No, I did not.

17 Q Why not?

18 A Again, those were medical determinations. It was not my
19 position to determine whether those medical data were
20 correct or not correct.

21 My position required that I make a decision
22 as to whether that environment inside the building
23 constituted a hazard which was different than what a
24 person would normally encounter doing everyday work or,
25 in fact, going to and from work.

1 Q Did you review the USACARA report?

2 A I did.

3 Q Did that deal specifically --

4 A You better tell me which one.

5 Q Well, I believe there were a series of docket numbers
6 that were used by USACARA.

7 A If I could get them by dates I could probably tell you
8 more than I could by numbers.

9 Q Didn't you move to implement one of the USACARA recom-
10 mendations you testified earlier?

11 A I said we did not -- I don't recall rejecting any of the
12 recommendations.

13 Q If I said 25 January 1980 would that help you?

14 A Yes.

15 Q Okay. What was the nature of that recommendation if you
16 recall?

17 A I would have to see it.

18 I think one of the recommendations was that
19 we do some air content surveys, which were being done
20 before I even arrived as the Chief of Staff.

21 Q All right. Let me refer you to 25 January 1980. It says:

22 "Report of Findings and Recommendations in
23 the Grievance of Mr. Leroy J. Pletten."

24 Specifically, the recommendations were as
25 follows:

1 "A. That the Commander initiate an air
2 content study of Mr. Pletten's immediate work area to
3 determine if toxic substances are present in amounts
4 exceeding those in the air outside his building of
5 assignment;

6 "B. That the Commander take further
7 action necessary to provide Mr. Pletten with an immediate
8 work area which is reasonably free of contamination; and

9 "C. That ventilation in Mr. Pletten's
10 immediate work area be evaluated periodically to assure
11 continuing maintenance of minimum healthful environmental
12 standards."

13 How many studies did you authorize to be
14 taken?

15 A I didn't specify. I know there were a number done.

16 Q How many?

17 A I couldn't tell you that now.

18 Q At what interval?

19 A I couldn't tell you that now.

20 Q All right. By "C" of that recommendation that you
21 continue to evaluate periodically, what did you take that
22 to mean? How did you seek to implement that?

23 A As I recall I wrote a DF probably to the safety office
24 which asked that they be done on a periodic basis. And
25 I saw several air content surveys.

1 Q And is it possible that they were all arising out of
2 the same week?

3 A No.

4 Q It's not? How do you know?

5 A Because I know it was over a longer period of time than
6 that.

7 Q I mean, you said several studies. Were they done by
8 different individuals or the same individual?

9 A Probably not. Probably by the same individual. But I
10 think you will find somewhere in the files that they
11 are identified by location and time and the date when
12 they were taken.

13 Q With regard to the reasonably free of contamination work
14 area, what made you believe that after the USACARA
15 report of January 25 that said "reasonably free of
16 contamination" that all of a sudden it would be smoke-
17 free?

18 A That question doesn't really relate to that.

19 Q Let me clarify it. Here it says that you were supposed
20 to take action to the Command group -- presumably you
21 were the one handed the responsibility; that you were
22 supposed to make his area of work reasonably free of
23 contamination.

24 And the basis of the medical disqualifica-
25 tion case that we are here for today is that Mr. Pletten

1 is medically disqualified -- as claims the Agency --
2 because "we cannot provide him with an absolutely smoke-
3 free environment.

4 A That's true.

5 Q Well, the question is who is requesting it?

6 A Those statements were used -- or similar terminology --
7 over and over again in our letters which went back and
8 forth with Mr. Pletten; that we considered the environ-
9 ment reasonably free of contaminants.

10 That was what USACARA asked us to do and
11 that is what our determination was.

12 Q How did you ever come to the conclusion that he couldn't
13 work in an area with a reasonable level of contamination?

14 A I think you could almost take at random some submissions
15 of grievances and you will find references to that.

16 Q Because a person requests relief in a grievance does it
17 mean that that's a necessity or precursor to his working?

18 A I think it is when it is related to letters that were
19 signed by some medical office that says he needs a smoke-
20 free environment.

21 Then I think you can make that relationship,
22 yes.

23 Q Is it possible that there was a misunderstanding or
24 miscommunication?

25 A I don't think so. I think, again, that those letters are

1 looked at closely -- and I haven't looked at them for a
2 year -- but if you looked at them closely it's quite
3 obvious in there that what the doctor was saying was
4 that the environment in his present work space was not
5 reasonably free of contaminants.

6 Q So you did see some of the doctors' statements?

7 A Yes.

8 Q What?

9 A Those letters which were provided. And the ones I saw
10 were generally provided as enclosures to a grievance.

11 Q Did you seek guidance from Dr. Holt?

12 A We did.

13 Q So the difference between Army Regulation 1-8 and that
14 type of environment and a smoke-free environment?

15 A Yes, I think so. I believe that the terminology
16 "reasonably free of contaminants" is a direct lift out
17 of AR 1-8.

18 Q And did you seek guidance from higher headquarters with
19 regard to this issue?

20 A I did not. Not specifically, no.

21 Q You mentioned that you discussed it with General Decker.

22 What was the nature of your contacts and
23 discussions with him?

24 A When you said higher authority I thought you meant
25 higher than the Command.

1 Q No, that's true. No, I did, and you answered it
2 correctly I am sure.

3 The question is what was your relationship
4 with General Decker as to this issue?

5 A This was discussed on a regular basis several times in
6 what was called Command group meetings; generally every
7 evening somewhere between 5:00 and 7:00 at night where
8 we would discuss the day's actions. And those would be
9 discussed at that time.

10 Q And did he follow along with this as it was going on?

11 A Yes.

12 Q Did he have you issue a directive for the entire Command
13 with regard to smoking?

14 A I don't believe so.

15 Q Did you ever issue a directive to the Command?

16 A A directive signed by me?

17 Q Or by anybody from the Command group?

18 A Not to my knowledge, no.

19 Q Why not?

20 A I didn't think it was necessary.

21 It doesn't make sense to have a Command
22 getting involved in the personal habits of its employees,
23 you know, as a Command policy letter.

24 Q Doesn't AR 1-8 require that you look at your Command with
25 regard to compliance with that regulation?

1 A Oh, I think that's much different than a policy letter
2 being signed by the Commander.

3 Now, if you are referring to were there
4 things done regarding smoking, yes, there were. There
5 were posters in the building which discussed smoking.

6 During my tenure there, there were at
7 least two clinics to help people stop smoking. There
8 were a number of items on the daily bulletin.

9 At the -- I forget what it's called. Every
10 August we had a booth set up there by the American Lung
11 Association.

12 From that standpoint, yes, the Command was
13 taking action. I think this was the intent of AR 1-8.
14 But specifically a letter signed by me, no.

15 Q Did the Command make a survey of its employees to find
16 out who was affected by this smoking issue?

17 A Not that I know of.

18 Q Why not?

19 A I didn't think it was necessary.

20 Q Did you have other complaints of people with regard to
21 smoking in the area?

22 A Not which came to me personally.

23 Q Were you familiar with any?

24 A I understand there were others.

25 Q If there were other problems with other employees, Colonel,

1 wouldn't it indicate to you that there should be some
2 kind of quantification of what the problem was?

3 A Not enough to make it that significant.

4 Q What is enough to make it significant?

5 A It's a personal opinion I think. It's a personal
6 determination.

7 You know, there were other complaints about
8 parking. And I don't recall, you know, that that would
9 justify making a survey of the entire Command to look
10 into parking problems. And I would treat the few
11 complaints about smoking in the same manner.

12 Q The few complaints? Is there a certain level at which
13 the Command starts to take action; 10 complaints, 100
14 complaints?

15 A I don't think it's by number.

16 MS. BACON: Objection. I think
17 Col. Benacquista has already testified that when these
18 complaints came to his attention that the employees were
19 accommodated.

20 MR. COHEN: Well, I don't think he could
21 have any problem answering it.

22 THE WITNESS: I don't think it's by number.
23 I don't think you can say eight or ten.

24 Q (By Mr. Cohen) You were a field officer before you got
25 into the Tank Command and other things?

2)

1 A I've been on and off for 27 years.

2 Q Twenty-seven years. Have you been in combat, sir?

3 A Yes, I have; combat zone.

4 Q What is the most important part of a troop or a platoon,
5 for example?

6 MS. BACON: Could you maybe state some
7 relevancy?

8 MR. COHEN: I will connect it up. You can
9 file an objection but I will connect it up.

10 MS. BACON: I object.

11 Q (By Mr. Cohen) Colonel, is it a commander's job to
12 protect all the people and personnel of his command to
13 the best that he can?

14 A That's a question that can't be answered directly.

15 Q Well, what is your --

16 A If a soldier is going to do his job and you are in combat
17 you are going to expose him to hazards.

18 Q I understand.

19 A And when you are exposing him to hazards you are not
20 protecting him.

21 Q No, I understand. But is it your job as his or her
22 commander to do as best you can to limit those hazards?

23 A There is so much environment out there, you know. I
24 don't know if you have been in combat or in a combat zone
25 but that is such a big environment to make a statement

1 like that. I can't answer that.

2 Q Well, let me ask you this way.

3 If you know of a hazard that can be
4 avoided for your people or personnel do you take action
5 to avoid that?

6 A It would depend on the circumstances.

7 Q You mean to tell me that you don't look out for the best
8 -- I mean, if you have some way to avoid a problem for
9 somebody you don't do it?

10 A You are relating it to combat and you are relating it to
11 a platoon and that is an entirely different environment
12 than an office.

13 Q I understand that. But let's assume that for the platoon
14 you do everything you can to protect the platoon; every-
15 thing that you can, that you have the ability to do --
16 do you do everything you can to protect the platoon?

17 A I just won't answer that question unless it is put in
18 some, sort of --

19 MS. BACON: Why don't you just ask him
20 what his responsibilities are as a commander of a platoon.

21 Is that what you are trying to find out?

22 MR. COHEN: No.

23 Q (By Mr. Cohen) Let me put it to you this way.

24 If you know that there is one employee,
25 for example, in an office or let's say a handful of

1 employees in an office that are suffering under something
2 that can be alleviated entirely and that it won't harm
3 any of the people who are restricted conceivably, like
4 banning smoking in the Command, will you take that action
5 for the good of the few or not, as a commander?

6 MS. BACON: I object to the saying that
7 the banning of smoking is equivalent to the banning of
8 a hazard. I do not think that has been established.

9 MR. COHEN: I am not asking him that. I
10 asked him whether he would ban smoking in general.

11 Let me rephrase it then.

12 Q (By Mr. Cohen) Are there any circumstances whatsoever in
13 an office where you would ban smoking entirely?

14 MS. BACON: I think the question is very
15 speculative, Steve, and I don't think it can be answered.

16 MR. COHEN: I think it can be.

17 THE WITNESS: The question -- and you have
18 to relate this back to the grievance.

19 MR. COHEN: No, I don't.

20 THE WITNESS: Well, I do, because that's
21 how I made the decisions. I didn't make the decisions
22 just based on my personal opinion.

23 Q (By Mr. Cohen) Okay. Go ahead.

24 A The question was the environment, really, not whether there
25 was smoking going on in there or not. But was that a

1 hazardous environment, was it reasonably free of contami-
2 nants, and was it that much different than what you are
3 ordinarily exposed to.

4 And my assessment of that was that no, it
5 was not. But that's an entirely different matter than
6 saying is there any reason why you would ban smoking.

7 Q Have you ever been approached at the Command or at any
8 of your other Commands to ban smoking around computers
9 and machines?

10 A Me personally, no.

11 Do I know that it is --

12 Q Is smoking banned in certain areas?

13 A Yes. -- in areas with sensitive equipment? Sure it is.

14 Q And in areas where there are documents that are flammable
15 I presume they also issue orders restricting smoking?

16 A That depends on how you define documents. These are
17 documents.

18 Q Are there areas that are "no smoking" because of a
19 hazard to --

20 A Yes, there are. Either from the standpoint of flammable
21 materials, yes.

22 Q And computers which are sensitive to dust and smoke and
23 stuff like that?

24 A Yes.

25 Q In other words, if I may extrapolate that, there are

1 sometimes when the United States Army will protect either
2 investments in material or items of concern to them, like
3 computers, to ban smoking so as to keep them viable; is
4 that correct?

5 A In my personal opinion that's a pretty flaky argument.
6 You don't put computers out in the rain.

7 I can see what you are getting at because
8 Mr. Pletten has used it a number of times in our
9 discussions. I really don't think that is relevant. I
10 really don't.

11 Q You see, the problem here, Colonel, is that we're before
12 a board and they determine what is relevant. You may be
13 right, but I would like an answer to the question.

14 A Why don't you restate the question and I will try to
15 answer it as directly as I can.

16 Q Okay. Let me restate it.

17 The United States Army then takes actions
18 to ban smoking where it is a hazard to certain pieces of
19 material and certain sensitive machinery?

20 A And people, yes.

21 Q And people?

22 A In those environments. They don't allow smoking around
23 places where there are gasoline fumes, obviously.

24 Q If it bothered Mr. Pletten why was it inappropriate? Did
25 they ever make a survey of the Command of any type to

1 determine whether there would be compliance with a
2 smoking ban? To your knowledge?

3 A Not to my knowledge, no.

4 Q And the reason I indicate this is because there is a
5 tremendous amount of documentation within the existing
6 complaint file with the MSPB that, subject to union
7 representation and consideration, the issue would be
8 dealt -- you know, would not be done. There were
9 problems with the unions and co-workers as to whether
10 you could even ban smoking.

11 MS. BACON: I object to this. Nowhere
12 have I seen this through this case file.

13 MR. COHEN: It's in there. It's from a
14 recommendation. It's from two of the recommendations
15 with regard to the case file and I will specifically
16 identify them.

17 Q (By Mr. Cohen) Colonel, were any discussions entered
18 into between you and the union at TACOM about the
19 circumstance?

20 A No. I did not discuss it personally, no.

21 Q Did anybody to your knowledge?

22 A I don't know.

23 Q With regard to the document identified as Agency's No. 4,
24 that is the Larry Wigner letter, did you have long
25 discussions with the legal office with regard to this

1 matter before it was written?

2 A Not long. We had discussions. The discussions were that
3 if every other day we were going to get a piece of paper
4 that alleges a separate grievance, which is really the
5 same as some previous grievance, you know, how are we
6 going to handle all this paper work.

7 And that was part of the rationale for
8 coming up with this letter.

9 Q In other words, the letter was saying that we will no
10 longer respond to your future correspondence?

11 A No, it didn't say that.

12 Q It did not? Look at page 2, Section D.

13 MS. BACON: I think the letter pretty
14 much speaks for itself.

15 MR. COHEN: Well, I can remind the Colonel.
16 It says,

17 "The Command will no longer respond to your
18 future correspondence concerning these matters."

19 Q (By Mr. Cohen) Does it say that or doesn't it?

20 A Let's not take a sentence out of context.

21 Q I'm trying not to.

22 A I think if you read this thing over again you will probably
23 find somewhere in here that they are going to be consoli-
24 dated and if they fall within the categories of the same
25 previous complaints that they will be addressed at that

1 time.

2 Q Did anybody direct that at least Mr. Pletten be given an
3 acknowledgment that it was received, that a complaint was
4 received and would be consolidated?

5 A I believe you will find that in the file.

6 Q Where? In whose file? Is it in your files?

7 A No. Obviously, there's a mass of paper work and to pull
8 it out and tell you a date of a letter and a sentence, I
9 can't do that.

10 Q Did you direct that they acknowledge or at least give an
11 acknowledgment letter of any future complaints?

12 A That wouldn't have been part of my direction to do that.

13 Q Well, Colonel -- is it Colonel Wigner?

14 A Yes.

15 Q Colonel Wigner directs that no response to any correspond-
16 ence will be given because they will be consolidated.

17 Did that mean -- and you were a party to
18 this letter and discussed it -- did that mean that nothing
19 further would be responded to? Would it be logged in or
20 what? What was the procedure going to be if Mr. Pletten
21 continued to file grievances?

22 A I suspect they would have been-logged in, yes.

23 Q He would have gotten an acknowledgment that they were
24 pending?

25 MS. BACON: I would submit that this is

1 the wrong witness to ask that of. I would suggest that
2 you would ask those questions of the person who actually
3 handled the grievances.

4 MR. COHEN: No. I would suggest that the
5 Colonel has made a statement that he was a party to this
6 letter and I want to know what his intentions were at the
7 time he wrote it.

8 THE WITNESS: The intentions were that we
9 were not going to allow ourselves to be put through a
10 paper mill by responding to the same question in a variety
11 of pieces of paper which were submitted everyday.

12 If one answer could satisfy ten pieces of
13 paper we would do it that way.

14 Q (By Mr. Cohen) You indicated further, if I can give you
15 part of the authorship of this letter at Section E, that
16 Mr. Pletten was on sick leave status based upon the advice
17 of his personal physician.

18 You indicated to me that you did not have
19 a complete abstract of the medical information; is that
20 correct? You only had what you were given; is that
21 correct?

22 A That's all I had. Now I was not Mr. Pletten's direct
23 supervisor. He worked in an office, the civilian personnel
24 office, and those were the channels where it was determined
25 where there was going to be sick leave or not and look at

1 those details of the paper work. Not at the Chief of
2 Staff level, no.

3 Q But isn't it the Command medical officer's responsibility
4 to determine such matters with regard to medical leave?

5 A I am sure that there was probably coordination between
6 his supervisor and the medical authorities.

7 Q But you didn't see all that?

8 A No. There would be a deluge of paper work. That's one
9 employee out of 5,000.

10 Q So you wouldn't have looked at all the circumstances yet
11 you wrote a letter indicating a conclusion as to his sick
12 leave status?

13 A I signed a letter in which that statement was in there,
14 yes. But that goes back to letters which were submitted
15 by Mr. Pletten in which he over and over again, as I
16 recall, kept referring to his suspension. I would gather
17 that's the way that kind of sentence gets in there. I
18 am sure you are familiar with how executive correspondence
19 is put together.

20 The question was is he suspended or is he
21 on sick leave. And you ask that question of the people
22 who deal in that sort of thing and they come back and
23 make a statement as to whether it is a suspension or sick
24 leave. Those technicians were obviously enough to
25 convince me that he was on a sick leave status and not

1 suspended.

2 Q Did you place him on sick leave at any time?

3 A No, I did not.

4 Q You did not?

5 A I didn't.

6 Q At any time?

7 A No.

8 Q Are you sure, Colonel?

9 MS. BACON: He just stated that he did not.

10 THE WITNESS: Mr. Pletten was in an office
11 which had a supervisory chain and that decision would not
12 be made by me to place him on sick leave status. It
13 would be someone in that supervisory chain.

14 Q (By Mr. Cohen) You did not ever authorize or initial
15 placement of Mr. Pletten on sick leave?

16 A I may have seen correspondence that said that, yes.

17 Q May I refer you to 28 March 1980, from Mr. Hoover, Chief
18 of Staff Coordination, signed on 3/28. Would that have
19 been your --

20 MS. BACON: Wait. What are you referring
21 to?

22 THE WITNESS: That's the coordination block.

23 Q (By Mr. Cohen) I am asking what it is. I don't know.

24 A That's what it is. I did not place Mr. Platten on sick
25 leave.

1 Q In other words, if Mr. Hoover signed a letter indicating
2 that he was on sick leave, he is the one who put him on?

3 A He's in that supervisory chain, yes. He is the one who
4 would make that determination, not me.

5 Q What is a coordination block?

6 A That lets me know that I have seen it and he is keeping
7 me informed.

8 Q Do you have direct supervisory powers over Mr. Hoover in
9 the Chief of Staff position?

10 A No, I did not. I was not the rater of Mr. Hoover.

11 Q Let me rephrase that.

12 If you said to Mr. Hoover to do something
13 would he have to comply?

14 A No, he would not.

15 Q Was he equal in terms of powers?

16 A As a civilian personnel officer he had different kinds of
17 duties in relation with the commander than other staffs.

18 Q Could you overrule Mr. Hoover?

19 A I could not overrule Mr. Hoover,

20 Q Let me understand something.

21 If you take a grievance from Mr. Hoover up
22 through the chain wouldn't it come to you at the third
23 step?

24 A In a grievance, yes.

25 Q So only during a grievance could you overrule Mr. Hoover?

1 A That's probably one of the times where I could make a
2 decision which would not involve going directly to the
3 General, yes. But that same relationship was with other
4 directors also.

5 Q But in that circumstance though as a grievance hearing
6 official? At that third step you could say, "Mr. Hoover,
7 I disagree with you. Put him back."

8 A I haven't seen the letter.

9 Q I'm sorry. Let me show it to you. It may be made an
10 exhibit.

11 A That is really not part of the grievance.

12 Q I didn't ask if it was. I am asking just for my own
13 information.

14 Could you overrule Mr. Hoover?

15 A In a matter like that?

16 Q Yes.

17 A I couldn't overrule him. I think he and I might get into
18 some hard discussion and we might convince one another of
19 something different if we disagreed.

20 In a case like that we probably would end
21 up in one of those sessions with the Commanding General.

22 Q Let's assume Mr. Hoover puts Mr. Pletten -- Mr. Hoover
23 being the civilian personnel officer -- on sick leave and
24 Mr. Pletten grieves through the negotiated procedure.

25 MS. BACON: No, he wouldn't.

1 Q (By Mr. Cohen) All right. Mr. Pletten is not in the
2 negotiated procedure. But let's assume he filed a
3 grievance administratively through the EEO or any other
4 organization. Does it eventually get to you?

5 A If it's a grievance it might.

6 Q In other words, if he went to the Equal Employment Office
7 and filed an administrative grievance on Mr. Hoover's
8 actions it could get to you?

9 A Yes, it could get to me.

10 Q In that circumstance you couldn't overrule Mr. Hoover?

11 A No. No. You're making an oversimplification. It is
12 not a matter between me and Mr. Hoover. It would be a
13 matter between the Equal Opportunity Office, and we would
14 dig deeper and we would look at regulations.

15 A piece of paper like that, that is an
16 action that is being taken by one member of the Command
17 who was keeping the Command group informed by getting a
18 coordination block.

19 Q That is not what I have asked.

20 If Mr. Pletten had appealed that decision
21 to put him on sick leave through Equal Employment, which
22 he did several times, and, if the matter had come to you
23 in the normal chain, wouldn't it -- would it have come
24 to you in the normal chain, first of all?

25 A If it reached that step of the grievance, yes.

1 Q At that time, if Mr. Pletten presented his case and
2 Mr. Hoover was also there, could you have told Mr. Hoover,
3 "You are wrong. Mr. Pletten is right. Do as Mr. Pletten
4 says."

5 A That would not be a matter of opinion. That would be a
6 matter of research into the matter.

7 Q I understand that.

8 A That is not overruling. That is saying whether there was
9 an error made or not. That is an entirely different
10 matter.

11 If I had the power to overrule I would
12 say that we are not going to do something like that and
13 it would not be done.

14 If you put it into the grievance chain it
15 is an entirely different thing.

16 Q Semantically I think I understand where we are coming from
17 now. We have wasted a lot of time on this but I think I
18 understand what you are saying now.

19 You would not necessarily overrule
20 Mr. Hoover but you would look at the compliance of
21 Mr. Hoover's actions to the regulations?

22 A Right.

23 Q And if he complied you would keep him on -- if factually
24 he was proven out.

25 A Yes.

1 Q If factually he was not proven out you would reverse it?
2 Is that correct?

3 A I would think I would.

4 Q And you indicated though that you didn't go at any time
5 to any of the doctors' reports that Dr. Holt may have had
6 or any of the lower line supervisors because Mr. Pletten
7 was just one of 5,000?

8 MS. BACON: I think you are misstating what
9 Colonel Benacquista has testified to. He testified that
10 he did not look at those doctors' letters. He did not
11 testify that he didn't do that because he was one of
12 5,000.

13 Q (By Mr. Cohen) Well, Colonel, tell me what you testified
14 to.

15 A Well, I was trying to make a point that there was a
16 personnel action taken, in this case on Mr. Pletten,
17 within his chain of command.

18 Your question was why didn't I get involved.
19 And the answer I was making there -- the point I was
20 making there -- is that there are personnel actions taken
21 on a lot of employees everyday of the week. I did not
22 get involved in those 5,000 unless they came to a grievance
23 channel or something like that. Then I would get involved.
24 But I would not interpose myself between an employee and
25 his supervisor. It is his supervisor's job to make those

1 kinds of decisions.

2 Q The problem I have here, Colonel, and I hope to categorize
3 this properly for you, is that it seems that we have a
4 lot of miscommunications and semantical decisions being
5 made on a series of letters by some people within the
6 Command as to the issue of whether or not Mr. Pletten
7 could work in an area that is reasonably smoke free or
8 absolutely smoke free.

9 Do you understand what my problem is?

10 A Well, I think we are making too big of a problem out of
11 it. I think the problem is being complicated unnecessarily
12 by the grievances. The problem was very simple; was the
13 environment reasonably free of contaminants. And the
14 answer in our opinion was yes.

15 In the grievances smoke free connoted
16 something entirely different and much more restrictive
17 to Mr. Pletten, which we were saying we did not agree with,
18 that our environment was reasonably free of contaminants.

19 He was invited to come back to work under
20 those circumstances.

21 Q But only invited to come back to work if he provided a
22 doctor's note.

23 A Well, when his doctor says he has to go home because the
24 environment is hazardous and says he needs smoke free --

25 Q Did you ever see a doctor's note saying that he could not

1 work?

2 A Well, I don't know if it said he could not work but it
3 certainly said that he required a smoke-free environment
4 or words to that effect. I have seen at least one that
5 said that.

6 Q Let me take out of the current case file a doctor's letter
7 and ask you to interpret that for us. I think that may
8 help us to get an understanding.

9 MS. BACON: Are you looking at Tab 2?

10 MR. COHEN: Yes, I am getting there.

11 Q (By Mr. Cohen) Let me show you Tab 2-B of this case.
12 It is from Dr. Bruce D. Dubin. Would you read that, sir?

13 A . . . Yes.

14 Q Colonel, does that indicate to you that Mr. Pletten
15 cannot return to work?

16 MS. BACON: I would object to this, to
17 Col. Benacquista's testimony on this.

18 Let the record reflect that this letter
19 is dated January 7, 1980, prior to any time at which
20 Mr. Pletten was declared unfit for duty based on his
21 doctor's requirements.

22 Q (By Mr. Cohen) Let me understand something, Colonel.

23 The objection is noted for the record.

24 But let me ask you this. Let's assume
25 for argument's sake that that was before any letter received

1 from Mr. Hoover indicating that he is on sick leave.

2 Were you familiar with that letter before
3 all this happened? Did you read that one?

4 A I don't know if I saw that one before, I may have. But
5 that is not the one I was referring to.

6 Q Okay. But let's assume that that letter is in there.
7 And let's also assume that if you turn the pages of that
8 tab that you will see subsequent letters from Dr. Dubin
9 that are a little different perhaps.

10 One is concerning a face mask which he
11 says is inadvisable. That was on 2/14.

12 One of March 17 where it says "From: Group
13 Health Plan, Dr. Salomon."

14 "This patient needs a smoke-free work
15 environment to avoid ambient tobacco smoke at all costs.
16 This includes a smoke-free . . ." And it goes on and on.

17 A Yes.

18 Q If you had had both letters; one which is seemingly more
19 liberal in terms of Mr. Pletten's ability to work and this
20 letter, which seems to be more restrictive, wouldn't it
21 have raised the question in your mind that a conflict
22 existed? A conflict between the two opinions?

23 A Not in my mind.

24 MS. BACON: I would object at this point
25 and state that I would consider Col. Benacquista not to

1 be a medical man and therefore would not be qualified --

2 MR. COHEN: Col. Benacquista is being
3 deposed and put on the record for the purposes of being
4 the Chief of Staff who makes decisions with regard to
5 action taken on personnel matters when they come to him
6 at a grievance chain level.

7 MS. BACON: That's correct.

8 MR. COHEN: The question of medical is
9 not at all involved it seems here, but interpreting the
10 written words of doctors who have never been spoken to
11 by anybody, which we will get to ourselves, Counselor,
12 when we depose these people.

13 But, I am asking him if he has a common
14 sense -- he is an intelligent man and he has gotten to
15 a high rank in the Army, which you don't get to by
16 accident. I would think he would be able to tell me if
17 the two letters seem at odds.

18 Q (By Mr. Cohen) Colonel?

19 A First of all, I looked at them and there is better than
20 60 days difference between the two. The two letters I
21 would have seen with the matter in between of a lot of
22 grievances.

23 And as I recall, the sequence leading up to,
24 I guess, the time when the suspension came about --

25 MS. BACON: I would --

1 MR. COHEN: Counsel, it is his testimony.

2 Q (By Mr. Cohen) Go ahead.

3 A -- that you see statements like "can't be around anybody
4 smoking within 25 feet," and all of a sudden escalating
5 to the fact that he is in a separate room and that is
6 not good either.

7 Q I understand. I see the progression too but doesn't
8 it show a difference of opinion between the two doctors,
9 even if the time period is taken into context?

10 One seems to be saying that he can go back
11 and the other seems to be saying that he can't.

12 A No. To be honest with you, no. I see what is apparently
13 something to look like a trap.

14 You say a difference of opinion among
15 doctors. And I just flipped to the next page and now I
16 am on the 24th of March and we are back to Dr. Dubin, who
17 was the author of the first letter on the 7th of January.
18 In this letter he says,

19 "This patient needs a smoke-free environ-
20 ment, free of ambient, lingering," et cetera, et cetera.
21 Now, this one is the same doctor.

22 Q Yes, I agree with you, Colonel.

23 Doesn't it seem that the doctor has gotten
24 himself mixed up a little? No offense to Dr. Dubin, we
25 are going to get to him. But doesn't it seem like he is

1 contradicting himself or at least escalating himself?

2 A I don't know. I am not qualified to discuss the merits of
3 doctors.

4 Q You are qualified to discuss the merits of a piece of
5 paper with writing on it?

6 A Sure.

7 Q So tell me your opinion on it.

8 A My opinion is that a doctor who, almost three months
9 later, will escalate and tells me that maybe there is a
10 change in the patient's health.

11 Q Maybe. But does it also cause you to seek additional
12 information?

13 A No. Particularly, you talked about two doctors. Now
14 this is a difference of seven days apart and you are saying
15 two doctors disagreed. And here at seven days apart they
16 are agreeing. Those two pieces of paper tell me that his
17 condition has changed since January.

18 Q Let Counsel for the Command ask you those questions. I
19 will ask you questions about the other ones.

20 Colonel, let me ask you this. This is
21 something I have never understood about this case since
22 the day I got involved in it.

23 Why didn't you just direct Mr. Pletten to
24 come back to work; that you had found the area to be smoke
25 free, relatively smoke free in compliance? Why didn't you

1 order him back?

2 A I think you have to rely on some professional opinion.
3 If this were simply that he was sensitive to cold, I would
4 not bring him back if he had to work in a refrigerator.

5 Now, if the doctor wants to say that he
6 needs a completely smoke-free work environment to avoid
7 ambient tobacco smoke, you know, I am not going to tell
8 the guy to get back in there.

9 If his health is really like that, you know,
10 I am not going to do that.

11 Q Are you aware that the Command tried to have a medical
12 retirement instituted on behalf of Mr. Pletten, a
13 disability retirement? Are you familiar with that?

14 A I believe that occurred after I left, I am not sure.

15 Q It is in the record. I will indicate to you that the
16 Command applied for a disability retirement on behalf
17 of Mr. Pletten; which disability retirement was denied
18 as being without basis.

19 Now once that has been arrived at by the
20 office of personnel management wouldn't you have then
21 indicated or directed that he return to work? Now that
22 you had insurance that he was not in fact disabled?

23 MS. BACON: I would object to your phrasing
24 the question in that way. I would have you ask whether
25 Col. Benacquista would have any knowledge as to what

1 exactly it would mean to --

2 MR. COHEN: I will lay a foundation.

3 Q (By Mr. Cohen) First of all, Colonel, do you think you
4 can answer the question as it was phrased? Do you need
5 me to lay a more thorough foundation?

6 A I think I would like you to say that again or at least
7 to repeat the question.

8 Q Well, let's ask it this way.

9 When a person applies for disability
10 retirement and is denied what does that mean to you as
11 an administrator?

12 A It would mean that he'd been evaluated by medical
13 authorities and determined that his disability, if he has
14 one, is not severe enough to merit retirement.

15 Q By not being able to retire, does that mean he should
16 continue to work?

17 A Not necessarily I don't think. You're talking about a
18 matter that would take some discussion and some documenta-
19 tion. And to make a decision based on this little bit,
20 I don't know.

21 Q Have you had any courses teaching you about disability
22 retirement?

23 A No. I've read about them. There are so many variables
24 that could be involved in a disability retirement. A
25 disability retirement -- it doesn't mean a man is entirely

1 healthy because it is denied. It is saying that that
2 disablement may not be so severe that it merits retire-
3 ment. That is two different things. I would have to
4 read the logic that led to the conclusion to say whether
5 I would tell a guy he had to come back to work.

6 Q In your position as an administrator if you received a
7 notice from OPM denying disability retirement would you
8 have sought guidance from OPM as to what you should have
9 done in that circumstance? Is that what you do?

10 MS. BACON: I object to that question
11 because he is not an administrator who deals with OPM
12 so how could he possibly know what he would do?

13 MR. COHEN: Col. Benacquista was the Chief
14 of Staff of one of the larger Commands in this country
15 and I suggest that he has been trained as an administrator
16 and knows the procedure to be followed or at least might
17 be able to enlighten me as to what procedure might be
18 followed.

19 MS. BACON: I think Col. Benacquista has
20 also testified that he relies on his technical people.

21 MR. COHEN: Well, I don't know whether he
22 has any independent knowledge. If he doesn't, he will
23 tell me I imagine. And then I will talk to the technical
24 people.

25 THE WITNESS: Well, I don't know if you are

1 asking me to make a judgment on a case that occurred.
2 You know, rather than saying what is the proper chain
3 that a disability retirement would go through. Those
4 are two entirely different questions.

5 Q (By Mr. Cohen) No. Well, presuming that the chain for
6 disability retirement goes through the OPM by way of the
7 Command and then OPM makes its decision. Hypothetically,
8 if you were faced with an OPM decision claiming that
9 disability was not warranted, what would you do? Who
10 would you refer to? Would you refer to your technical
11 staff?

12 A I don't think that would even come back directly to the
13 Chief of Staff.

14 Q Well, the Chief of Staff would never again see it?

15 A I don't know. I don't know that it would be seen on the
16 way up let alone on the way down.

17 Q I get the lasting impression, Colonel, that sometimes
18 when these things happen the Chief of Staff -- I guess
19 when I hear the words Chief of Staff I presume command
20 and control -- doesn't necessarily have all the informa-
21 tion. Is that true?

22 A No. That's throwing smog at the problem.

23 There is a technical channel of which many
24 administrative matters are handled.

25 Q I understand. But when you get to some things you don't

1 necessarily have all the documentation. You have to
2 rely heavily on what your technical people tell you is
3 true.

4 A' Not necessarily what they tell me. What can be shown.
5 What the documentation reports.

6 Q But if you were only shown one doctor's report as opposed
7 to three or three doctors' reports as opposed to five
8 then it is the selective perception of the technical
9 assistant, isn't it?

10 MS. BACON: I would submit that you should
11 probably lay a foundation that the Chief of Staff would
12 have anything to do with a disability retirement at all.

13 MR. COHEN: I am not even talking about
14 disability retirement now.

15 MS. BACON: What are you talking about?

16 MR. COHEN: I am talking about general
17 decisions. Col. Benacquista has had to sign letters
18 requesting meetings arranging to settle grievances of
19 enunciabile numbers. I don't even want to go into how
20 many.

21 And I have letters in front of me that
22 are exhibits in this matter that the Colonel has signed
23 stating that he went out to settle it and set up a
24 meeting where it could be settled. I applaud that and I
25 wish to God we could do that now.

1 . But the problem I have is, if he is going
2 to settle I want to know what kind of information he gets
3 and where he gets it from.

4 Q (By Mr. Cohen) Colonel, understand that I presume that
5 you work on the basis of what is in front of you. I don't
6 think -- and correct me if I am wrong. Are you able to
7 go and investigate yourself in most cases?

8 A I don't know what you mean by that.

9 Q Go and investigate the underlying facts that are presented
10 to you on one of these types of matters?

11 A I would look into them. I would ask questions.

12 Q Who would you ask questions of?

13 A I would ask questions of anyone who appears to be
14 involved.

15 Q And if those people don't respond fully to you then you
16 have only to rely on their responses?

17 A That's true, including the grievant --

18 Q I agree with you.

19 A -- who did not respond honestly.

20 Q How did you figure that the grievant did not respond
21 honestly? What do you base that allegation on?

22 A On matters of a letter that went out regarding some of
23 his grievances on timely response to his grievances and
24 correspondence. The manner in which those kinds of
25 grievances were submitted to the Command places much

1 doubt to the validity of dates and stamps and whether
2 or not really any of them were received.

3 Q Did you form an investigation to check that out?

4 A Did I have an investigation?

5 Q Did you form a conclusion on your own?

6 A I could form a conclusion based on some matters of
7 correspondence which came into the Command of a number of
8 grievances at one time, some with dates of 30 days in
9 arrears arriving. Then there were questions as to why
10 they were not responded to in a timely manner. This
11 places doubt in my mind as to whether they were correctly
12 dated when they were sent.

13 Q Did that cast appall on your consideration of other
14 matters regarding Mr. Pletten?

15 A No, but it aided in making a judgment that consolidating
16 grievances on the same subject was a proper method for the
17 Command to address them.

18 Q Were you prejudiced against Mr. Pletten as a result of
19 this?

20 A No. No.

21 Q Do you have a preconceived notion as to his veracity?

22 A Preconveived? No.

23 Q Did you have a notion as to his veracity?

24 A Yes. Yes.

25 Q What was that notion?

1 A That I was not dealing with an individual that I would
2 place implicit trust in.

3 Q Do you think he lied to you?

4 A It's not a question of lying.

5 Q I am asking a question. Yes or no?

6 A No.

7 Q What do you think he did?

8 A I think he was devious.

9 Q Do you think he misrepresented facts?

10 A Yes.

11 Q Then you think he lied?

12 A There's a difference.

13 Q You think one was -- what is the difference? Tell me the
14 difference.

15 A Half truths; not lies, not truths.

16 Q Half a truth isn't a truth.

17 A Full truths? I think that's a philosophical discussion.

18 MS. BACON: I don't understand where we
19 are going on this. Yes.

20 We have a file based on medical separation
21 and we'd had a question on whether we tried to accommo-
22 date Mr. Pletten and his requirement and all of a sudden
23 we are talking philosophy.

24 MR. COHEN: We are not talking philosophy.

25 We are talking about a man who had sent a series of

1 letters to my client, the appellant here, and indicated
2 that he wished to settle the matter with him in good
3 faith.

4 He has also now indicated that he didn't
5 completely trust him and believed him to be the propounder
6 of half truths and misrepresentations. And I submit,
7 although it is coloring his testimony a little bit, that
8 he thinks he lied; at least in some parts.

9 MS. BACON: He said he thought he
10 misrepresented dates. That's what he said.

11 MR. COHEN: And this is what I am getting
12 at. I asked him if he lied and he said no. Then I asked
13 him did he misrepresent and he said yes.

14 Then I asked him what the difference was.
15 I don't want to mince words with this. If he thinks he
16 lied I want to know about it.

17 And if he was then in that state of mind
18 trying to settle the complaint with him I want to know
19 about that too.

20 Q (By Mr. Cohen) Colonel, do you think he lied? Straight-
21 forward. Come on.

22 A I thought I answered that before when I said no.

23 Q All right.

24 A However, does a person lie -- if you want to talk
25 philosophy -- if something is backdated and dropped on a

1 desk without saying that I backdated this? You know,
2 that is a philosophical question. That is the kind of
3 question I had when I was dealing with the paper work.

4 Q Did you confront Mr. Pletten?

5 A I did not personally, no.

6 Q Did you instruct your subordinates to?

7 A No, I did not.

8 Q Did you write a letter about your suspicions to anybody?

9 A No.

10 Q Why not?

11 A I didn't think it was that important.

12 Q You think it is important now.

13 A I did not say that was important.

14 Q You mentioned it to me that you didn't think he was
15 dealing with you aboveboard.

16 A I would say that that's why when I did deal with him that
17 I tried to be as close to facts and dates as I could.

18 Q Colonel, you just said it wasn't important. And you also
19 told me in your testimony that the reason you decided to
20 take this action in the letter saying you wouldn't respond
21 any more, the Wigner letter, was because you didn't think
22 he was dealing altogether aboveboard and you couldn't
23 completely trust him.

24 Now, maybe I am coloring it --

25 A I didn't say that. I said that part of it was.

1 Q What was the other part?

2 A The other part was just a mass volume of grievances,
3 submitted as individual grievances, which all related to
4 the same subject and the same grievance, that we were
5 going to consolidate and they would be addressed as a
6 single issue. Some of which were already above the
7 Command level and being addressed by USACARA. And to
8 address another grievance which was already at that level
9 was a waste of time.

10 Q Did you review documents from higher headquarters with
11 regard to guidance regarding the Army regulation?

12 MS. BACON: Could you be a little more
13 specific, please?

14 Q (By Mr. Cohen) Did you write letters to higher head-
15 quarters asking for information, for example?

16 MS. BACON: You said Army regulations.
17 Are you saying all Army regulations?

18 MR. COHEN: I'm sorry.

19 Q (By Mr. Cohen) Army regulations concerning smoking?

20 A I don't recall that I signed any.

21 Q Did you read anything from the Surgeon General that is
22 provided by the Department of the Army?

23 A You are referring to a piece of paper. If I could see it
24 I could tell you whether I saw it before or not.

25 Q No, I am not referring to a piece of paper.

1 Did you make any requests to the Department
2 of the Army for information concerning --

3 A I said that I don't recall having signed any, no.

4 Q Did anybody in the Command group make inquiries with
5 regard to smoking to the Surgeon General or anything with
6 regard to the Army?

7 A I don't know.

8 MS. BACON: I would suggest that he is
9 testifying what he did and that he is probably not
10 competent to testify to what anybody else did.

11 MR. COHEN: As to his competency, I will
12 leave that to the trier of fact.

13 But I am asking him if he knows of anybody.
14 If he doesn't know of anybody he can say that, no, he
15 doesn't.

16 MS. BACON: That's right.

17 THE WITNESS: I don't know of anybody
18 specifically.

19 Q (By Mr. Cohen) Do you know of anybody generally?

20 A No.

21 Q You indicated earlier that you wouldn't sign a letter
22 sending somebody back in to a place where he thought there
23 was a hazard. Is that my --

24 A What was that again?

25 Q I am trying to remember exactly what you said, Colonel.

1 You said something to the effect that you
2 wouldn't direct a person to go back to work where he
3 thought there was a hazard, where that would be unsafe
4 for him.

5 Can you repeat what you said in that nature?

6 A If we are going to get into that I would like to go back
7 and hear what the whole line of questioning was.

8 Q Well, I'm not sure we can do that.

9 Well, let's go back -- no, let's not. It's
10 quite a ways back.

11 We were talking previously about why you
12 didn't just order him back to work. Why wouldn't you say,
13 "Look, we've done all this work and you should go back
14 to work"?

15 Why wouldn't you do that?

16 A His contention was that that was a hazard and that he
17 required a smoke-free environment.

18 We had acknowledged and transmitted a
19 number of times that the environment in the building was
20 considered reasonably free of contaminants, you know.

21 Why would I want to go around and tell
22 somebody, "You have got to go back in there"? That is
23 a personal judgment on his own part. The job was available.
24 All he had to do was to say, "I agree that this is
25 reasonably free of contaminants."

1 Q If the thinks it is a hazard though and you say it's not
2 what then happens?

3 A I think what probably happened apparently, from this chain
4 all the way from his supervisor on, is that ultimately
5 that ended up in a sick leave -- in an attempt to get him
6 to come back to work, to make some reasonable accommoda-
7 tion.

8 You cannot make a reasonable accommodation
9 if one side is not willing to give anything.

10 Q But you wouldn't direct him back to work or order him
11 back to work?

12 A No, I would not.

13 Q Because of his perception of the hazard?

14 A That's correct.

15 Q Even if you yourself had determined that no hazard existed?

16 A I couldn't make that determination.

17 Q You couldn't?

18 A No. I'm not a doctor.

19 Q But you could state what the Command's position was with
20 regard to the hazard. And did you so state?

21 A Based on doctors' letters which were made privy to us
22 that described that environment.

23 Q And in your October 6, 1980 letter to Mr. Pleten, where
24 you sated "the Command does not consider the working
25 environment in the Tank Automotive Command to be a health

1 or safety hazard," you were able to make that statement,
2 were you not?

3 A That's correct.

4 Q And even though the Command had determined that there was
5 no hazard you would still not order him back to work?

6 A A hazard to one is not necessarily a hazard to another.

7 Q But did you offer him the opportunity without -- I mean,
8 the opportunity to come back whether or not he had a
9 doctor's certification?

10 A I did not, no.

11 Q Why not? I mean, that is what seems to me to be --

12 A That was the whole basis of the original sick leave.

13 Q Do you understand that Mr. Pletten has always contended
14 that he is willing, ready, and able to go to work?

15 A Well, that statement sounds nice but if you back it by
16 a doctor's statement which says that a smoke-free environ-
17 ment is a requirement then that statement is no longer
18 valid. That's a nice statement taken out of context.

19 Q When we first started this rather lengthy colloquy the
20 first thing we talked about or one of the first things
21 we talked about was that sometimes you place yourself in
22 a position of hazard because it is your job.

23 I am sure you couldn't get a doctor in the
24 world to advise somebody to go into a combat zone or into
25 a factory, for example, or into any other -- well, I used

1 to work in a slaughter house and I am sure nobody would
2 recommend working there for one's health.

3 But it is still your position that the
4 Command could not or just would not order him back to
5 work? Did they have discretion in this?

6 A If that were a question before me, you know, I would be
7 sitting down with the civiliam personnel people looking
8 at the regulations and discussing that matter. But to
9 make that decision right here now, I couldn't do that. I
10 would have to look into the details of it.

11 Q Were you made aware of regulations regarding your ability
12 to order him back to work?

13 A I don't believe so. I don't recall.

14 Q Did you ask for such guidance?

15 A I did not.

16 Q Why not?

17 A At the time I just didn't.

18 MS. BACON: I object to your stating -- are
19 you testifying that there are regulations that stipulate
20 that he would have to order him back to work?

21 MR. COHEN: No. I just asked if he was
22 aware of any or asked that he be made aware of any.

23 Col. Benacquista offered testimony that he
24 was not aware of any and that he would have reviewed
25 regulations -- I believe you said you would have reviewed

1 regulations with civilian personnel if that issue was
2 before you.

3 And that issue was before you, was it not,
4 Colonel?

5 A No.

6 Q Was it never framed that way for you?

7 A I don't think it was ever framed to the point of ordering
8 him back to work.

9 Q Who does the framing of the issues? I guess that should
10 be a question.

11 A Everyone involved, really. Mr. Pletten helped frame the
12 issue by the grievances, as well as the civilian personnel
13 officer and personnel and his supervisor. You know,
14 everybody gets involved in framing an issue.

15 Q Is it possible that nobody ever really thought about that?

16 A I don't know.

17 Q Did you ever think about just ordering him back?

18 A I don't recall ever having thought about it.

19 MR. COHEN: May we go off the record for
20 a second.

21 (Off the record.)

22 (Back on the record.)

23 MR. COHEN: We have come back from a
24 break in which Mr. Pletten and I consulted.

25 If I might resume the questioning briefly.

1 Q (By Mr. Cohen) We are talking about the willingness of
2 the Command to take Mr. Pletten back,

3 That was, of course, Colonel, was it not,
4 contingent upon a doctor's note?

5 A Yes, as to whether there was any change in his physical
6 health.

7 Q If, however, there is an argument between the Agency and
8 Mr. Pletten as to what the doctors really meant, whether
9 the doctors banned him or not, that is something you
10 would have had no knowledge of?

11 A Would you say that again?

12 Q If I tell you that Mr. Pletten contends that his doctors
13 never denied his return to work and the Command says that
14 the doctors' letters did, is that something you would
15 have no knowledge of?

16 A Well, from the letters I have seen I would say that it
17 was rather clear to me that those doctors were stating
18 that the environment as it existed at the time they wrote
19 them, they considered to be a hazard, that they did not
20 think he should be in that kind of an environment.

21 Q To your knowledge did Mr. Pletten attempt to go back even
22 without doctors' notes?

23 A No, I don't know if he attempted to go back or not.

24 Q Did you discuss that with any of your subordinates?

25 A I am trying to recall, you know, the paper work of what

1 has been now a year ago.

2 It indicated that that party was ready,
3 willing, and able to go to work but not addressing any
4 of that other problem, you know, which is "I'll come back
5 to work just the way that environment is today." That
6 part was always left off.

7 Q I understand. But if I were to tell you that Mr. Pletten
8 addressed himself to Ms. Averhart on several occasions
9 so as to return to work, would that jog your memory?

10 A I don't recall that.

11 Q Then you wouldn't be informed as to whether he was turned
12 away?

13 A No.

14 Q Did anybody ever suggest that Dr. Holt examine Mr. Pletten?
15 From the Command?

16 A Well, he did examine him up until the time of the sick
17 leave in March of 1980, when Mr. Pletten had a medical
18 complaint.

19 Q Was it your impression that Dr. Holt had examined
20 Mr. Pletten?

21 A Yes.

22 You know, did I see it in writing? No.
23 But was Mr. Pletten over there? Obviously, yes, at the
24 dispensary.

25 But as to that examination, I don't know

1 how deep that could be.

2 Q With regard to the interpretations of the regulation on
3 handicapped employees, are you familiar with those?

4 A Yes.

5 Q And have you had guidance and training on those?

6 A I haven't had to use them for over a year but, yes. At
7 the time I was familiar with them.

8 Q I take it that in your present position you are no longer
9 involved with them?

10 A That's correct.

11 Q What is that you do now?

12 A Deputy Commander of the U.S. Army Logistics Center.

13 Q So that has to do with other things completely?

14 A Worldwide logistics.

15 Q So let me jog your memory for a minute.

16 What is the definition of disabled that
17 was given, if any?

18 A I couldn't tell you what it exactly said.

19 Q If somebody had a limitation, for example, we discussed
20 earlier that a person may not be disabled for purposes
21 of a disability retirement but may have a limitation that
22 is not sufficient to classify it as a disability, do you
23 then accommodate the limitation? Are there people in
24 command that are --

25 A No. You make reasonable accommodations. Again, I think

1 those are direct words out of the regulation. You make
2 a reasonable accommodation.

3 Q Mr. Pletten filed a grievance on April 30, 1980,
4 regarding the letter of March 28, 1980. Do you recall
5 that?

6 A No.

7 Q You don't?

8 A No..

9 Q If I were to show you the March 28, 1980, letter of
10 Mr. Hoover, which I have shown you before, do you recall
11 that?

12 A Yes.

13 Q Do you recall him having filed a letter to you and that
14 you replied to that by a July 10, 1980, letter that I
15 will show you right now.

16 I indicate to you, Col. Benacquista, that
17 that was written just prior to the Wigner letter, 14 days
18 prior.

19 A . . . Okay. The one in between is missing but I don't know
20 how relevant that is.

21 Q Pardon? I'm sorry?

22 A The grievance.

23 Q Oh, I'm sorry. That's funny, I don't have it available
24 either.

25 You indicated in the letter here that

1 Dr. Holt has determined, and I quote:

2 "Your letter indicates that you are ready,
3 willing and able to work. Dr. Holt has determined that
4 such is not the case based upon statements from your
5 attending physician and the stipulation for a smoke-free
6 environment."

7 Now, you indicated earlier that Dr. Holt
8 had examined Mr. Pletten?

9 A Yes.

10 Q Is that still the case?

11 A Yes.

12 Related specifically to that incident, no.
13 But if we go back into the time before I was even Chief
14 of Staff that there were occasions when Mr. Pletten
15 would feel ill or sick or however you want to refer to
16 it and would go to the dispensary at the Tank Automotive
17 Command. Dr. Holt was the only physician there and I
18 assume he saw Dr. Holt when he went there.

19 You will find in the grievances I believe
20 also where Mr. Pletten himself stated that Dr. Holt
21 placed him on sick leave.

22 Q Colonel, did you supervise the air studies that were done
23 personally?

24 A No.

25 Q And I presume you would have relied on the expertise of

1 the people selected to do those studies?

2 A Yes.

3 Q And specific locations of where the studies were done was
4 not discussed with you?

5 A I recall having given guidance that I wanted them taken
6 at a variety of places throughout the Command. So they
7 were taken at more than one location but I did not specify
8 exactly where they would be.

9 Q Who makes the determination of what reasonably free of
10 contaminants means?

11 I don't mean to be facetious by asking it
12 after all this.

13 A When the air content surveys were done by the
14 environmental hygienist or whatever, Mr. Braun. I don't
15 know. He is the technician and he is the one who made
16 the determination to refer to the standards and wrote
17 those up as a report.

18 Q In other words, you have no independent knowledge of
19 what "reasonably smoke free" is?

20 A I wouldn't attempt to define it, no.

21 Q And you relied presumably upon the directives of your
22 subordinates in whether your Agency complied with
23 "reasonably smoke free"?

24 A Yes. Reasonably free of contaminants.

25 Q I'm sorry. Now I am doing it.

1 A I don't want to do it either but it seems to evoke all
2 kinds of different meanings.

3 Q Was a ban on smoking in the Command unreasonable?
4 In your estimation was it unreasonable?

5 A I don't know if it was unreasonable or not. I think it
6 was unnecessary.

7 Q Why do you think that?

8 A When the surveys show that the air outside is not
9 significantly different than on the inside, banning
10 smoking just doesn't seem to make any sense. If you
11 want to get the air on the inside cleaner than the
12 outside we would have to filter all incoming air to make
13 a specialized environment within the building. That is
14 not reasonable.

15 Q Well, the question that follows from that is that there are
16 certain parts of the Command that are restricted from
17 smoking; correct?

18 A Yes.

19 Q Conference rooms and other places would conceivably have
20 less of a smoke content than places where smoking is
21 permitted; is that true?

22 A Yes. I would say yes, certain times.

23 Q Certain times? I mean, why else would you ban smoking in
24 a room if not to keep it smoke free by comparison to other
25 areas?

1 A I don't know what you are leading to. To say that
2 within that conference room that no human has ever walked
3 through when smoking, you know, I can't swear to that.

4 Q No. I understand that. But wouldn't the air content in
5 that specific area where smoking is banned -- that is
6 theoretically, if everybody follows their orders -- be
7 cleaner or more smoke free than others?

8 MS. BACON: I am going to object.
9 Col. Benacquista wouldn't have the competence to testify
10 to that. You would have to ask somebody who did the
11 actual testing.

12 MR. COHEN: That is precisely my point
13 that the people that were making decisions here, Counsel,
14 did not have the expertise and did not inquire as to the
15 expertise.

16 THE WITNESS: Those were based on the
17 regulation -- I believe 1-8 -- that talks about the air
18 circulation within a room. The surveys indicated that
19 those were in compliance.

20 Q (By Mr. Cohen) Colonel, I recall from when you were here
21 and I dealt with you on other matters that were an
22 inordinately busy man. Is that a fair statement?

23 A I don't think inordinately. I think I am busy.

24 Q You used to work long hours as I recall.

25 A Yes. Still do.

1 Q During that time any commander has to rely heavily on
2 their subordinates for the information that is funnelled
3 to them; is that correct?

4 A If you don't have faith in your subordinates you are in
5 trouble.

6 Q And if your subordinates don't provide you the full
7 information then you are making decisions based on what
8 they give you?

9 A It generally doesn't take very long to know when a
10 subordinate is not competent.

11 Q After the series of complaints in this matter did you
12 make any further personal investigation besides
13 referring to subordinates? Did you take a more thorough
14 interest in this than you would have normally in another
15 case, due to the nature of the number of complaints?

16 A Yes, I think so. Yes. I think I was probably more
17 involved in this case.

18 Q And you talked to more people?

19 A Yes.

20 Q Did there come a time when you said, "That's enough. I
21 am not checking any more"?

22 A No.

23 Q Did you draw a conclusion that your people had complied
24 and that Mr. Pletten had become a stumbling block and
25 given up any further investigation?

1 A I wouldn't refer to it as a stumbling block. I don't
2 think that's proper. I think we came to an impasse.
3 Our approach was to find some reasonable accommodation
4 to resolve this whole matter. The chief matter blocking
5 that was any indication on Mr. Pletten's side that there
6 would be any other definition of a safe environment other
7 than a smoke-free environment.

8 You know, we were just at an impasse.

9 Q Can I categorize that the difference was Mr. Pletten's
10 definition of "reasonable accommodation" versus the
11 Command's?

12 A I doubt that.

13 Q Do you think he had a much stricter definition?

14 A Yes. I think his was much much more restrictive by the
15 constant reference to smoke free to include ambient smoke.

16 Q Did anybody suggest a mediator in this matter at any
17 time, an independent third party?

18 A No, I don't believe so.

19 Q Nobody didn't mention it to you and you didn't mention it
20 to anybody else?

21 MS. BACON: I object to that. We are
22 talking about internal matters.

23 MR. COHEN: You bet your life we are,
24 Counsel. I want to know if there was that suggestion
25 made.

1 THE WITNESS: When you speak of a
2 mediator, you know, the channels that things go through
3 with the immediate supervisor, the next supervisor, the
4 EEO counselor, and myself, it is not just one person
5 saying no, no, no. Others are involved.

6 Q (By Mr. Cohen) Did the EEO officer say no?

7 A I said involved.

8 Q Well, you seemed to imply that they said no as well.

9 A Well, they were Equal Opportunity --

10 MS. BACON: Objection. He implied that
11 it is not one individual saying no, no, no; that he is
12 getting counseling from other individuals.

13 MR. COHEN: Well, I think that implies
14 that other people are saying no.

15 THE WITNESS: No. No. What I am saying
16 is that, you know, there isn't just one individual in
17 here that was making all the decisions and deciding all
18 the facts.

19 Q (By Mr. Cohen) Was there any intention on the part of
20 the Command to defer decisions on the equal employment
21 cases pending for Mr. Pletten?

22 A What do you mean by defer?

23 Q Defer until adverse personnel action was taken? Was it
24 discussed when you were there?

25 A Not to my knowledge.

1 Q Was this adverse action that presently the case before
2 the board discussed with you prior to your leaving?

3 A That is not a yes or no answer. At the time I left
4 Mr. Pletten was still on sick leave as I recall.

5 Q Well, he was on sick leave until he instituted this
6 action. The question then becomes --

7 A Well, I was under the impression -- well, I guess, paid
8 sick leave or whatever --

9 Q No, he was not.

10 A What I am saying is he had sick leave and he had annual
11 leave involved in that. At the time I left I think the
12 only discussions were, you know, what happens when all
13 the sick leave and annual leave is used up. You know,
14 what was going to happen.

15 But, laying any groundwork to do anything,
16 I don't recall having been involved in any of that.

17 Q And you don't recall hearing of anything?

18 A No.

19 Q You referred earlier to Mr. Pletten's absence as a sick
20 leave and, at one time prior, you slipped and referred
21 to it as a suspension. At that point Ms. Bacon tried to
22 stop you but you referred to it as a suspension.

23 Was it a suspension?

24 A No, it was not a suspension.

25 Q Why did you say it was?

1 A If I used that word it was just a mixup of words because
2 it has been thrown around back and forth. It was nothing
3 other than error.

4 Sick leave, paid or nonpaid. And annual
5 leave was involved.

6 MR. COHEN: I have nothing further.

7 MS. BACON: I have nothing further either.

8 MR. COHEN: Colonel, thank you.

9 - - - - (2:31 p.m.)

10 STATE OF MICHIGAN)
11) ss.
12 COUNTY OF WAYNE)

13 I, Jo Gallagher, Notary Public in and for
14 the above county and state, do hereby certify that the fore-
15 going deposition was taken before me at the time and place
16 hereinbefore set forth; that the witness was duly sworn to
17 testify to the truth, the whole truth and nothing but the
18 truth; that thereupon the foregoing questions were asked and
19 foregoing answers made by the witness, which were duly
20 recorded by me by stenomask recording and later reduced to
21 typewriting under my supervision; and I do further certify that
22 this is a true and correct transcription of my said stenomask
23 recording notes so taken.

24 IN WITNESS WHEREOF, I have hereunto set
25 my hand and affixed my notarial seal at Livonia, Michigan,
County of Wayne and State of Michigan; this 11th day of

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