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TARCOM HEARING
APPEAL FROM MERIT SYSTEM
PROTECTION BOARD

IN THE MATTER OF:

LEROY J. PLETTEN,

Appellant,

-vs-

DEPARTMENT OF THE ARMY,

Appellee.

Transcript of the deposition of EVELYN

BERTRAM, a witness in the above-entitled cause, taken before
Norma J. Yeager, Notary Public in and for the County of Oakland,
State of Michigan, at 3000 Town Center, Suite 1150, Southfield,
Michigan 48075, on Monday, April 26, 1982, commencing at or about
the hour of 9:45 a.m.

APPEARANCES:

COOPER & COHEN, 3000 Town Center, Suite 1150, Southfield,
Michigan 48075, Appearing on behalf of the Appellant.
BY: STEVEN Z. COHEN, ESQ.

EMILY SEVALD BACON, ESQ., United States Army-Tank Automotive
Command, Detroit Arsenal, Warren, Michigan 48093, Appearing
on behalf of the Appellee.

ALSO PRESENT:

Leroy J. Pletten, Appellant.

1 Southfield, Michigan

2 Monday, April 26, 1982

3 Approximately 9:45 a.m.

4 - - -

5 E V E L Y N B E R T R A M

6 being first duly sworn, was examined and testified on her
7 oath as follows:

8 EXAMINATION

9 BY MS. BACON:

10 Q Would you state your name for the record, please?

11 A Evelyn Bertram.

12 Q What is your position, Mrs. Bertram?

13 A Employee Relation Specialist.

14 Q How long have you worked at that particular position?

15 A Six or seven years.

16 Q What are the responsibilities of your position?

17 A Advice and assistance to supervisors and managers in the
18 areas of employee discipline, grievances, appeals; employee
19 management relations problems.

20 Q Is your function as advisor or decision-maker?

21 A Oh, as advisor.

22 Q Which managers and supervisors do you advise?

23 A The R and D Center -- Research and Development Center,
24 Production Assurance Director, Personnel Training and Force
25 Development Directorate.

1 Q Are you familiar with the appellant in this case,
2 Mr. Pletten?
3 A Yes, I am.
4 Q Were you involved in this particular action that we are
5 considering right now, the separation for medical disqualifi-
6 cation?
7 A Yes, inasmuch as I service the Personnel Office.
8 Q Did you service the individual who made the decisions in this
9 case?
10 A Yes.
11 Q And do you know what the decision to separate Mr. Pletten
12 was based on?
13 A Yes. It was based on the certifications from his personal
14 physicians that he could not work in the environment that
15 TACOM had to offer without hazard to himself.
16 Q I show you Agency Exhibit 17 and ask if you can identify
17 this?
18 A Yes. This is Mr. Pletten's supervisor's request for his
19 separation.
20 Q Was this forwarded to you for your action?
21 A Yes, it was.
22 Q What did you do upon receiving this request?
23 A Well, my first response is to review what materials are
24 given to determine whether or not the requested action is
25 supportable, whether or not it would be procedurally correct.

1 One of the first things I did was to recommend that
2 Mr. Pletten be given another opportunity to produce any
3 medical statements that might cause avoidance of the separa-
4 tion.

5 Q I direct your attention to Tab 8 of the Agency's response
6 and ask if you can identify that document?

7 A Yes.

8 Q Would you explain what it is, please?

9 A It is a letter that I drafted for Mr. O'Connor's signature,
10 addressed to Mr. Pletten, giving him the opportunity to
11 provide an updated physician's statement concerning his
12 current medical status, and to assist his doctor in making
13 such a determination, we gave him a very current environ-
14 mental air contents studies report that had been made.

15 Q I direct you to this document and ask you if you can identify
16 that?

17 A That is the result of my request to the safety officer for
18 the environmental statement.

19 Q That is the attachment letter which went with Mr. O'Connor's
20 letter?

21 A Yes.

22 Q To your knowledge, was anything ever furnished? Did
23 Mr. Pletten respond to this letter, to your knowledge?

24 A He did, but not within the time frame that had been
25 established and not before the proposed separation was

1 drafted. We did receive it later.

2 Q Did you take any actions based on the document furnished by
3 Mr. Pletten later on?

4 A That was his reply to the dispensary. It was considered
5 before a final decision was made on the proposed separation,
6 yes.

7 Q I direct you to Tab 7 and ask you if you can identify this
8 letter?

9 A Yes. That is the letter that was prepared for Mrs. Averhart's
10 signature, proposing the separation.

11 Q What is the purpose of the proposed separation, to the best
12 of your knowledge?

13 A To advise the employee of the action proposed by management
14 and the reasons therefore, and to give him an opportunity to
15 reply to it.

16 Q Did Mr. Pletten respond, to the best of your knowledge?

17 A Yes. There were several pieces of communication.

18 Q I direct you to Tab 9 and ask you if you can identify these
19 documents?

20 A Yes, I recognize each of them.

21 Q And what are they?

22 A They are his varied responses. One dated 16 November, which
23 had to have been a December date, but --

24 Q Although the documents would obviously speak for themselves,
25 in your own opinion, what was the substance of the response?

1 A Well, he was not responding to the paragraphs in our letter
2 to him of the medical aspects of his physical condition, or
3 statements doctors made. They were instead, it seemed, to
4 be a contest concerning Mrs. Averhart's personality or right
5 to do this. It was taking exception to that concerning
6 procedure, regulatory and personal aspects of the supervisor.

7 Q I note in responses he requests the Agency to furnish him the
8 material relied upon in opposing his separation. Was that
9 material ever provided to him?

10 A Yes. By Gloria Gilmore, who is my supervisor and was the
11 contact person named in the letter to Mr. Pletten.

12 Q I direct you to Tab 8 of the Agency's response and ask you if
13 that is the material you are referring to?

14 A Yes, it is.

15 Q After sending the proposed notice, what is the next pro-
16 cedural step required to be taken?

17 A After the proposed notice, we must consider the employee's
18 response, if any, and make a decision.

19 Q The proposed notice also indicates, in addition to making a
20 written response, that he has an opportunity to make an oral
21 response and Mr. Hoover should be contacted. To the best of
22 your knowledge, was Mr. Hoover ever contacted?

23 A I am told that he was. I am told --

24 MR. COHEN: Objection. Hearsay.

25 Q (By Ms. Bacon) To the best of your knowledge, did

1 Mr. Pletten ever make an appointment with Mr. Hoover?

2 A To the best of my knowledge, he did.

3 Q Now, in deciding what further actions to take on the proposed
4 action, whether or not to go through with the final action,
5 what considerations are taken into account in coming up with
6 a decision?

7 A The --

8 MR. COHEN: Objection. The question calls for
9 testimony as to a decision-maker's position. There is no
10 foundation that Mrs. Bertram is a decision-maker. The ques-
11 tion proposed by counsel earlier asked: "Are you an advisor
12 or decision-maker?" She said she was an advisor, not a
13 decision-maker. I am not certain she has a foundation to
14 make such an answer.

15 Q (By Ms. Bacon) No problem. Answer the question.

16 A Regarding what happens, okay. The reason for the initial
17 proposed action must be considered along with the employee's
18 response and the decision-maker must make a decision as to
19 whether or not to proceed with the proposed action.

20 Q To the best of your knowledge, who makes this final decision,
21 or who made this final decision?

22 A Mr. Hoover made the decision and presents his decision to the
23 Deputy Commander, Gen. Stallings, for confirmation and it was
24 Gen. Stallings who signed the letter thereby confirming the
25 decision.

1 Q Is this done according to regulatory requirements?

2 A Regulatory and command procedure by delegation of authority.

3 Q When was the decision letter sent?

4 A It was sent -- it is dated the 16th of January and would have
5 been sent on that date.

6 Q That document is reflected at Tab 10 of the Agency's response.
7 After that letter was sent out, did you receive anything
8 further from Mr. Pletten?

9 A Yes. Mr. Pletten requested a stay of action.

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

11 A Yes. That is the request.

12 MS. BACON: I submit that as Agency Exhibit 19

13 MR. COHEN: That is Agency 19?

14 MS. BACON: Yes.

15 MR. COHEN: No objection.

16 Q (By Ms. Bacon) Now, what did you do when you received
17 Agency 19, which is Mr. Pletten's request for stay of
18 personnel action?

19 A Well, the first thing I had to do was consult the Legal
20 Office because I did not know the legal ramifications of that
21 request. I found out it was as stated in there, a request
22 for the stay because Mr. Pletten apparently felt that we had
23 not complied with requirements of the requirements directives,
24 about the initial decision from the office of Personnel
25 management, and so we needed to confirm that we did, in fact,

1 and I had to get confirmation of that that we had complied
2 with that particular requirement.

3 Q I ask if you can identify this document?

4 A Yes. That is a response that I prepared for the signature of
5 Gen. Stallings sharing with Mr. Pletten that that was what we
6 learned.

7 MS. BACON: I move to submit that as Agency
8 Exhibit 20.

9 MR. COHEN: No objection.

10 Q (By Ms. Bacon) Mr. Pletten, in the context of this appeal,
11 has raised the issue of reasonable accommodation. Were you
12 ever involved in any action, or any attempt to provide the
13 same to him?

14 A I personally was not involved in providing Mr. Pletten any
15 accommodation. However, again, as the point of contact in
16 the Personnel Office, I am aware that this was done. Do you
17 want me to enumerate the kinds?

18 Q Well, you have stated that you handle grievances. What is
19 your function in terms of advising relative to grievances?

20 A Well, my function is to make recommendations, some of which
21 are accepted, some of which are not; some of the accommoda-
22 tions that were offered, with the face mask, a respiratory
23 device, which later was proven not to be an effective tool of
24 accommodating Mr. Pletten's problem. He was moved from one
25 work location out on the floor, into an office area with

1 partial partitions and, in fact, was satisfactory for a while,
2 it seemed, but later was not. Then his supervisor,
3 Mr. Kator, at the time, offered him a desk, or a work site
4 in an office that was totally enclosed and had open windows to
5 the outside, which the interior office did not. And this was
6 not satisfactory, either.

7 Q Why was that not satisfactory?

8 A Well, Mr. Pletten brought a medical statement saying he
9 should not be segregated from the workers. It would not have
10 been segregated in that there would be four or five other
11 non-smokers in that area, but he brought a certification we
12 should not make that move. So it was not done.

13 MS. BACON: I have no further questions at this
14 time.

15 EXAMINATION

16 BY MR. COHEN:

17 Q Mrs. Bertram, may I see your file, please?

18 A The whole thing?

19 Q Yes.

20 A As is?

21 Q As is. I will give it back to you. We will go off the
22 record for a minute.

23 (Off the record.)

24 Q (By Mr. Cohen) I am going to show you a note, Mrs. Bertram,
25 from your file that purports to be written from Emily Sevald

1 Bacon, attorney for the Agency. Is that her handwriting?
2 A Yes, it is.
3 Q Did you talk to Mrs. Bacon about the contents of her note?
4 A Yes.
5 Q Those were recommendations to be added into the proposed
6 notice?
7 A To the change of wording from the draft that I had originally
8 prepared.
9 Q Is that yellow sheet the draft or final copy that went out?
10 A That is the final copy.
11 Q May I have back, please, the note from Mrs. Bacon indicating
12 the following -- first of all, were these suggestions adopted?
13 A Yes.
14 Q It says in Paragraph 3 that it is recommended that the reason
15 why placement is not possible be added, such reason being
16 that the command is not able to provide a smoke-free work
17 environment anywhere on the installation. You indicated
18 that?
19 A Yes.
20 Q Do you know those facts to be true?
21 A Yes.
22 Q How do you know those facts to be true?
23 A By verification from the Safety Office and a number of air
24 content studies.
25 Q Did your verification take place prior to, or subsequent to

1 Mrs. Bacon's notation?

2 A Throughout the Pletten case, actually, and, yes, with
3 another contact with the Safety Office.

4 Q You indicated in the record Mrs. Averhart indicated only
5 toward April of 1981 was there any request for information
6 about smoke-free areas on the installation?

7 MS. BACON: I am going to object.

8 THE WITNESS: '81?

9 MS. BACON: I will object. Mrs. Bertram's
10 testimony would speak from Mrs. Averhart's knowledge.

11 Q (By Mr. Cohen) I am saying Mrs. Averhart indicated that the
12 only time -- as a matter of fact, if I might take the
13 opportunity, I believe we might find an exhibit in the record
14 where she indicated, notation, I believe, 10 and 11,
15 requesting that you advise this office the area in the
16 command which meets the criteria specified by Dr. Solomon.
17 I point you to 10 and 11. Those were written by
18 Mrs. Averhart and I apologize for the date. It is
19 17 December '80. Mr. Pletten's case arose far earlier than
20 that.

21 A Correct.

22 Q How many requests such as this were forwarded?

23 A I don't know. And it is only an opinion, but I doubt any
24 others than that were forwarded by Mrs. Averhart, but she
25 was not a supervisor at the outset of Mr. Pletten's problems.

1 Q You have handled Mr. Pletten's case since its inception?

2 A Yes.

3 Q How many other requests went out like that?

4 A A guess would be six or seven, whatever.

5 Q Do you have a record of those? Are they in this record?

6 A I am not -- some of the requests would have been verbal, so

7 if you are meaning written requests, no, but we did the air

8 contents study in 1979.

9 Q How does one make a verbal request from all the managers at

10 the installation, in that, just Building 230 covers 250,000

11 square feet?

12 A How does one verbally request on behalf of the managers?

13 The managers as a large group were not consulted. It was a

14 request to the Environmental folks, the Environmental people

15 in Safety and Industrial Hygienist in several health clinics,

16 who were requested to make the air contents study; that was

17 telephonic.

18 Q Mrs. Averhart requested this from -- she directed this to

19 whom, Industrial Hygienist as well as to Safety, and you

20 contacted both hygienists and Safety?

21 A Yes.

22 Q Prior to the --

23 A Yes.

24 Q -- telephone request?

25 A Yes.

1 Q They would have recollection of that, would they?

2 A I am sure they would.

3 Q Did they do the study at every part of the plant?

4 A I couldn't testify to that. I have records of them having
5 made numerous studies at various points throughout the
6 installation.

7 Q How many places?

8 A I would have to count them.

9 Q Do you have them in your records to be able to count them?

10 A I think so.

11 Q At the time you aided in the decision regarding Mr. Pletten,
12 did you know the number?

13 A I would have known there were numerous, but whether there
14 were seven or eight, I can't tell you.

15 Q More than 10?

16 A Totally, throughout the installation?

17 Q Yes.

18 A Yes.

19 Q Well, more than 10, less than 20?

20 A I would say so, somewhere in that range.

21 Q Were they done at the same places or varied places?

22 A Varied places.

23 Q How many individual divisions are there in TACOM?

24 A I don't know. A large number.

25 Q More than 100?

1 A I would think -- oh, yes. Divisions, not directorates.

2 Q I understand that. Divisions are sub units of the directorate?

3 A Yes.

4 Q It is conceivable they would have missed some places.

5 A It could be conceivable, but this affirms they did not.

6 Q They did studies in perhaps 10 to 20 places out of a hundred,

7 at least in the neighborhood of 100 branches?

8 A Now you are saying branches.

9 Q I'm sorry. Divisions.

10 A They did them at all of the major locations at the time of

11 the principal problems concerning air content. They even

12 went out to our 16 Mile Road location and made air content

13 studies and found that there was a similar air flow and

14 conditions existing there.

15 Q Did you direct their investigations as to where they should

16 go?

17 A No.

18 Q What is a major location?

19 A Where we have a reasonable number of people, a large number

20 of people.

21 Q How is it determined? Name 10 places. The numbers --

22 A We had seven or 800 out there at a time.

23 Q Name the 10 largest places of command, the 10 major locations.

24 A You have been on the installation. The installation is, for

25 all practical purposes, a mile square complex. In 1980, we

1 also had about seven or 800 people working at another complex
2 about five miles north of the Arsenal. That, of course, was
3 a major work area. Since that time, we have closed the
4 16 Mile Road offices and built a new building in the Arsenal,
5 which now houses those employees.

6 Now, coming back to your question, how many
7 major work sites are there now: Just the Arsenal. We
8 service our office, Personnel Office.

9 Q You said they did studies at major locations. How do I know
10 what it is? You said major locations. Does that mean
11 command? I want to know more specifically.

12 A Building 200, Building 230, HISA.

13 Q Wait a minute. Isn't Building 230 250,000 square feet?

14 A Yes.

15 Q That's rather large.

16 A I was not finished, Within Building 200 and 230, there was
17 several different points at which they made the studies as
18 well.

19 Q Why, in your initial letter, have you not included these
20 changes Mrs. Bacon referred to, the reason for placement?
21 Why didn't you address the issue of placement? Is it not
22 possible?

23 A Well, I guess I would have to say it was an oversight. I
24 didn't feel that it was necessarily germane, but I think it
25 was a good recommendation.

1 Q You have specialized for how many years in this area, in this
2 type of work?
3 A Six or seven.
4 Q You wrote Mrs. Averhart's matters, didn't you?
5 A Wrote her matters?
6 Q Her letters.
7 A The proposed separation letter, I prepared that, yes.
8 Q Did you direct Mrs. Averhart as to what she should be doing?
9 A I was responding to Mrs. Averhart's request for the separa-
10 tion.
11 Q You did not discuss this with her before she made the request?
12 A Yes. She asked me what her next step was and how to go about
13 it. That is after the disability requirement had been
14 disapproved.
15 Q Who made the decision -- advised her the removal was a
16 potential?
17 A That was one of the options she had. I advised her of that.
18 Q What other options did she have?
19 A Not too many.
20 Q What were they?
21 A The other options would be continuing Mr. Pletten on -- in
22 his known past status, in carrying him on sick leave. That
23 was not a very viable option. That had already been going
24 on for two years.
25 Q Why is that not viable?

1 A Because decisions had been made along the way that were
2 leading to the final action of retain or separate.
3 Q Wait a minute. Let me understand something. Why were these
4 leading to this? Are you saying there was an inexorable
5 march to remove Mr. Pletten?
6 A No.
7 Q Why --
8 A I am saying this: Number one, he was placed on leave; he was
9 unable to return to duty, according to his own doctors'
10 statements, in our working environment. We considered separa-
11 tion earlier, but that did not seem appropriate because there
12 was the possibility of disability retirement and, as you know,
13 the Agency filed that information in his behalf. That was
14 disapproved by the Commission, so then we have to make some
15 other decisions, and the decision was to proceed with
16 separation due to medical disqualification.
17 Q Why could you not keep him; sick leave without pay?
18 A What could that accomplish?
19 Q What would it mean to sever a man's career without any
20 actual knowledge he could not come back?
21 A Without actual knowledge he could not come back?
22 Q That is right. It was your presupposition he would never be
23 able to come back and you could not provide the proper type
24 of environment. Don't things change, Mrs. Bertram?
25 A Yes. Well, of course they do. They are always changing.

1 But the facts at the time were, and still are today, that the
2 work environment is not such that he can work in that
3 location without hazard to himself, by medical certification.

4 Q Didn't you add a new building at TACOM?

5 A Yes.

6 Q Have you taken an air study there?

7 A Yes, there were.

8 Q Were or did?

9 A They did.

10 Q What are the results?

11 A That they did not meet the requirements of Mr. Pletten's
12 physicians.

13 Q What were the quantifications, the qualified studies? Where
14 are those studies? I have not seen them yet.

15 A Do you want to give me my folder back, please?

16 Q Yes.

17 A Well, I am sure you have been through this. There is not one
18 in here for Building 229 or 231.

19 Q Mrs. Bertram, I am sure you would know, because you made all
20 the recommendations based on the information, or advised,
21 did you not, and know -- by the way, I don't believe there is
22 one for the new building.

23 A I don't see one. I guess I don't have one.

24 Q When did the new building open?

25 A June and August last year.

1 Q June to August of '81?

2 A Yes.

3 Q When were all the studies done? We are referencing in your
4 reports.

5 A I don't have the exact date.

6 Q Give me an approximation.

7 A Mr. Pletten submitted a grievance concerning the air in those
8 buildings and it was in response to that grievance that the
9 contents study was made.

10 Q In the new buildings?

11 A Yes.

12 Q I don't understand then. Why don't we have specific
13 references to those buildings?

14 A Well, the major reason being, we are not discussing that
15 grievance, we are discussing the separation.

16 Q You have testified that there is no place in the command that
17 will meet his requirements?

18 A Correct.

19 Q I want to know how you back that up? You have told me there
20 is a general statement, and also told me there is two new
21 buildings that have opened since August '81, and I would like
22 to know what basis, you know, if you have any evidence for
23 me, so I can look at it.

24 A I don't have it here.

25 Q Do you happen to remember the results now?

1 A Only to the extent that they meet OSHA requirements and
2 Department of Army requirements, but not Mr. Pletten's
3 physicians' requirements.

4 Q Show me one document from one physician that says
5 Mr. Pletten cannot work in anything except a smoke-free
6 environment, directing that he can -- requiring that he not
7 work. Show me one document.

8 A One letter would be 17 March '80, a letter which is Tab 2D
9 in the Agency's packet. This patient needs a smoke-free
10 work environment to avoid ambients tobacco smoke at all costs.
11 This includes smoke-free eating areas, restaurant facilities
12 and working area where his job takes him throughout the day.
13 And it goes on from there.

14 Q Where in that letter does it say he cannot work in anything
15 but a smoke-free environment? I recognize it says this
16 patient needs a smoke-free working environment, but I don't
17 find any language that says he can't work --

18 A To avoid ambients tobacco smoke at all costs. It does not
19 say he cannot work in anything but a smoke-free environment.

20 Q Not to my knowledge. Is that your interpretation of the
21 letter?

22 A That was Dr. Holt's interpretation.

23 Q What interpretation did you place on it?

24 A I don't have authority to place an interpretation on it.

25 Q But you have to analyze it on your own?

1 A I have to use the material given to me to include those
2 specialists schooled in that area; that is the medical people
3 and environmental people.

4 Q What about the submission of Dr. Dubin in 1981? I refer
5 specifically to Tab 2D 120BS, which states: "To Whom It May
6 Concern: There is not, and has not been, any medical reason
7 for denying Mr. Pletten's ability to work and for denying him
8 an environment reasonably free of contamination." And it is
9 signed, Bruce Dubin. Does that not contradict your presump-
10 tion with regard to the other letter?

11 A That does cause some contradiction, but the other statement
12 subsequently brought by Mr. Pletten goes back to the need for
13 a smoke-free environment. And in March a number of letters
14 were brought in including the March 5th letter, again signed
15 by Dr. Dubin, which says something to the effect if he is
16 able to work, as long as he is completely separated in the
17 working area so he is totally free from cigarette smoke.

18 Q You are quoting from Dr. Dubin's letter?

19 A Yes. Dr. Solomon, about that same time in a letter dated
20 March 12, 1981, Dr. Solomon said that a smoke-free environ-
21 ment means to me no smoke particulates (sic) matter in the
22 air at all.

23 Q At any time did Dr. Solomon indicate absent a smoke-free
24 environment Mr. Pletten could not work? There is no question
25 a smoke-free environment was best for Mr. Pletten. I can't

1 argue with that just as I can't argue the best I could have
2 in my own office would be a smoke-free environment, but you
3 have not shown me yet, any part of the letter that says he
4 cannot, or should not work. Can you find language of that
5 sort?

6 A They have said that he must have a smoke-free environment,
7 and then --

8 Q Where does he say that he must have a smoke-free environment
9 in order to work?

10 A The one we have just read.

11 Q You are talking about March 5? It is not there.

12 A The January one I just quoted.

13 Q January '81 from Dr. Solomon, or what?

14 A Going back to March '80, March 17, 1980, Dr. Solomon said
15 this patient needed a smoke-free work environment to avoid
16 ambients tobacco smoke at all costs.

17 Q But does it say he can't work?

18 A No, it does not say he can't work, it says it must be avoided
19 at all costs.

20 Q Let's go with this for a minute. Coal miners, for example,
21 are placed in deep, dark holes miles below the surface and I
22 would advise a coal miner, I would say, "If you want to have
23 a healthy lung, you should avoid coal mining," but by no
24 stretch of the imagination is it said they are forbidden from
25 working. Do you understand that?

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A Yes.

Q Isn't there a chance there is semantical argument among the doctors and between the doctors and TACOM as to what is meant in Mr. Pletten's case?

A Yes, there is that chance. That is why the Agency went back to the doctor for a definition of what is meant by smoke-free environment.

Q But does it say anything as to whether or not he could or could not work even if the environment was smoke-free?

A No.

Q They didn't say even if they were capable of giving him a smoke-free environment, they would let him come back to work?

MS. BACON: Objection. Who is "they"?

MR. COHEN: Command.

THE WITNESS: Yes. Command did that in October '81 by saying to Mr. Pletten, "Go back to your doctor, your disability retirement has been disapproved. This is the air that we have and it meets OSHA and Army requirements, and ascertain whether you can come back to work."

Q (By Mr. Cohen) And Mr. Pletten presented himself to Mrs. Ayerhart, did he not, with a letter from Dr. Dubin dated 1-20-81 and said I am here ready to work, didn't he?

A I am told he did.

Q Yes. And the record would reflect he did. He did what you

1 said to do, he got a letter from Dr. Dubin saying the guy can
2 work.

3 A Right. Dr. Dubin has not said he can't work and, obviously,
4 he worked at home, essentially some work, but he cannot work
5 without hazard to himself in our environment. And regulations
6 definitely require that we consider that.

7 Q Isn't it also a fact that the command, pursuant to
8 Col. Benacquista and other higher command have determined
9 there is no hazard pursuant to regulations?

10 A There is no hazard to the average employee as determined by
11 the command's ability to meet the OSHA and Department of
12 Army requirements. I would have to assume, and I am not a
13 doctor, that Mr. Pletten's requirements are more stringent
14 than the average employee's.

15 Q You assumed. Did you contact the doctors and ask them?

16 A No. That is not my role. I do not talk medical terms.

17 Q But you are evaluating medical terms in giving advice to
18 Mrs. Averhart and others, are you not?

19 A From a personnel regulatory and procedure standpoint, yes.
20 She had other advice from medical people, not me.

21 Q If there is confusion, though, as you indicated Dr. Dubin's
22 letter of January 20th supposes to you, in your mind wouldn't
23 it have been logical to call the doctor or take testimony
24 from him? This Mr. Pletten obviously could not get in its
25 entirety, and you could have avoided this whole rigamarole.

1 A What could Mr. Pletten not get in its entirety?

2 Q He got a letter, pursuant to your request, a letter to
3 Dr. Dubin asking, in spite of the fact we cannot get a
4 totally smoke-free environment, can the man work. You didn't
5 ask him that, did you?

6 A No.

7 Q Isn't that the big question here?

8 A No, I don't think so.

9 Q Why not?

10 A I think the big question is: Can Mr. Pletten work in the
11 environment that is provided? And his doctors have said no.

12 Q Where? Where have they said no? You just testified you
13 never asked the doctors if, in the environment provided, can
14 he work. You said, we have a letter, a contradictory letter
15 that skirts the issue, but never says it specifically. And
16 Mr. Pletten was asked to provide a note saying he could go
17 back to work. He so provided it. Where is the reasoning
18 that led you to that conclusion?

19 A The reasoning is in the fact his doctors have said he needs
20 an absolutely smoke-free work environment. Free of any smoke
21 particulate whatsoever, and we cannot provide that outside
22 of a clean room.

23 Q I understand that. And presuming that as the bottom line
24 prerequisite, did you ask the doctors, again, did you ask the
25 doctors, or direct anybody to write a letter to the doctors

1 or have any contact with any doctors, that despite the
2 absence of ^{an} absolutely smoke-free environment, can he work
3 without hazard. Did you ask that question of the doctors?
4 A We wrote to the doctors and asked them again -- excuse me.
5 We wrote to Mr. Pletten and asked him to get the doctors'
6 statements. It is not my job to contact his doctors, it is
7 his job to contact his doctors. Or if there is some misunder-
8 standing of medical information, it is doctor to doctor, not
9 Personnel to doctor.
10 Q Did Dr. Holt write to these doctors?
11 A I can't tell you.
12 Q Did Dr. Holt have contact with these doctors?
13 A I can't tell you.
14 Q Didn't he tell you?
15 A I don't know.
16 Q You saw Dr. Dubin's letter. Did you say to Dr. Holt, "Find
17 out what the story is."
18 A Surely. I talked to him several times. Whether he talked
19 to the doctor is his business, not mine. I would like to
20 come back to the first question. It was suggested to Leroy
21 to go see your doctor and see if you can come back to work.
22 Q Has Dr. Holt confirmed the information that the environment
23 has been improved? Has Dr. Holt concurred the environment
24 has not become --
25 A We provided the environment statements about the air content

1 that existed. It is up to his doctor to determine he can
2 return.

3 Q Didn't USACARA say he could not come back -- that study had
4 not been completed pursuant to regulatory requirements, was
5 that the conclusion?

6 A I don't think so, not in toto.

7 Q The recommendation utilized USACARA's findings?

8 A Yes, I think so. Because one of the things we are referring
9 to is that first grievance --

10 Q I'm referring to USACARA recommendations in the tabs, Tab 4,
11 4 or 7 -- let's try 3.

12 A All right. That was the first one. The quotation from the
13 commander was Mr. Pletten is entitled to a work area reason-
14 ably free of contamination. Now, reasonably free is provided.

15 Q But at the time of the USACARA study, USACARA points the
16 finger, does it not, at command as saying you have not done
17 any of these things, you have not given us the information,
18 we don't know what the information is. Isn't that true?

19 A I don't know.

20 Q Read 3, you tell me. Look at it specifically.

21 A I see it now.

22 Q There is no evidence that analysis of air content was made
23 to show Mr. Pletten's work area is reasonably free of toxic
24 substances?

25 A But it does also say that the air flow meets the requirements,

1 and so forth and so forth.

2 Q Where does it say that?

3 A Well --

4 Q While the ventilation system may provide, that is not a
5 determination that it does provide, is it, Mrs. Bertram?

6 A No, I guess not.

7 Q So your statement would be there is no evidence there was any
8 compliance?

9 A I don't know what she had to work with, but in 1979, looking
10 now at Agency Tab A, in 1979 there were some air content
11 studies. Whether they had been provided to her or not, I
12 don't know.

13 Q But you have made these conclusions, have you not, that
14 there was total compliance, but we still don't know whether
15 or not Mr. Pletten can work in an area that is not smoke-
16 free?

17 A Without hazard to himself.

18 Q We don't know that, do we --

19 A His doctor has said.

20 Q You have yet to show me where his doctors have said that.
21 You have not shown me one single letter where it says
22 Mr. Pletten cannot work except in a smoke-free environment
23 Without hazard to himself, have you?

24 A Not in those words. The doctor says air contamination must
25 be avoided at all costs. And to me that is saying the same

1 thing.

2 Q If I now challenge that and Mr. Pletten has in his responses
3 to you and his letters, did anybody at command bother to
4 check with the doctors to ask them the specific questions
5 rather than analogizing verbiage that may or may not mean
6 the same thing?

7 A I cannot answer because I would not contact the doctors.
8 That is one of the options of Dr. Holt in his position and I
9 don't instruct Dr. Holt --

10 Q Did you advise him?

11 A It was one of the things discussed, yes, sir.

12 Q You discussed it? Did you advise him to do so?

13 A No, I did not.

14 Q Why not?

15 A That is not my role.

16 Q You just said you can discuss and advise him, but not your
17 duty to direct? Did you advise, did you so advise him?

18 A Advise, meaning the suggestion that he do it?

19 Q Yes.

20 A I don't recall that I did. I will say no.

21 Q Why didn't you?

22 A I have no reason.

23 Q Did you prepare -- this may be a little off the wall, but I
24 have information, Mrs. Bertram, you have filed a Complaint
25 with Worker's Compensation on your office on your own behalf

1 regarding smoke-related matters?

2 MS. BACON: Objection. Irrelevant.

3 THE WITNESS: Yes, I filed a Complaint.

4 Q (By Mr. Cohen) Then it is true?

5 A Yes.

6 Q Was that matter resolved?

7 A Yes.

8 Q What was the nature of your complaint?

9 A I was suffering from conjunctivitis and the -- and I saw my
10 physician because of it. And one of the reasons that my
11 condition may have existed was because of smoke.

12 Q Cigarette smoke?

13 A No, this was cigar smoke.

14 MR. COHEN: Off the record.

15 (Off the record.)

16 Q (By Mr. Cohen) How was the matter resolved?

17 A The office of Workmen's Compensation reimbursed me for
18 medical expenses. I had to see my doctor twice.

19 Q It was considered a work-related injury?

20 A They reimbursed me for medical expenses. I suppose it was a
21 sufficiently work related disease; it was compensable.

22 Q Owing to that fact, had you suggested to command Mr. Pletten's
23 case be sent to Workmen's Compensation Board?

24 A I did not have to. He did that on his own.

25 Q Is that still pending?

1 A No. As far as I know, it was disapproved.

2 Q Did you concur in Mr. Pletten's attempt?

3 A I neither concurred or non-concurred. The medical evidence
4 he produced was sent to Worker's Compensation. I don't recall
5 being asked for witness statements or anything. I don't
6 think I was.

7 Q If the command filed additional writing requirement matters
8 without his permission, did the command assist him in prepara-
9 tion of the comp claim?

10 A Let me see. The Personnel Office compensation clerk assisted
11 him in processing his claim. One of the things that is a
12 required step in adjudicating that claim is the supervisor's
13 statement and witness statements. I don't recall being asked
14 to function as a witness statement and it was outside of the
15 realm of any other processing.

16 Q Are there some problems with smoking-related injuries in the
17 command, to your knowledge?

18 A To my knowledge, no.

19 Q Other smoke-related complaints by other personnel?

20 A To my knowledge, no, but I don't necessarily have that
21 knowledge.

22 Q But you yourself had that problem at one time?

23 A Yes.

24 Q If you know, did the Tank Command meet Army regulations at
25 the time you had your problem?

1 A I don't know.

2 Q Did you ask for a study to be made?

3 A No.

4 Q You didn't ask for air studies?

5 A No.

6 Q But from your impression, it was causing you some harm?

7 A It was an immediate co-worker who was working quite closely
8 with me that was a chain cigar smoker, and it caused a
9 problem, yes.

10 Q Did you ask your supervisor to get the cigar smoker to stop
11 smoking?

12 A Yes.

13 Q Was that accomplished?

14 A He smoked all the more.

15 Q Wonderful. What did your supervisor do?

16 A Nothing.

17 Q Did you file a Complaint?

18 A After my infection was cleared up and about that same time,
19 the employee transferred, so the problem resolved itself.

20 Q You didn't go over your supervisor's head?

21 A No.

22 Q If he had not been transferred, would you have?

23 A I don't know. I'm glad I didn't have to make that decision.

24 Q Are you familiar with Mrs. Averhart's proposed notice?

25 A Yes.

1 Q Did you prepare it?

2 A Yes.

3 Q In draft form?

4 A In final form for her signature.

5 Q Did you go over it with her?

6 A Yes.

7 Q Do you think she understood each and every part of it?

8 A I presume so. She signed it.

9 Q In testimony the other day, I asked Mrs. Averhart, "Are you
10 familiar" -- did you familiarize Mrs. Averhart with all
11 evidence that goes into one of these letters?

12 A Mrs. Averhart has her own folder on Mr. Pletten. Certainly
13 she is aware of the whole problem. It was she who applied
14 for disability retirement and she who received the dis-
15 approval.

16 Q She indicated to me on testimony that that was at the
17 direction of Mr. Hoover.

18 A That may be.

19 Q And the conclusions that are drawn in the letter are con-
20 clusions drawn from the evidence?

21 A It is my verbiage based on facts presented.

22 Q And she knew all the facts as well as you did?

23 A I certainly think so.

24 Q She testified she had no knowledge of certain letters and
25 particularly Dr. Dubin's January 20th letter indicating he

1 could go back to work. Were you familiar with that?

2 A With the fact she said she was not aware of it?

3 Q Yes.

4 A No, I cannot confirm nor refute that statement.

5 Q Mrs. Averhart, on her direct testimony, indicated had she

6 known, she would have considered that with the conflict of

7 Dr. Dubin's statement of January 20th and his other state-

8 ments. Did she have copies of all the medical information?

9 A I have never compared her record against my own.

10 Q Did she read this completely? Is that the normal thing? Is

11 she the deciding official?

12 A Her decision was to request the separation action and to

13 sign the proposed letter. She does not make the final

14 decision, no.

15 Q Now, it says in the letter, and I was going down the letter

16 with her, line by line, what are OSHA requirements regarding

17 smoking?

18 A I'm sorry. I didn't bring that with me.

19 Q Have you reviewed them?

20 A Yes.

21 Q Do you know, basically, what they mean, what they state?

22 A Basically, yes. Not specifically.

23 Q Give me an overview, please.

24 A Of course, OSHA requirements cover everything. Are you

25 talking just about air now? I can't quote any of it.

1 Q Give me a sense of what its general thrust is.

2 A It talks about safe working conditions and a healthy work
3 environment.

4 Q How does it define, if you know, in general terms.

5 A I don't know.

6 Q What does Army regulations say in that regard?

7 A The Ar 1-8 says we will have satisfactory working conditions,
8 reasonably safe and reasonably free of -- reasonably safe
9 working conditions and environment.

10 Q If I can quote, "An environment reasonably free of contamina-
11 tion."

12 A All right.

13 Q Also it says the Department of the Army also recognizes the
14 right of individuals to smoke in such buildings, provided
15 such action does not endanger life or property, cause dis-
16 comfort or unreasonable annoyance to non-smokers, or infringe
17 upon their rights. Are you familiar with that part?

18 A Yes, I am.

19 Q Who made a decision as to what discomfoted or annoyed
20 Mr. Pletten?

21 A Mr. Pletten makes that decision.

22 Q And if smoking of any type bothers or discomforts or annoys
23 Mr. Pletten, doesn't the regulation, in its plain language,
24 also recognizes the right to smoke?

25 A If one reads only that far, yes, it can be read that way.

1 There are other paragraphs further on that talk about the
2 rights of other employees, however.

3 Q Can you point that out, please? You are talking about the
4 equitable balance between rights of non-smokers and those of
5 smokers in implementing and enforcing the smoking policy?

6 A Yes.

7 Q And attempts to balance those rights?

8 A Yes.

9 Q But the basic underlying theory of the Ar as it is written
10 that if it does cause discomfort or unreasonable annoyance,
11 then people have no right to smoke even owing to the
12 equitable balance? Is that a fair reading of it?

13 A That is a reading of it. There are other interpretations of
14 it and where, for example, you might say in that paragraph
15 that it would preclude smoking anywhere, cafeteria, hallways,
16 et cetera, et cetera, if it is an unreasonable annoyance to
17 one individual. However, if you go to other paragraphs, it
18 does not require no smoking in corridors, lobbies, restrooms,
19 and so forth. Mr. Pletten's medical statement said he could
20 not even function there.

21 Q We have gone through all that around and around. And what
22 his doctors say and don't say, it is a matter of interpreta-
23 tion also.

24 A Okay.

25 Q Yes or no, are they that etched in black and white?

1 A No.

2 Q I didn't think so. Getting back to the AR, did USACARA
3 impose an interpretation of the AR 1-8 on the command?

4 A Impose an interpretation?

5 Q Did they make that judgment as to what the interpretation of
6 the AR should be?

7 A No, I don't think so. They made some recommendations.

8 Q At CF Tab 3, does it say that the commander has the authority
9 to ban all smoking, or take whatever action is necessary to
10 control smoking in an area under his jurisdiction, and this
11 could be considered a factor of union negotiations, is that
12 correct?

13 A Yes.

14 Q Did the command accept the conclusions of the USACARA report?

15 A Yes.

16 Q And recommendations?

17 A Yes.

18 Q And did the command, to your knowledge, ever initiate the
19 discussions with the union as to union negotiations as
20 regarding smoking?

21 A No, it did not.

22 Q Did they ban smoking in the civilian personnel division?

23 A No.

24 Q Why is it, then, that the Merit System Protection Board
25 in Washington has written in no reason exists (sic) in the

1 case called Pletten versus the United States Army, that
2 indeed it had been banned in civilian personnel division?
3 A Because they have a copy of the DF Mr. Pletten prepared for
4 signature of the Personnel Office written when he was
5 desirous of smoking being banned, but Mr. Grimmett, the
6 Personnel Officer, never received the DF.
7 Q So they are under a misapprehension?
8 A Yes, that was originally a misapprehension and when we got
9 a report of the investigation back, a letter was prepared by
10 the Legal Office correcting that misapprehension.
11 Q Did they ask for reconsideration of the matter in view of
12 that misstatement of fact?
13 A I think the action was left up to the Merit System Protection
14 Board as to whether or not they would reopen the case, but --
15 Q Do you have a copy of that letter for the Legal Office?
16 A Not here.
17 Q It is not in your file?
18 A No, that would be with that appeal file.
19 Q Was there ever a discussion about banning smoking in the
20 civilian personnel section?
21 A Discussion? I am sure there were discussions to do it.
22 Q Were you involved in those discussions?
23 A No.
24 Q Do you know who was involved in those discussions?
25 A Probably Mr. Grimmett because he would have been the

1 Personnel Officer at that time, and probably Col. Benacquista.
2 He would have been our Chief of Staff at that time and
3 Mr. Moore. He would be the Deputy.

4 Q Mr. Moore is a smoker?

5 A Yes.

6 MS. BACON: Objection.

7 Q (By Mr. Cohen) Are you a smoker, Mrs. Bertram?

8 A No.

9 Q Have you ever been?

10 A No, not once.

11 Q Who assesses Dr. Holt's performance in the command?

12 MS. BACON: I object to that as not being in
13 the scope of Mrs. Bertram's knowledge.

14 MR. COHEN: I don't know if she is telling me
15 -- let her answer.

16 THE WITNESS: I guess I am not really sure.
17 If we are asked for any input, it would be command group,
18 Chief of Staff, but he is -- his employing office is not
19 within the command, it is with the health agency.

20 Q (By Mr. Cohen) The reason I asked, first of all, I have
21 known you a while now and my reaction has generally been, if
22 there is a misunderstanding or absence of full information,
23 you are going to go find out what it is. Is that a fair
24 statement of the way you operate?

25 A I like to think so.

1 Q It is my experience that is the case. Mr. Pletten's case
2 has been a rather heavily publicized one within the command,
3 has it not?

4 A Yes.

5 Q And as a layman looking at medical terminology, how would you
6 classify it? Would you characterize all medical evidence so
7 far as being confusing or clear to you personally?

8 A To me, it is clear. There has been some confusing, you know,
9 twists to it from time to time, but to me it is clear.

10 Q Has it been possible -- maybe this is my characterization:
11 Has there not been a little bit of gamesmanship from the
12 doctors, not only as to standards, but as to esoteric dis-
13 cussions, philosophical discussions, as to smoke-free,
14 relatively smoke-free, and contamination, any of those
15 wonderful standards that seem to stick out to us?

16 A Perhaps so, but I have to come back to the requests that
17 were sent out for the clarification, you know, and when we --
18 when the command recognized and made -- and deciphered the
19 various documents Mr. Pletten had furnished the command
20 concerning his condition, and we went back to the doctor and
21 tried to clarify what did you mean by smoke-free, we were
22 trying to put an end to those games.

23 Q But nobody seems to have ever talked to the doctors
24 personally, like Dr. Dubin and Dr. Solomon.

25 A I have not. I cannot say that no one did.

1 Q What if your communication was not specific? For example,
2 we have cited the one question I am going to be asking the
3 doctors on their depositions, is: Can you work despite the
4 fact there is not a smoke-free, without any particulate,
5 environment? Wouldn't that have been the ultimate question?
6 A I hope when you ask it, you also ask it as without hazard to
7 ourselves. While many people feel we don't have concern for
8 the individual, that is not true and regulations require we
9 be humane enough to look at the hazards we may be causing the
10 employee, and we are not trying to hire people that are going
11 to suffer ill effects and, therefore, become compensation
12 cases. That is not the name of the game either.
13 Q You were a compensation case.
14 A Yes.
15 Q You wouldn't be considered medically disqualified either.
16 A No, but my doctor didn't certify I needed a completely
17 smoke-free environment.
18 Q You made a complaint you needed an environment free of smoke.
19 Didn't the gentleman puff on his cigar?
20 A My complaint was my doctor had said my conjunctivitis was
21 aggravated, or caused by that cigar smoke.
22 Q Then I would say the implication then is that you needed a
23 more smoke-free environment than you had.
24 A It would have been nice.
25 Q And the problem I am having with this is: If it is a hazard

1 to Mr. Pletten, smoking is a hazard to Mr. Pletten, isn't it
2 a hazard to everybody to a certain degree?

3 A The medical profession has said it is, but in varying degrees
4 to different people.

5 Q And the Surgeon General of the United States in his report
6 says --

7 MS. BACON: Objection. Are you going to ask
8 if she knows about the Surgeon General's report?

9 Q (By Mr. Cohen) Mrs. Bertram, are you aware of the recent
10 Surgeon General's report indicating what happens to a person
11 in the proximity of a smoker, are you familiar with that?

12 A Not intimately.

13 Q But you are knowledgeable of the Surgeon General's report?

14 A Yes.

15 Q Do you try, personally, try and avoid contact with cigarette
16 smokers?

17 A Moderately, yes. Not totally. I allow people to smoke at
18 my desk when they are visiting.

19 Q But if you have a preference?

20 A If I had a preference, they wouldn't.

21 Q If a person has a hazard presented to them, if Mr. Pletten
22 breached the hazard, is there any regulation you are familiar
23 with that would prohibit Mr. Pletten from working?

24 A If he is aware of the hazard, any regulation that would
25 permit him to work?

1 Q That would prohibit him.

2 A That decision is not his to make, it is the employer's to
3 make. He can't waive any Worker's Compensation in the event
4 he suffers disease because of the employment, at least I am
5 not aware of that.

6 Q First of all, let's establish: Isn't it true Worker's
7 Compensation people maintain Mr. Pletten does not have a
8 compensable injury?

9 A Yes.

10 Q Then you don't have fear of Workmen's Compensation?
11 A Sure we do.

12 Q How?

13 A Because we knowingly bring him back to work after his doctor
14 said he needed an absolutely smoke-free work environment.
15 Then we are subjecting ourselves to the -- the Army is
16 subjecting itself to the compensation claims that may result.

17 Q Did you ask Mr. Pletten for waiver of liability?

18 A No.

19 Q Why not?

20 A I am not at all certain that there are such provisions.

21 Q Why didn't you ask if there were any provisions?

22 A (No answer.)

23 Q For example, you didn't know whether you had to go beyond an
24 initial request for disability requirements, so you asked
25 for guidance here -- you didn't. That is unlike you,

1 Mrs. Bertram.

2 A Sorry.

3 Q Why didn't you ask? It would have solved this problem, would
4 it not?

5 A It may have.

6 Q I point your attention to Mr. Benacquista's October 6, 1980
7 letter. It says the command does not consider the working
8 environment in a Tank Automotive Command to be a health or
9 safety hazard. Now, owing to the colonel's statement, are
10 you then saying it is still a hazard to Mr. Pletten?

11 A I am not saying that. His physicians have said that.

12 Q His physicians? You have not shown me anywhere in any of
13 the letters where Mr. Pletten is classified that his environ-
14 ment, as constituted, is a hazard to Mr. Pletten. Show me
15 that in any of the letters.

16 A It is not in those words.

17 Q But it is implied, in your estimation?

18 A Yes.

19 Q What is a clean room?

20 A In my estimation, a clean room is an isolated area totally
21 free of any contaminants.

22 Q Do they have any such room at the Tank Command?

23 A Not to my knowledge.

24 Q What about the area surrounding the computers? Are those
25 relatively free of contamination and smoke?

1 A Not to my knowledge.

2 Q Have they banned smoking in the computer areas?

3 A In some areas of the computer rooms, yes.

4 Q Did you offer Mr. Pletten retraining in that area, so he
5 could work in that area?

6 A No.

7 Q Why not?

8 A You don't retrain somebody at the GS-12 level. Retraining
9 would be at a lower level.

10 Q This is the first smoking case command had, wouldn't that
11 be a reasonable --

12 A I have to go back again. If Environmental people state there
13 are no working areas of the command that are totally free
14 of any smoke particulates?

15 Q Are there any areas in the command where smoking is banned?

16 A To my knowledge, no.

17 Q Conference rooms?

18 A Sorry.

19 Q Auditoriums?

20 A Yes, but they are not working areas.

21 Q And computer areas, there may be some computer areas where
22 it is banned?

23 A Yes.

24 Q Do you know, did anybody discuss accommodating Mr. Pletten in
25 that situation by retraining him in another area?

1 A To my knowledge, no.

2 Q Why not, if you know?

3 A I don't know.

4 Q Did you ever refuse to take an air study for Mr. Pletten?

5 A I beg your pardon?

6 Q Did you ever refuse to order an air study performed for

7 Mr. Pletten?

8 A I don't recall ever being asked to perform an air study for

9 Mr. Pletten.

10 Q Did you refuse to give him copies of an air contents study

11 that was performed, the subject of an Equal Employment

12 complaint against you?

13 A I don't recall being asked for copies of an air contents

14 study. He has been given copies of air contents studies.

15 Q I understand. Did you ever have a grievance filed against

16 you by Mr. Pletten?

17 A Yes, but not on that.

18 Q July 1980 does not click in your mind when such a grievance

19 was filed against you?

20 A I don't recall a grievance filed because of refusing to give

21 an air contents study. It was another matter entirely.

22 Q Assuming for arguments sake that I had testimony from the

23 doctors, which is what I am intending to take in the next

24 couple of weeks, that Mr. Pletten could work even if it

25 weren't smoke-free. What would you advise the command?

1 A I would cross that bridge when I get to it.

2 Q Hypothetically what would be your advice?

3 A I don't know.

4 Q Would that contradict the command?

5 A It may.

6 Q Let's say he could go back to work and it would not contradict

7 the hazard he has, what would you do?

8 A Consider re-employment.

9 Q Would there be anything that would mitigate against

10 re-employment?

11 A No, not if he is clearly physically able to work in our

12 environment, then he would be applicable in our consideration.

13 Q Do you have any animosity toward Mr. Pletten?

14 A None whatsoever.

15 Q You think he was a good employee when he was working?

16 A He was a very good employee.

17 Q Have you asked Dr. Holt whether or not the environment was

18 safe at TARCOM?

19 A No, I have not.

20 Q Why didn't you ask him?

21 A The Environmental Safety people said it is.

22 Q I thought it was a medical decision?

23 A Well --

24 Q Mr. Lang testified studies were initiated by Dr. Holt.

25 A Okay.

1 Q Is that true?

2 A Some of them have been initiated by Dr. Holt; others have
3 been initiated by the Safety Office. Some were done by
4 Mr. Braun, Industrial Hygiene Office and some have been
5 transmitted by Mr. Lang.

6 Q Which are Dr. Holt's people?

7 A The hygienist work.

8 Q That is Braun?

9 A Yes.

10 Q So that is information you are referring to?

11 A Correct.

12 Q Did you ask for Dr. Holt's input as to the study once they
13 were completed?

14 A I didn't ask for it, no. I know he reviewed them on occasion
15 at least. Whether he saw them all or not, I don't know.

16 Q The problems I have with Mrs. Averhart, for example, she does
17 not know anything about certain letters. What conclusion
18 am I to draw from this, Mrs. Bertram? A breakdown in com-
19 munication?

20 A You will have to draw your own conclusion, but she was not
21 supervisor the entire time and she was not the only acting
22 supervisor.

23 Q Here is the lady who proposed a man's removal and makes a
24 request and calls you into it?

25 A Right.

1 Q She says, "I think I need advice," and she goes over things
2 and she does not know a piece of evidence exists. Is that
3 her fault or your fault, Mrs. Bertram?

4 A Our fault.

5 Q What portion is yours and what portion is hers? How do you
6 say it is our fault?

7 A Well, I don't know whose fault it is. I thought we were in
8 full communication. If we weren't, then I'm sorry, but I
9 don't know that one letter is that important. There were so
10 many medical statements and I think that she had the benefit
11 of the stand that the medical folks were taking.

12 Q With the November 2 letter from Mr. O'Connor that you offered,
13 how come you gave him only eight days? He had been on leave
14 without pay for two years. Why only eight days? Isn't that
15 a little restrictive?

16 A Not really. He was able to bring in doctors' certificates in
17 an hour's time, previously; within a day at least.

18 Q So you are basing --

19 A But he could have asked for additional time if it was
20 inadequate time and that would have been granted.

21 Q Did you have authority from Mr. Pletten to seek information
22 from his doctors?

23 A No.

24 Q Did you seek such authority?

25 A No. We asked him to deal with his doctors.

1 Q Are you familiar with the Michigan Employment Security
2 Commission regarding Mr. Pletten's claim for unemployment
3 compensation?

4 A I am aware there was one.

5 Q I ask you to examine this please and identify it if you can.

6 A All right.

7 Q Can you identify it?

8 A I can identify it. I have not seen it before, if that is
9 what you mean.

10 Q Can you tell me what the decision of the Commission was, if
11 you know?

12 A I was told that he had been approved for unemployment com-
13 pensation.

14 Q What is your understanding of the unemployment laws in the
15 State of Michigan, if any? Does that mean he could work?

16 A It means that the case was -- the reason for his unemployment
17 at that time met with the requirements.

18 MS. BACON: I object to any testimony
19 Mrs. Bertram might give on this, as not being in the purview
20 of her expertise.

21 MR. COHEN: At this time in the testimony, I
22 hereby make a motion the presiding official take official
23 notice of the facts of the Michigan Employment Security Act
24 and Michigan Employment Security rules and regulations which
25 provide a person has to be ready and able to work in order to

1 collect unemployment compensation.

2 MS. BACON: I would note for the record also,
3 Mr. Pletten's case has not been finally adjudicated; that it
4 is still on appeal.

5 MR. COHEN: But at the present moment --

6 MS. BACON: At the present moment the issue
7 of whether or not Mr. Pletten is ready, willing and able to
8 work has not been addressed by the Commission.

9 MR. COHEN: At this point they have authorized
10 his receipt of unemployment benefits.

11 MS. BACON: To the best of my knowledge.

12 Q (By Mr. Cohen) Did somebody offer Mr. Pletten a different
13 room in a different location?

14 A Different -- he was moved off the floor in an open office
15 area to a semi-private office in the line of supervisors, and
16 then was offered -- when that was not satisfactory, he was
17 offered another work location, which had full partitions and
18 was shared only by non-smokers, yes.

19 Q When was the offer made?

20 A I don't know the exact date, but it was by Mr. Jerry Kator
21 and I think it would have been in early 1980.

22 Q Was it made in writing?

23 A No. At least I am not aware of it in writing.

24 Q Did the command make various offers to Mr. Pletten as to
25 compliance and were those offers made in writing?

1 A No.

2 Q Did the command make offers, for example, the face mask and
3 other things you referenced earlier?

4 A I don't think the face mask was ever offered in writing. It
5 was purchased and given to him and then he brought in a
6 statement by his doctor saying that was not the answer to
7 the problem, and so it was recalled.

8 Q The statement was saying the concept of wearing a face mask
9 was ludicrous?

10 A Absolutely ridiculous, yes, but it was a genuine effort
11 because it was thought to be an answer to a problem he was
12 concerned about with what would happen if the air flow system
13 were turned off for some reason.

14 Q Are you familiar with this memorandum for Col. Phillips?

15 A No, I am not familiar with this. I don't recall ever seeing
16 it before.

17 Q If I told you Archie Grimmett, Civilian Personnel Officer,
18 wrote that and I provide it for the record, can you identify
19 it for the record?

20 A I am afraid not.

21 Q You have never had notice of it?

22 A No, I haven't.

23 Q The initialed upper, right-hand corner are standard govern-
24 ment documents?

25 A Yes.

1 Q What would they signify?

2 A The preparer and reviewer.

3 Q Do you recognize any of the names?

4 A (No answer.)

5 Q If I suggested the name Larry Delargy?

6 A Yes, that probably is his initials.

7 Q And Helen Cochran?

8 A Helen Cochran reviewed.

9 MR. COHEN: I am going to submit this as

10 Appellant's 1, which will have to be tied in later, but just

11 so you can see it. We will move its admission at a later

12 time.

13 MS. BACON: My objection would be lack of

14 foundation, but if you want to mark it now, no problem. Off

15 the record.

16 (Off the record.)

17 Q (By Mr. Cohen) What other documents did you prepare in this

18 charge of grievance or adverse personnel action on the

19 proposed notice for Mrs. Averhart? Did you prepare any other

20 documents?

21 A Yes. I prepared the final decision letter too.

22 Q For Mr. Hoover?

23 A No, for the general.

24 Q Did the general get informed of all that was going on?

25 A The general had a full packet of the materials relied upon

1 and the packet of medical statements, and so forth, that
2 Mr. Pletten had furnished.

3 Q Was there a meeting between Dr. Holt and Gen. Stallings to
4 your knowledge?

5 A I don't know.

6 Q Was there a meeting with you and anybody else with
7 Gen. Stallings?

8 A Not with me, but I am sure Mr. Hoover and Gen. Stallings met
9 and talked, and I don't know who else would have been there.
10 Gen. Stallings, as a matter of general course, does his own
11 investigating where he thinks that is appropriate.

12 MR. COHEN: Off the record.

13 (Off the record.)

14 Q (By Mr. Cohen) Did you review the USACARA reports, you
15 personally?

16 A All of them, each of them, as they came in?

17 Q Yes.

18 A Yes.

19 Q Was it stated in a letter in response to a USACARA report
20 that the command disagreed with some of the findings, some
21 of the facts adduced, but was willing to implement the
22 recommendation. Is that true?

23 A You are speaking of that first grievance again?

24 Q Yes.

25 A Yes.

1 Q What are the facts they disagreed with?

2 A Well, we did not disagree with the recommendation that we

3 initiated air contents studies. That, of course, was done.

4 It may well have been the recommendation that was followed

5 and caused Mr. Kator to offer Mr. Pletten the second work

6 location, but I don't know. We also ventilated, or checked

7 the ventilation periodically, so the three recommendations

8 were complied with.

9 Q Were they not checking ventilation prior to that?

0 A Not regularly.

1 Q Funny. I had Mr. --

2 A We had done it, but I don't know that they were doing it

13 regularly.

14 Q Interesting you should mention that. This morning I talked

15 at great lengths with Mr. Lang. Mr. Lang indicated,

16 testified, indeed, over his 30 years the regulation requires

17 it and he has been having at least one or more, probably two

18 such air flow studies each year.

19 A That may be, but we weren't doing them, to my knowledge, at

20 least not doing them with concerted interest in that

21 particular work area where Leroy was working. And, to my

22 knowledge, they were being done much more frequently than

23 just once or twice a year.

24 Q But they were never quantified in terms of actual findings,

25 they were never written up?

1 A Previous to that time, I don't know.

2 Q How is it that you initiated some of the studies?

3 A Well, I initiated that one in November of 1981, for example,
4 in support of the final evidence to get a clearance for
5 Leroy to return to work, but that was in conjunction with
6 the request from Mrs. Averhart to proceed with his separation.

7 Q And information from the new building, you didn't receive?

8 A I received information. I don't have them here.

9 Q They are not in the file?

10 A Correct.

11 Q But if I want to show the hearing officer that we have a --
12 we looked at everything -- we don't have all that information
13 yet, do we?

14 A I don't have that. I didn't bring it.

15 Q It is available?

16 A It is probably available.

17 Q Rather than having you come back and testify, could you ask
18 for that information and then submit it to Mrs. Bacon that I
19 might see it? It will allow us to --

20 A Surely.

21 Q Referring to Agency response to us, which is Tab 13 -- now
22 Tab 13 indicates the Agency -- this is the third paragraph
23 from the bottom. I have referenced this before. Did you
24 prepare this?

25 A Yes.

1 Q It says that the Agency, although not agreeing with all the
2 findings of facts, accepts the recommendations in said report
3 thereby bringing the grievance to an end as provided. What
4 findings of facts did the Agency not agree with?
5 A I can't answer the question.
6 Q You did write this, did you not?
7 A Yes, but I don't --
8 Q What did you have in mind?
9 A Some of the things that Mrs. Kennedy, the examiner, had said
10 were not -- well, we just didn't agree with all the facts as
11 they had been presented in her report of findings, but to be
12 specific, I'm sorry, I can't be.
13 Q Did you ask her for clarifications, or did you submit
14 additional evidence subsequent to her report?
15 A No, because the conclusions and recommendations were, of
16 course, the important aspects of her advice and we could
17 comply with the recommendations and we didn't take exception
18 to her conclusions.
19 Q If you are talking about not agreeing with the findings of
20 facts, isn't that tacit opposition to the regulations? Did
21 the command bridle up the regulation AR 1-8?
22 A I don't understand the question.
23 Q Were they having troubles with the implementation of it?
24 A Of AR 1-8?
25 Q Yes.

1 A No, I don't think so.

2 Q Had they sought any answer from higher command as to its
3 implementation?

4 A I think so, but that would have been the Environmental and
5 Safety people and I do not know the extent to which this was
6 done.

7 Q We have established they had not done regulation standards
8 and AR 1-8 required there be at least 10 percent per person.

9 A Ten cubic feet.

10 Q Whatever it is. So obviously they didn't know whether they
11 had been complying or not.

12 A No. You just said Mr. Lang indicated he had been doing those
13 studies once or twice a year.

14 Q Your testimony was they had not been done on a regular basis
15 and, indeed, Mr. Lang testified further he could not produce
16 any evidence other than he is certain, of over 30 years
17 experience, he recalls them being done.

18 A The extent of my department was the concerted effort for the
19 air contents studies that were recommended by USACARA's
20 report. Certainly we had not done them previous to that
21 time with the intensity with which they were conducted after
22 the recommendation of the examiners.

23 Q Have you done polls of the personnel at command to determine
24 their thinking on smoking?

25 A No.

1 Q Why not?

2 A It just has not been done.

3 Q Wouldn't it seem a logical thing to do to get the feeling of
4 the workers as to their ideas about smoking?

5 A You are asking my opinion and I am not running the command,
6 so I don't have an opinion.

7 Q How long have you worked for command?

8 A Seventeen years.

9 Q Are you retiring this week?

10 A Yes.

11 Q What GS have you risen to?

12 A Twelve.

13 Q That's up there pretty high and it is one you are proud of?

14 A I am not ashamed of it.

15 Q Don't commanders, relying on subordinates, listen to their
16 workers?

17 A Of course.

18 Q Have suggestions been made?

19 A I have not --

20 Q Unless you are asked for a recommendation, you don't give
21 one?

22 A If you are busy, and I am always busy, and you are doing your
23 job, you don't look for more work, nor initiate studies not
24 appropriate to the job.

25 Q Can you explain for me the circumstances whereby suddenly

1 there was this sudden interest and concentrated inquiry to
2 determine the atmosphere and environment and its use, all the
3 studies made to check on air movement, and so on, does that
4 not seem unusual to you?

5 A I don't quite understand --

6 Q They had not been doing the study with regularity, there was
7 a paucity of information. Mr. Pletten comes along and he
8 complains and suddenly the information is gathered with which
9 to fire him.

10 MS. BACON: I object to the question being
11 asked in that particular fashion.

12 Q (By Mr. Cohen) Mrs. Bertram doesn't. It seems like all of
13 a sudden it is being manipulated to get rid of him.

14 A No. And I don't think your term "suddenly" is appropriate.
15 This case has been dealt with over a three-year period. That
16 certainly is not sudden.

17 MR. COHEN: I have nothing further.

18 MS. BACON: I have nothing further.

19 (11:45 p.m.)
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