AGENCY DISREGARD OF ITS OWN DISCIPLINE REGULATION

Elsewhere is discussed the agency's violation of its own leave regulation, TARCOM-R 600-5, Chapter 14. That is a substantive matter.

Here is discussed a separate violation, the violation of its discipline regulation, TARCOM-R 600-5, Chapter 18. That regulation contains both due process and procedural aspects. The agency violated in both these respects.

In law, when an agency violates its own regulation(s), its action is *ultra vires*. That means the action exceeds, is outside, the agency's jurisdiction. See federal law 5 USC § 552.(a)(l)(C) - (D). That law makes publication of an agency's rules, thus of the agency following them, "jurisdictional," *Hotch* v *U.S.*, 212 F2d 280 (1954).

See also a long line of similar precedents, e.g., by the U.S. Supreme Court, *Bowen* v *City of New York*, 476 US 467; 106 S Ct 2022; 90 L Ed 2d 462 (1986); *Morton* v *Ruiz*, 415 US 199, 231; 94 SCt 1055, 1072; 39 L Ed 2d 270 (1974).

See also *W. G. Cosby Transfer & Storage Corp* v *Dept of Army*, 480 F2d 498, 503 (CA 4, 1973). This precedent shows that the agency, Dept of the Army, has committed this type violation previously, thus is a repeat offender.

This type violation is committed by other federal agencies as well, see, e.g., *Onweiler* v *U.S.*, 432 F Supp 1226, 1229 (D ID, 1977); *Berends* v *Butz*, 357 F Supp 143, 154-158 (D Minn, 1973); *Anderson* v *Butz,* 550 F2d 459 (CA 9, 1977); *Dean* v *Butz*, 428 F Supp 477, 480 (D HAW, 28 Feb 1977); *St. Elizabeth Hospital* v *U.S.*, 558 F2d 8, 13-14 (CA 9, 1977); *Aiken* v *Obledo*, 442 F Supp 628, 654 (D ED Cal, 1977); *Historic Green Springs, Inc* v *Bergland*, 497 F Supp 839, 854-857 (D ED Va, 1980); and *Vigil* v *Andrus*, 667 F2d 931, 936-939 (CA 10, 1982).

Federal subject matter jurisdiction presents an issue raiseable by a party or adjudicator at any time. *Enrich* v *Touche Ross & Co.*, 846 F2d 1190 (CA 9, 1988); Fed. R. Civ. P. 12(h)(3). The issue of lack of subject matter jurisdiction may be made at any time, even after disposition, and even collaterally, say Fed.R.Civ.P. 12(h) and 60(b)(4). See also *Taubman Co* v *Webfeats*, 319 F3d 770, 773 (CA 6, 2003). It is not equitable, but extraordinary and exceptional, to ratify an agency *ultra vires* act outside agency jurisdiction.

TACOM's other violations have been covered elsewhere. This provides details on the TACOM non-compliance with this too of its own regulations, its own Discipline Regulation, issued 21 June 1978, i.e., only about 15 months before the violations at issue began.

1. THE AGENCY DID NOT ABIDE BY ITS OWN DISCIPLINE REGULATION TARCOM-R 600-5, CHAPTER 18, DISCIPLINE AND DISCIPLINARY ACTION, IN ITS OVERALL MANDATES WITH RESPECT TO POLICY, DEFINITIONS, ACTIONS, ETC.

The Regulation, 600-5, para. 18-1, "sets forth the policies, responsibilities and procedures relating to employee discipline." As the record of TACOM's noncompliance shows, same were not followed.

The Regulation, 600-5, para. 18-3, "Definitions," says, "For purposes of this chapter, the following definitions will apply:" For example, "a. Discipline. Actions taken by a supervisor to correct an employee's violation of rules, regulations, policies, directives, standards of conduct,. Safety practices, or instructions." Re the onset of the forced leave and the "supervisor" Jeremiah H. Kator, same was not "taken by" him, as he did not deem Mr. Pletten guilty of any "violation," and had indeed sought to halt violations by others giving rise to the instant situation.

The Regulation, 600-5, para. 18-3.b., "Informal Disciplinary Actions," covers "Oral admonitions and warnings taken by the supervisor on his/her own initiative," and says "[t]he employee should be advised of the specific infractions or breach of conduct, exactly when it occurred (date of the incident) and should be permitted to explain his/her conduct or act of commission or omission." The supervisor Jeremiah H. Kator, deeming Mr. Pletten guilty of nothing, took no such "actions."

The Regulation, 600-5, para. 18-3.b., continues, "The infraction may be documented on the Employee Record Card, Standard Form 7-B, or summarized on a Memorandum for Record." As Mr. Pletten committed no "infraction," no documentation of same occurred.

The Regulation, 600-5, para. 18-3.c., says "Formal Disciplinary Actions. Written reprimands, suspensions, and removals. These actions are normally initiated by supervisors but may not be accomplished without action on the part of the civilian personnel office." The supervisor Jeremiah H. Kator deemed Mr. Pletten not guilty of any infraction, hence "initiated" none. The forced leave, occurring contrary to the regulations, laws, and precedents herein cited, was wholly "accomplished without action on the part of the civilian personnel office." The "decision to terminate" (documented by EEO officials including Henry Perez, Jr., Kenneth R. Adler, and Gonzellas Williams) in the 1979-February 1980 time frame was likewise wholly "accomplished without action on the part of the civilian personnel office."

The retroactive early January 1982 documentation of same, garbled self-contradictorily as the Standard Form 52 shows, i.e., typed as "separation - medical

disqualification" but subsequently handwritten as "removal" – then both versions typed onto the Standard Form 50 – shows no "action on the part of the civilian personnel office" occurred until 8 January 1982 (by Employee Relations Specialist Evelyn Bertram who initialed said SF-52 that date), just 14 days before the 22 January 1982 effective date cited on the Standard Form 50 (i.e., clearly less than 30 days notice).

The Regulation, 600-5, para. 18-3.d., says "Adverse Actions. Disciplinary and nondisciplinary removals, suspensions, furloughs without pay and reductions in rank or pay. These actions are covered by FPM Chapter 752 and require that certain procedural requirements must be observed." Clearly, these "requirements" were not "observed."

> [FPM Chapter 752 mandates can now be found in 5 CFR § 752. In either case, same must be obeyed, as per multiple court precedents upholding same, and pursuant to constitutional due process mandates requiring advance notice, and the long line of such court precedents as well.]

The Regulation, 600-5, para. 18-3.e., covers "Written Reprimand" infractions. As Mr. Pletten committed no infraction, no reprimand was issued.

The Regulation, 600-5, para. 18-3.f., says "Suspension. The placement in a temporary absence from duty, non-pay status for a specific continuous period, administered to an employee for serious or repeated offenses." As Mr. Pletten committed no infraction, no suspension was issued. What TACOM did direct against Mr. Pletten was in violation of same, cited in advance no "specific continuous period," but was protracted without "period" being specified, until – after the fact – the total "period" could only be learned by retroactive comparison via looking at the aforesaid garbled Standard Form 50 citing both "Removal" and "Medical Disqualification."

The Regulation, 600-5, para. 18-3.f., further says, "Generally, a suspension is imposed after prior oral warnings, admonitions or written reprimands have proved ineffective, or when the gravity of the offense is deemed sufficiently serious to require a more serious corrective action." Here, TACOM identified neither criterion as having been met, and Mr. Pletten agrees that neither criterion has been met.

The Regulation, 600-5, para. 18-3.g., says "Removal. The separation of an employee due to his/her misconduct, delinquency, unsatisfactory performance of duties or other offense personal to the employee resulting from willful, careless, or negligent conduct." TACOM cited no such matters with respect to Mr. Pletten, and Mr. Pletten denies any having occurred.

The Regulation, 600-5, para. 18-3.g., goes on to say, "Removal is generally effected after other less severe disciplinary measures have failed or are not deemed appropriate due to gravity of the offense." But TACOM had not "effected other less severe disciplinary measures," instead, had given Mr. Pletten him a long record of awards. TACOM also cited no "offense" committed by Mr. Pletten, much less, one of "gravity" warranting "removal."

The Regulation, 600-5, para. 18-3.h., says "Conduct. Refers to behavior of employee relative to legal or regulatory standards. Such behavior may be on or off duty. The standards of conduct apply to all employees in all jobs., although penalties for violation may differ in accordance with the factors identified in paragraph 18-5g. 'Conduct' is normally to be differentiated from 'performance.' For example, even though performance may be of high quality, disciplinary or adverse action may be effected based upon improper conduct." Here, TACOM cited neither aspect on Mr. Pletten, instead, had given him a long record of awards.

The Regulation, 600-5, para. 18-3.i., says "Performance. Relates to the overall quality of work performance. Standards of performance are not codified in law or regulation although many standards of performance are normally tailored to each job. Local policy requires that such standards be reduced to writing. While such written standards are mandatory, many standards must of necessity be articulated on a day-to-day basis. For example, specific unique requirements for a project and suspense dates. Depending on context, 'performance' when used to describe a total situation also means or includes the concept of 'conduct.'" Here, TACOM cited neither aspect against Mr. Pletten, instead, had given him a long record of awards.

The Regulation, 600-5, para. 18-3.j., says "Absence Without Leave (AWOL). Any unauthorized absence from duty for which pay must be denied. A charge to AWOL usually forms the basis for a disciplinary or adverse action, but it is itself not a disciplinary action." Here, Pletten has never had an "unauthorized absence from duty" during his entire career, indeed, TACOM issues him a series of recognitions for not even using authorized absence! (sick leave), noting that he'd never used a day of sick leave during entire career!

The Regulation, 600-5, para. 18-4., says "Objectives." The objectives of this chapter are to provide: a. Guidance to supervisors regarding the concept of discipline." Yes, but TACOM, as the record shows, ignored this with respect to Mr. Pletten.

The Regulation, 600-5, para. 18-4.b., says "objectives" include "A policy and procedure for the maintenance of daily discipline and the administering of appropriate corrective action when needed to assure continuing orderliness and efficiency." Again, this was not followed, nothing of "corrective action" was "needed," much less even alleged to have been "needed," with respect to Mr. Pletten.

The Regulation, 600-5, para. 18-4.c., says "objectives" include "Guidance that all employees should be motivated to maintain responsible behavior through the promotion of sound employee-management relations." Pletten's career-long record of awards from TACOM is a good example of "responsible behavior," indeed, above the quality of peers.

The Regulation, 600-5, para. 18.4.d., says "objectives" include "Assurance that all employees will be treated fairly under uniform standards of discipline." Here, TACOM deviated in the extreme, citing no standards at all re the peremptory and retroactive ouster without notice nor opportunity to reply, much less, "uniform" with how other employees were and are "treated."

The Regulation, 600-5, para. 18-5., says "Policies. a. Concept. The broad objectives of discipline are top train and motivate employees to conform to, and act within, reasonable standards of conduct." Here, Mr. Pletten is a model employee example of this, as shown by his career-long record of awards.

The Regulation, 600-5, para. 18-5.a., continues by saying: "A supervisor's responsibility to maintain discipline encompasses more than just reacting to an employee's deviation from the generally accepted rules of conduct. It requires a concentrated effort, on a daily basis, to emphasize the prevention of those occasions and incidents which may result in disciplinary action." Here, Mr. Pletten is a model employee example, as shown by his career-long record of awards. His immediate supervisor Jeremiah J. Kator followed the rule. It was higher level management that overruled him in effecting the "decision to terminate" Mr. Pletten.

The Regulation, 600-5, para. 18-5.a., continues by saying: "Some effective means of establishing and maintaining discipline are to: (1) Personally serve as an example." Mr. Kator did this, and sought to apply this approach Branch-wide in his Branch (Position and Pay Management) of which he was supervisor, but was overruled by others, e.g., Messrs. Archie D. Grimmett and Edward E. Hoover.

The Regulation, 600-5, para. 18-5.a., continues by saying: "(2) Promotes cooperative attitudes. Make evident to the employees concern for their interest and welfare." Mr. Kator did this, and sought to apply this approach Branch-wide in his Branch (Position and Pay Management) of which he was supervisor, but was overruled by others, e.g., Messrs. Archie D. Grimmett and Edward E. Hoover.

The Regulation, 600-5, para. 18-5.a., continues by saying: "(3) Develop good working relationships. Respect employee knowledge, judgments, and skills. (4) Encourage self-discipline. (5) Communicate the Government's expectation of mature, responsible

performance." Supervisor Kator did this, but others, e.g., Messrs. Archie D. Grimmett and Edward E. Hoover, chose to disregard these clauses, placing their personal habits above the rule of law, contrary to both these clauses, and case law, e.g., *Knotts* v *U.S.*, 128 Ct Cl 489; 121 F Supp 630 (1954).

The Regulation, 600-5, para. 18-5.b. says "Constructive Effort. Disciplinary action should normally be taken only after other positive efforts have been exhausted in correcting breaches of reasonable standards of conduct by employees. Supervisors should adhere to a course of counseling employees to eliminate the problem situation with a view toward maintaining discipline and morale by teaching rather than by punitive action."

TACOM cited no "breaches" by Pletten. No "other positive efforts" at all (not to mention "even one act of "counseling" much less an entire "course of counseling") were "taken," much less, "exhausted," prior to the "decision to terminate" as documented by EEO officials (including Henry Perez, Jr., Kenneth R. Adler, and Gonzellas Williams) in the 1979-February 1980 time frame. Same was done in a peremptory manner without adherence to any of the requirements of notice, opportunity to reply, have reply heard and considered before decision is effected, etc.

The Regulation, 600-5, para. 18-5.b. continues by saying "Formal action should be avoided when the desired result can be accomplished by closer supervision, on-the-job training, medical evaluation, enrollment in the Alcohol and Abuse Prevention and Control Program (ADAPCP), or other positive means. When the gravity of offense is deemed sufficiently serious to compel disciplinary action, the principles of this paragraph need not necessarily apply." TACOM cited no "offense" at all, much less one needing any of the listed measures, much less, one of "gravity" so "sufficiently serious to compel disciplinary action" (the "decision to terminate" as noted by the aforesaid Messrs. Perez, Adler, and Williams) at all. Such was definitely not "avoided," but is a matter of record by said impartial witnesses.

The Regulation, 600-5, para. 18-5.c., says "Information. An employee being disciplined should be specifically advised of each infraction or breach of conduct for which he/she is charged, when and where it occurred, and be given an opportunity to explain his/her conduct or inaction, as the case may be." TACOM has never cited any "infraction or breach of conduct" by Mr. Pletten, much less, "given [him] an opportunity to explain."

The Regulation, 600-5, para. 18-5.d., says "Timeliness. In order to be effective, discipline must be administered promptly. Desired results diminish in relation to the time lapse between the offense and the corrective action. However, decisions to reverse a complete case solely on the basis of untimeliness will normally only be made after

professional review or an examiner or arbitrator." Here, the "decision to terminate" (documented by EEO officials including Henry Perez, Jr., Kenneth R. Adler, and Gonzellas Williams) in the 1979-February 1980 time frame was the extreme opposite of long belated untimeliness after some breach or infraction. Instead, the "decision to terminate" was made before Mr. Pletten committed any. TACOM of course has never, afterwards, ever alleged any "breach or infraction" by Mr. Pletten thereafter either! And TACOM has refused for all these many years, decades, to ever allow review by an "examiner or arbitrator," notwithstanding Mr. Pletten's multitudinous importunings for same. Mr. Pletten followed the *Elchibegoff* v *U.S.* [ECB], 106 Ct Cl 541, 561 (1946) precedent, he "allowed no grass to grow under his feet. If there ever was a case in which a man was active in trying to secure his rights, the plaintiff [Elchibegoff] was in this case. He protested all over the lot." Mr. Pletten did / does likewise.

The Regulation, 600-5, para. 18-5.e., says "Reasonableness. When determining the extent of disciplinary action, it should be established that the employee knows, or could be reasonably expected to know, the standards of conduct expected. Responsible judgment will be applied to prevent disproportionate imposition of penalties for offenses. When imposing a progressive penalty for a repeat offense, consideration will be given to the time since the prior offense." TACOM adhered to none of this. TACOM cited no offense allegedly committed by Mr. Pletten, hence, it cannot be said that he "knows, or could be reasonably expected to know, the standards of conduct expected" re which unknown matter he is being disciplined. And certainly TACOM has cited no "offense" re which Mr. Pletten supposedly committed one "prior."

The Regulation, 600-5, para. 18-5.f., says "Other Types of Actions to Consider. Alternatives to disciplinary or adverse action which do not reduce pay include the following: denial of within grade increases [WGI] for less than acceptable performance, requesting a fitness for duty examination when deficiencies or misconduct appear to be caused by a health problem, and referral of employees to the ADAPCP when the problem appears to be drug/alcohol related." Here, pursuant to Mr. Pletten's excellent performance, supervisor Jeremiah H. Kator, far from seeking a "denial" of same, *approved* a within grade increase (WGI) for Pletten!

The Regulation, 600-5, para. 18-5.g., says "Like Penalties for Like Offenses. Like penalties should be imposed for like offenses. Reasonable penalties with the Department of the Army for offenses are contained in appendix A. The following factors should be considered when deciding the appropriate penalty: (1) Gravity of offense. (2) Frequency of offense. (3) Mitigating circumstances. (4) Service history of employees. (5) Employee's grade and duties. (5) Employee's explanation and intent." Here TACOM identified no "offense," no "gravity," no "frequency." And TACOM certainly ignored Mr. Pletten's

career-long "service history" of awards. And absent telling Mr. Pletten what alleged "offense" he is accused of, he cannot begin his reply, cannot begin to present an "explanation and intent." By law, 5 USC § 7513.(b)., an agency must notify the accused 30 days in advance, so his side can be presented and considered. Mr. Pletten has, like *Elchibegoff*, continuously asked for this all these years and decades.

The Regulation, 600-5, para. 18-5.g., goes on to say, "However, for employees serving the one year probationary or trial period, termination or removal is authorized for any offense consistent with sound personnel management principles and judgment." Here, Mr. Pletten is a decade into his career, well beyond his long past 1969-1970 "one year probationary or trial period," but being treated worse than such employees would be.

The Regulation, 600-5, para. 18-5.h., says "Discrimination. Disciplinary or adverse action shall not be instituted for reasons of political activity (except as otherwise provided by law or regulation), race, color, national origin, religion, marital status, sex, age or physical handicap." TACOM cited no "reasons" at all for the "decision to terminate" herein cited, hence, is committing so extreme a violation as to be beyond words.

The Regulation, 600-5, para. 18-5.i., says "Authorized Actions. Should positive supervisory counseling effort fail, or be deemed inappropriate, any actions authorised by this regulation or higher authority may be utilized. In addition, penalties prescribed for violation of laws, executive orders or rules and regulations (ranging from removal to monetary fine and/or imprisonment) may also apply." TACOM did no "counseling effort," much less "positive supervisory counseling effort." Supervisor Jeremiah H. Kator in fact opposed the "decision to terminate" and granted Mr. Pletten a within grade increase (WGI) for his good performance. Same is the last performance documentation of record with respect to Mr. Pletten. No other performance appraisal was issued thereafter, inasmuch as the "decision to terminate" was already in effect (as later retroactively documented by Standard Form 50).

The Regulation, 600-5, para. 18-5.j., says "Unauthorized Actions. The following actions may not be imposed as disciplinary under the stipulations of this chapter: (1) Reduction in force. (2) Removal or suspension because of disloyalty or deliberate and wilful security violations. (These will be effected IAW AR 690-1 as non-disciplinary suspensions or removals). (3) Placing an employee in a leave status without his/her consent when he/she is ready, willing and able to work (see Chapter 14, Leave Administration)." TACOM violated this, by imposing the forced leave after the 1979/early 1980 "decision to terminate" documented by the aforesaid Messrs. Perez, Adler, and Williams. The enforced leave was imposed as a retroactive "cover story" to conceal the unlawful "decision to terminate" without adherence to any of the pertinent laws and rules, and to obstruct Mr. Pletten from securing review of same via an "examiner or arbitrator" as per para. 18-5.d.

The Regulation, 600-5, para. 18-6., says "Supervisors. Continually evaluate conduct of employees. Initiate corrective action for breach of expected behavioral practice in the form of closer supervision, counseling, on-the-job training, and personal example before imposing formal disciplinary action." Here, supervisor Jeremiah H. Kator, doing all this, saw no "breach" by Mr. Pletten. Additionally, he as aforesaid, in evaluating Mr. Pletten's record, granted him a within grade increase (WGI).

The Regulation, 600-5, para. 18-6., continues by saying, "If formal discipline becomes the only recourse or the gravity of offense is such as to compel disciplinary action without other considerations, supervisors will promptly: a. Discuss the nature of the offense and action to be proposed with the Employee Relations Specialist." Supervisor Jeremiah H. Kator did not wish to initiate any type of disciplinary action, so did not do this. If someone else did, no record of such has ever come forth in now these some thirty (30) years. Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams.

The Regulation, 600-5, para. 18-6., continues by saying, "b. Obtain written approval for all recommended actions from next level supervision prior to submitting the matter to Civilian Personnel Division." Supervisor Jeremiah H. Kator did not wish to initiate any type of disciplinary action, so did not do so, nor did he do this. Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams.

> [If someone else did "obtain" such "written approval," no record of such has ever come forth in now these some thirty (30) years. Such documentation would be mandatory to be provided to Mr. Pletten pursuant to his continuing request for the case file, i.e, a copy of all material relied on. See 5 CFR § 752.404(f), the federal agency, here, TACOM, must state all reasons including ex parte contacts. This concept against *ex parte* communications has been repeatedly upheld, see e.g., *Barnhart* v *U. S. Treasury Dept*, 588 F Supp 1432 (D CIT, 1984); *Sullivan* v *Navy*, 720 F2d 1266, 1273-4 (Fed, 1983). And see *Fall River D & F Corp* v *NLRB*, 482 US 27, 52; 107 S Ct 2225, 2241; 96 L Ed 2d 22, 43 (1987), "Under the 'continuing demand' rule, when a union [here, Mr. Pletten] has made a . . . demand [request for the material relied on] that has been rejected by the employer, this demand remains in force until the moment when the employer attains [provide same]."

The Regulation, 600-5, para. 18-6., continues by saying, "c. Verbally notify employee that disciplinary action is being proposed." Neither supervisor Jeremiah H. Kator nor anyone else did this. Mr. Pletten had committed nothing re which to do so!

The Regulation, 600-5, para. 18-6., continues by saying, "d. Provide full specific, and complete written information to Civilian personnel Division when disciplinary or adverse action is warranted and state the action to be proposed (who, what, when, where, why)." Neither supervisor Jeremiah H. Kator nor anyone else did this. Mr. Pletten had notoriously committed nothing re which to do so! Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams.

> [But if someone did, see above indented note, p 9. And provide the undersigned same so he can begin preparing his pre-decision defense and reply. And reverse for not having provided same heretofore.]

The Regulation, 600-5, para. 18-6., continues by saying, "e. Sign and deliver appropriate letters or proposal or decision." Again, Supervisor Jeremiah H. Kator did not do this. Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams.

The Regulation, 600-5, para. 18-6., continues by saying, "f. Consider the employee's reply to the proposed reprimand and decide whether or not the reprimand should be effected. Consider the employee's reply to the proposed suspension or removal jointly with the director,. Office chief, or project/product manager." Again, Supervisor Jeremiah H. Kator did not do this. Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams.

The Regulation, 600-5, para. 18-7. says "Employee Relations Specialist. a. Advise and assist supervisors regarding the appropriate information or formal corrective action to be taken." Again, Supervisor Jeremiah H. Kator sought no such "advice and assistance," as Mr. Pletten had committed no "offense" re which to seek same. Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. The Management-Employee Relations Branch supervisor, Helen F. Cochran, denied having had a role ("was not personally involved," MESC Transcript, p 29) in the ouster decision process.

The Regulation, 600-5, para. 18-7., continues by saying, "b. Prepare all notices of proposed disciplinary or adverse action for signature of authorized supervisor, insuring job protection requirements are met." Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. And it is clear from the record that "insuring job protection requirements are [NOT] met."

The Regulation, 600-5, para. 18-7., continues by saying, "c. Prepare all letters of final decision for signature of the deputy commander, director, office chief, project/product manager, commanding officer, or supervisor, as appropriate insuring proper grievance or appeal rights are included." Nobody did this prior to the "decision to terminate" documented by the aforesaid Messrs. Perez, Adler, and Williams. Note case law such as *Miyai* v *D.O.T.*, 32 MSPR 15, 20 (1986), "The agency in this case has not shown–or even alleged–that it ever notified the appellant of his right to file an appeal or of any limitations on that right . . . it evidently has maintained consistently that the appellant has no appeal rights." Hence, Mr. Pletten's situation became an *Elchibegoff* one, "active in trying to secure his rights . . . [h]e protested all over the lot," but to no avail, as TACOM opposed his case being heard. TACOM's own EEO Officer, Gonzellas Williams, verified Mr. Pletten's repeated (nineteen) attempts to utilize the EEOC review process, 29 CFR §1613 now §1614, re which all were refused processing, hence no review on merits in Pletten's chosen forum has ever occurred.

The Regulation, 600-5, para. 18-8. says "Director, Office Chief, Project/Product Manager. a. Make or request that further investigation be made, if needed, to acquire adequate facts and evidence sufficient for decision." Here, this was not done, none of the various employee investigation standards or criteria were met:

> (i) neither the seven point private sector criteria of *Grief Bros Coop Corp*, 42 Lab Arb (BNA) 555 (1964) and *Combustion Eng, Inc*, 42 Lab Arb (BNA) 806 (1964),
>
> (ii) nor the twelve point civil service criteria of *Douglas v Veterans Admin*, 5 MSPR 280, 305-306 (1981),
>
> (iii) nor the five point civil service criteria of *Yorkshire v MSPB*, 746 F2d 1454, 1456 (CA Fed, 1984). (The latter case also references at 1457, n 4, issues of inconsistencies and failure to investigate, apropos here).

In law, the absence of pre-decision investigation is legally unacceptable, *NAACP v Levi*, 418 F Supp 1109, 1114-1117 (D DC, 1976) (not investigating before acting); *Boddie v Connecticut*, 401 US 371; 91 S Ct 780, 786; 28 L Ed 2d 113 (1971) (must be due process in advance at the crucial meaningful time); *Cleveland Bd of Educ* v *Loudermill*, 470 US 532; 105 S Ct 1467; 64 L Ed 2d 494 (1985) (saying likewise). EEOC's position is that an agency failure to adequately develop the record subjects the agency to adverse inference. *Hashimoto* v. *Dep't of Housing and Urban Development*, EEOC Appeal No. 01A24642 (May 11, 2004). Combining these legal principles with TACOM's own regulation providing for pre-decision investigation, TACOM's double violation on this aspect alone is doubly clear.

The Regulation, 600-5, para. 18-8., continues by saying, "b. Jointly with employee's supervisor consider employee's reply to proposed disciplinary/adverse action." Supervisor Jeremiah H. Kator did not do this. This did not happen, certainly not prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams, nor thereafter. As TACOM refused to follow any of the rules, provided no specifics, no charges, no "who, what, when, where, why" (Para. 18-6.d.). TACOM precluded Pletten from replying. One must know what one is to reply to, before one can begin replying! And one cannot make a pre-decision "reply" to a "decision to terminate" long since prior placed into effect years previously.

The Regulation, 600-5, para. 18-8., continues by saying, "c. Decide action to be taken or recommend action to be taken to Deputy Commander." This did not happen, certainly not prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams, nor thereafter.

> [But if someone did, see above indented note, p 9. And provide the undersigned same so he can begin preparing his pre-decision defense and reply. And reverse for not having provided same heretofore.]

The Regulation, 600-5, para. 18-8., continues by saying, "d. Sign appropriate letters." This did not happen, certainly not prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams, nor thereafter.

The Regulation, 600-5, para. 18-9. says "Legal Office. Provide counsel to Civilian Personnel Division and review the legal sufficiency of the proposed action upon request." The record of multitudinous legal errors establishes that this did not happen, certainly not prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams, nor thereafter.

> [But if someone did, see above indented note, p 9. And provide the undersigned same so he can begin preparing his pre-decision defense and reply. And reverse for not having provided same heretofore.]

2. THE AGENCY DID NOT ABIDE BY ITS OWN DISCIPLINE REGULATION TARCOM-R 600-5, CHAPTER 18, DISCIPLINE AND DISCIPLINARY ACTION, I.E., NO ORAL ADMONITION OR WARNING BEFORE THE "DECISION TO TERMINATE."

The Regulation, 600-5, para. 18-10. says "Oral Admonition or Warning. The supervisor will: a. Inform the employee specifically and in detail of the infraction or breach of conduct and when it occurred. This has never occurred. Supervisor Jeremiah H. Kator did not do this, as he did not deem Mr. Pletten guilty of any "infraction or breach of conduct." Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. And none did so afterwards.

The Regulation, 600-5, para. 18-10., continues by saying, "b. Allow the employee an opportunity to explain his/her viewpoint." This has never occurred. Supervisor Jeremiah H. Kator did not do this, as he did not deem Mr. Pletten guilty of any "infraction or breach of conduct." Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. And none did so afterwards.

The Regulation, 600-5, para. 18-10., continues by saying, "c. When appropriate, inform the employee of what is expected of him/her in the future and what the consequences will be if he/she fails to comply with the expectations." This has never occurred. And see b. above.

The Regulation, 600-5, para. 18-10., continues by saying, "d. Record warnings and agreements reached on the Employee Record Card, Standard Form 7-8, (no record of an oral admonition is required) or by a Memorandum for Record." Likewise, this has never occurred.

3. THE AGENCY DID NOT ABIDE BY ITS OWN DISCIPLINE REGULATION TARCOM-R 600-5, CHAPTER 18, DISCIPLINE AND DISCIPLINARY ACTION, I.E., NO FORMAL WRITTEN REPRIMAND BEFORE THE "DECISION TO TERMINATE"

The Regulation, 600-5, para. 18-11. says "Formal Written Reprimand. a. The supervisor will: (1) Discuss the need for reprimanding the employee with the next higher level supervisor." Again, supervisor Jeremiah H. Kator did not do this, as he did not deem Mr. Pletten guilty of any "infraction or breach of conduct." Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. And none did so afterwards.

The Regulation, 600-5, para. 18-11.a., continues by saying, "(2). If advice is needed, discuss the principles of reprimand and/or the specific facts with the appropriate Employee Relations Specialist." Again, Supervisor Jeremiah H. Kator sought no such "advice" as he deemed that Mr. Pletten had committed no "offense" re which to seek same. Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. The Management-Employee Relations Branch supervisor, Helen F. Cochran, denied having had a role ("was not personally involved," MESC Transcript, p 29) in the "decision to terminate" process.

The Regulation, 600-5, para. 18-11.a., continues by saying, "(3). Prepare a Disposition Form (DA Form 2496) addressed to the second level supervisor, stating: (a) The pertinent facts and circumstances regarding the offense. (b) The reason a written reprimand is considered necessary. (c) The length of time the reprimand is to remain in the employee's Official Personnel Folder, SF 66. (Minimum period of one year to a maximum period of three years). (d) Any previous related corrective or disciplinary action taken including oral admonitions and warnings." Again, supervisor Jeremiah H. Kator did not do this, as he did not deem Mr. Pletten guilty of any "infraction or breach of conduct." Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. And none did so afterwards.

> [But if someone did, see above indented note, p 9. And provide the undersigned the Disposition Form so he can begin preparing his pre-decision defense and reply. And reverse for not having provided same heretofore.]

The Regulation, 600-5, para.18-11.a., continues by saying, "(4). The second level supervisor must investigate the facts on both sides. If he/she decides the proposed action is justified the recommendation will be forwarded to the Civilian Personnel Division, ATTN: Chief, Management-Employee Relations Branch, for review and determination that it is consistent with established policy governing disciplinary practices." There being no request from the first level supervisor, there was no "second level supervisor" action, and definitely nothing done to "investigate." There was therefore no "forwarding" a "recommendation" as specified. The Management-Employee Relations Branch supervisor, Helen F. Cochran, denied having had a role ("was not personally involved," MESC Transcript, p 29) in the action process against Mr. Pletten.

The Regulation, 600-5, para. 18-11.a., continues by saying that "[t]he supervisor will" "(5). Personally date, sign, and deliver letters of reprimand in a private area, containing acknowledgment and date of receipt on the Official Personnel Folder copy. Should the employee refuse to acknowledge receipt, record the fact on the Official Personnel Folder copy; and date and sign it. Return the Official Personnel Folder copy to the Employee Relations Specialist." Again, this never happened.

The Regulation, 600-5, para. 18-11.a., continues by saying that "[t]he supervisor will" "(6). Consider any reply, oral or written, the employee and/or his representative, if any, may make. Perspire a memorandum for record if the reply is oral." Again, this never happened.

The Regulation, 600-5, para. 18-11.a., continues by saying that "[t]he supervisor will" "(7). Evaluate the employee's reply and decide whether the reprimand should be sustained or withdrawn. Forward evaluation and decision to the Civilian Personnel Division, ATTN: Chief, Management-Employee Relations Branch. Include specific reasons for the decision and attach the employee's reply (copy of the memorandum for the record if the reply is oral)." Again, this did not happen.

The Regulation, 600-5, para. 18-11.a., continues by saying that "[t]he supervisor will" "(8). Personally deliver all letters of decision (prepared by the servicing Employee Relations Specialist) applying the same procedure cited in (5) above." Again, this never happened.

The Regulation, 600-5, para. 18-11.a., continues by saying that "[t]he supervisor will" "(9) Record the reprimand on the Employee Record Card, Standard Form 7-B." Again, supervisor Jeremiah H. Kator did not do this, as he did not deem Mr. Pletten guilty of any "infraction or breach of conduct." Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. And none did so afterwards.

> [But if someone did, see above indented note, p 9. And provide the undersigned the Employee Record Card so he can begin preparing his pre-decision defense and reply. And reverse for not having provided same heretofore.]

. The Regulation, 600-5, para. 18-11.b. says "The appropriate Employee Relations Specialist will: (1) If advice is needed, inform the supervisor regarding the principles of a formal reprimand. (2) Prepare the letter of proposed reprimand for the signature of the supervisor." There being no request from supervisor Jeremiah H. Kator, there was no "advice" needed nor sought. The Management-Employee Relations Branch supervisor, Helen F. Cochran, denied having had a role ("was not personally involved," MESC Transcript, p 29) in the action process against Mr. Pletten.

The Regulation, 600-5, para. 18-11.b., continues by saying, "(3) If advice is sought by the employee an alternate Employee Relations Specialist will advise the employee regarding the regulatory and procedural aspects of his/her right to reply (and of his/her right submit a grievance as a result of having been formally reprimanded). (See Chapter 9, Grievances and Appeals)." Having received no such disciplinary document or notice, Mr. Pletten sought no such "advice."

The Regulation, 600-5, para. 18-11.b., continues by saying, "(4) Review the proposed reprimand, the employee's reply (memorandum for record if reply is oral) and the supervisor's evaluation and decision to sustain or withdraw the reprimand for procedural requirements. (5) Prepare the letter of decision." Again, this did not occur as supervisor Jeremiah H. Kator did not deem Mr. Pletten guilty of any "infraction or breach of conduct." Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. And none did so afterwards.

> [But if someone did, see above indented note, p 9. And provide the undersigned the documentation of same so he can begin preparing his pre-decision defense and reply. And reverse for not having provided same heretofore.]

4. THE AGENCY DID NOT ABIDE BY ITS OWN DISCIPLINE REGULATION TARCOM-R 600-5, CHAPTER 18, DISCIPLINE AND DISCIPLINARY ACTION, I.E., IT ISSUED NO SUSPENSION BEFORE THE "DECISION TO TERMINATE," NOR DID IT FOLLOW THE REGULATION'S REMOVAL SPECIFICATIONS EITHER.

The Regulation, 600-5, para. 18-12. says "Suspension or Removal. a. The supervisor will: (1) Discuss the need for suspension or removal of an employee with the next higher level supervisor (and any sequentially higher level supervisors within a directorate/office considered appropriate)." Again, this did not occur as supervisor Jeremiah H. Kator did not deem Mr. Pletten guilty of any "infraction or breach of conduct." Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. And none did so afterwards.

The Regulation, 600-5, para. 18-12.a., continues by saying, "(2). If advice is needed, discuss the principles of suspension or removal and/or the specific facts with the appropriate Employee Relations Specialist." Again, Supervisor Jeremiah H. Kator sought no such "advice" as he deemed that Mr. Pletten had committed no "offense" re which to seek same. Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. The Management-Employee Relations Branch supervisor, Helen F. Cochran, denied having had a role ("was not personally involved," MESC Transcript, p 29) in the ouster decision process.

Regulation 600-5, para. 18-12.a., continues, "(3). Prepare a Request for Personnel Action, Standard Form 52, reflecting the recommended disciplinary action and a Disposition Form (DA Form 2496) addressed to Civilian Personnel Division (ATTN: Chief, Management Employee Relations Branch) containing the following information: (a) The pertinent facts and circumstances regarding the offense(s). (b) A determination regarding the number of work days for which a suspension should be imposed (see guidelines contained in Appendix A)." Again, supervisor Jeremiah H. Kator did not do this, as he did not deem Mr. Pletten guilty of any "infraction or breach of conduct." Nobody of course did this prior to the "decision to terminate" as documented by the aforesaid Messrs. Perez, Adler, and Williams. And none did so afterwards.

> [But if someone did, see above indented note, p 9. And provide the undersigned the Disposition Form so he can begin preparing his pre-decision defense and reply. And reverse for not having provided same heretofore.]

It must be noted in view of the substantial case law showing forced leave to be a suspension, that even treating the no-notice ouster most favorably to TACOM, i.e., treating the ouster as a mere "suspension" as distinct from a "removal," that TACOM was in non-compliance, as the "suspension" was made for an indefinite period, not for a "determined" "number of work days." Absent such "determination," and absent prior notice to the undersigned; TACOM denied Pletten opportunity to reply prior to the same being imposed.

The Regulation, 600-5, para. 18-12.a., continues by saying, "(3). Prepare a Request . . . containing the following information: (c) A recitation of previous related incidents and any corrective or formal action taken, including oral admonitions and warnings." Again, supervisor Jeremiah H. Kator did not do this, as he did not deem Mr. Pletten guilty of any "infraction or breach of conduct." Nobody of course did this prior to the "decision to terminate" documented by the aforesaid Messrs. Perez, Adler, and Williams. And none did so afterwards.

> [But if someone did, see above indented note, p 9. And provide the undersigned the Disposition Form so he can begin preparing his pre-decision defense and reply. And reverse for not having provided same heretofore.]

The Regulation, 600-5, para. 18-12.a., continues by saying, "(4) Personally sign, date, and deliver all letters proposing suspension or removal in a private area applying the same procedure cited in paragraph 187-11a(5)." Again, supervisor Jeremiah H. Kator did not do this, as he did not deem Mr. Pletten guilty of any "infraction or breach of conduct." Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. And none did so afterwards.

[But if someone did, see above indented note, p 9. And provide the undersigned the Disposition Form so he can begin preparing his pre-decision defense and reply. And reverse for not having provided same heretofore.]

The Regulation, 600-5, para. 18-12.a., continues by saying, "(5). "Jointly with the director, office chief, project/product manager or commanding officer consider any reply, written or oral, which the employee and his/her representative, if any, may make. (Prepare and sign a memorandum for record if the reply is oral.)" Again, supervisor Jeremiah H. Kator did not do this, as he did not deem Mr. Pletten guilty of any "infraction or breach of conduct." Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. And none did so afterwards.

The Regulation, 600-5, para. 18-12.a., continues by saying, "(6) Personally deliver all letters of decision . . ." As there was no such letter, Mr. Kator delivered none to Mr. Pletten.

The Regulation, 600-5, para. 18-12.b., says "The appropriate Employee Relations Specialist will: (1) If advice is needed, advise the supervisor regarding the principles of suspension or removal." Again, Supervisor Jeremiah H. Kator sought no such "advice" as he deemed that Mr. Pletten had committed no "offense" re which to seek same. Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. The Management-Employee Relations Branch supervisor, Helen F. Cochran, denied having had a role ("was not personally involved," MESC Transcript, p 29) in the ouster decision process.

The Regulation, 600-5, para. 18-12.b., continues by saying, "(2). Prepare the letter of proposed suspension or removal for the signature of the supervisor." Again, Supervisor Jeremiah H. Kator issued no such "letter" as he deemed that Mr. Pletten had committed no "offense" re which to seek same. Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. The Management-Employee Relations Branch supervisor, Helen F. Cochran, denied having had a role ("was not personally involved") in the ouster decision process.

The Regulation, 600-5, para. 18-12.b., continues by saying, "(3) If advice is sought by the employee, an alternate Employee Relations Specialist will advise the employee regarding the regulatory and procedural aspects of his/her right to reply and of the right to grieve and/or appeal such suspension or removal (see Chapter 9, Grievances and Appeals)." Having received no such disciplinary document or notice, Mr. Pletten sought no such "advice." Again, note case law, e.g., *Miyai* v *D.O.T.*, 32 MSPR 15, 20 (1986), "The agency in this case has not shown–or even alleged–that it ever notified the appellant of his right to

file an appeal or of any limitations on that right . . . it evidently has maintained consistently that the appellant has no appeal rights." Hence, Mr. Pletten's situation became an *Elchibegoff* one, "active in trying to secure his rights . . . [h]e protested all over the lot," but to no avail, as TACOM opposed his case being heard. TACOM's own EEO Officer, Gonzellas Williams, verified Mr. Pletten's repeated (nineteen) attempts to utilize the EEOC review process, 29 CFR §1613 now §1614, re which all were refused processing, hence no review on merits in Pletten's chosen forum has ever occurred.

The Regulation, 600-5, para. 18-12.b., continues by saying, "(4) If the proposal is a suspension, prepare the letter of decision for the signature of the director, office chief, project/product manager or commanding officer; if a removal within TARCOM and TARADCOM, for the signature of the Deputy Commander; within serviced independent project managers and other activities, for the signature of the designated officials, normally the official first or second in rank." Again, this did not occur as supervisor Jeremiah H. Kator did not deem Mr. Pletten guilty of any "infraction or breach of conduct." Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. And none did so afterwards.

> [But if someone did, see above indented note, p 9. And provide the undersigned the documentation of same so he can begin preparing his pre-decision defense and reply. And reverse for not having provided same heretofore.]

The Regulation, 600-5, para. 18-12.c., says, "c. The director, office chief, project/product manager or commanding officer will: (1) Jointly with the supervisor who proposed the suspension or removal, consider any reply, oral or written, which the employee and his/her representative, if any, may make (jointly prepare and sign a memorandum for record if the reply is oral)." Again, supervisor Jeremiah H. Kator did not do this, as he did not deem Mr. Pletten guilty of any "infraction or breach of conduct." Nobody of course did this prior to the "decision to terminate" in 1979/1980 as documented by the aforesaid Messrs. Perez, Adler, and Williams. And none did so afterwards.

> [But if someone did, see above indented note, p 9. And provide the undersigned the documentation of same so he can begin preparing his pre-decision defense and reply. And reverse for not having provided same heretofore.]

The Regulation, 600-5, para. 18-12.c., continues by saying, "(2) For suspensions of 30 calendar days or less, evaluate the employee's reply and decide the effect the suspension, substitute a lesser penalty, or with the proposal in its entirely." Again, this was not done.

TACOM refused Mr. Pletten this consideration process. The "decision to terminate" as documented by Mr. Henry Perez, etc., was made and enforced without notice, much less without allowing right of reply, much less, allowing consideration of same.

The Regulation, 600-5, para. 18-12.c., continues by saying, "(2) . . . For suspensions over 30 calendar days and removals, evaluate the employee's reply and prepare a written recommendation that the action be effected, a lesser penalty be substituted, or the proposed action be withdrawn." Again, this was not done, TACOM refused Mr. Pletten this consideration process.. The "decision to terminate" as documented by Mr. Henry Perez, etc., was made and enforced without notice, much less without allowing right of reply, much less, allowing consideration of same.

> [But if someone did, see above indented note, p 9. And provide the undersigned the documentation of same so he can begin preparing his pre-decision defense and reply. And reverse for not having provided same heretofore.]

The Regulation, 600-5, para. 18-12.c., continues by saying, "c. The director, office chief, project/product manager or commanding officer will: . . . (3) Submit to Civilian Personnel Division, ATTN: Management Employee Relations Branch, the basis for the decision or recommendation citing specific reasons in response to the reply." There being no request from first level supervisor Jeremiah H. Kator, there was no "second level supervisor" action, and definitely nothing done to "investigate." There was therefore no "forwarding" a "recommendation" as specified. The Management-Employee Relations Branch supervisor, Helen F. Cochran, denied having had a role ("was not personally involved," MESC Transcript, p 29) in the action process against Mr. Pletten.

The Regulation, 600-5, para. 18-12.c., continues by saying, "c. The director, office chief, project/product manager or commanding officer will: . . . (4) Sign the decision letter prepared by the Employee Relations Specialist if the action to be effected is a suspension or 30 calendar days or less." This was never done. So far as is known the Director over Pletten's office was never involved.

> [But if said Director was involved, see above indented note, p 9. And provide the undersigned the documentation of same so he can begin preparing his pre-decision defense and reply. And reverse for not having provided same heretofore.]

Regulation 600-5, para. 18-12.d. says "Civilian Personnel Division will: (1) Transmit to the deputy commander the facts of the case when recommending a suspension longer than

30 calendar days or a removal. (2) Provide recommendations on the appropriate course of action." As the prior process had not occurred, this too did not happen prior to the "decision to terminate" Mr. Pletten as documented by EEO officials including Henry Perez, Jr., Kenneth R. Adler, and Gonzellas Williams) with respect to the 1979-February 1980 time frame.

> [But if such transmittal and recommendations did occur, see above indented note, p 9. And provide the undersigned the documentation of same so he can begin preparing his pre-decision defense and reply. And reverse for not having provided same heretofore.]

The Regulation, 600-5, para. 18-12.e. says "Legal Office Representative will: (1) Review, upon request, both the letter proposing suspension or removal and the decision letter, together with the appropriate file, to determine the legal sufficiency. (2) If acceptable, sign and date the Management-Employee Relations organizational copy on a coordination line. If unacceptable, informally discuss disagreements with the Employee Relations Specialist and reduce comments to writing using a Disposition Form (DA Form 2496) addressed to the Civilian Personnel Officer or other requesting official." Again, as the prior process had not occurred, this too did not happen prior to the "decision to terminate" Mr. Pletten as documented by EEO officials including Henry Perez, Jr., Kenneth R. Adler, and Gonzellas Williams) with respect to the 1979-February 1980 time frame.

> [But if such transmittal and recommendations did occur, see above indented note, p 9. And provide the undersigned the documentation of same so he can begin preparing his pre-decision defense and reply. And reverse for not having provided same heretofore.]

It must be added to the foregoing, concerning the time frame for the "decision to terminate" Mr. Pletten as documented by EEO officials including Henry Perez, Jr., Kenneth R. Adler, and Gonzellas Williams). Management years later, in 1982 (as their concealment of the "decision to terminate" was faltering) issued a Standard Form 50, Notification of Personnel Action, on the "decision to terminate," years later, in January 1982.

In doing so, TACOM management contradicted themselves. Their typed request was for one action, a "medical disqualification"! For a supposed 'qualification' matter which every relevant agency denies even exists!

But their handwritten request was for a disciplinary removal! Note that that handwritten request is dated 8 January 1982, hardly two weeks before the 22 January 1982

effective date. Thus the 30 days notice requirement set forth by 5 USC § 7513.(b) is blatantly violated prima facie. Not to mention the massive violation of TACOM's own regulations.

The Regulation, 600-5, para. 18-13. is "References. a. AR 600-50. b. FPM/CPR 735. C. FPM/CPR 751. D. FPM/CPR 752. e. AR 690-1." These rules, some of which are now codified at 5 CFR 752, are of course, violated by TACOM as well, by the failure to adhere to their principles on merits, due process, progressive discipline, right to reply, etc.

5. THE AGENCY DID NOT ABIDE BY ITS OWN "TABLE OF PENALTIES," NEITHER THE ONE IN TARCOM-R 600-5, NOR THE AGENCY-WIDE ONE IN CPR 700 (C 14) 751.A.

The Regulation, 600-5, concludes with an Appendix A, in essence a Table of Penalties. The record shows that TACOM cited nothing against Mr. Pletten with respect to same. Mr. Pletten, as his supervisor Jeremiah H. Kator, well knew, had committed no offense. And nobody else has ever come forward in these last some thirty (3) years identifying any offense by Mr. Pletten. Certainly none was identified in any 30 days advance notice as mandated by law, 5 USC § 7513.(b). Wherefore, the "decision to terminate" as documented by EEO officials including Henry Perez, Jr., Kenneth R. Adler, and Gonzellas Williams, in the 1979-February 1980 time frame, should be reversed. And the same action, reversal, should be taken re the subsequent cover-up action some years later (documented as of January 1982) styled as a "removal," that action should be likewise reversed.

Note pertinent precedents with respect to "Table of Penalties" principles cited in pertinent court precedents. Agencies must consider several factors in determining the appropriateness of a penalty. See *Weiss* v *United States Postal Service*, 700 F2d 754, 756 (CA 1, 1983); *Douglas* v. *Veterans Administration*, MSPB N. AtO75299006 at 31-32 (April 10, 1981). Foremost is the consistency of the penalty imposed with the agency's table of penalties. *Gipson* v. *Veterans Administration*, 682 F2d 1004, 1011 (CA DC, 1982); *McLeod* v *Dept of the Army*, 714 F2d 918, 922 (CA 9, 1983).

TACOM conspicuously does not cite any Table of Penalties matter. It certainly does not reference either its own local Table of Penalties, nor the Army-wide Tables Pertaining to the Penalties of Various Offenses, CPR 700 (C 14) 751.A, March 2, 1973. Absent TACOM even mentioning what Pletten supposedly violated, what regulation(s) / clause(s) it relies on, it has not even begun to develop its case. Even personnel/human resources trainees are taught to use the Table of Penalties as a starting point before even beginning writing a notice of discipline.

6. THE DOCUMENTATION (STANDARD FORM 50's) CORROBORATES THE FOREGOING MULTIPLE VIOLATIONS.

Personnel guidance instructs agencies how to prepare the documentation (e.g., Standard Forms 50) for personnel actions. This guidance includes Federal Personnel Manual Supplement 296-33, and the *OPM Guide to Personnel Data Standards*.

For example, Federal Personnel Manual Supplement 296-33, pp 11, 12, and 15, distinguishes among various personnel action terms, e.g., "termination," "removal," etc. Example: "Removal" is defined as

> "A disciplinary separation action, other than for inefficiency or unacceptable performance . . . where the employee is at fault," p 11.

A "removal" can only be effected pursuant to pre-identified (30 days prior) written notice of charges of violating conduct rules or performance standards, citing the rules, qualifications requirements, and/or performance standards involved as allegedly having been violated, incidents, dates, witness names, etc., and typically citing prior corrective action (warnings, unsatisfactory ratings, reprimands, suspensions, etc.) having failed to secure improvement in performance and/or conduct.

"Termination" in contrast is "where the employee is not at fault," FPM Supp. 296-33, p 15. One example is "disability."

Moreover, different personnel terms have different three digit numeric codes for recording on the Standard Form 50, Box 12. (See the *OPM Guide to Personnel Data Standards*.) Thus different personnel terms must be clearly distinguished, not muddled as TACOM did. This is true for all personnel actions, including separations. See the "Separations" section of the said *OPM Guide*.

Court precedent says likewise. See *Jones* v *J. J. Security*, 767 F Supp 151, 152 (ED Mich, 1991), citing *Gantz* v *City of Detroit*, 392 Mich 348, 356; 220 NW2d 433 (1974):

> "While removal, like discharge, results in separation, it is a quite different action. Separation by discharge is through the power of discipline. Separation because of ineligibility [disqualification] is not because of discipline at all. It is like a circuit judge having to vacate his office because he moved from his residence within the circuit. It is the non-existence of a sine qua non to employment."

The agency, TACOM, denied Pletten the right to reply, as TACOM never specified which personnel action (removal or disqualification) it meant, but muddled the two. Please carefully review the SF-50, Box 12 contrasted with Box 30. Please note that that muddle is contradictory, and worse, without thirty (30) days in advance of the "decision to terminate." The absence of such advance notice violates the thirty (30) day notice requirement of federal law 5 USC § 7513.(b).

Note also the Removal SF-50, Box 14, "Authority," which cites "ZLM, Auth 5 USC 7512," as the authority for the action. But the correct code for removal is "RAH." See the "Legal Authority" section of the said OPM Guide.

And note that with the cover story to delay admission of the ouster, the forced Leave Without Pay (LWOP), the SF-50, Box 14, cites no authority at all. In contrast, for LWOP, the authority for genuine LWOP is "DAM" under Reg. 630.101."

Note also that TACOM issued no Extension despite its refusing to return Mr. Pletten 13 December 1981, the false cover story date placed on the SF-50, Box 12. Thus both personnel code (763) and "authority" for the extension from 13 Dec 1981 to 22 Jan 1982 are lacking.

In short, TACOM violated every relevant clause of its own Regulation 600-5, Chapter 18, Discipline and Disciplinary Actions. Wherefore, the agency lacked jurisdiction. See federal law 5 USC § 552.(a)(l)(C) - (D). That law makes publication of a qualification requirement "jurisdictional," *Hotch* v *U.S.*, 212 F2d 280 (1954), one of a long line of cases pursuant to said law.

Accordingly, the adverse actions taken against whistleblower Pletten should be reversed.