7/10/85

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:)
)
Leroy J. Pletten)
)
v.)
)
Office of Personnel Management)

OBJECTION TO OPM'S 24 June 1985 "FINAL AGENCY SUBMISSION IN RESPONSE TO APPEAL"

NOW COMES the Appellant, Leroy Pletten, and in support of his objection, states procedural, constitutional, estoppel, res judicata, and substantive objections as follows:

1. OPM on 24 May 1985 in its "AGENCY RESPONSE TO NOTICE OF APPEAL," on p. 1, described the situation at hand wherein "no further submission will be made." The 24 June 1985 OPM submission was made in the situation in which OPM stated that it would make "no further submission."

2. A hearing was held Tuesday, 25 June 1985, in reliance upon the 24 May 1985 OPM statement descriptive of when "no further submission will be made." "Equitable estoppel prevents a party from assuming inconsistent positions to the detriment of another party," U.S. v. Georgia-Pacific Company, 421 F.2d 92 at 96 (1970). OPM has estopped itself from doing what it has now done. The court elaborated, "Equitable estoppel is a rule of justice which, in its proper field, prevails over all other rules."

3. The 24 June 1985 submission is untimely, as not made sufficiently in advance of the hearing, even if OPM had not already stated that such submission would not be made. It is doubly untimely, coming after motion was made to close the record at the time, in reliance on the OPM 24 May 1985 statement. OPM did not see fit to send representation to the hearing.

4. Note that OPM on 18 June 1985 indicated in its "Agency Objection to Witness Request," p. 1, concerning the prior MSPB decisions, "the principles of res judicata apply." OPM is now trying to relitigate the situation MSPB has already decided. Such behavior by OPM denies due process and the equal

121

protection of the laws, as OPM is opposing giving me the equal benefit of res judicata/estoppel principles, and is doing so at the last moment, untimely, contrary to its own 24 May 1985 statement.

5. The Presiding Official has already identified his view of the "bottom line" of this case, "The question to be resolved is whether the appellant's disability prevents him from working in the environment that the agency has provided for him," p. 1 of his prehearing order of 10 June 1985. The bottom line is the "identity of issue" with the 20 June 1983 issuance, which OPM stated is res judicata in its 18 June 1985 submission. MSPB and USACARA have already confirmed the hazard. See 5 C.F.R. 1201.66 on satisfying the burden of proof.

6. OPM wants to relitigate the 20 June 1983 issuance from Victor Russell, whose p. 9 emphasized the hazard, and p. 2, ftn. 2, noted the "serious health hazard" (in contrast to OPM's misrepresentation by citing only "discomfort"). Relative to the bottom line as already identified by the Presiding Official's prehearing order, OPM wants to relitigate. The OPM behavior is unacceptable in accordance with precedents such as Raper v. Hazelett & Erdal, 114 Ill.App.3d 649, 70 Ill.Dec. 394, 449 N.E.2d 268 at 271 (1983), citing Continental Can Co., USA v. Marshall, 603 F.2d 590 at 596 (CA 7, 1979). The bottom line ("identity of issue" with the 20 June 1983 issuance from Mr. Russell, especially pp. 9-10) as identified by the Presiding Official in his prehearing order is already res judicata according to OPM's own 18 June 1985 submission.

7. The 20 June 1983 issuance from Mr. Russell cites Dr. Francis Holt on p. 9, for the explanatory "nexus" connecting the hazard (more than just "discomfort") to what the Presiding Official's 10 June 1985 prehearing order points to as the bottom line. (Citing Dr. Holt as distinct from Drs. Salomon and Dubin arose due to agency concealment of the full extent of the hazard as noted in my 10 May 1985 appeal: Count XXVI, paras. 250-252, pp. 42-43, as juxtaposed with para. 10). OPM is not allowed to relitigate the hazard and explanation, since both USACARA and MSPB have doubly confirmed the hazard.

8. The OPM submission (which it said it would not make) - is doubly violative of estoppel principles. MSPB offered it the opportunity to make its views known about two years ago, via its August 1983 solicitation of amicus curiae input. OPM chose to remain silent then. Cf. Georgia-Pacific, supra, "'He who keeps silent when duty commands him to speak shall not speak when duty commands him to keep silent.'" OPM silence in 1983, upon which MSPB relied, estopps OPM in 1985, when OPM untimely (and contrary to its own statement of "no further

submission") wishes to halt its self-imposed silence when it has already been offered opportunity to bring its expertise to bear on the case.

9. Note Hazelett & Erdal, supra, guidance concerning the thoroughness of litigation of the bottom line matter at issue, here as identified by the Presiding Official's 10 June 1985 prehearing order. OPM's implied objections on the thoroughness of the prior litigation are not made in good faith. For example, note that OPM does not even mention the hazard emphasized by Mr. Russell, as admitted against interest by Dr. Holt, an admission against interest. (OPM only cites "discomfort," a situation where OPM distorts the facts to its own purposes, behavior similarly rejected in U.S. v. Marshall, 488 F.2d 1169 (1973).) Note p. 7, encl. 1, of the 25 January 1980 USACARA Report, "Mr. Pletten has established that, insofar as he personally is concerned, smoking does constitute a safety hazard to him." The 25 January 1980 USACARA Report is res judicata. Considering the known hazard, and p. 60 of the 1964 Surgeon General's Report, encl. 2 (available in the public domain, and copied by me, e.g., in the 10 May 1985 appeal, para. 10), establishing the hazard to the satisfaction of USACARA and MSPB is obvious.

10. OPM "should have known it would not prevail on the merits when its only evidence was the inconsistent statements," by it contrary to res judicata and the already-established hazard, apt words from Piper v. DoJ, 4 MSPB 89 at 90 (1980), cited in Yorkshire v. MSPB, 746 F.2d 1454 at 1457, n. 4 (1984). See Also Cicero v. USPS, 4 MSPB 145 at 146 (1980), in light of the evidence accumulated by the agency, OPM "should have known" better than to dispute the hazard, and dispute the explanatory matter as only "discomfort." The MSPB and USACARA confirmations of the hazard are res judicata.

WHEREFORE, this objection to the 24 June 1985 OPM submission should be upheld.

Date: 5 July 1985 Leroy J. Pletten

Leroy J. Pletten
Appellant

2 enclosures

25 JAN 1980

PECA
Report of Findings and Recommendations in the Grievance of Mr. Leroy J. Pletten, US Army Tank-Automotive Materiel Readiness Command, Warren, Michigan

Mr. Pletten has established that, insofar as he personally is concerned, smoking does constitute a safety hazard to him. The compliance with DODI 6015.18 and AR 1-8 recommendations does not preclude such happening and the question that ensues is whether measures beyond those recommended should be taken to ensure total compliance with those regulations.

2. With regard to relief "c, Return to equivalent worksite as before provided there is no smoking within 25 feet", COL Thomas informed Mr. Pletten there were no facilities available other than those occupied. Mr. Pletten stated during telephone conversation with me that he wished to withdraw that request.

3. With regard to the ban on smoking in all areas where grievant is for at least one minute, COL Thomas stated that the command had no authority to act and the request was unreasonable. The information provided in D-1 above also applies to this request and reply.

4. Mr. Pletten requested that emphasis on programs to discourage smoking should be initiated as suggested by AR 1-8. COL Thomas replied that educational programs including counselling by the Medical Officer was provided for high risk personnel. He further advised that the Medical Officer is in the process of initiating an educational program to discourage smoking within the general workforce. Mr. Pletten stated that he does not recall seeing any notices of educational programs directed at high risk personnel.

5. Mr. Pletten requested a finding that the Civilian Personnel Division does not physically meet the criteria to accommodate smokers. COL Thomas stated that adequate ventilation is provided in common work areas and that the Civilian Personnel Divison is adequate to accommodate smokers. Mr. Pletten countered that if the Civilian Personnel Division were truly adequate to accommodate smokers, he would not be suffering from the effects of the smoke from smokers. The regulation provides that smoking will be permitted in common work areas only if ventilation is adequate to remove smoke and provide an environment that is healthful.

6. Mr. Pletten requested total and permanent compliance with the "letter and spirit" of the medical

It thus appears that the pyrolysis of many organic materials can lead to the formation of components carcinogenic to mice. Cigarette paper consists essentially of cellulose. Pyrolysis of cellulose has been shown to produce benzo(a)pyrene. The observation (2) that treatment of tobacco with copper nitrate decreases the benzo(a)pyrene content of the cigarette smoke suggests a possibility for improvement by the use of additives or catalysts. The fact that side-stream smoke contains three times more benzo(a)pyrene than main-stream smoke has been cited (50) as evidence that more efficient oxidation could conceivably lower the content of carcinogenic hydrocarbons.

THE GAS PHASE

The gas phase accounts for 60 percent of total cigarette smoke. Hobbs et al. (34, 35) found that 98.9 mole percent of the gas phase is made up of the following seven components:

Nitrogen	73 mole percent
Oxygen	10
Carbon-dioxide	9.5
Carbon-monoxide	4.2
Hydrogen	1.
Argon	0.6
Methane	0.6
	98.9

The approximately one percent of the gas phase not accounted for by the seven major constituents contains numerous compounds, no less than 43 of which have been identified as present in trace amounts. Some of these are listed in Table 4 (1).

TABLE 4.—*Some gases found in cigarette smoke*

Compound	Concentration	State level for industrial exposure*	Toxic action on lung
	(ppm)	(ppm)	
Carbon Monoxide	42,000	100	Unknown
Carbon Dioxide	92,000		None
Methane, ethane, propane, butane, etc.	87,000	500	None
Acetylene, ethylene, propylene, etc.	31,000	5,000	None
Formaldehyde	30	5	Irritant
Acetaldehyde	3,300	200	Irritant
Acrolein	180	0.5	Irritant
Methanol	700		Irritant
Acetone	1,100	200	Irritant
Methyl ethyl ketone	800	200	Irritant
Ammonia	300	100	Irritant
Nitrogen Dioxide	250	5	Irritant
Methyl Nitrite	200		Unknown
Hydrogen Sulfide	40	20	Irritant
Hydrogen Cyanide	1,000	10	Respiratory enzyme poison
Methyl Chloride	1,200	100	Unknown

*The values listed refer to time-weighted average concentrations for a normal work day.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:)
)
Leroy J. Pletten)
)
v.)
)
Office of Personnel Management)

MOTION TO PROVIDE FREE COPY OF TRANSCRIPT

NOW COMES the Appellant, Leroy Pletten, and in support of his motion for a free copy of the transcript, states as follows:

1. A hearing was held Tuesday, 25 June 1985.

2. 5 C.F.R. 1201.53(a) authorizes the Board to provide a free copy of the transcript.

3. Due to the prolonged situation from 17 March 1980 to the present, Appellant has been without pay for years.

WHEREFORE, this motion for a free copy of the transcript is made.

Date: 5 July 1985

Leroy J. Pletten

Leroy J. Pletten
Appellant

CERTIFICATE OF SERVICE

Docket No.
CSA 2 448 252

I hereby certify that the foregoing material was served by regular mail on this date to the following parties:

Franklin L. Lattanzai, Chief
Disability Claims Division
Retirement and Insurance Programs
(Disability Appeals Branch)
U.S. Office of Personnel Management
P. O. Box 664
Washington, D.C. 20044

Howard J. Ansorge, Presiding Official
Merit Systems Protection Board
Chicago Regional Office
230 South Dearborn Street, 31st Floor
Chicago, Illinois 60604

Date: 5 July 1985

Leroy J. Pletten

Leroy J. Pletten
Appellant