Enclosures

JAN. 2 1985

1. 30 January 1984 OPM letter confirming a lack of merit to my being ousted. I meet all the qualifications and medical form requorements of record, as the examining doctors have repeatedly pointed out.

2. Analysis that MSPB has jurisdiction only to reverse the ouster; i.e., that it lacks jurisdiction except to reverse; i.e., none for what it has done (denounce the 25 Jan 1980 USACARA analysis, denounce AR 1-8, disregard the difference between not permitting smoking and banning it; disregarding the right standard (unqualified and absolute" safety duty), etc., etc.

3. Analysis pointing out the actual sources of my being ousted. Cf. Sullivan v. Navy, 720 F.2d 1266 (1984). Note Gen. Stallings' deposition admission of not having even read AR 1-8. Clearly, Mr. Hoover orchestrated my being fired. Mr. Hoover opposes having AR 1-8 enforced, as it would affect him personally.

4. Analysis on expediency vs. integrity.

5. Another agency effort to misdirect me to MSPB appeals route, dated 14 Dec. 1984, CIRA-JA. The installation fears EEOC integrity ever since 9 April 1980, when Mr. Perez noted that the installation fired me apart from job requirements (a prohibited personnel practice confirmed by OPM 30 Jan. 1984).

6. Analysis based on FPM Suppl. 831-1,S10

7. 24 Oct. 1980 memo, consistent with Dr. Holt's deposition that excused absence applies. Dr. Holt was pressured by Col. Benacquista and E. Hoover to not continue excused absence for me, as applies to hazards. Cf. Sullivan v. Navy, supra.

8. The beginnings of a criminal indictment of Col. Benacquista.

9. Extract (from p. 3-4) of my deposition.

10. Memos from me, 1 June 1983 and 24 July 1984, seeking a criminal
11. investigation of the installation/MSPB misconduct

12. 19 June 1979 memo from the installation legal office, confirming the full authority involved. Note no reference to a union role, enforcement difficulties, etc. MSPB officials (corrupted and/or bought) fabricated such claims years later.

13. Analysis of 83-1 ARB 8267 (Schnadig case), refuting MSPB claims.

14. Chronology--context of AR 1-8

15. Chronology--context of my being ousted

16. Chronology--police power context

17. Chronology--smokers are dangerous

United States
Office of
Personnel Management

Washington, D.C. 20415

JAN 30 1984

In Reply Refer To:

Your Reference

Mr. Leroy J. Pletten
8401 18 Mile Road #29
Sterling Heights, MI 43078

Dear Mr. Pletten:

This is in reply to your Freedom of Information request dated December 12, 1983, and received in this office on January 23, 1984. A copy of your letter was forwarded to this office for reply to those items pertaining to qualification requirements since this office has responsibility for the development of qualification standards.

Specifically, you requested a copy of any and all qualification requirements issued by OPM that require smoking as a condition of Federal employment. You asked that this include qualification requirements in Handbook X-118 as well as any OPM may have issued or may be using that are not a part of the X-118 system. You also requested that if there are no such requirements that we so state.

This office is not aware of any qualification standards issued or in use by OPM that require the ability to smoke. As a consequence, we cannot fill your request for copies of such material.

Sincerely,

Joseph W. Howe

Joseph W. Howe
Assistant Director
for Standards Development

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MSPB lacks jurisdiction Except to Reverse, Due to the
Well-established Invalidity of "Desires"/"Preferences" JAN. 2 1985

Smoker "desires" have no legal standing in the discrimination context. Such preferences cannot be offered as a bar to granting relief. Note well-established principles that "certainly discrimination based on eight-hour laws or customer preferences cannot be offered in justification. Rosenfeld v. Southern Pacific Co., /3 EPD 80917 444 F.2d 1219 (9th Cir. 1971); Diaz v. Pan Am World Airways, Inc., /3 EPD 8166/ 442 F.2d 385 (5th Cir.), /4 EPD 7560/ cert. denied, 404 U.S. 950 (1971)," Evans v. Sheraton Park Hotel, 5 EPD 8079, pp. 6921-6922, 5 FEP Cases 395 (1972).

Even "laws" "cannot be offered in justification" for "discrimination." Here, no laws require tobacco smoke as a job qualification requirement. The Handbook X-118 does not. The job description does not. No advance notice/specificity has been provided showing any requirement. Hence, there is no requirement/qualification for smoking, upon which to base a dis-qualification for failure to meet the non-existent requirement.

Courts emphasize the duty to identify the alleged requirements/qualifications. Here, relative to tobacco smoke, "the job requirements and qualifications had never been formally changed," Sabol v. Snyder, 524 F.2d 1009 at 1011 (1975). "Workmen are not employed to smoke," MTM Co. v. MCP Corp., 49 F.2d 146 at 150 (1931).

Courts have often been involved in striking down cases where alleged "requirements" (really only "desires" or "preferences") were asserted by employers, but not proven. Here, the installation has simply failed to prove the condition precedent for having a "dis"-qualification case: an extant qualification.

"That condition not having been met, the action was never commenced," Siemering v. Siemering, 95 Wis.2d 111 at 115, 288 N.W.2d 881 at 883 (1980). Hence, MSPB lacks jurisdiction to decide anything after the matter of lack of requirements/qualifications, pointed out by me in my deposition, p. 4, and in the 11 Nov. 1983 amicus brief from Environmental Improvement Associates. MSPB has jurisdiction solely to reverse the case for lack of requirements to commence the case. (MSPB has no jurisdiction for example, to do what it has done--reargue the USACARA Report of 25 Jan. 1980; cf. Spann v. McKenna, 615 F.2d 137 (1980).)

Courts have often been involved in striking down "desires" or "preferences" as in such cases as these:

Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) rejecting desire for high school diploma

Nance v. Union Carbide Corp., Consumer Prod. Div., 397 F. Supp. 436 (1975) rejecting weight lifting preference

Clearly, as EEOC accurately noted 8 April 1983, p. 4, there has been no "compliance with any of the applicable standards of proof required of an agency," not even on a qualification--the condition precedent for a "dis"qualification. MSPB lacks jurisdiction, except to reverse the ouster.

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JAN. 2 1985

Persons Causing the Pattern of Abuse, Neglect, Exploitation and Endangerment

The persons primarily responsible for the pattern are John J. Benacquista and Edward E. Hoover. At the installation, at all times and continuing to the present, "there's a hazard for all these . . . people. . . . Yes. Yes. . . . People smoking in their vicinity is hazardous to them," an admission against interest from the employer's own physician, Dr. Francis J. Holt (Deposition, p. 42). The hazard at the employment site is obvious. It was covered up for years by installation officials, but was admitted at the depositions.

The toxic substances at issue would be immediately suppressed due to the danger, however, I am being exploited, endangered, abused and neglected solely because the source of the toxic materials arises from tobacco. I am being exploited because of where the hazard comes from.

The hazard was admitted by Dr. Holt, and confirmed by MSPB 20 June 1983, and 24 Oct. 1984. There is no doubt of the hazard, it is well-established fact that tobacco smoke ingredients exceed safety limits on the order of 10, 100, 1000 times over.

The installation is abusing me sadistically by refusing to pay me. The failure/neglect to remit my pay is a separate and additional form of abuse, neglect, exploitation and endangerment. It causes loss of home, mobility, health maintenance capability, etc., etc. The neglect, exploitation, and abuse concerning my pay relates to crimes by installation personnel acting in their personal capacity (the government is not generally chargeable with crimes by its employees, so far as I know). Note that there is a hazard, but see how J. Benacquista handled it. At his deposition, he explained why he had my pay cut off. It was because I refused to agree to his extortion. He testified of me, "All he had to do was to say, 'I agree that this is reasonably free of contaminants,'" i.e., agree to say there is no danger, i.e., agree to alter my anticipated testimony. The demand made by him violates Michigan law. See People v. Atcher, 65 Mich.App. 734, 238 N.W.2d 389 (1975).

He and Mr. Hoover stopped my pay "in an attempt to get" me "to give" up my accurate and confirmed "perception of the hazard." See the deposition. Note State v. Gates, 394 N.E.2d 247 (1979), on "use of . . . monies to . . . keep the business going." Here, the cited offenders want to "keep" the danger, abuse, neglect, and exploitation, and the smoking, "going." They have shown a willingness to stop at nothing. They violate Michigan law, so far with impunity. My pay, p. 62, "was available," "The job was available" if, and only if, I would agree to accede to the extortionate insistence that I retract saying that there is a hazard at the installation.

Since J. Benacquista has admitted commiting extortion, please arrange for protective measures on my behalf. This should include obtaining action for orders saying for them to cease and desist their endangering behavior, to cease and desist their neglecting to pay me, and their exploiting me because the hazard's source is tobacco smoke (as distinct from other source). There is more than one violation. There is thus more than one source of aid. See cases on interactions of multiple laws, as in Hentzel v. Singer Co., 138 Cal.App.3d 290, 188 Cal.Rptr. 159 (1982), and Cipellone v. Liggett Group, Inc., 593 F.Supp. 1146 (1984).

Encl 3

Expediency vs. Integrity

JAN. 2 1985

NAACP v. Detroit Police Officers Ass'n., 591 F.Supp. 1194 (1984), provides excellent insight consistent with the 25 Jan. 1980 USACARA Report, and the 23 Feb. 1982 and 8 April 1983 EEOC decisions. P. 1202 shows graphically why a nonsmoker was fired: the installation and MSPB "made a politically expedient decision that it would rather face a lawsuit by" a nonsmoker, "than face a lawsuit by" a smoker. The installation "also decided it would threaten" me, and did so in a series of events shown by the record: denunciation in the installation newsletter; medical harassment by Dr. Holt; refusal to implement the 25 Jan. 1980 USACARA Report despite the duty decided at that same time, in Spann v. McKenna, 615 F.2d 137 (1980); refusal to process my EEO complaints seeking redress; suspending me; opposing MSPB jurisdiction to reverse the suspension for lack of a qualification requirement upon which to base the ouster; seeking ex parte (including verbally) to have MSPB alter its jurisdiction to decide other matters besides the one (no qualification requirements) it is supposed to decide, indeed, in lieu of that one; etc.

The installation, "knowing full well that" smokers are not permitted to endanger nonsmokers under OSHA and AR 1-8 guidance, and "knowing full well that" smokers are to be controlled (disciplined up to and including removal) when they do endanger nonsmokers, made an "expedient" decision for the personal reasons of people such as Col. Benacquista. See his deposition, p. 62, admitting at the bottom what he demanded I say. Cf. Dr. Holt's admission confirming my statement, "People smoking in their vicinity is hazardous to them," p. 42. Col. Benacquista admitted suspending me for saying likewise, p. 47. (Demanding such "a choice of" a person is found in discrimination, Nance v. UCC, CPD., 397 F.Supp. 436 at 452, item 78 (1975), and in extortion, People v. Atcher, 65 Mich.App. 734, 238 N.W.2d 389 (1975).)

The installation, "knowing full well that" smokers would have no recourse if they were stopped from endangering people, decided to oust me. Smokers have no right to endanger people since nobody is allowed to endanger others; "preventable forms and instances of hazardous conduct must . . . be entirely excluded from the workplace," NR & C Co., Inc. v. OSHRC, 489 F.2d 1257 at 1267 (1973), and "An employer has a duty to prevent and suppress hazardous conduct by employees," n. 36, p. 1266. This principle was implemented in Shimp v. NJBT Co., 145 N.J.Super. 516, 368 A.2d 408 (1976). Smokers have no recourse when a rule is being enforced, as was confirmed right here in Michigan in Jacobs v. Mental Hlth. Dep't., 88 Mich.App. 503, 276 N.W.2d 627 (1979). The installation "knowing full well that" it had no case against me (but only against the smokers endangering others at the installation) decided to oust me, to obstruct AR 1-8.

The installation "never sought declaratory relief . . . It cites no authority, nor could it," NAACP, at 1201, n. 7. "The rights of smokers exist only insofar as discomfort or unreasonable annoyance is not caused to nonsmokers," USACARA, p. 12. That is how the Army has already "balanced" matters, contrary to MSPB's non-recognition of this, 24 Oct. 1984, p. 5; cf. balancing as cited by the Supreme Court, ATM Inst. v. Donovan, 452 US 490 at 509 (1981).

Encl 4

DEPARTMENT OF THE ARMY
UNITED STATES ARMY CRIMINAL INVESTIGATION COMMAND
HEADQUARTERS, FIRST REGION
FORT GEORGE G. MEADE, MARYLAND 20755-5325

REPLY TO
ATTENTION OF:
CIRA-JA

DEC 14 1984

Mr. Leroy J. Pletten
8401 18 Mile #29
Sterling Heights, MI 48078

Dear Mr. Pletten:

Enclosed are your DF's dated 23 August 1984 and 24 July 1984 requesting an investigation regarding the circumstance which led to your leaving the Federal service.

Your proper avenue of redress is the Merit System Protection Board which investigates situations in which an employee claims to have had a improper job action taken against him.

If I can be of further assistance, do not hesitate in contacting me.

2 Encl
as

John H. Valieant
Colonel, MPC
Commanding

Encl 5

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JAN 2 1985

FPM Supp. 831-1, Subchapter S10, was issued with FPM Letter 831-78. It provides revealing data on the inadequacy of the bizarre local behavior, and of the bizarre MSPB behavior sustaining the local viciousness directed against non-smokers such as me. Para. S10-2(b) requires "a copy of the employee's performance standards and latest performance appraisal of record." It tells the agency to "identify critical elements for which performance is deficient and describe specific examples of deficient performance." The installation has no case, and has had none. The installation behavior was void ab initio, since 17 March 1980. The installation cited no specificity at all. My appraisals, including the "latest" one, were exemplary. No "deficient" aspects whatsoever existed. On the contrary, I recived multiple letters of appreciation for my commendable performance. In addition, an award and a step increase were granted to me.

S10-2(d) says that "the employee's position description and critical elements" "must" be provided. That is a matter of specificity. It is also a matter covered in Stalkfleet v. U.S. Postal Service, 6 MSPB 536 at 541 (1981). Here, the installation has provided no such data. Smoking is not covered in the "position description," and is definitely not required for performing the "critical elements." On the basis of thse facts, the action against me was unwarranted. In addition, smoking is not even so much as a de minimis job or qualifications requirement. That fact devastates the installation non-case.

S10-2(f) indicates that "the awarding of a pay increase or other recognition based on fully successful performance (including a within-grade increase to a General Schedule employee) only a short time before the . . . application for disability retirement . . . must be explained in sufficient detail." Here, it was granted during the period. Mr. Martin Baumgaertner's malice precluded me from being able to raise the issue at a hearing. MSPB has continued to refuse to even address the matter. No explanation at all has been provided. No explanation at all--is not specificity. "OPM deems this type of pay action to be a confirmation that the employee's service or performance is useful and efficient . . . ."

S10-3(a) discusses "conditions of employment." Smoking is not a condition of employment. The installation has expressly stated that. See claim A9-190131 by Ms. Evelyn Bertram, wherein management in the personnel office expressly denied that smoking is a "conditions of employment" matter. Cf. Sabol v. Snyder, 524 F.2d 1109 at 1011 (1975), where the individual prevailed because (as here) the "job requirements and qualifications had never been formally changed." The installation and MSPB simply refuse to respond to well-established legal principles. "Workmen are not employed to smoke."

Grd 6

DISPOSITION FORM

For use of this form, see AR 340-15, the proponent agency is TAGCEN.

REFERENCE OR OFFICE SYMBOL	SUBJECT
DRSTA-ALS	Excused Absence for Safety Hazards

TO: Actg Dep Commander (DRSTA-CG)

FROM: Leroy J. Pletten (DRSTA-ALS)

DATE: 24 Oct 80

CMT 1

1. This will refer to our meeting 23 Oct 80. We discussed efforts to resolve the extant safety hazard.

2. Pending decision on the course of action, please have CPO change my status to excused absence.

3. Excused absence is the past practice for safety hazards. The regulations do not distinguish between safety hazards insofar as employee leave status is concerned. They do not cite one status for all hazards except smoking, and a different status for hazards involving smoking. A hazard is a hazard.

4. As we discussed, placing me on the proper status will help show Command good faith pending decision. Dealings with "clean hands" are more likely to produce acceptable results that are mutually agreeable.

5. We can work together to resolve the matter.

Leroy J. Pletten

LEROY J. PLETTEN
Pos Class Spec

DA FORM 1 FEB 67 2496 REPLACES DD FORM 96, WHICH IS OBSOLETE.

☆ U.S.GPO:1978-0-665-041/144

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN J. BENACQUISTA,

Defendant

CRIMINAL INDICTMENT COMPLAINT

NOW COMES the Plaintiff, UNITED STATES OF AMERICA, by and through a Crime Prevention Officer, and for its Complaint against the named Defendant, states as follows:

1. Defendant is a citizen of the United States of America.

2. As Chief of Staff of the U.S. Army Tank-Automotive Command base in Warren, Michigan, Defendant was responsible to obey the laws of the land both personally and in his official capacity, including but not limited to safety laws, EEO rules, agency rules, etc.

3. At his installation, "there's a hazard for all these other people. . . . Yes. Yes. . . . People smoking in their vicinity is hazardous to them." (Ref. Dr. Holt's Deposition, p. 42).

4. Defendant has views opposed to obeying safety, "It doesn't make sense to have a Command getting involved in the personal habits of its employees . . . ." (Ref. his Deposition, p. 25).

5. Defendant demanded that a subordinate, LEROY PLETTEN, "say, 'I agree that this is reasonably free of contaminants'" despite the hazard noted in paragraph 3, above (Ref. Dep., p. 62).

6. PLETTEN declined to alter his anticipated testimony. (Ref. People v. Atcher, 65 Mich.App. 734, 238 N.W.2d 389 (1975).)

7. Defendant overruled the medical letters confirming PLETTEN's ability to work, i.e., pressured other subordinates, and "made that determination" (Dep., p. 13), to negate the medical emphasis on the clear and consistent ability to work.

8. Dr. Holt knew that excused absence/administrative leave was the proper status for a hazard-caused absence (Dep., p. 41), as he had provided it until overruled by Defendant BENACQUISTA.

9. Placing PLETTEN on sick leave (suspension or termination as EEOC noted 8 April 1983, p. 6) was for pressuring him to retract (para. 5 above), since he met all the job requirements of record, "The job was available." (Ref. Dep., p. 62.)

COUNT I

10. Defendant's behavior constitutes extortion in violation of MCLA 750.213, MSA 28.410. (Ref. U.S. v. Kibler, 667 F.2d 452 (1982), and U.S. v. Wilford, 710 F.2d 439 (1983).

COUNT II

11. The failure to remt PLETTEN's pay constitutes embezzlement in violation of MCLA 750.174, MSA 28.371.

Q Would you state your name for the record.

A Leroy J Pletten.

Q Mr. Pletten, you are the subject of this claim as a removal action. Are you familiar with the circumstances surrounding the removal?

A To a great extent, yes.

Q Have you read the proposed notice and the notice of removal in this action?

A Yes, I have.

Q Do you understand them?

A No, I don't.

Q Why is it that you don't understand them?

A They're clear (sic) and vague. And, you know, I've written advance notices in other cases and these letters look like sort of the start towards a possible letter. But really there's nothing in there that is anything except conclusions and no factual evidence, and it seems inconsistent and contradictory.

Q You are familiar with the basis of the Government's claim is that you're disqualified medically from returning to work? Do you understand that?

A No, I do not understand that.

Q What is it that you do understand as far as the medical aspect of the claim?

A Well, that they assert that that's the case, but I don't understand it because there's no medical qualification factors to be disqualified from.

Q I'm going to show you a document that I've written at the top right-hand corner as Appellant's Proposed Number 6. Can you identify this, please?

A Yes. This Appellant's Number 6 is a document I received from the Office of Personnel Management under the Freedom of Information Act in response.

Q When was that request filed under the Freedom of Information Act?

DISPOSITION FORM

For use of this form, see AR 340-15, the proponent agency is TAGCEN.

REFERENCE OR OFFICE SYMBOL	SUBJECT
8 April 1983 EEOC Decision	Request for Criminal Investigation

TO Criminal Investigation Command FROM Leroy J. Pletten DATE JUN 1 1983 CMT 1

1. This is a request for a criminal investigation of a pattern of unlawful activities transpiring over a period of several years. The pattern includes but is not limited to falsification, extortion, embezzlement, and other crimes up to the present. More data will be provided during the investigation.

2. As a matter of background, I was a federal employee for the Army Tank-Automotive Command in Warren, Michigan, from 1969 to 1980. I reported violations of AR 1-8, issued under 32 C.F.R. 203, sought enforcement of the guidance, and in reprisal, a "suspension or termination" was imposed. The reprisal was directed against me for reporting that the environment at the installation was not reasonably free of contamination.

3. It was made clear that the condition for letting me return to duty was that I would have to say that I agree that the environment is reasonably free of contamination. When I declined, the above-cited pattern and especially the falsifications, were intensified. Cf. People v. Atcher, 238 N.W.2d 389 (1975), People v. Percin, 47 N.W.2d 29 (1951), and State v. Gates, 394 N.E.2d 247 (1979).

4. The hazard reported, relates to tobacco smoke, which is inherently dangerous, as shown in Austin v. State, 48 S.W. 305 (1898), Banzhaf v. F.C.C., 405 F.2d 1082 at 1097 (1968), Larus & Brother Company v. F.C.C., 447 F.2d 876 at 880 (1971), and Commonwealth v. Hughes, 364 A.2d 306 (1976). Cf. Rum River Lumber Co. v. State, 282 N.W.2d 882 (1979), and the Michigan Law Review, Vol. 81(1), pp. 237-258, November 1982 citing Linder v. United States, 268 U.S. 5 (1925). Under AR 1-8, smoking is not permitted when there is a hazard. Moreover, as EEOC noted, p. 5, "The agency presented no evidence that it considered the rights of the non-smokers or even recognized that its own regulations permitted smoking only to the extent that it did not cause discomfort or unreasonable anoyance to others." Combining p. 6 EEOC data, concerning "the agency's smoke-filled environment which the agency refuses to alter," with the above, EEOC found that corrective "actions were not even attempted." Indeed, "The agency does not argue nor does the record support that it ever complied with the recommendations of the grievance examiner," p. 5. Instead, the "suspension or termination" was imposed.

5. Cf. State v. Gates, on "use of . . . monies to . . . keep the business going." The installation wants "to keep" smoking "going" even when not permitted. Thus, it has "intentionally failed to remit" my pay, when I declined to agree that the environment is reasonably free of contamination.

6. Thus, this request for criminal investigation is being made.

Leroy J. Pletten

Leroy J. Pletten

DA FORM 1 FEB 62 2496 REPLACES DD FORM 96, WHICH IS OBSOLETE. ☆U.S.GPO:1978-0-665-041/144

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DISPOSITION FORM

For use of this form, see AR 340-15, the proponent agency is TAGCEN.

REFERENCE OR OFFICE SYMBOL	SUBJECT
Deposition--Col. J. Benacquista; Decisions 4-6-83 and 6-18-84	Request for Criminal Investigation

TO Criminal Investigation Command FROM Leroy J. Pletten CPO DATE 24 July 1984 CMT 1

1. Another confirmation of the extortion and embezzlement pattern by installation officials has been issued and forwarded. The 6-18-84 issuance reiterates what was stated 4-6-83. Note the reiterated emphasis on the "consistent and clear evidence" of my being "able to return to work" throughout the period at issue. You will recall that on 4-8-83, EEOC described the installation refusal to have me on duty status as "essentially the same as a suspension or termination." You will also recall the 4-9-80 letter from Mr. Perez referencing the then already clear "agency's decision to terminate" me retroactively and without notice and without specificity.

2. You will note that the installation overruled my "clear" ability "to return to work." Note that the most recent confirmation (6-18-84) is consistent with the repeated MESC analyses. Those analyses on my ability to work are res judicata, as are the 4-6-83 and 6-18-84 analyses. I meet all the job requirements of record, and all the job qualifications and duties of record. (See also the 30 Jan. 1984 OPM letter, the 25 Jan. 1980 USACARA Report, and my SF-50.)

3. Since I meet all the requirements of record, I repeatedly returned to duty, but was turned away. (Cf. Bevan v. N.Y. St. T. R. System, 74 Misc.2d 443, 345 N.Y.S.2d 921 (1973).) Turning me away despite the "consistent and clear evidence" of my being "able to return to work" was for extortion purposes by installation smokers, as Col. Benacquista admitted 4-23-82 under cross-examination. I meet all the requirements of record, he admitted, p. 62, "The job was available." You will recall my pointing out the extortion by him and installation officials, like in People v. Atcher, 65 Mich.App. 734, 238 N.W.2d 389 (1975). (I presume you read the depositions.)

4. Col. Benacquista admitted why the installation repeatedly turned me away, "All he had to do was to say, 'I agree that this is reasonably free of contaminants,'" i.e., agree to alter my anticipated testimony. Like the extortion victim in Atcher, supra, I declined. So the extortion mushroomed into embezzlement, p. 63. Installation officials suspended/terminated me "in an attempt to get him . . . to give" up "his perception of the hazard," i.e., to force me to change my anticipated testimony. Cf. State v. Gates, 394 N.E.2d 247 (1979).

5. Note that enforcing the AR 1-8 threshold conditions precedent before smoking can be "permitted," is protected by sovereign immunity cf. Jacobs v. Mental Hlth. Dep't., 88 Mich.App. 503, 276 N.W.2d 627 (1979). Thus, extortion and embezzlement to coerce me occurred. Thus, this renewed request is made.

Leroy J Pletten

Leroy J. Pletten

DA FORM 1 FEB 67 2496 REPLACES DD FORM 96, WHICH IS OBSOLETE. ☆U.S.GPO:1978-0-665-041/144

Encl 11

...of this form, see AR 340-... Prescribing agency: TRADOC.

DA IA
Civ Pers Off
(DRSTA-AI)

Prohibition of Smoking in Civilian Personnel Division

FROM Chief Counsel
(DRSTA-L)

DATE 19 Jun 79
Ms. Lewandowski/mm/7171

1. Army Regulation 1-8 does give officials the authority to ban smoking in areas under their jurisdiction. The Department of the Army, however, recognizes an individual's right to smoke in a DA occupied building and action to ban smoking should be undertaken only when the smoking is found to endanger life or property, cause discomfort or unreasonable annoyance to non-smokers, or infringe upon their rights.

2. As a general rule, a minimum ventilation rate of ten cubic feet of fresh air per minute per person is recommended to remove smoke from work areas and provide a healthful environment. LTC Larry R. Wigner, Cdr, HISA, expressed the opinion in a DF to the Inspector General dated 29 May 79 that this regulation is adhered to Command wide. A request, however, has been made that HISA make a specific testing of the ventilation rate in the Personnel Office. We are awaiting the results of that testing.

3. The DF proposing an absolute smoking ban appears extreme and probably is unnecessary to comply with AR 1-8, which requires a balancing of smokers' and non-smokers' rights. It is suggested that alternative means to solve this problem be investigated. One possible solution might be to rearrange office seating to separate smokers from non-smokers, provided, of course, that this will not impair the efficiency of the work units. Some alternative approaches worthy of consideration are the use of modern technology or the application of compensating physical principles. There are several "home remedies" such as a burning candle or a flat dish of vinegar in the vicinity of the smoker that are reputed to help absorb smoke from the air. While these ideas may appear impractical, perhaps a modification of these methods would help to permit smoking while yet not offending the sensitivities of non-smokers. Also, there is commercially available an ashtray that supposedly absorbs smoke from burning cigarettes.

for RICHARD T. TARNAS
Chief Counsel

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DA FORM 2496 REPLACES ... WHICH IS OBSOLETE.

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Encl 12

The record shows that the installation suspended/terminated me on 17 March 1980 without providing any advance notice/reasons. MSPB could find no reasons, hence, it has used data from a later adverse action effected years later, to try retroactively somehow to uphold the ouster. (MSPB liars and criminals had committed multiple violations, hence, MSPB officials are willing to commit any number of offenses to try supporting the prior offenses.)

The case of Schnadig Corp. and Uphol. Int'l. Union, FMCS No. 82K/27223, 83-1 ARB 8267, pp. 4187-4192 (1983), answers the false claims made by MSPB, retroactively, without allowing me any opportunity to reply.

What MSPB Liars Say	What an Accurate Analyst Says
"the ban would obviously be difficult to enforce," p. 5 of the 24 Oct. 1984 symptoms.	". . . urges the Company . . . 'The Company expects the employees to live within the restriction and thus it should not need a police force,'" p. 4189. The "concern is anticipatory. More significantly, as the Company aptly points out, the expectation is that the entire work force . . . will abide by the rule upon its being upheld," p. 4192.
"a question exists concerning whether unilateral imposition of a total ban would violate the existing collective bargaining agreement," p. 5.	"past practices are in any event not inviolate. . . . it is not only the prerogative, but the obligation of the Company of the Company to maintain a safe working place. Safety is paramount," p. 4191. "The Company did not violate the contract when it" unilaterally "withdrew . . . rooms from the permissible smoking areas," p. 4192.
"A total ban on smoking could well contravene the relevant agency regulation," p. 5.	"Since the allowance of smoking . . . has created a . . . hazard . . . the prohibition of such conduct is clearly reasonable," p. 4189. "Safety is paramount. . . . 'excess caution is to be preferred over a policy which may not be cautious enough,'" p. 4191.

Please note the severe deviance of the MSPB symptoms. MSPB makes no reference to what normal employers expect: rule compliance. It cites no collective agreement at the installation, no specific clause, and no answer to the alleged "question" it has. It relies on the danger as justification for ousting me, instead of recognizing that safety rules (incorporated in AR 1-8 by reference) forbid hazards, and forbid smokers from endangering nonsmokers. No advance notice/specificity was provided me. The rules have not yet been recognized, as EEOC pointed out aptly 8 April 1983.

Chronology of Events

Context in Which the "Disqualification" Occurred

26 Aug. 1969 — Employment began based on qualifications and job description of record.

The Duration — At all times, unbeknownst to me, "there's a hazard for all these . . . people. . . . Yes. Yes. . . . People smoking in their vicinity is hazardous to them," as Dr. Francis J. Holt, the installation's own doctor, testified (Deposition, p. 42).

Sep. 1974 — Became a Senior Employee Relations Specialist. Performed duties including preparation of the procedures on discharging employees, and on fitness for duty examinations. Received awards for work/attendance.

Sep. 1977 — Reassigned as Senior Position Classification Specialist, qualifications waived.

Nov. 1977 — AR 1-8 was issued. The regulation, unbeknownst to me, was not "even recognized," and was never implemented locally.

May 1979 — Tobacco harm diagnosed; requested protection in the office; immediate supervisor, J. Kator, agreed (he said), but no action occurred. Criticism of my work began; work site changed.

Jun 1979 — As no action to implement AR 1-8 had occurred, I sought formal review through the established channels with which I was familiar. (No procedure existed by which to seek recognition of AR 1-8 except by complaint, a fact Mr. Archie Grimmett admitted in EEOC Docket No. 01.82.1399).

19 Jun. 1979 — The installation legal office agreed on the full authority conferred by AR 1-8, on both banning and not permitting smoking (two separate concepts: one relates to the threshold conditions precedent before smoking can be permitted; the other is an employer prorogative on directing the workforce.)

Months — Nothing was done by the installation. My request greatly enraged management, which knew full well the violations being permitted. Grievance processing was stalled long past the regulatory time limits, etc., as the 25 Jan. 1980 USACARA Report shows. Claims of "unreasonable"/"no authority" were made, the same as MSPB is reviving despite their being rejected. My worksite in the office was changed.

Sep. 1979 — Reprisal was decided upon, in the form of "derogatory references in" the installation newspaper. Ref. EEOC decision 23 Feb. 1982, p. 2. The installation refused to process the case properly, clearly based on its guilty knowledge of its own wrongdoing.

Encl 15

Chronology of Events

Context in Which the "Disqualification" Occurred

5 Oct. 1979 — Other employees see the Commanding General via his "open door" policy. I tried, and was denied access. The personnel officer, Archie Grimmett, wrote a memo saying to the Commander not to see me.

The Duration — As "mechanical failures happen all the time" (Dr. Holt's admission, p. 25), I reported some of them individually through the safety reporting procedure. This was unsuccessful, as Dr. Holt's admission shows.

Dec. 1979 — Due to the common hazard, I filed EEO class action cases, reporting the installation non-compliance with the threshold conditions precedent before smoking can be permitted under 32 CFR 203. Solving the hazard for others would automatically solve it for me, without my having to request it, and make me a target of reprisal. Management made clear its desire for me to retract my requests for compliance.

21 Dec. 1979 — After having worsened the situation by its "relocating" me to a worse site, I began reporting the hazard to Dr. Holt, the installation physician responsible for recommending correction of hazards caused by dangerous people. When people cause hazards, they are to be sent off-post. Instead, Dr. Holt sent me off-post, albeit on the proper status (excused absence). The ever-worsening situation is like that noted in Hentzel v. Singer Co., 138 Cal.App.3d 290, 188 Cal.Rptr. 159 (1982).

Jan. 1980 — Dr. Holt finally did something, albeit ineffectively, as he is totally under management's control (which I recognize as myself having been part of management). He issued a memo citing the phrase "smoke free" -- a clear synonym for the "remove smoke" phrase in 32 CFR 203. At the time, I thought it was progress. In hindsight, it is clear that the phrase was used to divert attention, and to obstruct the compliance process, so that it would not start, and has not.

25 Jan. 1980 — USACARA sustained my grievance. It showed the sharp distinction between not "permitting" smoking when the conditions precedent are unmet--a mandatory ministerial act by management must occur. In contrast, a "ban" refers to the theoretical situation where all conditions precedent are met, but the installation wants to permit smoking anyway. USACARA also noted the lack of any requirement for tobacco smoke, p. 9, in response to my carefully constructed request.

Thereafter — The installation continued to refuse to recognize its obligations under AR 1-8. It does not argue ever complying. (It premises my disqualification on its refusal to even deal with the danger, much less, the other conditions precedent. Ref. 8 Apr. 83 EEOC ltr.)

Chronology of Events

Context in Which the "Disqualification" Occurred

Feb. 1980 "When the agency failed to abide by the" USACARA Report, "appellant filed even more EEO complaints." Ref. 23 Feb. 1982 EEOC decision, p. 2. Refusal to obey a USACARA Report is supposed to be almost impossible. Army Civ. Pers. Reg. 771 forbids such disregard; see Spann v. McKenna, 615 F.2d 137 (1980). The refusal of implementation meant continuation of the fact that "there's a hazard for all these . . . people," including me (Dr. Holt's deposition, p. 42). Based upon my Army training in rule enforcement, persistence counts, so I was persistent in seeking solution of the hazard. See NR & CCI v. OSHRC, 489 F.2d 1257 at 1266, n. 36 (1973), "An employer has a duty to prevent and suppress hazardous conduct."

by Mar. 1980 Unbeknownst to me, management had clearly decided to dig in their heels against the regulations. People such as Col. Benacquista and E. Hoover were upset that Dr. Holt periodically sent me on the proper status (excused absence under FPM 630.11) due to the hazard. That did not solve the hazard just as "biological monitoring did not eliminate or even reduce the hazard; it merely disclosed it," AS & RC v. OSHRC, 501 F.2d 504 at 515 (1974). They clearly decided they wanted me fired, although that also would not solve the hazard. Unbeknownst to me, I was in danger of being fired summarily without notice.

Mar. 1980 Mr. Hoover sent a memo to Dr. Holt challenging the sending me off-post on the appropriate status (excused absence under FPM 630.11) to intimidate Dr. Holt and his staff. This ex parte communication interfered with their independent decision making.

17 Mar. 1980 My doctor called attention to my being ready, willing and able to work. The doctor is right, since tobacco is not an essential function of the job, indeed, is unlisted, cf. Sabol. v. Snyder, 524 F.2d 1009 at 1011 (1975), "job requirements and qualifications had never been formally changed" to reference tobacco smoke. The doctor also called attention to the failure to have dealt with the hazard--a hazard which Dr. Holt has himself testified to. Under pressure from Col. Benacquista, Dr. Holt overruled my doctor. Thus began my suspension, as Col. Benacquista testified (Dep. p. 47, and p. 13, confirming that he "had made that determination," not a trained medical person. His purpose, to pressure me into stopping citing the hazard, he admitted, p. 62. He knew "The job was available," i.e., that I met the requirements of record for being ready, willing, and able to work, and that he had overruled that.) That voids the ouster ab initio, which in turn voids the subsequent admitted removal.

Chronology of Events

Context in which the "Disqualification" Occurred

24 Mar. 1980 Dr. Holt's first allegation overruling my ability to work, based on Col. Benacquista's command. This defied the fact of my meeting all the requirements of record, and even the 24 Mar. 1980 memo from Dr. Bruce Dubin reaffirming my ability to work in a safe jobsite.

25 Mar. 1980 Dr. Holt's first overruling of my doctor did not show enough hostility to the rules, hence, he was told to rewrite the overruling memo. He submissively and unprofessionally complied, instead of doing his duty and noting my ability to work IAW the requirements of record. Note that he utterly omits any reference to the hazard, which he himself testified to, pp. 25 and 42 of his deposition. Dr. Holt by then was so intimidated by Col. Benacquista, note that he also did not dare to defend continued placing me on excused absence, even though he knew better, admitted p. 41. Left unpressured, Dr. Holt would undoubtedly have followed the excused absence/administrative leave rule. There has clearly been gross violation of ex parte pressure principles. (Cf. Sullivan v. Navy, 720 F.2d 1266).

28 Mar. 1980 Eleven days had gone by. Mr. Hoover then felt bold enough, knowing Dr. Holt had been cowed into submission, to notify me of the retroactive suspension, with appeal rights to MSPB, based on the suspension directed by Col. Benacquista, p. 47. Unbeknownst to me, the installation intended to pretend there was no suspension to obstruct any review at all. Misdirecting me to MSPB was improper, since MSPB lacks jurisdiction except to reverse for failure to show any unmet requirements.

31 Mar. 1980 Appeals by me to EEOC, the proper organization of jurisdiction en toto, based upon its expertise to which deference is due, that job requirements must be in writing (of record), necessary, and validated. Also appealed to MSPB.

Apr. 1980 MSPB questioned whether it had jurisdiction.

9 April 1980 EEOC official Henry Perez, Jr. immediately recognized my ouster apart from job requirements of record, for what it was—a termination decision. He notified TARCOM, which clearly decided to avoid allowing any EEOC review and has obstructed it ever since.

10 April 1980 As a sadistic harassment measure, since threats and the newspaper article criticism, etc., had not intimidated me, a psychiatric examination was directed, without any specifics, since there were none.

18 April 1980 Mr. Hoover's letter to MSPB. Note his hostility to excused absence, the proper status as Dr. Holt admitted. Note no claims of meeting the AR 1-8 threshold conditions precedent, and no claims of "accommodation" under the law MSPB now cites so prominently. Note reprisal re OWCP case (partum dec. - 11

Chronology of Events

Context in which the "Disqualification" Occurred

14 Apr. 1980 — EEO Pre-complaint through the agency EEO system, on the suspension. The installation prefers MSPB disregard of law and facts, so refuses to allow any processing, for fear of EEOC review based on EEOC expertise, that there are no validated requirements.

29 Apr. 1980 — Ms. Bacon wrote a misleading letter to MSPB, to divert attention off MSPB lack of jurisdiction except to reverse for lack of recorded, validated requirements for tobacco smoke. She focused attention onto what were later called the Mosely (v. Navy, 4 MSPB 220) criteria, to divert attention off the fact they only apply when there are job qualification requirements of record (precluding MSPB jurisdiction at the earliest point: no review beyond reversal for lack of requirements is allowed). Also disregards that Mosely received a hearing.

1 May 1980 — My pre-complaint through EEO channels at the installation, re the malicious order for psychiatric exam. As reprisal is the only basis for it, the installation's guilty knowledge led it to forbid any review, especially since the local EEO Officer, K. Adler, supported me on review 29 Sep. 1980, The installation could not trump up any reason for rejecting the case, so utter refusal of processing was decided. There is clearly fear of EEOC competence and integrity, whereas MSPB can be trusted to support TACOM regardless. MSPB supports overruling my doctor, whereas EEOC does not.

28 Apr. 1980 — Dr. Salomon rejects the psychiatric exam order, and notes installation overruling of his input.

27 May 1980 — Dr. Dubin also opposes the psychiatric examination. Pre-complaint is filed by me concerning installation falsehoods being sent to MSPB. Installation misprocesses the case in desperation, to avoid EEOC review on the merits. See EEOC Docket 01.81.0324, cited in EEOC Decision of 23 Feb. 1982.

27 May 1980 — Psychiatric exam conducted by Dr. Schwartz confirms that I should be allowed to return to work immediately.

The Period — Periodic Efforts by me to return were rebuffed. Cf. Bevan v. N.Y. St. T. R. System, 74 Misc.2d 443, 345 N.Y.S.2d 921 (1973), another case where no requirements properly existed, and where the person also returned on his own, despite employer opposition. My case is even clearer than that: tobacco smoke cannot possibly be a job requirement. Only personal "desires" are involved, in this qualifications case.

Chronology of Events

Context in Which the "Disqualification" Occurred

23 July 1980 M. Baumgaertner denies any MSPB jurisdiction at all. Refers the case to other channels, such as EEOC. That decision ignored the fact MSPB has jurisdiction to reverse for lack of requirements of record, and no further jurisdiction. He denied me a hearing, as EEOC noted 8 April 1983, p. 3. He ignored the fact that, since the installation had succeeded in suspending me, they would never allow review. A suspension must be justified on different terms than removal. He denied me the ability to call Col. Benacquista, whose testimony alone would have destroyed the ouster, so removal would never have been reached. (The reasons now cited as justification were not cited back then as the record clearly shows. Retroactive reasons are the epitome of violation of what civil service rules are about.)

Aug. 1980 My appeal to Headquarters, MSPB.

18 Sep. 1980 Additional wrong data by the installation to MSPB.

29 Sep. 1980 The installation's own EEO Officer wrote a report in my favor. He noted the common aspects rather than singling me out, recommended that the installation cease its refusal to even discuss coming into compliance, etc., etc. I did not know it at the time, but thereafter, he was forbidden from ever processing any of my cases favorably ever after.

8 Oct. 1980 My EEO pre-complaint, agency channels, on the 18 Sep. 1980 wrong information to MSPB headquarters. The case has never been processed. The installation has guilty knowledge of MSPB receptivity to false information. MSPB has been corrupted, and successfully corrupted. TACOM fears an EEOC order to it, judicially enforceable, telling it to stop giving false data to MSPB, or more, taking official notice of MSPB receptivity to false input.

23 Oct. 1980 Meeting with Col. Benacquista, wherein he made clear his views: retract or else, as they have MSPB on their side. See his admissions, p. 13, 47, and 62. I am not accustomed to being a crime victim (extortion and embezzlement), so I was at a loss for what to do.

9 Dec. 1980 Letter to Army Police at Selfridge requesting a criminal investigation.

19 Dec. 1980 Pre-complaint re additional wrong data sent by the installation to MSPB, 10 Nov. 1980

23 Dec. 1980 Pre-complaint on the Army Police unwillingness to investigate. These cases are so wrought with peril for installation officials, that all processing has been refused. All my allegations are thus considered undisputed (indeed, confessed to).

Chronology of Events

Context in which the "Disqualification" Occurred

The Period — Clearly ex parte communications with MSPB took place, based on the joint installation/MSPB hostility to the rules. They became partners in crime, and thus EEOC review is anathema to them.

24 Feb. 1981 — Formalized my EEO complaint on refusal of Army Police to investigate. (The other cases were made formal also, despite the refusal of the installation to provide counseling.)

The Period — Claim filed with MESC for unemployment, based on my having been fired. Hotly disputed by the installation.

24 Feb. 1981 — Knowing MSPB's hostility to the rules, and willingness to rule accordingly, the installation tried for my disability retirement, knowing that apart from job requirements (which I meet), there is no basis.

26 Feb. 1981 — Pre-complaint re disability retirement effort.

1 Apr. 1981 — C. Averhart and E. Hoover file for my retirement. As they have done nothing to solve the problem under AR 1-8 (without reaching "accommodation" issues), they cite nothing as done, for the reason nothing was done. The danger testified to by Dr. Holt (pp. 25 and 42) is a common one, hence, no basis for ousting me, except smoker "desires" (i.e., reprisal).

30 July 1981 — MESC rules in my favor on my eligibility for unemployment compensation. I meet all the job requirements of record. The admitted danger is not a job requirement. The installation begins appealing, always unsuccessfully.

18 June 1981 — The many ex parte communications with MSPB by the installation pay off. MSPB invents multiple claims of actions taken, none of which were. MSPB reverses the time sequences involved. MSPB cites the Mosely criteria, disregarding that they apply only when there are job requirements of record, and disregarding that Mosely was given a hearing. Corruption is clear. Cf. U.S. v. Goins, 593 F.2d 88 (1979).

17 July 1981 — My appeal to EEOC, successful 8 April 1983.

7/8 Jul 1981 — My doctor and I accept the claims of actions which MSPB asserted. No response is ever received from the installation. There is utter silence from MSPB. (Later, on an ex parte basis, MSPB and TACOM officials decide to invent claims that my job took me all over the "entire facility" (contrary to C. Averhart's testimony, p. 30), in order, corruptly, to vitiate the effect of the 7/8 July 1981 acceptances.)

Chronology of Events

Context in Which AR 1-8/32 CFR 203 Were Issued

Mar. 1847	Outdoor smoking ban upheld, Com. v. Thompson, 53 Mass. (12 Metc.) 231 (1847)
Dec. 1880	Tobacco is not a necessity, Bradley v. Murray, 66 Ala. 269 (1880)
21 Apr. 1890	Tobacco smoke is dangerous, State v. Heidenhain, 42 La.Ann. 483, 7 So. 621, 21 Am.St.Rep. 388 (1890)
22 Dec. 1898	Tobacco smoke is dangerous, including to Army recruits, verified by Army doctors; cigarettes are inherently bad; ban upheld, Austin v. Tenn., 101 Tenn. 563, 48 S.W. 305 (1898), affirmed, 179 U.S. 343, 21 S.Ct. 132, 45 L.Ed. 224 (1900)
29 Nov. 1913	Start somewhere on controlling tobacco, upheld, State v. Olson, 26 N.D. 304, 144 N.W. 661 (1913), appeal dismissed, 245 U.S. 676, 38 S.Ct. 13, 62 L.Ed. 542 (1917)
9 Apr. 1917	Smoker dangerous to himself, compensation upheld, Haller v. City of Lansing, 195 Mich. 753, 162 N.W. 335 (1917)
26 Jun. 1923	Throw smoker out of the building when he is dangerous, Keyser Canning Co. v. Klots Throwing Co., 94 W.Va. 346, 118 S.E. 521 (1923)
24 Mar. 1924	Expulsion of student for smoking, upheld, Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924)
1927	"Tobacco asthma is well known," John Harvey Kellogg, in Tobaccoism or How Tobacco Kills, Modern Medicine Publishing Co., Battle Creek, Mich., 1927, p. 55
2 July 1930	Smoker-caused fire in restroom compensated, Rushing v. Texas Co., 199 N.C. 173, 154 S.E. 1 (1930)
30 Mar. 1931	"Workmen are not employed to smoke," Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corp., 49 F.2d 146 (1931)
9 Jun. 1936	Compensation for injured nonsmoker upheld despite claim "the legal proposition is a novel one," Jones v. Eastern Greyhound Lines, Inc., 159 Misc. 662, 288 N.Y.S. 523 (1936)
4 June 1941	Compensation for endangered nonsmoker upheld on foreseeability issue, McAfee v. Travis Gas Corp., 137 Tex. 314, 153 S.W.2d 442 (1941)
21 Nov. 1950	Smoker "discharged for smoking immediately after" causing harm, Bluestein v. Scoparino, 277 App. Div. 534, 100 N.Y.S.2d 577 (1950)

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Context for 32 CFR 203/AR 1-8 (c)d)

6 Sep. 1952	S. .xing is a disease, "one o. our most serious diseases," Lancet, Vol. 263, Issue 6732, pp. 480-2
Jan. 1954	Army author agrees smoking is a disease (addiction); Tex. St. J. of Med., Vol. 50, Issue 1, pp. 35-36
27 Sep. 1955	Smoker dangerous to himself, compensation upheld, Secor v. Penn Service Garage, 19 N.J. 315, 117 A.2d 12 (1955)
12 Oct. 1961	Danger to lungs known decades before, medical history overview, Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (1961)
5 June 1963	Strong duty concerning smokers dangerous to themselves, Green v. American Tobacco Co., Fla., 154 So.2d 169 (1963)
26 Oct. 1964	Multiple causes of action arising from tobacco smoke harm, Fine v. Philip Morris, Inc., 239 F.Supp. 361 (1964)
21 Nov. 1968	Judicial notice of the tobacco hazard as an inherent danger, not dependent on fortuitous conditions, Banzhaf v. F.C.C., 132 U.S.App.D.C. 14, 405 F.2d 1082 at 1097 (1968), cert denied, 396 U.S. 342, 90 S.Ct. 51, 24 L.Ed.2d 93 (1969)
Aug. 1970	Army recognition of the danger published in Military Medicine, Vol. 135, Issue 8, pp. 678-681
20 Aug. 1971	Tobacco smoke detrimental effects are beyond controversy, Larus & Bro. Co. v. F.C.C., 447 F.2d 876 (1971)
31 Jan. 1974	20% of vehicle capacity for smoking, upheld, Nat'l. Ass'n. of Motor Bus Owners v. U.S., 370 F.Supp. 408 (1974)
8 Oct. 1976	Smoker dangerous to third parties, criminal indictment upheld, Com. v. Hughes, 468 Pa. 502, 364 A.2d 306 (1976)
20 Dec. 1976	Smoking dangerous to others, injunction issued, Shimp v. N.J. Bell Tele. Co., 145 N.J.Super. 516, 368 A.2d 408 (1976)
Jan. 1977	Workers' compensation claim A9-190131 by co-worker Evelyn Bertram due to tobacco smoke danger in installation personnel office. Management then said that smoking is not "a condition of her work."
May 1977	The military command structure "may be our strongest tool in constructing workable anti-smoking campaigns," due to the great harm tobacco causes the Army, Military Medicine, Vol. 142, Issue 5, pp. 397-398

In this context, 32 CFR 203 and AR 1-8 were then issued.

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LIL

The Rule Must Be Upheld Under the "Police Power"

The rule must be upheld and enforced under well-established police power principles. "The promotion of safety of persons and property is unquestionably at the core of the . . . police power," Kelley v. Johnson, 425 U.S. 238 at 247, 96 S.Ct. 1440 at 1445, 47 L.Ed.2d 708 (1976). Due to the hazards of tobacco smoke of which judicial notice has often been taken, the police power has often been applied to regulate tobacco and its use, since "The power to protect the public health lies at the heart of the . . . police power," even sustaining "many of the most drastic exercises of that power," Banzhaf v. F.C.C., 132 App.D.C. 14 at 29, 405 F.2d 1082 at 1097 (1968), cert. denied, 396 U.S. 842 (1969).

The police power in various ramifications has been applied to tobacco for well over a century. Examples include:

Outdoor smoking ban, upheld, Commonwealth v. Thompson, 53 Mass. (12 Metc.) 231 (1847)

Tobacco held not a necessity, Bradley v. Murray, 66 Ala. 269 (1880)

Smoking ban upheld, judicial notice of the danger taken, State v. Heidenhain, 42 La.Ann. 483, 7 So. 621, 21 Am.St.Rep. 388 (1890)

Tobacco not a necessity, held, not a defense to restraint of trade charges, People v. Duke, 19 Misc.Rep. 292, 44 N.Y.S. 336 (1897)

Conviction for sale of cigarettes, upheld, In re May, 82 F. 422 (1897)

Tobacco selling restrictions upheld, judicial notice of hazard taken, Gundling v. City of Chicago, 176 Ill. 340, 52 N.E. 44 (1898), affirmed, 177 U.S. 183, 20 S.Ct. 633, 44 L.Ed. 725 (1900)

Conviction for importing and selling cigarettes, upheld, the hazard has "become well and generally known," Austin v. State, 101 Tenn. 563, 48 S.W. 305 (1898), affirmed sub nom., Austin v. Tennessee, 179 U.S. 343, 21 S.Ct. 132, 45 L.Ed. 224 (1900)

Cigarette tax upheld, Cook v. County of Marshall, 119 Iowa 384, 93 N.W. 372 (1903), affirmed, 196 U.S. 261, 25 S.Ct. 233, 49 L.Ed. 471 (1905)

Tobacco selling restriction, upheld, State v. Sbragia, 138 Wis. 579, 119 N.W. 290 (1909)

Conviction for selling cigarette papers, upheld, with judicial encouragement to enforce the law and reduce widespread violations, Allen v. State, 10 Okla.Crim.Rep. 75, 133 P. 1138 (1913)

Banning selling and importing cigarettes, precludes use thereof. Clearly, any "right to" tobacco "is so limited by the police power that a ban . . . does not violate that right," pertinent words equally applicable here, from Quilici v. Village of Morton Grove, 695 F.2d 261 at 267 (1982), cert. denied, U.S. 104 S.Ct. 194, 78 L.Ed.2d 170 (1983).

End 16

The Police Power Supports the Rule

Starting somewhere on controlling tobacco, upheld, State v. Olson, 26 N.D. 304, 144 N.W. 661 (1913), appeal dismissed, 245 U.S. 676, 38 S.Ct. 13, 62 L.Ed. 542 (1917)

Conviction for possession ("keeping") and selling of cigarettes, upheld, State v. Nossaman, 107 Kan. 715, 193 P. 347 (1920), appeal dismissed, 258 U.S. 633, 42 S.Ct. 314, 66 L.Ed. 802 (1922)

Court guidance on smoker violating no smoking rule, employer's duty "if necessary to discharge him," and at minimum, "ought to have put him out of the building," Keyser Canning Co. v. Klots Throwing Co., 94 W.Va. 346 at 361, 118 S.E. 521 at 527 (1923)

Expulsion of student for smoking, upheld, Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924)

Ban on tobacco advertising by billboard or placard, upheld, State v. Packer Corp., 78 Utah 177, 2 P.2d 114 (1931), affirmed, 285 U.S. 105, 52 S.Ct. 273, 76 L.Ed. 643 (1932)

Tobacco company misconduct, convictions upheld, American Tobacco Co., et al. v. United States, 147 F.2d 93 (1944), affirmed, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946)

Smoker "discharged for smoking immediately after" violating no smoking rule, judicial notice taken, Bluestein v. Scoparino, 277 App.Div. 534, 100 N.Y.S.2d 577 (1950)

False and misleading tobacco company advertising, judicial notice taken, sanctions upheld, P. Lorillard Co. v. Federal Trade Commission, 186 F.2d 52 (1950)

Smoking is a disease, "one of our most serious diseases," Lennox Johnston in medical journal Lancet, Vol. 263, Issue 6732, pp. 480-482, 6 September 1952

Smoker held not "a person of normal sensibilities," hence, police power would not be used on his behalf, Aldridge v. Saxey, 242 Or. 238 at 248, 409 P.2d 184 at 188-189 (1965)

Conviction for violation of tobacco tax, upheld, State v. Sedacca, 252 Md. 207, 249 A.2d 456 (1969)

Smokers are not owed a greater duty arising from their "smoking propensities," Guss v. Jack Tar Management Co., 407 F.2d 859 (1969)

No equal time duty on smoking, "the detrimental effects of cigarette smoking . . . are beyond controversy," Larus & Bro. Co. v. F.C.C., 447 F.2d 876 at 880 (1971)

Tobacco advertising ban on broadcast media, upheld, Capital Broadcasting Co. v. Mitchell, 333 F.Supp. 582 (1971), affirmed, 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972).

Smokers are Dangerous to Themselves, Property, and Others, Thus Confirming the Danger Smokers Pose, as Evident from AR 1-8/32 CFR 203, Juxtaposed with FPM Suppl. 752-1

26 Jan. 1979	Smoker dangerous to himself, compensation upheld, Edgewater Motels, Inc. v. Gatzke, Minn., 277 N.W.2d 11
6 Feb. 1979	Smoker defiance of no-smoking rule, forcibly controlled, sovereign immunity precludes smoker recourse, Jacobs v. Mental Health Dep't., 88 Mich.App. 503, 276 N.W.2d 627
26 Feb. 1979	Bribery to obtain pro-tobacco action from a government official, conviction upheld, U.S. v. Goins, 593 F.2d 88
27 July 1979	Smoker dangerous to people and property, repeatedly escaped control, compensation for the harm upheld, Rum River Lumber Co. v. State, Minn., 282 N.W.2d 882
11 Oct. 1979	Smoker dangerous, compensation for the harm upheld, Dickerson v. Reeves, Tex.Civ.App., 588 S.W.2d 854
1 Apr. 1980	Smokers endanger nonsmoker, no smoking rule not enforced, judicial notice taken, Alexander v. C.U.I. Appeals Brd., 104 Cal.App.3d 97, 163 Cal.Rptr. 411
28 Nov. 1980	Investigation of tobacco company behavior, upheld, F.T.C. v. Carter, 636 F.2d 781
24 Apr. 1981	Smoker dangerous to nonsmoker, compensation for the harm upheld, Shipley v. City of Johnson City, Tenn. App., 620 S.W.2d 500
22 Jan. 1982	Control of smoker dangerousness, upheld, Soc. Sec. Admin., 82-1 ARB § 8206
6 Aug. 1982	Smoker hostility to rules noted, no recourse for smokers, upheld, Diefenthal v. C.A.B., 681 F.2d 1039, cert denied, 459 U.S. 1107, 103 S.Ct. 732, 74 L.Ed.2d 956
14 Sep. 1982	Control of smoker dangerousness, upheld, Smith v. Western Elec. Co., Mo.App., 643 S.W.2d 10
26 Nov. 1982	Entitled to worksite free of smoker dangerousness, noted, albeit in context of wrongful alternative (less than full compensation, as per FPM 630.11), due to no job requirement for tobacco smoke, Parodi v. OPM, 12 MSPB 274
20 Dec. 1982	Smoker reprisal against a nonsmoker seeking rule enforcement, noted, Hentzel v. Singer Co., 138 Cal. App.3d 290, 188 Cal.Rptr. 159
23 Apr. 1983	Employer expects rule compliance, control of smokers in restrooms, upheld, Schnadig Corp. & Union, 83-1 ARB § 8267

End 17

The Rule is Supported by the Police Power

Higher cigarette tax proportioned to toxic levels, upheld, Long Island Tobacco Co., Inc. v. Lindsay, 74 Misc.2d 455, 343 N.Y.S.2d 759 (1973), affirmed, 42 App.Div.2d 1056, 348 N.Y.S.2d 122 (1973), affirmed, 34 N.Y.2d 748, 357 N.Y.S.2d 504, 313 N.E.2d 794 (1974)

Smoking on interstate buses limited to "20 per cent of the capacity of the vehicle," upheld, National Ass'n. of Motor Bus Owners v. United States, 370 F.Supp. 408 (1974)

Higher cigarette tax proportioned to toxic levels, upheld, with judicial analysis of local autonomy principles allowing full range of the exercise of the police power, People v. Cook, 34 N.Y.2d 100, 356 N.Y.S.2d 259, 312 N.E.2d 452 (1974)

Expulsion of student for smoking, upheld, with judicial notice of the hazard, and indoor and outdoor smoking ban, upheld, Randol v. Newberg Public School Board, 23 Or.App. 425, 542 P.2d 938 (1975)

Smoker caused fire on the job, with "results including the death of two firemen," indictment "on two counts of involuntary manslaughter," upheld, Commonwealth v. Hughes, 468 Pa. 502, 364 A.2d 306 (1976). Cf. Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 at 342, 72 S.Ct. 329 at 331, 96 L.Ed. 367 (1952), "Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line" (violating employer rule, crossing over to indictable conduct)

Tobacco smoke dangerous to others, injunction issued proscribing the hazard, Shimp v. N.J. Bell Tele. Co., 145 N.J.Super. 516, 368 A.2d 408 (1976)

Physically restraining smoker violating no smoking rule, upheld, with sovereign immunity precluding smoker recourse, Jacobs v. Mental Health Dep't., 88 Mich.App. 503, 276 N.W.2d 627 (1979)

Physically controlling smoker, including via hospitalization, judicial notice taken, Rum River Lumber Co. v. State, Minn., 282 N.W.2d 882 (1979)

Investigation of tobacco company behavior, upheld, F.T.C. v. Carter, 636 F.2d 781 (1980)

Smoking is "relatively trivial," no recourse for smokers when restrained, Diefenthal v. C.A.B., 681 F.2d 1039, cert. denied, 459 U.S. 1107, 103 S.Ct. 732, 74 L.Ed.2d 956 (1983)

The rule at bar "is oriented to those interests which are proper aims of any exercise of the . . . police power," Quilici v. Village of Morton Grove, 532 F.Supp. 1169 at 1177 (1981), affirmed, 695 F.2d 261 (1982), cert. denied, U.S. 104 S.Ct. 194, 78 L.Ed.2d 170 (1983). Smoking is subject to the police power. Hence, the rule must be upheld and enforced.