Unlawful Effects of No Advance Notice/Specificity

In his 9 April 1980 letter, Mr. Henry Perez, Jr., of EEOC, noted "the agency's decision to terminate" me. Mr. Perez is right. The installation had fired me on 17 March 1980; a termination apart from job requirements of record is obvious to trained personnel such as Mr. Perez. See also Sabol v. Snyder, 524 F.2d 1009 at 1011 (1975).

Note that no advance notice/specificity has been provided to me. MSPB is responsible to decide cases based on the evidence presented in advance, thus allowing the employee a chance to reply. The civil service advance notice requirement is parallel to, and indeed, identical to the long-standing EEO principle on advance notice. After management presents its "reasons," the employee "must then be given the opportunity to show that the 'assigned reason' was 'a pretext or discriminatory in its application.' McDonnell Douglas, 411 U.S. at 807, 93 S.Ct. at 1827," data from Lynn v. Regents of the Univ. of California, 656 F.2d 1337 at 1341 (CA9, 1981).

Here, MSPB corruptly gives alleged "reasons" years after the fact. Note the intentional false claims of actions taken, false claims in the 18 June 1981 decision, actions which "were not even attempted," as EEOC accurately noted. Note the false claims of supposed reasons why halting a hzaard is somehow an "undue hardship," though OSHA rules and 29 CFR 1910.1000.Z allow no "undue hardship" basis of objection to taking safety measures.

Note that MSPB, in defiance of the advance notice principles, is now providing supposed reasons for the installation firing me in March 1980, claiming only "cannot" back then. Since that is not specific and is not "proof," EEOC objected to the lack of reasons provided. Reasons were not provided in advance. The lack of advance "reasons" for the installation "cannot" claim by itself voids the adverse action.

Here, MSPB has suddenly, after almost half a decade, suddenly dreamed up reasons, assertions that the installation had made back in 1979, unsuccessfully, to USACARA. (Cf. Spann v. McKerma, 615 F.2f 137, re finality of USACARA rejecting installation claims.) MSPB, p. 5, has dreamed up after-the-fact claims re union involvement possibilities, etc.

The installation had no case back in 1980; that is why EEOC found no proof for the case back then, per its 8 April 1983 decision. MSPB has refused to overrule the non-case, even though MSPB is supposed to decide cases based on installation reasons presented, see Horne v. MSPB, 684 F.2d 155 (1982). The installation had no case back in 1980 (claims of "cannot" are not a case, as EEOC said), so reversal was required. Management is required to give its alleged reasons; "the plaintiff must then be given the opportunity to" rebut, or reply ("reply" is the civil service term for an advance notice response). Here, MSPB has already issued a decision, before the advance notice even has been issued to assert alleged difficulties/hardships such as MSPB cites on p. 5 of the 24 Oct. 1984 issuance. My right of reply to the alleged reasons has been destroyed by MSPB--indeee, not even "recognized".

Examples of Rules/Regulations Violated JAN. 2 1985

An adverse action "cannot be effected if there is lack of compliance with departmental regulations," Piccone v. U.S., 407 F.2d 866 at 872 (1969), or with government-wide rules. Examples of the numerous principles and rules violated by the imstallation include but are not limited to:

"Reason for action not clearly shown," FPM Suppl. 752-1, S4-1. c(1). No job requirement for the matter at issue (tobacco smoke) has been shown.

"Personal animosity," FPM Suppl. 752-1, S3-2.a.(3). Smoking involves smoker personal "desires," not business necessity requirements of record.

"No cause because no change in circumstances," FPM Suppl. 752-1, S3-2.b.(1). Premising ouster on a continuing hazard before and after ouster reflects the same continuing circumstances.

"Action unduly harsh for offense," FPM Suppl. 752-1, S3-2. b.(2). No offense by me has been shown.

"Unlike penalties for like offenses," FPM Suppl. 752-1, S3-2.b.(3). No offense by me has been shown.

"Duty Status During Notice Period," FPM Suppl. 752-1, S5-4. The danger does "originate with the" personal desires of others, hence, excused absence based on the hazard is warranted. Note "the objective of keeping the employee in an active duty status in his regular position whenever practicable."

CPR 700,Chapter 771, on implementation of USACARA Reports. It has not been implemented, as EEOC has twice ruled, on 23 Feb. 1982, and 8 April 1983. Cf. Spann v. McKenna, 615 F.2d 137.

5 USC 7902, on safety. Installation premising my ouster on the extant hazard confirms the danger.

29 USC 651-678, on safety. See above.

32 CFR 203, on safety, unremoved smoke, etc. See above.

5 USC 2302, on prohibited personnel practices. Disqualifying a person without citing a qualification requirement, is the epitome of violation.

29 CFR 1613.220 & 234, avoidance of delay, and implementing EEOC decisions. The installation non-compliance is at the ultra-violation level.

MSA 28.371, MCLA 750.174, embezzlement.

18 USC 1001, on multiple false statements, by government offenders.

The above is a partial listing of areas of local and MSPB wrong doing. The non-compliance does not allow for my ouster.

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The Suspension or Termination Was for Personal Reasons

It is a fundamental civil service principle that employees cannot lawfully be discharged based on the personal reasons held by others. See Knotts v. U.S., 128 Ct.Cl. 489, 121 F.Supp. 630 (1954). Here, of course, smoking is purely personal. "The agency does not argue nor does the record support that" there are any official reasons for ousting me; cf. a like EEOC analysis, p. 5, 8 April 1983.

The installation does not argue nor does the record support that there are any job requirements for smoking. Indeed, OPM has explicitly denied that such requirements even exist. See its 30 Jan. 1984 letter. Cf. Prewitt v. U.S. Postal Svc., 662 F.2d 292 at 309 (1981), wherein Mr. Prewitt "raised a genuine question of material fact as to whether the postal service's physical standards for employment are sufficiently 'job related.'" Here, the installation does not argue nor does the record support any official basis whatsoever for ousting me. The installation does not even claim there are any "physical standards" for smoking, much less, for endangerment, discomfort, unremoved smoke, etc.--all violations of AR 1-8. The agency case is solely, repeat, solely, for the personal reasons of mentally ill people such as C. Averhart, E. Hoover, F. Holt, R. Shirock, J. Benacquista, etc.

The installation does not argue nor does the record support that there are any job requirements for smoking. The case is clearly based on personal reasons, e.g., malice, personal animus, etc., as has been raised by me and pointed out by me since the first appeal, before M. Baumgaertner. The installation has not provided any specificity, for the reason that there is none to be provided. OPM has made that clear.

See Valparaiso Univ. Law Rev., Vol. 13, p. 485, 1979, "a person with only a right arm . . . is unimpaired in relation to jobs which only require one arm." Smoking is not "required" at all, and certainly not for "the essentials of the job if afforded reasonable accommodation," Prewitt, supra, at 305. Since I am "unimpaired" as a matter of law, that is why I do not "need" so-called reasonable accommodation. Simply control mentally ill smokers. That is the underlying factor--smoker mental disease. ("Overwhelming clinical evidence supports characterizing smoking as a physical addiction . . . as a disease," Mich. Law Rev., Vol. 81(1), p. 240, Nov. 1982.) Once mentally ill smokers are controlled, a safe "environment" (the word that mentally ill deciding officials fixate on), will follow as a matter of course, without even ever having to reach issues such as on OSHA, AR 1-8, etc. Enforce the mental health law; and everything else will fall into place.

Smoking is not necessary under any statute. See Bradley v. Murray, 66 Ala. 269 at 274 (1880), "Pipes, tobacco and cigars, are too clearly without the pale of the statute, to require discussion." M. Baumgaertner, etc., have clearly failed to have issued a competent MSPB decision. Brevity in overruling the installation personal behavior is what is needed. Ousting me was personal.

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Because of their mental illness, local smokers objected to having my EEO cases processed, refused to implement the USACARA Report in my favor, and "When the agency failed to abide by" it, and I "appellant filed even more EEO complaints" as a result, the local smokers refused to process my requests for review, as EEOC noted 23 Feb. 1982, p. 2. Thus, the hazard continued in its full force and fury, to the extreme that local smokers decided to pretend they had banned smoking, although in fact they had not done so since, as a result of their mental illness, they feel "that that which is so pleasant to the user is without question pleasant to every one else." See Dr. Tracy's astute analysis of smoker mental illness. Although "protection" for me (a particular target of smoker sadism due to my referring to AR 1-8) is needed, as is clear and as the installation's own doctor testified, the mental illness of smokers prevents such "protection" from being provided, by their grotesque refusal to allow the review process to function--the very process through which "protection" would come.

In the civil service, and as a very fundamental part of the American judicial system, ex parte communications are not allowed. The courts have made this abundantly clear in various cases, e.g., Camero v. U.S., 375 F.2d 777 (1967); Jaret v. U.S., 451 F.2d 623 (1971); and Brown v. U.S., 377 F.Supp. 530 (1974). Some people lack substantial capacity to conform to the rules against ex parte communications (5 CFR 1201.101, etc.), and lack substantial capacity to recognize the wrongfulness of soliciting ex parte data. Thus, "protection" from smoker brazen defiance of rules, including fundamental rules that are the bulwark of America, is needed. When mentally ill people defy the established system for presentation of cases, they destroy the basis by which "protection" is even obtained. Hence, please approve this request for protection.

Ex parte communications are a violation that parallel the violation of refusal to allow a hearing in which to present the case. EEOC noted the refusal of a hearing in all the cases it decided 23 Feb. 1982 and 8 April 1983. Refusal to let an employee have a hearing to present his case was rejected by the courts in cases such as these: Churchwell v. U.S., 414 F.Supp. 499 (1976); Goodman v. U.S., 358 F.2d 532 (1966); and Hanifan v. U.S., 354 F.2d 358 (1965). Clearly, "protection" for me is doubly needed, not just from the initial hazard that caused the situation, but also from the insane refusal to allow the system for review to operate. There is simply no excuse for refusing a hearing and/or soliciting ex parte communications in the 1980's. The Supreme Court rejected ex parte methods and disregarding the right to a hearing, as long ago as 1895, in Mattox v. U.S., 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895). A hearing is for "testing the recollection" of (alleged) witnesses, to find out whether they really recollect what they have claimed, especially, have claimed ex parte.

When such long-established principles of law are disregarded, it is clear that the offenders are unresponsive to normal stimuli, and lack insight into the nature of reality, including the foreseeability that someone will reference/question the ex parte data, and thus expose that ex parte communications occurred.

Sullivan v. Navy, 720 F.2d 1266 JAN. 2 1985

It is undisputed that Mr. Edward Hoover is a liar. He has sufficient personnel background to have recognized that there are no X-118 or other qualifications requirements for smoking. USACARA had called that fact to the installation's attention on 25 January 1980. OPM is well aware of the fact that X-118 criteria do not require smoking. However, for his own personal reason, a desire to endanger and discomfort others without regard for AR 1-8, he arranged to fire me. He did this in retaliation for my requests for rule compliance. Due to his misconduct (and that of others), AR 1-8 compliance "actions were not even attempted," as EEOC accurately noted 8 April 1983.

Mr. Hoover opposes AR 1-8. His presence is one of the reasons why AR 1-8 was not implemented in my office, in the personnel office, or anywhere on the installation. He "effectively killed" compliance with AR 1-8, cf. U.S. v. Browning, 630 F.2d 694 at 697 (1980). In my appeals starting in March 1980, he has "obstructed or interfered with the process of truthfinding in an investigation in the process of enforcing the law." Moreover, "Literal truth is not the test here, and in any event," he "did not . . . tell the literal truth." Instead, he has engaged in "the giving of incomplete and misleading answers" and letters. Such misconduct involves "corrupt obstructing or impeding of due and proper administration of the law," Browning, supra, at 698.

Falsehoods are a definite method of obstructing compliance with rules. Mr. Hoover uses falsehoods. He does this based on assurance ex parte that MSPB is amenable to falsehoods. The MSPB proclivity for falsehoods is evident in the record. MSPB opposition to review on the merits is clearly established. When local liars are dealing with MSPB liars, each liar gives the other liars the lies that the other is receptive to.

Here, for example, note the 20 June 1983 issuance from Victor Russell, p. 8, "the appellant's job requires that he move about the entire facility on a continuing basis (Hoover Deposition at 58)." Brazen falsehoods such as this have an unlawful purpose--the causing of confusion and the obstruction of "the process of truthfinding," Browning, supra, at 699. The brazen false claim was fed by Mr. Hoover to a receptive MSPB.

MSPB liars have not summarily rejected the false input. Their pattern is to the contrary. MSPB invents falsehoods that the installation has overlooked or abandoned. MSPB invented the claim of a ban on smoking in the Personnel Office, 18 June 1981. MSPB revived the abandoned claims of a lack of authority and of unreasonableness of compliance even starting, 20 June 1983.

MSPB further assists in obstructing "the process of truthfinding," by its refusal of specificity. For example, Mr. Hoover has lied about the locations where my job takes me. I have asked for specificity, pp. 5-6 of Mr. Russell's assertions. The installation has numerous buildings. There are co-workers. "It strikes us as highly irregular and inequitable to expect a defendant to prepare a defense against accusations known to be untrue by the accuser," Nye v. Parkway Bank & Trust Co., 114 Ill.App.3d 272, 448 N.E.2d 918 at 919, n.2 (1983). Nonetheless, I try as best as possible. MSPB refusal of specificity under such circumstances is malicious and corrupt.

This is a discrimination case, as distinct from an accommodation case. Thus, discrimination cases provide insight. The installation has a "general atmosphere of discrimination," Sweeney v. Bd. of Trustees of Keene St. Coll., 604 F.2d 106 at 113 (1979). The record shows "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts," Int'l. Bro. of Teamsters v. U.S., 431 U.S. 324, 97 S.Ct. 1843 at 1855 (1977). Note the 8 April 1983 EEOC decision, p. 5, "The agency presented no evidence that it considered the rights of the non-smokers or even recognized . . . its own regulations" such as AR 1-8, AR 600-20, etc. EEOC's analysis is the same as the 25 January 1980 USACARA findings. There has been no progress at all. Instead, in reprisal for my winning the 25 January 1980 Report, the installation worsened conditions.

EEOC further noted, on 23 February 1982, p. 2, "When the agency failed to abide by the" 25 January 1980 Report, "appellant filed even more EEO complaints." The agency erroneously rejected "all the instant cases," so EEOC overturned every agency decision therein, and ordered proper processing to begin. The agency has refused to comply. EEOC has thus confirmed that the words, "'had their requests ignored,'" Teamsters, supra, at 1856, is appropriate in my situation. Thus, the endangerment continued and worsened. "The evidentiary record here was capable of but one tenable interpretation--the existence of unconstitutional . . . discrimination. . . . the present effect of past practices was clear," NAACP v. Allen, 483 F.2d 614 at 617 (1974). Endangerment is "the present effect of past practices" of refusal to provide a safe work site, of refusal to have "even recognized . . . its own regulations," and of "the agency's smoke-filled environment which the agency refuses to alter." Cf. Hairston v. McLean Trucking Co., 520 F.2d 226 (1975), on "practices which constitute present and continuing . . . discrimination." Here, installation "practices . . . constitute present and continuing" permission for smokers to discomfort and endanger nonsmokers, and "the agency refuses to alter" this. Like Hariston, installation "policy and practice . . . tended to prevent" compliance, since the Army's "own regulations" were not "even recognized."

The refusal "interferes with . . . ability to practice a profession or earn a livelihood," Kyriazi v. Western Elec. Co., 476 F.Supp. 335 (1979), for nonsmokers including me, when smoking endangers them and causes conditions such as those listed in 32 C.F.R. 203, and causes other conditions as well, including but not limited to lung cancer. Since 32 C.F.R. 203 confirms the harm caused by smoking, and goes so far as to itemize diseases caused by smoking (which its limits on smoker behavior are designed to prevent), "the burden then shifts to the employer to prove that a class member was not discriminated against," Kyriazi v. West. El. Co., 465 F.Supp. 1141 (1979), citing Franks v. Bowman, 424 U.S. 747 at 772, 96 S.Ct. 1251 at 1268 (1976). The "burden . . . shifts to the employer to prove that" I am not endangered. Instead, the installation is conditioning its case on the extant endangerment which "the agency refuses to alter." Conditioning an adverse action on refusal to conform to rules, stands them on their head. Suppressing a hazard by smokers, even if done "'brusquely,'" is "relatively trivial," Diefenthal v. C.A.B., 681 F.2d 1039 at 1042 (1982), and certainly does not rise to the level of a "hardship," much less, an "undue" one. Safety is the law; preferences to the contrary have no legal standing, Diaz v. Pan Am World Airways, Inc., 442 F.2d 385 (1971), cert. den. 404 U.S. 950 (1971).

This is a discrimination case, as distinct from an accommodation case. Thus, discrimination cases on non-job related requirements provide insight. For example, Hill v. Nettleton, 455 F.Supp. 514 at 519 (1978), discusses a requirement "not reasonably related to the duties of the position . . . McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)." "Workmen are not employed to smoke," Maloney Tank Mfg. Co. v. Mid-Continent Petrol. Corp., 49 F.2d 146 (1931). As a long-time Position Classification Specialist, I am foreseeably likely to ask for specificity on a nexus with employment and "duties." Here, I sought specificity, and was refused. The refusal violates the right to reply, and to have the reply considered, thus making the case void ab initio, based on a long line of cases including but not limited to Bonet v. U.S. Postal Service, 661 F.2d 1071 (1981).

MSPB has a pattern of making decisions wherein the entire cause of action has not been considered, but only a fragment, or on a speculative basis; cf. Rustrata v. U.S.M.S.P.B., 549 F.Supp. 344 (1982), and Horne v. M.S.P.B., 684 F.2d 155 (1982). The fundamental nexus (with employment and specifically with duties) has not even begun to be established; of course, as a matter of law, when there is a danger caused by co-workers, it is the endangerers who are to be disciplined, not the endangered persons. When there is a hazard, however caused, excused absence is the appropriate status for the victims.

Nobody is employed to smoke. MSPB has not even begun to "examine the position descriptions" for "legitimate job requirements," Stalkfleet v. U.S. Postal Service, 6 MSPB 536 at 541 (1981), citing Coleman v. Darden, 595 F.2d 533 (1979). Additionally, it is up to the installation to provide an advance notice, making appropriate allegations, with specificity. Here, no advance notice was issued. Clearly, no specificity was provided, and no reply rights. The EEOC decision notes, p. 1, the retroactivity involved, i.e., that a 28 March 1980 decision placed me on "suspension or termination," p. 6, retroactively to 17 March 1980, and that I then "appealed on March 31, 1980." There was no advance notice, only the one letter. That letter demanded that I provide proof, that of all people in the world, I should uniquely provide proof that I would not be endangered by tobacco smoke, when in fact, tobacco smoke endangers everybody; medical letters have repeatedly notified the installation of the common situation. However, the installation "refuses to alter" the situation to meet the 32 C.F.R. 203 guidance against endangerment, since the installation has not "even recognized" the agency's "own regulations," p. 5.

The installation demand for a medical impossibility "amounted to a condition of employment," Tomkins v. Pub. Serv. Elec. & Gas Co., 568 F.2d 1044 at 1047 (1977), in defiance of 32 C.F.R. 203, and contrary to the job description, and in disregard of the fact that, as a matter of law, "Workmen are not employed to smoke." "Further, the job requirements and qualifications had never been formally changed," Sabol v. Snyder, 524 F.2d 1009 at 1011 (1975). As a matter of law and job description, there has never been a requirement for smoking. It is clear that the installation demand sought to circumvent the 25 January 1980 USACARA Report I had won, and to circumvent the 32 C.F.R. 203 guidance against endangerment. EEOC has noted (on 23 Feb 1982 and 8 April 1983) that the installation failed to abide by the Report; cf. Spann v. McKenna, 615 F.2d 137 (1980).

The Installation Fired Me Because of my OWCP Claim JAN. 2 1985

Firing a person because of his having filed a workers' compensation claim violates public policy. Note that "the better view is that an employer . . . is not free to discharge an employee when the reason for the discharge is an intention on the part of the employer to contravene the public policy," apt words from Sventko v. Kroger Co., 69 Mich.App. 644, 245 N.W.2d 151 at 153 (1976). The court cited public policy aspects of workers' compensation, and continued, "Discouraging the fulfillment of this legislative policy by use of the most powerful weapon at the disposal of the employer, termination of employment, is obviously against the public policy" involved.

The installation fired me for the purpose of obstructing my workers' compensation claim. The installation is hazardous in terms of the high levels of toxic substances given off by smokers, and worse, by the inadequate ventilation system obviously incapable of ability to "remove smoke"; thus, toxic substances build up greatly based on the multiplier effect, of high levels added upon prior unremoved high levels.

In order to obstruct my workers' compensation claim, the installation fired me. Note the time period involved (early 1980) when I was fired: right after the Army's own grievance office had ruled in my favor that there was a hazard, p. 7 of the 25 Jan. 1980 USACARA Report. That analysis was an embarrassment to the installation, just as had been the OWCP approval of a prior claim (by Mrs. Evelyn Bertram). A hazard was obvious; however, installation officials oppose the 29 C.F.R. 1910.1000.Z OSHA safety rules. E. Hoover, R. Shirock, J. Benacquista, F. Holt, etc., are mentally ill individuals, and it is well established that "actions resulting from mental disease are often purposeful, intentional, and ingeniously planned," data from the Mich. Law Review, Vol. 79(4), p. 754, March 1981. Thus, they had me fired in order to obstruct my workers' compensation claim.

OWCP takes note of hazards at installations, as cases such as, for example, Dennis L. O'Neill, 29 ECAB 259 (1978), show. Installation mentally ill officials knew that OWCP would recognize the still uncorrected hazard (10's, 100's, or 1,000's of times OSHA limits), and that OWCP confirmation of the hazard would support efforts to have the installation directed to comply with the rules on hazards. Thus, smoker retaliatory urges were stirred up against me, and for their improper purpose of obstructing my OWCP claim.

Note Mrs. Bertram's testimony (MSPB Dep. p. 44), referencing installation anger that the uncorrected hazard foreseeably would have a result mentally ill smoker officials would not like: "the Army is subjecting itself to the compensation claims that may result." In response to a question about "fear of Workmen's Compensation," the admission came out: "Sure we do."

Mentally ill smokers at the installation definitely have a "fear of Workmen's Compensation." Because of their mental illness, they oppose anything that would re-confirm the hazard. Their mental illness caused their "fear of" OWCP, so they fired me in order to obstruct my OWCP claim.

Public Policy Violations

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The installation fired me because my personal physician, like any conscientious doctor, recommended that a safe job site be provided. Note Col. John J. Benacquista's testimony (MSPB Dep. p. 24), about the medical letters, "if you looked at them closely it's quite obvious in there that what the doctor was saying was that the environment in his present work space was not reasonably free of contaminants."

Quantities of contaminants began at these levels: carbon monoxide, 42,000 ppm; carbon dioxide, 92,000 ppm; formaldehyde, 30 ppm; acetaldehyde, 3,200 ppm; acrolein, 150 ppm; ammonia, 300 ppm; nitrogen dioxide, 250 ppm; hydrogen sulfide, 40 ppm; hydrogen cyanide, 1,600 ppm; methyl chloride, 1,200 ppm; etc., and so on and on, for each of the 4,000+ chemicals involved. When a second plume is added onto the first, the quantity goes up, and so on and on, in a clear multiplier effect of danger. That is why the toxic substances involved are found for so many years, decades, and centuries, to be dangerous to people. These toxic substances collectively constitute the No. 1 (# 1) safety hazard.

The installation fired me because my doctor pointed out the unsafe job site. The installation fired me because I (a trained personnel specialist thoroughly familiar with grievance processing) filed a successful grievance, which resulted in the Army's own grievance office telling the installation to come into compliance with the Army's own rules which the installation refuses to have even "recognized." The installation fired me on 17 March 1980 in defiance of the "consistent and clear evidence" of my being at all times "able to return to work" on 17 March 1980 and every day thereafter.

The installation fired me because of the requests that the installation provide a job site "reasonably free of contaminants" in accordance with the established criteria set by law and rules. The installation is in violation of public policy. Note that the public policy is well established that employers act wrongfully when they discharge a person for asking that laws and rules be obeyed. See multiple precedents including but not limited to:

Harless v. First Nat. Bank in Fairmont, W.Va., 246 S.E.2d 270 (1978)

Petermann v. International Brotherhood, Inc., 174 Cal.App.2d 184, 344 P.2d 25 (1959)

Cloutier v. Great Atlantic & Pac. Tea Co., 121 N.H. 915, 436 A.2d 1140 (1981)

Pierce v. Ortho Pharmaceutical Corp., 166 N.J.Super. 335, 399 A.2d 1023 (1979)

Brown v. Transcon Lines, 284 Or. 597, 588 P.2d 1087 (1978)

Alcorn v. Anbro Engineering, Inc., 2 Cal.3d 493, 86 Cal.Rptr. 88, 468 P.2d 216 (1970)

Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977)

Hentzel v. Singer Co., 138 Cal.App.3d 290, 188 Cal.Rptr. 159 (1982)

Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974)

Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973)

Input from confabulators is inadmissible, as numerous precedents show. See, e.g., State v. Mack, Minn., 292 N.W.2d 764 (1980); People v. Tait, 99 Mich.App. 19, 297 N.W.2d 853 (1980); People v. Gonzales, 108 Mich.App. 145, 310 N.W.2d 306 (1981), aff'd., 415 Mich. 615, 329 N.W.2d 743 (1982); Peterson v. State, Ind., 448 N.E.2d 673 (1983); and People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484 (1983), etc. Inadmissibility is based on the "substantial problems with confabulation, fantasy, and distortion," "jumbled" aspects, and a "tendency . . . to respond in a way which he believes" another "desires," Gonzales, supra, at 309-313. Symptoms of this type arise in organic mental disorders, and the behavior of local and MSPB subjects is replete with symptoms of these types, as the record shows. EEOC noted the behaviors involved, including but not limited to crediting non-existent events, not recognizing rules such as AR 1-8, not recognizing the 25 January 1980 USACARA Report as binding, etc., etc. MSPB officials had responded in a way they believed the installation desired, as is clear from their use of ex parte decision techniques instead of providing a hearing as specified by the rules, and indeed, as noted in the very precedent cited, Mosely v. Navy, 4 MSPB 220 (1980).

It is well established that decisions are invalid when a deciding official (or officials) is (are) "'quite drunk' and . . . had 'blacked out' from drinking on other occasions," Mack, supra, at 766. The legal principles apply to exclude input from both witnesses and deciding officials. Here, of course, the claims of the local witnesses are inadmissible, and the issuances from MSPB are inadmissible. (The inadmissibility of either is, of course, sufficient to void the decisions involved.)

The strictness of the criteria involved do not require proof that confabulations have already occurred; or that there have been multiple incidents. One time is one too many. Here, of course, the confabulations have been repeated and continued for years, with even later confabulations being more bizarre and deviant than the preceding confabulations and fantasies and distortions. Over the process of time, the untreated mental conditions of local and MSPB officials have worsened. Their odd views have been "prone to" worsen, not merely "to 'freeze,'" Gonzales, supra, at 312. (Worsening is foreseeable in organic mental disorder, as distinct from a "technique.") The symptoms and behaviors are apparent in multiple incidents, not merely on a one-time basis. Even one time is one too many, Detroit & T. S. L. R. Co. v. Campbell, 140 Mich. 384, 103 N.W. 856 (1905). At 399, the Michigan Supreme Court said, "We do not know that the" deciding officials "were influenced in this case, but we are of the opinion that" appellants "should not be subjected to such dangers, or be required to show affirmatively that they have suffered." Here, I have already been "subjected to" confabulations, fantasies, etc., and the non-recognition of the existence of the AR 1-8 criteria, the disregard of the existence of AR 600-20, etc., etc. Campbell, supra at 399, noted that "In the case of Hicks v. Wayne Circuit Judge, McGrath, Mich. Mand. Cas. 870, a new trial was ordered in a similar case . . . although . . . the offending consisted merely of the furnishing of cigars to the jurors . . . Assuming such consent from . . . silence, the cigars were furnished. . . . the relief granted was by mandamus. Here it arises upon objection to confirmation" of the adverse action. Here, the harm involves worse than "furnishing of" tobacco, i.e., concerns the symptoms from the use of tobacco, or from other causes.

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The record shows multiple examples of confabulation, fantasy, and distortion by government personnel (and MSPB officials) to the extent that "admission is prohibited," People v. Gonzales, 415 Mich. 615, 329 N.W.2d 743 at 747 (1982), of any of their input; i.e., all of the testimony, briefs, ex parte communications, decisions, etc. is inadmissible. The confabulations, fantasies, etc., including by MSPB officials such as Ersa Poston, Ronald Wertheim, Robert Taylor, etc., on the supposedly "improved" work site were rejected by EEOC as "actions . . . not even attempted," 8 April 1983, p. 5. Admissibility of MSPB decisions must be "denied on the grounds of inadequate foundation or inadmissibility for want of proof of reliability," People v. Harper, 111 Ill.App.2d 204, 250 N.E.2d 5 at 6-7 (1969).

Cf. State v. Mack, Minn., 292 N.W.2d 764 at 766 (1980), discussion and comment that the confabulator whose input was inadmissible "was 'quite drunk' and . . . had 'blacked out' from drinking on other occasions" as well. The pattern of input from the installation and MSPB is consistent with a finding likewise on more than one occasion. When deciding officials have "'blacked out'" repeatedly, it is foreseeable that their views would be rejectedly repeatedly. Here, of course, the local and MSPB claims have been repeatedly rejected--by USACARA, by OPM, by MESC, by EEOC, and even by what "its own people" including EEO counselors "thought," cf. Litton Sys., Inc. v. AT & T Co., 700 F.2d 785 at 811 (1983). Mr. Braun admitted the lack of an offer of air conditioning, i.e., that his recommendations for it were rejected. Mr. Kator admitted that nothing was done to control smoking. The multiple counselors' reports likewise show nothing was done. (The counselors obtained their input from the local personnel on the scene, along with claims that nothing could be done due to the reasons (unreasonableness and lack of authority) claimed until the 25 January 1980 USACARA Report. Thereafter, those claims were abandoned, for reliance on the single word "cannot.")

The confabulations from local and MSPB personnel are inadmissible. Courts consistently reject inadmissible input when "want of proof of reliability" exists, as here. Indeed, it is not necessary to speculate that local and MSPB officials might confabulate in the future--the basis for rejection of their input as sufficient in law. But here, the confabulations have already occurred. There is no need to speculate that mentally disordered local and MSPB officials could confabulate an "improved" job site, or even that they might confabulate numerous supposed improvements, none of which "were . . . even attempted." Here, they have already confabulated numerous fantasies, so clearly the burden of proof for their inadmissibility is more than amply met. See multiple court precedents including but not limited to Peterson v. State, Ind., 448 N.E.2d 673 (1983); and People v. Hughes, 59 N.Y.2d 523, 466 N.Y.S.2d 255, 453 N.E.2d 484 (1983).

Mr. Robert Taylor's unresponsiveness to the "normal stimuli" of an EEOC decision is evident, in his disregard of the "fact" aspects he ignored. See his odd issuances confirming that confabulation and fantasy "is especially prone to 'freeze' if it is compatible with the subject's prior prejudices, beliefs, or desires," People v. Gonzales, 108 Mich.App. 145, 310 N.W.2d 306 at 312 (1981). He has displayed that his confabulation of an "improved" job site is "frozen."

Characteristic Features of the Disease Known as "Smoking"

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Smoking "is a specific disease," "one of our most serious diseases," as noted in The Lancet, Vol. 263(6732), p. 482, 6 Sept. 1952. Characteristic features/symptoms of the disease known as "smoking" include but are not limited to the following:

"'morbid preoccupation' of the mind with the cigarette," noted in The Practitioner, Vol. 195(1170), p. 794, December 1965.

"active tendency to strike out at the environment," "impetuousness," "implicit or overt actions designed to rebel or retaliate," noted in The Journal of Nervous and Mental Disease, Vol. 141 (2), pp. 169-170, August 1965.

"a considerable feeling of defiance for authority and the individuating thrill of setting aside some rule," noted in Staff Meetings of the Mayo Clinic, Vol. 35(13), p. 387, 22 June 1960.

"marked resentment patterns towards those who were trying to reduce his smoking," noted in Applied Therapeutics, Vol. 4(10), p. 891, October 1962.

"relapse . . . is the rule rather than the exception" and "the premorbid personality of the subject is the decisive factor," noted in Texas State Journal of Medicine, Vol. 50(1), p. 36, January 1954.

"rationalization" and "lack of insight," noted in Surgery, Gynecology and Obstetrics, Vol. 111(12), p. 233, August 1960.

"when forced . . . to restrict or give up smoking completely . . . acts like a child to whom mother refuses oral gratification . . . immediately feels unjustly treated," noted in The Psychiatric Quarterly, Vol. 20(2), p. 320, April 1946.

"The narcosis is a grandeur narcosis . . . intrusive and obtrusive. . . . In the narcosis there is not the least thought of possible impropriety in its use . . . And in still less degree is there anything like self-censure," noted in Medical Review of Reviews, Vol. XXIII(12), p. 818, December 1917.

"rebellious attitudes . . . this rebelliousness antedates smoking," showing "expressions of pervasive personality tendencies," noted in Journal of Consulting Psychology, Vol. 30(3), pp. 227, 229, June 1966.

"usually unaware of their disturbance of judgment," noted in The Lancet, Vol. 242(6225), p. 742, 19 December 1942.

"marked differences in central neuronal activity between habitual smokers and nonsmokers," noted in Neuropsychologia, Vol. 6 (4), p. 387, December 1968.

Smoking is "one of our most serious diseases," as noted above. Rebelliousness as a characteristic feature/symptom augments the seriousness of the disease.

The smokers whose behavior in March 1980 is the issue in this matter do not demonstrate that they are "what the law requires them to be, 'sober, intelligent, and judicious persons,'" astute words from Commonwealth v. Fisher, 226 Pa. 189, 75 A. 204 at 205 (1910). E. Hoover, J. Benacquista, and F. Holt are smokers. Smoking is not an "'intelligent, and judicious'" choice. Smoking "causes insanity," as Dr. Matthew Woods accurately observed, "to repeat again familiar facts." Cf. data from L. Pierce Clark, M.D., in the Medical Record, Vol. 71(26), pp. 1072-1073, 29 June 1907, concerning "tobacco poisoning," "Its chronic toxic effect on the nervous system . . . is to induce toxic congestion of the brain, spinal cord, and peripheral nerves." The smoker behavior at issue demonstrates "intoxication due to smoking," astute words from Dr. John H. Kellogg, in Tobaccoism or How Tobacco Kills, p. 32.

The smokers and deciding officials in this matter are clearly not "what the law requires them to be, 'sober, intelligent, and judicious persons.'" Moreover, "the law requires . . . that they continue to be" "'sober, intelligent, and judicious persons'" during the entire span of the decision process. Their behavior shows that they have not met such criteria at any point whatsoever during any portion of the decision process. They have clearly not been "free from the effects of" tobacco "intoxicants which, in the language of Chief Justice Shaw, disqualify them for a 'proper deliberation and exercise of their reason and judgment.'"

Their smoking is "serious and grave misconduct . . . which . . . has deprived" me "of" my "constitutional rights." In addition, their use of impairing substances has "deprived" me "of" prompt enforcement of AR 1-8, the 25 January 1980 USACARA Report, and multiple other rules. It has "deprived" me "of" an uninterrupted career. In Fisher, supra, at 206, the misconduct of the deciding officials included the offender obtaining "cigarettes," "beer and cigars." Here, of course, the conduct is much worse--well beyond obtaining cigarettes and/or cigars, but actually the extreme of using them. The smokers go to the extreme of actually inhaling tobacco substances.

Tobacco substances "cause insanity." It "cannot be said that" a smoker "is a person of normal sensibilities," Aldridge v. Saxey, 242 Or. 238, 409 P.2d 184 at 188-9 (1965). Going to the extreme of actually voluntarily inhaling tobacco substances is not "'intelligent, and judicious.'" Fisher, supra, at 207, indicates, "Verdicts obtained under circumstances of this character cannot receive the approval of a judge or court which has proper respect for and enforces the constitutional rights of the citizen." Here, in addition, various reviewers have already rejected the installation behavior on the merits, without reaching the symptoms and behavior of the smokers. Note the USACARA Report, the EEOC decisions, the OPM analyses, the MESC decisions, etc.

Fisher, supra, at 206, states, "We will not go further into . . . showing the misconduct . . . . What has been stated was amply sufficient to require and compel the learned judge below to set aside the" March 1980 installation behavior. The evidence in the initial case "was amply sufficient to require and compel" MSPB to have "set aside the" March 1980 installation behavior.

The local materials from Edward Hoover and Francis Holt are vitiated ab initio; i.e., the case was void from 17 March 1980. Many precedents show that the use of impairing substances does "vitiate the verdict," Bilton v. Territory, 1 Okla.Crim. 566, 99 P. 163 at 166 (1909). Here, it does "vitiate" the initial management "verdict" (i.e., the decision to terminate me 17 March 1980 by disregarding the lack of X-118 requirements, and by overruling the medical data showing my ability to work, and by their jumbling "safety" and "medical" aspects, etc.) Messrs. Hoover and Holt are smokers, and smoking has long been recognized "as one of the causes of insanity," such that smokers "become deranged from smoking tobacco," as noted by Dr. Samuel Solly, in The Lancet, 14 February 1857, p. 176.

"It is the duty of" Messrs. Hoover and Holt that they should have made "each" issuance "freed from any influence . . . other than the evidence and the law," Bilton, supra. However, what they did, due to the adverse impact on their mental abilities, "constitutes an incorrect interpretation of the applicable regulations and is not supported by the evidence in the record as a whole," as EEOC noted on 8 April 1983, p. 6. The judgment of Messrs. Hoover and Holt shows inability to respond correctly to stimuli. Their severe impairment arises from their being under the influence of an impairing substance. They display "intoxication due to smoking," a descriptive phrase from Dr. John H. Kellogg, Tobaccoism or How Tobacco Kills, p. 32. It is well-established "that the immediate effect of tobacco smoking" is "to greatly increase" unresponsiveness to stimuli, as noted by J. Friedman, et al., in Nature, Vol. 248, pp. 455-456, 29 March 1974.

Here, "the use of intoxicating" materials "by" them "as shown by the uncontradicted evidence in this case was so excessive as to render all who partook of it absolutely incapable of that calm, dispassionate, and impartial consideration of the case which the law demands. It would be a travesty upon the administration of justice to permit a" termination decision "to stand where the" persons "rendering it are subjected to influences so calculated to impair their reason and inflame their passions and prejudices. It would be impossible for" persons "who ind ged in" smoking "to the extent shown in this record to bring to bear upon the law and the facts in the case that discriminating and impartial judgment required in the proper exercise of their functions as" management officials. "It is a matter of common knowledge that the use of" tobacco "continuously and in large quantities and to excess stupefies the mental faculties and impairs the reason and judgment. No one who has" smoked "to the extent shown . . . in this record could pass intelligently upon the issues in any case, much less in a case where" their personal behavior is the issue. The quotes show the pertinent analysis, and are from Myers v. State, 111 Ark. 399, 163 S.W. 1177 at 1182 (1914).

The effect on the brain of those smokers is well described as "serious . . . hazard" (p. 2, n. 2) with "a likelihood of continuing harm" (p. 9), data from Mr. V. Russell, 20 June 1983. Dr. Holt testified (Dep., p. 72), "it's a safe assumption that if you continue to . . . smoke," the condition "will get worse." Messrs. Hoover and Holt have continued to smoke. "It's a safe assumption that" their mental health has become even "worse." As of 1980, it was already so bad on the rules and the facts, that their behavior was rejected by EEOC as wrong.

Deciding officials "are to be kept free from outside influences during the" decision process, Com. v. Fisher, 226 Pa. 189, 75 A. 204 at 205 (1910). It is "important that" deciding officials such as Edward Hoover, Francis Holt, and John Benacquista should have been in March 1980 "what the law requires them to be, 'sober, intelligent, and judicious persons.'" But they were not. Instead, they were smokers. Smoking is not "'intelligent, and judicious.'" "In the administration of law, there is perhaps nothing that is guarded with more vigilance by the judiciary than the conduct of" deciding officials, Central of Georgia Ry. Co. v. Hammond, 109 Ga. 383, 34 S.E. 594 (1899).

"For the sake of public policy, and for the purpose of maintaining and protecting the integrity of the" decision process, "and to insure a fair and impartial trial to litigants, it is the policy of the law that each" deciding official "should be kept entirely and absolutely free from any influence which might tend to prejudice or bias his mind in favor of either party to the case on trial," Hammond, supra. The people who terminated me do not measure up to these standards of integrity, and freedom from prejudicial influence. "Smokers show the same attitude to tobacco as addicts to their drug, and their judgment is therefore biased," data from Dr. L. M. Johnston, in The Lancet, Vol. 2 for 1942, Issue 6225, 19 December 1942, p. 742. Tobacco "registers a permanent and definite impression in nervous structures when it is used for months or years," data from L. P. Clark, M.D., in the Medical Record, Vol. 71(26), pp. 1072-1073, 29 June 1907. Tobacco is known "as one of the causes of insanity," noted by Dr. Samuel Solly, in The Lancet, Vol. 1 for 1857, 14 February 1857, p. 176.

"Tobacco intoxication is an egotistic narcosis. Tobacco makes the user feel like parading the narcosis and the manner and act of taking the narcotic. The narcosis is a grandeur narcosis," data from James L. Tracy, M.D., in Medical Review of Reviews, Vol. XXIII(12), December 1917, p. 818. It is clear that the smokers involved have been "parading" their condition. They have not kept themselves "entirely and absolutely free from any influence" such as tobacco, which is far more than merely an "influence," but is indeed "one of the causes of insanity." Cigarette smoking "'is an actual drug dependence' . . . an addiction and an organic mental disorder," data from William Check, in J.A.M.A., Vol. 247(17), 7 May 1982, p. 2333. The smokers who terminated me so many years ago, and have opposed review ever since, "are diseased and proper subjects for . . . treatment," Mich. Law Rev., Vol. 81(1), November 1982, p. 243, n. 36, citing Linder v. U.S., 268 U.S. 5 at 18 (1925). The "diseased . . . subjects for . . . treatment" are clearly not "entirely and absolutely free from any influence" such as tobacco-induced impaired judgment.

Hammond, supra, notes "that the trial judge should not, and this court will not, inquire whether injury resulted to the accused or not, but the verdict, upon principles of sound public policy, will be set aside, to the end that the purity of" the decision process "may be preserved unimpaired. . . . This ruling is based upon the idea that the court will, at all hazards, protect the purity of the" decision process. For that reason, the termination should be "set aside."

"The adverse effects upon health attributable to smoking have been well documented." Nevertheless, "Experience has shown that persons smoking more than 10 cigarettes per day are less likely to quit," data from Am. J. Pub. Health, Vol. 71(11), pp. 1253-1255, November 1981. At 1254, "Moderate smokers . . . do not see themselves as susceptible to health problems caused by cigarette smoking. In order to quit, it is not sufficient for persons to believe smoking is a serious health problem; they must see themselves as personally susceptible to any adverse effects." Even when doctors advise smokers to quit, "greater obstacles from 'long-time smokers'" are noted.

Smoker brain damage is such that "addicts are usually unaware of their disturbance of judgment," data from The Lancet, Vol. 2(6225), p. 742, 19 Dec. 1942. Tobacco is "wholly noxious . . . always harmful . . . inherently bad, and bad only," Austin v. State, 101 Tenn. 563, 48 S.W. 305 at 306 (1898). Yet in clear "disturbance of judgment" due to their brain damage, "Moderate smokers . . . do not see themselves as susceptible to health problems caused by cigarette smoking." Cf. data from Lyle Tussing, Ph.D., in Psychology for Better Living, 1959, p. 345, concerning "those individuals who are . . . insane in the legal sense of the term . . . suffering from a real derangement of their mental lives, so severe that they do not respond to and are not motivated by normal stimuli. Generally, they have very little insight into their own conditions."

Dr. John H. Kellogg, in Tobaccoism, 1927, p. 77, states that "prolonged use of tobacco is recognized as one of the most common causes of insanity." That is why writers on tobacco and on mental disorder use identical and interchangeable words and concepts to such a large extent.

Smoker "distorted time perception" is cited by Peter H. Knapp, M.D., et al., in Am. J. Psychiatry, Vol. 119(10), pp. 966-972, April 1963. P. 969 cites smokers who "spoke about time moving slowly" along with showing "marked denial of concern . . . about any dangers connected with tobacco." Clearly that displays unresponsiveness to "normal stimuli," Dr. Tussing's apt words.

The unresponsiveness to "normal stimuli" goes to the extreme that "persistent smokers . . . considered that their own chests had become immune to the effects of smoking," data from The Brit. J. of Prev. and Soc. Med., Vol. 23(1), pp. 23-27 at 25, Feb. 1969. Such "disturbance of judgment" brings to mind data on "permanent destruction of brain tissue . . . . Where the damage is severe . . . symptoms typically include . . . Impairment of orientation--especially for time but often also for place and person . . . inability to think on higher conceptual levels and to plan." Smokers' impaired orientation for "time" and for their own "person" in terms of vulnerability to ill effects from tobacco, results in "inability to think . . . to plan" a course of action for "protection" of themselves and others from the danger.

Smokers "have very little insight," i.e., "are usually unaware of their disturbance of judgment," i.e., of their brain damage.

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Numerous precedents demonstrate that use of impairing substances vitiates decisions. Overturning the decision is mandatory "regardless of affirmative proof of the effect . . . upon the mind," Bilton v. Territory, 1 Okla.Crim. 566, 99 P. 163 at 166 (1909). Indeed, "prejudice will be presumed," State v. Applegate, 28 N.D. 395, 149 N.W. 356 at 357 (1914). Here, the harm that has arisen is so clear that it is not necessary to reach presuming that harm has resulted. The harm is already established. Local and MSPB officials have refused to consider the merits. They have refused to be responsive to AR 1-8. They ignore the input from USACARA. They ignore the results of the reviews by OPM, MESC, etc. The lack of X-118 requirements is disregarded. Etc.

The use of impairing substances does "vitiate the verdict." Dr. John Kellogg, in the 1920's had already noted "that the intoxication due to smoking is attributable not alone to the natural poisons of tobacco, but to tobacco smoke; that is, to the poisons produced by the combustion of tobacco," p. 32 of Tobaccoism or How Tobacco Kills. The use of an intoxicant does "vitiate the verdict . . . regardless of affirmative proof of the effect the intoxicants had upon the mind of the" deciding officials, Bilton, supra. That case cites multiple precedents in support of its accurate analysis: Jones v. State, 13 Tex. 168, 62 Am. Dec. 550 (1854); State v. Bullard, 16 N.H. 139 (1844); Leighton v. Sargent, 31 N.H. 119, 64 Am. Dec. 323 (1855); State of Iowa v. Baldy, 17 Iowa 39 (1864); People v. Douglass, 4 Cow. (N.Y.) 26, 15 Am. Dec. 332 (1825); People v. Gray, 61 Cal. 164, 44 Am. Rep. 549 (1882); and Gregg v. McDaniel, 4 Del. (4 Harr.) 467 (1846).

Tobacco impairs thinking. It is well-established "that the immediate effect of tobacco smoking" is "to greatly increase" unresponsiveness to stimuli, as noted by J. Friedman, T. Horvath, and R. Meares, in Nature, Vol. 248, pp. 455-456, 29 March 1974. Dr. Kellogg, in Tobaccoism, p. 88, had noted likewise, "Robert Lee Bates under the supervision of Professor Knight Dunlap, of Johns Hopkins University, demonstrated that the accuracy of mental operations is definitely diminished by smoking . . . 'It is strongly indicated that the immediate effect of smoking . . . is a lowering of the accuracy of finely coordinated reactions (including associative thought processes).'"

In Bilton, supra, the court said, "We believe it will not be contended that the use of intoxicants . . . during the performance of . . . duty will aid them in bringing about the furtherance of justice. No good results can be claimed for it, but much harm may result. It is the duty of" deciding officials "to have each" decision "freed from any influence or consideration other than the evidence and the law." Disregarding that principle "should vitiate the" decisions locally and from MSPB "regardless of affirmative proof of the effect . . . upon the mind of" each deciding official.

The adverse effects upon MSPB have already been documented by EEOC, 8 April 1983, p. 6, "the decision of the Board constitutes an incorrect interpretation of the applicable regulations and is not supported by the evidence in the record as a whole." Applegate, supra, indicates the "right to the cool, dispassionate and unbiased *judgment* of each" deciding official. The record shows that this right has been violated egregiously, to my detriment.

"Parties are entitled to have a cause submitted only to sober" and sane deciding officials, cf. Hedican v. Pennsylvania Fire Ins. Co., 21 Wash. 488, 58 P. 574 at 575 (1899). When the installation allowed Francis Holt and Edward Hoover, etc., to be involved in the decision to terminate me in March 1980, that right was violated. Thus, the non-case must be overturned.

"Nicotine is one of the most powerful of the 'nerve poisons' known," data from C. W. Lyman, in the New York Medical Journal, Vol. 48, pp. 262-265, 8 September 1888. The 1980 DSM-III shows the rapid onset of symptoms, after only "at least several weeks," of the severe type listed. Here, the smokers involved have all smoked for a period of time far in excess of that amount of time. The record shows that "smoking is a dependence disorder," data from The Journ. of Resp. Diseases, May 1981, p. 11. "Neither alcohol nor even heroin exerts a more powerful addictive effect than nicotine," data from the Mich. Law Rev., November 1982, p. 243. Thus, it is well-established that "the immediate effect of tobacco smoking" is "to greatly increase" unresponsiveness to stimuli, data from Nature, Vol. 248, 29 March 1974, pp. 455-456. The smokers who terminated me show "intoxication due to smoking," an accurate description on tobacco effects from Dr. J. H. Kellogg, in Tobaccoism or How Tobacco Kills, p. 32.

The offenders have been intoxicated "due to smoking" during the entirety of the decision process. "Such gross breach of . . . duty . . . cannot be condoned. Parties are entitled to have a cause submitted only to sober" deciding personnel, "and the court will not undertake an inquiry into the state or condition of mind of a" deciding official "who has been intoxicated during the progress of a" case, "but will assume that he was incompetent to determine the cause. Drunkenness" (or worse, tobacco intoxication) "during the progress of a" case "is not only the gravest breach of . . . duty, but it is also a most serious contempt of . . . the administration of the law. Jones v. State, 13 Tex. 168; Brown v. State, 137 Ind. 240, 36 N.E. 1108; Ryan v. Harrow, 27 Iowa, 494. . . . The cause is reversed because of the misconduct."

The astute analysis in Hedican, supra, is consistent with a long line of cases on reversal "regardless of affirmative proof of the effect . . . upon the mind of the" deciding personnel, Bilton v. Territory, 1 Okla.Crim. 566, 99 P. 163 at 166 (1909), as "prejudice will be presumed," State v. Applegate, 28 N.D. 395, 149 N.W. 356 (1914). Cf. Brant ex dem. Buckbee v. Fowler, 7 Cow. 562 at 563 (N.Y., 1827), "the rule is absolute, and does not meddle with consequences." Here, of course, the "consequences" have included the continued use by the installation of false and misleading input, without even an effort to meet the burden of proof on the merits. Thus, the installation misconduct has been repeatedly rejected, but the installation refuses to alter its misconduct, despite being told repeatedly of its errors by several reviewers (MESC, EEOC, USACARA, OPM, etc.)

The installation misconduct and symptoms arise from the actual use of tobacco substances/intoxicants, not just their being provided. Cf. Com. v. Fisher, 226 Pa. 189, 75 A. 204 (1910); Central of Georgia Ry. Co. v. Hammond, 109 Ga. 383, 34 S.E. 594 (1899); Detroit & T. S. L. R. Co. v. Campbell, 140 Mich. 384, 103 N.W. 856 (1905), for insightful data distinguishing using/providing tobacco products.

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"The EEG Effects of Tobacco Smoking - a Review," by Dr. James Conrin, in Clinical Electroencephalography, Vol. 11(4), October 1980, provides insight on smoker mental disorder. At 186, "smoking does produce obvious changes in EEG activity."

At 185, "Since humans typically administer nicotine to themselves chronically over long periods, Bhattacharya and Goldstein (1970) compared chronic and acute dose effects. After 3 weeks of nicotine exposure, decreased hypocampal wave amplitude occurred in response to nicotine. This was due to reduced size of theta waves and the appearance of sporadic low voltage desynchronized waves. An increased variability of cortical waves appeared with a change in the distribution of wave amplitudes." Such data is consistent with information from Wm. M'Donald, in The Lancet, Vol. I(1748), p. 231, 28 Feb. 1857, "no smoker can think steadily or continuously on any subject while smoking. He cannot follow out a train of ideas . . . ."

At 181, "Brown (1968) studied the EEG activity of heavy smokers (2.5 to 5 packs per day), moderate smokers of 1 pack per day, former heavy smokers, and nonsmokers. General EEG differences appeared between smokers and nonsmokers, and especially pronounced differences appeared between heavy smokers and nonsmokers. . . . Nonsmokers exhibited more alpha activity and much less high frequency rhythmic activity." At 182, when stimuli were presented, "EEG responses were significantly fewer in the smoker group. . . . the responses of former heavy smokers resembled those of current heavy smokers. . . . Heavy smokers and former heavy smokers exhibited EEG patterns different from nonsmokers. Higher median alpha frequencies may be expected for current smokers due to the effects of nicotine and carbon monoxide on the EEG." P. 182 also notes, "The alpha activity of nonsmokers was also of lower frequency than that of heavy smokers." Clearly, the brain tissue of nonsmokers does not emit high frequency waves generated in the course of brain cell death agonies due to carbon monoxide, nicotine, etc.

P. 181 has data consistent with data on brain damage, i.e., that brain damage is permanent and irreversible. A brain cell: once dead, always dead, i.e., ". . . smoking heavily over long periods produces permanent changes in EEG activity." Thus, note the accuracy of data from J. B. Neil, in The Lancet, Vol. I(1740), p. 23, 3 Jan. 1857, "Dr. Webster states that, in the post-mortem examinations of inveterate smokers, cretinism is always present."

P. 184 states, "Low doses of nicotine activate the EEG tracing while high doses cause convulsive seizures followed by electrical silence." At 185, "Green and Arduini (1954) . . . found that cortical desynchronization was accompanied by regular waves in the hippocampus, and cortical synchronization was accompanied by hippocampal desynchronization. . . . On the other hand, Longo, Guinta and deCarolus (1967) presented data that indicated multifocal seizure activity . . . rather than just hippocampal foci. In any case, these studies demonstrated some basic effects of nicotine on cortical arousal." In any case, note the accuracy of the 1857 analysis, "in . . . inveterate smokers, cretinism is always present." The details on locations are interesting, but that is the bottom line.

Edward Hoover, John Benacquista, and Francis Holt demonstrate by their behavior that their claims from 17 March 1980 to the present were not "freed from any influence . . . other than the evidence and the law," Bilton v. Territory, 1 Okla.Crim. 566, 99 P. 163 at 166 (1909). They are smokers. "Smoking adversely affects several 'structures and functions of the body.' Nicotine exerts physiological effects on heart rate, metabolism, and (as would be expected from its addictive influence) on the brain," as noted in the Mich. Law Review, Vol. 81(1), November 1982, pp. 244-245, and citations therein. Dr. Holt testified that "it's a safe assumption that if you continue to expose . . . to cigarette smoke, he will get worse" (Dep. p. 72). To the brain, smoking is "a serious . . . hazard" with "a likelihood of continuing harm," p. 2, n.2, and p. 9, respectively, of the 20 June 1983 MSPB issuance. That explains why smoking is "one of the causes of insanity," as noted in The Lancet, 14 February 1857, p. 176. Smokers even "become deranged from smoking tobacco."

The phrase, "intoxication due to smoking," from Dr. John Kellogg, in Tobaccoism or How Tobacco Kills, p. 32, also provides insight. Smokers become ill to such an extent that a special regulation became necessary to deal with the problem (32 C.F.R. 203). Smokers become ill to such an extent that the Surgeon General has issued numerous reports on the matter. Smoker illnesses include both physical and mental illnesses. The latter "would be expected," Mich. Law Rev., supra, p. 244. Smoker hostility to being controlled is such that AR 1-8 became necessary to curb their behavior, and to make their behavior subject to nonsmoker "personal determinations." This case arises from smoker bias and prejudice against AR 1-8, to the extreme that EEOC has had to reject the smoker behavior as both "an incorrect interpretation of the applicable regulations and . . . not supported by the evidence."

The situation brings to mind Underwood v. Old Colony St. Ry. Co., 31 R.I. 253, 76 A. 766 (1910). A deciding official was "not in a fit condition to serve" in making decisions. He "expressed opinions hostile to the defendant, showing a bias and prejudice against the defendant, which made him an unfit" person "to sit in the case." Here, the individuals (Messrs. Hoover, Benacquista, and Holt) were "unfit . . . to sit in the case." They have "expressed opinions hostile to the" rules and evidence. Indeed, it has been necessary for EEOC, MESC, etc., to overrule their behavior. In Underwood, supra, the offender "misconducted himself . . . by interfering with the attention of other" persons. That brings to mind the interference with having MSPB take jurisdiction on the March 1980 appeal. The "interfering with the attention of" MSPB took the form of ex parte letters. EEOC on 8 April 1983, p. 3, rightly rejected such "interfering" by noting, "Petitioner was not afforded an opportunity to present his evidence in a hearing."

In Underwood, the offender "had to be warned two or three times," p. 768. Here, smokers have been warned repeatedly by the Surgeon General on the dangers of smoking. AR 1-8 has been called to their attention. USACARA "warned" the installation on 25 January 1980. MESC, EEOC, and OPM have also "warned" the installation. Here, too, it is clear the offenders are "so" tobacco "intoxicated as to be unable to understand and weigh intelligently and properly the testimony," rules and evidence. They are "unable to comprehend even . . . simple instruction."

The installation behavior is wrong on multiple bases. Tobacco intoxication on the part of the officials who terminated me in March 1980 is the fundamental and underlying source of the situation. The odd behavior of smokers such as Edward Hoover, Francis Holt, and John Benacquista, arises from the "fact that smoking is a dependence disorder," data from R. Bone, M.D., J. Phillips, M.D., and P. Chowdhury, Ph.D., in The Journ. of Resp. Diseases, May 1981, p. 11. Moreover, "tobacco dependence is classified as an addiction and as an organic mental disorder," as noted in reference to the DSM-III in J.Am.Med. Ass'n., Vol. 247(17), 7 May 1982, p. 2333.

The smokers whose behavior is at issue have not, as a result of their poor mental condition, "even recognized that" the agency's "own regulations permitted smoking only to the extent that it did not cause discomfort or unreasonable annoyance to others," the 8 April 1983 EEOC reference (p. 5) to AR 1-8, etc. Because of their use of impairing substances, installation smokers have done what "they had no right to try," words from State v. Applegate, 28 N.D. 395, 149 N.W. 356 at 357 (1914). If they did air content studies under other than the prescribed criteria (and they claim they have), "they clearly violated the law" or rule, "as they had no right to try any such experiment. Consolidated Ice Mach. Co. v. Trenton Hygeian Ice Co. (C.C.) 57 Fed. 898; People v. Conkling, 111 Cal. 627, 44 Pac. 314."

Moreover, if they inhaled tobacco substances, an additional problem arises with thsir behavior. Smoking "causes insanity," as Dr. Matthew Woods noted in J.A.M.A., Vol. XXXII(13), 1 April 1899, p. 68 .

Disregarding the AR 1-8 criteria, as the installation has done, clearly cannot and "will not rebut an employee's statement that smoke in the air in his or her workplace is damaging his or her health," FMCS Arb. Case 81K-26042, 22 January 1982, p. 19. It clearly "will not rebut an employee's statement" under other aspects of the criteria contained in the regulation. Indeed, "they clearly violated the" rule, "as they had no right to try any such experiment," Applegate, supra, and especially not for their admitted purpose, to "rebut" my "statement." AR 1-8 does not authorize any such installation behavior. Neither do the precedents.

Under the circumstances, including "the fact that smoking is a dependence disorder," Bone, et al., supra, and such "is classified as an addiction and as an organic mental disorder," J.A.M.A., supra, "prejudice will be presumed," Applegate, supra.

That precedent cites numerous other precedents in support of its accurate anlysis, including these cases: Berry v. Berry, 31 Iowa 415; Davis v. State, 35 Ind. 496, 9 Am.Rep. 760; Dolan v. State, 40 Ark. 454; State v. Greer, 22 W.Va. 800; Creek v. State, 24 Ind. 151; etc.

Here, the installation's vitiating the installation's own case, is two-fold: the use of tobacco substances and thus impairing judgment, and the claims of air content studies (if done) without the adherence to the criteria of AR 1-8, and for the purpose of trying to "rebut" my analysis. Doing such "clearly violated" AR 1-8, "as they had no right to try."

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The article, "Some Characteristic EEG Differences Between Heavy Smoker and Non-Smoker Subjects," by Barbara B. Brown, in Neuropsychologia, Vol. 6(4), pp. 381-388, December 1968, provides insight on smoker brain damage. At 387, "The differences in both sustained EEG patterns and responsiveness indicate marked differences in central neuronal activity between habitual smokers and non-smokers," and "The EEG patterns of heavy smokers contained significantly less alpha and more high frequency (13-28 c/s) rhythmic activity than did those of non-smokers." At 381, "This work was supported in part by The Council for Tobacco Research, U.S.A."

P. 385 notes "distinctive differences in brain wave patterns between heavy smokers and non-smokers . . . All heavy smoker subjects evidenced an attitude of slight agitation or anxiety . . . The differences in responses . . . found between the heavy smoker and non-smoker groups . . . are more likely related to fundamental differences . . . underlying brain electrical activity. Responses . . . were consistently fewer in the smoker group." Cf. with such data on "fundamental differences," data from J. B. Neil, in The Lancet, Vol. I(1740), p. 23, 3 Jan. 1857, "Dr. Webster states that, in the post-mortem examinations of inveterate smokers, cretinism is always present." The "fundamental differences" noted between smokers and non-smokers arise from that fact. Smokers have become brain-damaged, whereas non-smokers have not.

At 382, "the amount of alpha activity present in the EEGs of heavy smokers was significantly less than that found for non-smokers. Also, the frequency of alpha was significantly faster in the heavy smoker group. Further, the quantity of high frequency rhythmic (and synchronous) activity was marked in the EEGs of heavy smokers and negligible in the EEGs of non-smokers."

P. 384 shows that nonsmokers are more responsive to stimuli with greater mental alertness and speed of response to stimuli than that shown by smokers, "peak times occurred earlier in the responses of the nonsmokers and the differences were statistically significant." Moreover, "the values for former heavy smokers resembled those for the heavy smokers," thus again confirming that smokers do not recover from their brain damage.

P. 385 notes that "nicotine rapidly accumulates in brain tissue," and p. 387 states "that the fast EEG patterns of the heavy smoker is related to diffuse rather than focused attention." That information is consistent with data from Wm. M'Donald, in The Lancet, Vol. I(1748), p. 231, 28 Feb. 1857, "no smoker can think steadily or continuously on any subject . . . . He cannot follow out a train of ideas . . . ." Convulsions in the brain foreseeably impair "focused attention," with "diffuse," i.e., non-consecutive and garbled and disconnected results. Note data on brain damage in Abnorm. Psychol. and Modern Life, by Dr. James C. Coleman, pp. 460-461 of the 5th ed., 1976, discussing "permanent destruction of brain tissue . . . Where the damage is severe," "impairment of higher integrative functions . . . symptoms typically include . . . Impairment of . . . comprehension, and judgment . . . with inability to think on higher conceptual levels." Thus, it is clear that smoker brain damage foreseeably results in "diffuse" garbled writings "rather than focused attention."

"Neither alcohol nor even heroin exerts a more powerful addictive effect than nicotine," data from the Mich. Law Rev., Vol. 81(1), November 1982, p. 243. "Smokers show the same attitude to tobacco as addicts to their drug, and their judgment is therefore biased," "and addicts are usually unaware of their disturbance of judgment," data from Dr. Lennox M. Johnston, in The Lancet, Vol. 2 for 1942, 19 December 1942, p. 742. Smoking "is an actual drug dependence . . . classified as an addiction and an organic mental disorder," data from William A. Check, in J.Am.Med.Ass'n., Vol. 247(17), 7 May 1982, p. 2333. Note the two-fold classification.

It is inappropriate for tobacco-intoxicated people to issue decisions, such as that in March 1980 to terminate me, for my asking that AR 1-8 be implemented in accordance with its terms and criteria, as summarized by USACARA (25 January 1980) and by EEOC (8 April 1983). Thus, the decision to terminate me must be reversed (a) on the lack of merits, (b) on the disregard of the pertinent rules, (c) on the failure to "accommodate" me, i.e., the refusal to halt the over-accommodation of smokers, and (d) due to the tobacco intoxication of the deciding officials. In dealing with such situations, "the rule is absolute, and does not meddle with consequences," Brant ex dem. Buckbee v. Fowler, 7 Cow. 562 at 563 (N.Y., 1827). The "rule is absolute" on intoxication, and this is a case of "intoxication due to smoking," insightful words from Dr. John H. Kellogg, in Tobaccoism or How Tobacco Kills, p. 32. "Neither alcohol nor even heroin exerts a more powerful addictive effect than nicotine," Mich. Law Rev., supra. The intoxicating effect of nicotine is clearly strong.

The danger from tobacco is worse than from other intoxicants due to the "organic mental disorder" (brain damage) aspect. Killed brain cells do not recover. Moreover, the repetitive nature of acts of smoking must be distinguished from intermittent acts of consuming intoxicating liquor. Cases are reversed for the latter, as the precedents show, as even a one-time abuse is one too many: "the rule is absolute," Brant, supra. A survey of pertinent precedents is contained in cases such as State v. Applegate, 28 N.D. 395, 149 N.W. 356 (1914); Bilton v. Territory, 1 Okla.Crim. 566, 99 P. 163 (1909); Patrick v. Victor Knitting Mills Co., 37 App.Div. 7, 55 N.Y.S. 340 (1899); People v. Lee Chuck, 78 Cal. 317, 20 P. 719 (1889); Ryan v. Harrow, 27 Iowa 494, 1 Am.Rep. 302 (1869); etc. The latter covers the pertinent principles as follows: "all" precedents "admit that the drinking of intoxicating liquors . . . while in the discharge of their duties . . . is a very dangerous practice, that ought to be discouraged; it is uniformly condemned. All unite in holding, too, that, if it appear that a juror was under the influence of spiritous liquor while sitting in the case, the verdict cannot be sustained," pp. 499-500. Here, clearly the deciding officials are smokers. Smoking is not only "an addiction," it is also "an organic mental disorder," Check, supra.

It is clear that the termination decision in March 1980 occurred while the deciding officials were under the influence of tobacco. Even if there were a case to be made, and there is not, that *fact* alone (without reaching any others whatsoever) warrants reversal of the adverse action. But here, the installation has been told repeatedly of its errors. It "refuses to alter" the misconduct, as EEOC noted 8 April 1983, p. 6. Clearly, reversal is warranted on many grounds.

"Tobacco intoxication . . . makes the user feel like parading . . . the manner and act of taking the narcotic. The narcosis is a grandeur narcosis. . . . So far, in fact, does this grandeur impression carry, that to the user of tobacco any opposition to its use at once suggests that there is mental abnormality in those who would interfere with its use," data from James L. Tracy, in Medical Review of Reviews, Vol. XXIII(12), December 1917, p. 818. Tobacco-induced brain damage and delusions of grandeur produce an additional effect, that tobacco "addicts are usually unaware of their disturbance of judgment," data from Dr. Lennox M. Johnston, in The Lancet, Vol. 2 for 1942, 19 December 1942, p. 742.

Smoker symptoms of mental illness are consistent with what Dr. Karl Menninger observed in his book, The Crime of Punishment, 1968, p. 99, "Is it not common knowledge that the belief that others are mentally ill rather than oneself is one of the commonest signs of mental illness?" The smokers in the case at bar display "one of the commonest signs of mental illness." They are reacting to requests for enforcement of AR 1-8 in a manner that is foreseeable in mentally disordered persons. "The person addicted to tobacco behaves in a specific way when forced by medical necessities to restrict or give up smoking completely. He acts like a child to whom mother refuses oral gratification. He immediately feels unjustly treated and reacts with . . . aggression," data from Edmund Bergler, M.D., in The Psychiatric Quarterly, Vol. 20(2), April 1946, p. 320.

It is clear that Edward Hoover, Francis Holt, John Benacquista, etc., in terminating me in March 1980, were acting as mentally ill persons. Since the non-case of the installation arose from improper reasons, personal reasons, as I noted in my initial appeal in March 1980, it is clear that the installation behavior must be overturned. Reversal of the adverse action is based on multiple precedents, from as long ago as Rose v. Smith, 4 Cow. 17 (N.Y., 1825), People v. Douglas, 4 Cow. 26 (N.Y., 1825), and Brant ex dem. Buckbee v. Fowler, 7 Cow. 562 at 563 (N.Y., 1827), "the rule is absolute, and does not meddle with consequences." Here, of course, there are multiple "consequences," foremost among which is a termination for personal reasons of smokers, in violation of fundamental civil service principles against removals for personal reasons of others, enunciated as long ago as Knotts v. U.S., 121 F.Supp. 630 (1954). In addition to the fact of smoking per se as personal, the mental disorder aspects of smokers emphasize that personal reasons are the cause. Thus, EEOC and other reviewers have already rejected the installation non-casee.

Please reverse the adverse action for the psychiatric reasons cited, as well as based on the merits. "The test is not whether the irregular matter" (smoker mental problems) "actually influenced the result, but whether it had the capacity of doing so. The stringency of this rule is grounded upon the necessity of keeping the administration of justice pure and free from all suspicion of corrupting practices," State v. Ovitt, Vt., 229 A.2d 237 at 240 (1967), and citations therein. Here, "the irregular matter actually influenced the result." Reversal is thus "'imperatively required,' Panko v. Flintkote Co., 7 N.J. 55, 80 A.2d 302," Ovitt, supra.

The installation has no case. That is why it has presented none. It has presented no evidence on requirements for smoking--a merit matter that precedes other aspects. Until the merits of a case exist, later issues in the series do not arise. Persons such as Edward Hoover, Francis Holt, John Benacquista, etc., fail to comprehend this. They are smokers, and display symptoms of impaired mental functioning—foreseeable based on the known adverse and impairing effects of tobacco smoke. They display "intoxication due to smoking," an apt phrase from Dr. John H. Kellogg, in Tobaccoism or How Tobacco Kills, p. 32. Their condition "differs from alcohol and drug abuse . . . in the strength of the dependence and the . . . dangers which attend it. Neither alcohol nor even heroin exerts a more powerful addictive effect than nicotine," data from the Mich. Law Rev., Vol. 81(1), November 1982, p. 243.

"Public policy forbids that such acts be tolerated in the trial of cases," State v. Strodemier, 41 Wash. 159, 83 P. 22 (1905). Repeated "acts" of smoking cannot "be tolerated in the" behavior of persons who take adverse action, especially when it is the personal conduct of the persons involved, that is at issue. "It is the policy of the law . . . that nothing outside of the evidence shall be permitted to influence" the decisions on adverse actions. Here, the persons who terminated me in March 1980 display behavior "classified as an addiction and as an organic mental disorder," data from William A. Check, in J.A.M.A., Vol. 247(17), 7 May 1982, p. 2333. "Public policy forbids . . . such" departure from "the evidence." The installation case (non-case) was void ab initio. It is void on the merits. It is void by reason of the fact that the installation has not "even recognized" AR 1-8's authority, as EEOC noted 8 April 1983, p. 5, as USACARA had likewise noted years before. But also, the non-case is void due to the local behavior; they "indulge in . . . intoxicating" substances "without . . . the consent of the defendant" (me). There, the court noted that "dire results may follow."

Here, "dire results" did "follow" from their indulgence in intoxicating substances. They terminated me without notice, without regard for merits, and without even recognizing the multiple rules involved. Deciding officials "disposed to such habits may readily bring" adverse action proceedings "into disrespect and contempt."

Smoking "causes insanity" as Dr. Matthew Woods noted as long ago as 1899 in J.A.M.A., Vol. XXXII(13), p. 685, "to repeat again familiar facts." The agency "cannot be heard to deny its prejudicial influence. People v. Chin Non (Cal.) 80 Pac. 681; People v. Stokes, 103 Cal. 196, 37 Pac. 207, 42 Am. St. Rep. 102; People v. Azoff, 105 Cal. 634, 39 Pac. 59. . . . under the circumstances of this case, prejudice must be presumed," Strodemier, supra, at 22. That is the same concept ("prejudice will be presumed") as found in other cases, including State v. Applegate, 28 N.D. 395, 149 N.W. 356 (1914).

Here, the prejudice has so clearly already occurred, that the installation behavior has already been overruled by USACARA, OPM, MESC, EEOC, etc., by reviews independent of each other. The use of impairing substances by officials such as F. Holt, J. Benacquista, E. Hoover, etc., was not reached. However, such use is the underlying cause of the situation, and must be dealt with. "If one . . . may be permitted to do such acts" and terminate people who want rules enforced, others "may do so." Such must be prevented.

The speed with which tobacco smoking "causes insanity" provides insight on why the case is void ab initio (from 17 March 1980). Even one time acts result in overturning decisions, as numerous precedents show. It is well-established that smoking "causes insanity," as noted by Dr. Matthew Woods in J.A.M.A., Vol. XXXII(13), p. 685, 1 April 1899. Indeed, smoking has long been known "as one of the causes of insanity," see The Lancet, Vol. 1 for 1857, p. 176, 14 February 1857 (Dr. Samuel Solly). Thus, "it cannot be said that" a smoker (such as J. Benacquista, F. Holt, E. Hoover, etc., who terminated me in March 1980) "is a person of normal sensibilities," Aldridge v. Saxey, 242 Or. 238, 409 P.2d 184 (1965).

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The inadmissibility of their input, including the overruling of the medical evidence on my unrestricted ability to work, arises not only from (1) their long-term smoking behavior that has given rise to their multiple symptoms, but also (2) from the immediate adverse effects of smoking. It is well-established "that the immediate effect of tobacco smoking" is "to greatly increase" unresponsiveness to stimuli, as noted by J. Friedman, T. Horvath, and R. Meares, in Nature, Vol. 248, pp. 455-456, 29 March 1974.

Smokers were the persons who overruled the medical evidence. Their symptoms, and the identical symptoms in MSPB personnel, require reversal of the adverse action(s) against me. Precedents show reversal of cases for one-time acts of misconduct by deciding officials, including misconduct by a judge, or by one or more jurors. Examples include but are not limited to the following precedents.

Detroit & T. S. L. R. Co. v. Campbell, 140 Mich. 384, 103 N.W. 856 (1905)

State v. Baldy, 17 Iowa 39 (1864)

Bilton v. Territory, 1 Okla.Crim. 566, 99 P. 163 (1909)

Davis v. State, 35 Ind. 496, 9 Am.Rep. 760 (1871)

State v. Demareste, 41 La.Ann. 413, 6 So. 654 (1889)

United States v. Spencer, 8 N.M. 667, 47 P. 715 (1896)

State v. Applegate, 28 N.D. 395, 149 N.W. 356 (1914)

Commonwealth v. Fisher, 226 Pa. 189, 75 A. 204 (1910)

Jones v. State, 13 Tex. 168, 62 Am.Dec. 550 (1854)

State v. Strodemier, 41 Wash. 159, 83 P. 22 (1905)

Leighton v. Sargent, 31 N.H. 119, 64 Am.Dec. 323 (1855)

The principle is well-established: use of impairing substances vitiates the decision. This is true "regardless of affirmative proof of the effect . . . upon the mind," Bilton, supra, as "prejudice will be presumed," Applegate, supra. Here, the record is replete with evidence of the multiple symptoms, confabulations, fantasies, etc., that have been generated locally and by MSPB officials.

Subjecting people to a foreseeable hazard is unlawful. This is well-established under several principles of law. Under OSHA, the safety duty "adjective" ("'free' of a hazard") "is unqualified and absolute: A workplace cannot be just 'reasonably free' of a hazard," Nat'l. Rlty. & C. Co., Inc. v. OSHRC, 489 F.2d 1257 at 1265 (1973). Congress placed "the 'benefit' of work health above all other considerations," Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 at 509, 101 S.Ct. 2478 at 2490, 69 L.Ed.2d 185 at 202 (1981). Here, the hazard was an unrestricted hazard, in its full force and fury. Disregard of safety and "violation of the regulations is evidence of negligence to be considered with the other facts and circumstances," Dunn v. Brimer, 537 S.W.2d 164 at 165 (1976). "In Michigan, violation of a statute is negligence per se . . . ," Thaut v. Finley, 50 Mich.App. 611, 213 N.W.2d 820 at 821 (1972).

In law, "a conscious, intentional, deliberate, voluntary decision" to ignore established safety principles "properly is described as willful," F. X. Messina Const. Corp. v. OSHRC, 505 F.2d 701 at 702 (1974). It is well-established that the hazard involved has a natural, probable, and foreseeable consequence of death; cf. Brennan v. OSHRC, 494 F.2d 460 (1974). The offenders are on notice of the unlawfulness of failure "to cope with accumulations of" toxic substances, p. 462. In law, calculated acts are equated, e.g., "All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by another kind of wilful, deliberate and premeditated killing," is equated, People v. Wiley, 18 Cal.3d 162 at 169, 133 Cal.Rptr. 135 at 138, 554 P.2d 881 (1976). Toxic substances are "poison." The hazard is well-established such that there can be no "failure to perceive it," Dillon v. State, 574 S.W.2d 92 at 94 (1978). The hazard is "known taking into account the standard of knowledge in the industry," Nat'l. Rlty., supra, at 1265, n. 32. It is well established that the safety duty "adjective is unqualified and absolute." Hence, "the failure to perceive it" (or to obey it) "constitutes a gross deviation from the standard of care . . . ," Dillon, supra. The basic Michigan case on poison is People v. Carmichael, 5 Mich. 10, 71 Am.Dec. 769 (1858). At 21, "we are not disposed to resort to . . . subtleties to defeat a law which, if severe, is to the public benignant and humane in its severity." At 19, "It is obvious that the law does not encourage tampering with such matters . . . ." At 17, "Where an unlawful act is done, the law presumes it was done with an unlawful intent, and here the act . . . was unquestionably unlawful. . . . It is unnecessary to decide how far even positive proof that a man was misinformed as to the degree of injury likely to arise . . . would avail him in defense . . . the intention is in law deducible from the act itself . . . ."

The situation has its genesis in disregard of basic safety principles. The Supreme Court has indicated that it is not "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," Boyce Motor Lines, Inc. v. U.S., 342 U.S. 337 at 340, 72 S.Ct. 329 at 331, 96 L.Ed. 367 (1952). It is well established that a single act can violate more than one legal principle or restriction. The initial violation may be no more than disregard of an employer's stated work rule. See Commonwealth v. Hughes, 468 Pa. 502, 364 A.2d 306 (1976). There a work rule violation caused a fire which, in turn, produced "the death of two firemen," p. 308, leading to "two counts of involuntary manslaughter."

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Toxic substances involve a potential for wide devastation. Their characteristic structure, size, invisibility, portability, method of operation, and capability for harm are such that failure or refusal to adhere to safety rules poses a foreseeable widespread (or "universal") danger. Poisons act adversely upon anyone coming within their ambit of life-endangering ability. The legal principle of "universal malice" covers non-compliance "without knowing or caring who may be the victim," Mitchell v. State, 60 Ala. 26 at 30, cited in Black's Law Dictionary, 4th ed., 1968, p. 1110.

In situations of "universal malice," a legal doctrine of particular relevance in safety based upon the foreseeable "universal" consequences of an uncorrected hazard, harm is foreseeable to one or more persons. Even one violation is one too many, in law. "If no one else" but one person is harmed, "that is so much of loss fortunately saved to respondent," DeMarco v. U.S., 204 F.Supp. 290 at 292 (1962). "The wonder of the case is that . . . there were not more . . . victims," Nestlerode v. U.S., 122 F.2d 56 at 59 (1941). "For if ever there was a case which presented every aspect of complete and reckless disregard for the rights of others, this is it. If there are mitigating circumstances, we have failed to find them. Precisely what happened is what might have been expected as the result . . . and is the natural and probable consequence . . . . Malice is presumed under such conditions."

Universal malice includes "'evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life,'" State v. Massey, 20 Ala.App. 56, 100 So. 625 at 627 (1924). That case cites examples of hazards confirming that the legal doctrine of "universal malice" does "have an apt and intelligible meaning, when used in regard to such cases, and it is clear that such acts producing death . . . may constitute murder in the first degree." Clearly, a hazard commonly "is not directed to any particular individual, but is general and indiscriminate." A hazard does not involve "provocation," and clearly not "sufficient provocation." Even one violation is one too many, although a hazard is commonly "general and indiscriminate . . . putting the lives of many in jeopardy." A conviction is valid even if "death would occur . . . in less than one percent of the cases," Turner v. State, 76 Wis.2d 1, 250 N.W.2d 706 at 712 (1977). A disregard of safety is clearly "capable of producing death in and of itself," p. 713. Considering the known hazard, combined with the duty involved, the disregard of safety clearly does "present an apparent and conscious danger of producing death."

The disregard of safety is clearly "willful." What happened "is the natural and probable consequence." Montgomery v. State, 178 Wis. 461, 190 N.W. 105 at 107 (1922), a "universal malice" case, provides an insightful distinction between degrees of murder involved: "If an act be committed with a premeditated design to effect death, it is murder in the first degree; but if it is merely imminently dangerous to others, evincing a depraved mind, regardless of human life and without premeditated design, it is murder in the second degree." Considering the known hazard, and the well established safety duty "above all other considerations," disregard of safety under such circumstances is "premeditated."

The Rule is an Implementation of Other Rules

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The rule at issue is an implementation of other, more fundamental rules. There is no authority or jurisdiction allowing a challenge to those rules. Non-enforcement of the rule at issue constitutes an unlawful challenge to the more fundamental rules. Those fundamental rules include but are not limited to:

The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651-678, and implementing rules, e.g., 29 C.F.R. 1910.1000.Z. "An employer has a duty to prevent and suppress hazardous conduct by employees," including behavior hazardous to themselves, N.R. & C. Co., Inc. v. O.S.H.R.C., 489 F.2d 1257 at 1266, n. 36 (D.C. Cir., 1973). The rule at issue implements the employer's duty "to prevent and suppress hazardous conduct" (smoking), and the employer has no choice in the matter since "the detrimental effects of cigarette smoking on health are beyond controversy," Larus & B. Co. v. F.C.C., 447 F.2d 876 at 880 (CA4, 1971).

(It is not necessary to reach more specific aspects, such as identifying more sub-elements of the hazard (since tobacco smoke considered as a whole is hazardous). However, for the sake of illustration, compare 29 C.F.R. 1910.1000.Z guidance on carbon monoxide (50 p.p.m. limit) with this: "The smoker of cigarettes is constantly exposed to levels of carbon monoxide in the range of 500 to 1,500 parts per million when he inhales," noted in Journal of the Indiana State Medical Association, Vol. 72(12), p. 904, December 1979. As a matter of law, the employer has no choice but to obey the federal mandate "to prevent and suppress hazardous conduct" due to the hazard to smokers themselves. (It is not necessary to reach the issue of the hazard to nonsmokers, as the employer's duty arises and must resolve the matter before additional personnel are also endangered.) (Cases such as Shimp v. N.J.B.T. Co., 145 N.J.Super. 516, 368 A.2d 408 (1976), Smith v. Western Elec. Co., Mo.App., 643 S.W.2d 10 (1982), etc., were improperly pleaded, i.e., addressed other matters than the hazard to smokers themselves, although Shimp, supra, arrived at the right result, albeit by indirection).)

Criminal law principles such as are evident in the manslaughter indictment case of Commonwealth v. Hughes, 468 Pa. 502, 364 A.2d 306 (1976). Deaths of firemen while attempting to extinguish a fire are foreseeable, and the smoker was indicted. The employer was evidently not charged, due to the employer's no-smoking rule. The evident decision to not prosecute the employer is questionable, in view of the well-established medical facts on the foreseeability of smoker rebelliousness, and/or in view of the position taken by the court in Bluestein v. Scoparino, 277 App.Div. 534, 100 N.Y.S.2d 577 (1950). The rule at issue reflects prudence on the part of the employer, to minimize potential liability(ies). Enforcement of the rule is essential for full protection of the employer, and the employees as well.

There is no authority or jurisdiction to challenge the enforcement of the rule at issue. Challenging the rule is, in effect, a challenge to the more fundamental rules cited above.

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EEG studies show the accuracy of the 1857 analysis that "crime keeps pace with the increased consumption of tobacco . . . Witness . . . juvenile delinquents--the inveterate smokers of the present," data from The Lancet, Vol. I(1751), p. 303, 21 March 1857. One example given by W. N. Spong in The Lancet, Vol. I(1753), p. 360, 4 April 1857, is, "increase of cowardly assaults . . . ."

Examples are cited in Brain, Vol. 92, pp. 503-520, 1969:
"Murder of great ferocity with trivial cause," p. 507;
"Wife murder in a depression," p. 508;
"Recurring rages with trivial cause . . . being exceedingly abusive to everybody," p. 510;
"unprovoked assaults," p. 510; and
"Habitual gross cruelty . . . burned down four buildings," p. 511.

Examples are cited in The Am. J. of Psychiatry, Vol. 98(4), pp. 499-503, January 1942:
"destructive," "hit other" people, "persistent stealing," p. 501;
"theft," "unusual laziness and inattentiveness," p. 501; and
"persistent stealing and incorrigibility," p. 501.

Examples are cited in The Am. J. of Psychiatry, Vol. 98(4), pp. 494-498, January 1942:
"liked to see dead people," p. 495;
"frequently stole appreciable sums of money . . . and lied constantly," p. 495;
"stealing, fighting, using vile language," p. 495;
"attempted suicide," p. 495; and
"stolen on many occasions and did not seem to recognize that it was wrong . . . lying . . . with no remorse about any of his actions," p. 496

An example is also given in The Am. J. of Psychiatry, Vol. 95(3), pp. 641-658, November 1938, of a person who "had a terrific temper and occasionally injured other" people, "and broke furniture when he became angry" with "frequent unprovoked temper displays."

"The action of smoking on the brain" includes "great irritability of temper," data from Samuel Booth, L.S.A., in The Lancet, Vol. I(1748), p. 229, 28 Feb. 1857.

Smoking behavior includes an "alarming passion for fraudulently obtaining . . . money. This propensity to . . . vicious habits . . . I . . . ascribe . . . to . . . tobacco," data from J. Taylor, L.S.A., in The Lancet, Vol. I(1749), p. 250, 7 March 1857.

Smoker "irritability" is cited in the DSM-III, p. 160. Thus, it continues to be a part of smoker behavior. And "crime keeps pace," i.e., "crime keeps pace with the increased consumption of tobacco," Lancet, supra. Smokers engage in "cowardly assaults," murder, recurring rages, stealing, suicide, and incorrigibility in dealings with people even after rules are brought to their attention. Smokers are unresponsive to normal stimuli.

Smoking and Crime

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W. N. Spong, in The Lancet, Vol. I(1753), p. 360, 4 April 1857, discusses effects of smoking in terms of "the irresolution of character . . . the increase of cowardly assaults upon women, &c."

J. Taylor, L.S.A., in The Lancet, Vol. I(1749), pp. 250-251, 7 March 1857, indicates that "the baneful effects of tobacco exhibit . . . fearful manifestations . . . The smoking youth of the present day exhibits a slothfulness . . . an indifference . . . and there is also a corresponding condition of the mental faculties; witness . . . the alarming passion for fraudulently obtaining . . . money. This propensity to the indulgence in vicious habits on the part of the rising generation must have a cause somewhere, and I hesitate not to ascribe it to their immoderate use of tobacco."

Another writer states the following in The Lancet, Vol. I (1751), p. 303, 21 March 1857, "I can confidently assure . . . that crime keeps pace with the increased consumption of tobacco! ('Smoking leads to Drinking.') Statistics will bear me out in this assertion. Witness the necessity of providing 'reformatory schools' for juvenile delinquents--the inveterate smokers of the present day."

Samuel Booth, L.S.A., in The Lancet, Vol. I(1748), pp. 228-229, 28 February 1857, explains, "The action of smoking on the brain is sedative. It appears to diminish the rapidity of the cerebral action," for lessened responsiveness to stimuli such as laws, i.e., indifference. Also, "The action of smoking on the brain" includes "great irritability of temper."

David Johnson, M.R.C.S., in The Lancet, Vol. I(1740), p. 22, 3 January 1857, stated, "There can be no doubt that the moral evils occasioned . . . by the use of this plant are of the most extensive and frightful kind." J. R. Pretty, in The Lancet, Vol. I(1748), pp. 230-231, 28 February 1857, notes, "smoking is not a practice resulting from civilization, but has been received from . . . barbarism . . . men in a savage state commonly smoke." Maurice G. Evans, M.R.C.S., in The Lancet, Vol. I(1747), pp.201-202, 21 February 1857, states, "A greater curse never befel this country than the introduction of tobacco."

"The influence of immoral associations, and the solicitations to, and opportunities of, vice . . . are hardly to be resisted by the feeble will, the plastic tempter, and the warm passions," data from The Lancet, Vol. I(1753), pp. 354-355, 4 April 1857.

"When something 'new' in medical literature is published, it is a wise precaution to read previous literature on the subject--that 'something new' may not really be new," data from Alison B. Froese and A. Charles Bryan, in Am.Rev.Resp.Dis., Vol. 123(3), pp. 249-250, March 1981.

Noting tobacco-produced crime is not "really . . . new."

Smokers pose a clear and present danger to people and property. The record is replete with cases showing the enormity of the catastrophes caused. Disorientation for time and place is often evident in the court records, for cases before and after the "Rediscovery" of "Tobacco Use as a Mental Disorder." Such disorientation is evident as a certain mental incapacitation to foresee consequences.

Commonwealth v. Hughes, 364 A.2d 306 (Pa. 1976), is an example of dangerous smoker behavior. Smoker Gerald Hughes "was arrested on August 9, 1973, and indicted on two counts of involuntary manslaughter . . . ." (Such data belies the hallucination, delusion, or other deviance in the 18 Jun 81 MSPB issuance concerning "undue hardship.") Smoker Hughes admitted causing a fire which "raged uncontrollably for approximately four hours. Numerous injuries were sustained including the death of two firemen." Other consequences of Mr. Hughes' smoking behavior were also indicated by the court: "The injured included 38 firemen, one policeman and three civilians." "Fifty-one properties were evacuated which involved a total of 109 residents."

The Court analysis discussed factors such as "mental state," word meanings, inherently dangerous items, etc. Such concepts are, to a great extent, beyond the capacity of brain-damaged individuals whose thinking capacity is impoverished, disconnected, concrete, and otherwise impaired. Such data provides insight on the smoker's allegations in the case. The court rejected the smokers' claims. At 312, "it is clear that a" normal, sane "person in the situation of the appellee should have been fully aware that his conduct was proscribed by the provisions of this section." What is adequate in word meanings for normal sane people is adequate as a matter of law. Cf. Aldridge v. Saxey, 409 P.2d 184 (1965), concerning a smoker, "it cannot be said that he is a person of normal sensibilities."

In Hughes, at 311, "Fire, dealt with by the law of arson, is the prototype of forces which the ordinary man knows must be used with special caution because of the potential for wide devastation. . . . it must be remembered that the forces or substances covered . . . are inherently dangerous and their improper handling is capable of causing widespread devastation." That analysis provides insight for the case at bar. "Smoking" is an overview word; the behavior involves various aspects, including "highly overlearned" aspects, addiction, etc. "Fire" is one aspect. Smokers are clearly disconnected from, and apathetic and indifferent to, the various aspects. "Fire" is "inherently dangerous." Capacity for complete thought processes is evident in Austin v. State, 48 S.W. 305 (1898), concerning the totality, "cigarettes . . . are inherently bad." Properly associated and connected thoughts deal with the totality, not with a disconnected portion. Hughes, supra, arises from Hughes' failure to act on common knowledge; the law upheld by the Court was "taken from" "The American Law Institute's Model Penal Code."

Additionally, "criminal actions resulting from mental disease are often purposeful, intentional, and ingeniously planned, Mich. Law Rev. 79(4): 754 (Mar. 1981). Mr. Hughes "attempted to light a cigarette" in "the presence of" "a highly flammable solvent" "after ascertaining that there was no one in the area to observe him" violate the "strict smoking provision."

"Neural Factors Related to Habitual Aggression," in Brain, Vol. 92, pp. 503-520, 1969, provides insight. At 519, "a major factor in the aetiology of pathological persistent aggression is disturbance of cerebral physiology. . . . EEG abnormalities in habitual aggressives were seen bilaterally in 64 per cent and they almost invariably involved the anterior part of the brain. The temporal lobes were affected in all, the anterior part three times as often as the posterior, whilst rhythms known to be associated with temporal lobe dysfunction were present in over 80 per cent." Author Denis Williams indicates at 503, "In the multitude of papers written about the occurrence of abnormalities in the electroencephalogram in those with disturbed behaviour, there are many which relate to convicted criminals."

It is clear "that crime keeps pace with the increased consumption of tobacco," data from The Lancet, Vol. I(1751), p. 303, 21 March 1857. Note that "in . . . inveterate smokers, cretinism is always present," data from The Lancet, Vol. I(1740), p. 23, 3 January 1857. "Impairment of inner reality and ethical controls--with lowering of behavioral standards" is well-established as a consequence of "permanent destruction of brain tissue," data from Abnormal Psychology and Modern Life, 5th ed., 1976, pp. 460-461. Thus the cycle arises: smoking, cretinism, impairment of ethical controls, crime.

EEG studies show impaired brain activity foreseeable in smokers/criminals. Examples of behaviors involved include "murder, attempted murder, grievous bodily harm, rape or attempted rape," p. 506, in Brain, supra. Tobacco smoke clearly involves "grievous bodily harm" to non-smokers, involuntary invasion of the body, and death. When the Surgeon General says smoking is the nation's number one public health problem, and when the Surgeon General says violence is the nation's number one health problem, both statements concern the same matter. Smoker violence is a medical fact known longer than recent discoveries such as on penicillin.

P. 508 cites an example of the murder of a person with asthma. Cf. Wangerin v. State, 73 Wis.2d 427, 242 N.W.2d 448 at 450 (1976), admitting in a killing, "'While I was hitting him it sounded like he was having an asthma attack.'"

Why were the installation smokers sadistic and brutal to the extreme that needing "protection" from smokers was admitted by Dr. Holt (T. 14)? "The action of smoking on the brain" produces "great irritability of temper," data from Samuel Solly, in The Lancet, Vol. I(1748), p. 229, 28 Feb. 1857. Note the fact that I "pressed" the "matter" of having AR 1-8 enforced, and the 25 Jan. 1980 USACARA Report enforced. Cf. the example in Brain, p. 510, "if the matter is pressed," the "EEG abnormal" person "just goes 'fighting mad,'" and "being exceedingly abusive." Cf. Rum River Lumber Co. v. State, 282 N.W.2d 882 (1979) like smoker behavior. Then take into account the local sadism directed against me, behavior obviously incompatible with medical standards of acceptable response. The grave danger includes smoker behavior. Thus, please rule favorably for "protection" action in accordance with accepted standards.

The under-reporting of the danger at the installation, even to the extreme of claiming that smoking was banned, has been caught. The under-reporting took place to conceal the danger caused by local mentally ill/dangerous smokers. The under-reporting does, of course, arise from the fact that "Nicotine exerts physiological effects on . . . the brain," noted in Mich. Law Rev., Vol. 81(1), pp. 244-5, Nov. 1982, i.e., "smoking causes insanity," a long known medical fact cited in The Lancet, Vol. I(1751), p. 303, 21 March 1857, in J.A.M.A., Vol. XXXII(13), p. 685, 1 April 1899, as "familiar facts," evident in the DSM-III, etc.

Even though smokers do "become deranged from smoking tobacco" (noted in The Lancet, Vol. I, Issue 1746, p. 176, 14 Feb. 1857), "actions resulting from mental disease are often purposeful, intentional, and ingeniously planned" (data from Mich. Law Rev., Vol. 79, Issue 4, p. 754, March 1981). The insane local offenders who have created the hazard do not want to receive psychiatric help, just as the "mentally ill and dangerous" smoker in Rum River Lumber Co. v. State, 282 N.W.2d 882 (1979), rejected psychiatric help and even "escaped three times" from the mental hospital where he was committed. Local mentally ill smokers oppose the due process of law, for example, commitment laws, that would bring them help were they to stop under-reporting the hazard, and admit the hazard they have created.

Moreover, the legal authority of the victim of a hazard caused by dangerous behavior is clear, as the courts have continuously pointed out. The under-reporting of the hazard is "purposeful, intentional, and ingeniously planned" to obstruct the legal authority of the victim (me), an authority noted in multiple precedents including the following:

State v. Smith, 378 So.2d 261 (1979)

Brown v. United States, 256 U.S. 335, 41 S.Ct. 501, 65 L.Ed. 961 (1921)

State v. Lee, 258 N.C. 44, 127 S.E.2d 774 (1962)

State v. Pennell, 224 N.C. 622, 31 S.E.2d 857 (1944)

State v. Sharpe, 18 N.C.App. 136, 196 S.E.2d 371 (1973)

State v. Grant, 228 N.C. 522, 46 S.E.2d 318 (1948)

Inge v. United States, 356 F.2d 345 (D.C.Cir. 1966)

Com. v. Fisher, 420 A.2d 427 (1980)

People v. Smith, 54 Mich.App. 652, 221 N.W.2d 464 (1974)

People v. Tomlins, 213 N.Y. 240, 107 N.E. 496 (1914)

State v. Smith, 1979, supra, is especially pertinent considering smoker "untoward propensity" (State v. McKenzie, 608 P.2d 428 at 445 (1980)) to murder people in whom they have caused "asthma" lung injury. Cf. Brain, Vol. 92, p. 508, example (4), 1969, and Wangerin v. State, 243 N.W.2d 448 at 450 (1976). From such smoker behavior, "protection" is needed.

Poison, like fire, "is the protype of forces" or substances "which the ordinary man knows must be used with special caution because of the potential for wide devastation," Com. v. Hughes, 468 Pa. 502, 364 A.2d 306 at 311 (1976). The unqualified and absolute safety adjective requires foresight and vigilance for compliance. What foresight and vigilance consist of and require is well described in cases such as United States v. Park, 421 U.S. 658, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975). At 672, "The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in . . . enterprises whose services and products affect . . . health and well-being . . . ." Here, the lack of adherence to the safety duty does adversely "affect . . . health and well-being" up to and including causing death. At 671, "'The accused, if he does not will the violation, usually is in a position to prevent it . . . .'" That is the case here. At 673-4, "the defendant had, by reason of his position . . . responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so." At 678, "he could not rely on his system of delegation to subordinates to prevent or correct" violations. Safety involves a stringent duty since it does "'touch phases of the lives and health of the people which, in the circumstances of modern industrialism, are largely beyond self-protection, " p. 667. The phrase, "'largely beyond self-protection,'" is clearly applicable in the situation here.

These concepts are applied in U.S. v. Y. Hata & Co., Ltd., 535 F.2d 508 (1976), and U.S. v. Starr, 535 F.2d 512 (1976). The offenders have not "offered to prove that they planned and attempted" compliance measures, p. 511. Considering the duty, compliance is not an "objective impossibility." An unsafe occurrence is foreseeable; the duty "requires the defendant to foresee and prepare for such an occurrence, whether it be deemed 'natural' or 'artificial,'" p. 515. Here, no protective measures were taken. An incident was foreseeable. No provisions were made to aid the foreseeable victim(s), the same violation as in Brennan v. OSHRC, 494 F.2d 460 (1974). Even in non-life-threatening situations, i.e., simply as a routine duty, "A tort-feasor has a duty to assist his victim. The initial injury creates a duty of aid and the breach of the duty is an independent tort. See Restatement (Second) of Torts § 322, Comment c (1965)," Taylor v. Meirick, 712 F.2d 1112 at 1117 (1983). Here, multiple duties were breached.

Poison/toxic chemicals involve a potential for wide devastation. Even one death is, as a matter of law, one too many. The duty of prevention, and of aid, is long standing. Cf. Stehr v. State, 92 Neb. 755, 139 N.W. 676 at 678 (1913), "The defendant was charged with the duty to see to it that . . . life was not endangered; and it is apparent that he could have performed that duty . . . ." And, "To constitute murder, there must be means to relieve and willfulness in withholding relief." Here, these criteria are met. Here, both the "means to relieve" and, indeed, to have prevented, "and willfulness in withholding relief" and prevention are evident.

How the Installation Commits Fraud in Reports JAN. 2 1985

Note Dr. Francis J. Holt's "admission against interest" as the installation's own doctor, "there's a hazard for all these other people. . . . Yes. Yes. . . . People smoking in their vicinity is hazardous to them," Dr. Holt's Deposition, p. 42.

The hazard because of the multiple plumes of tobacco smoke given off by smokers, is clear. Voluminous medical reports show the hazard. Note the various Surgeon General's Reports; NIOSH Current Intelligence Bulletin 31; J. of the Indiana St. Med. Ass'n., Vol. 72(12), pp. 903-905, Dec. 1979; Am. J. of Pub. Hlth., Vol. 72(11), pp. 1283-1285, Nov. 1982; court precedents recognizing the hazard, etc. The data exists long before this century. Examples of the hazardous levels are:

Toxic Substances in Tobacco Smoke		29 CFR 1910.1000.Z Limit
acetaldehyde	3,200 ppm	200 ppm
acrolein	150 ppm	0.1 ppm
ammonia	300 ppm	50 ppm
carbon dioxide	92,000 ppm	5,000 ppm
carbon monoxide	42,000 ppm	50 ppm
formaldehyde	30 ppm	5 ppm
hydrogen cyanide	1,600 ppm	10 ppm
hydrogen sulfide	40 ppm	20 ppm
methyl chloride	1,200 ppm	200 ppm
nitrogen dioxide	250 ppm	5 ppm

As Dr. Holt admitted, "People smoking in their vicinity is hazardous to them." The employer's legal duty is clear, "An employer has a duty to prevent and suppress hazardous conduct by employees," NR & CCI v. OSHRC, 489 F.2d 1257 at 1266, n. 36 (1973).

Installation officials, hostile to safety, decided to obstruct compliance with the safety duty (to do what is "necessary" for the employer to come into compliance, regardless of whether violators think that compliance is "reasonable"). To evade compliance, installation officials decided to falsify the figures (in violation of 18 USC 1001). Here is how the falsifying was done. A figure such as 40,000 ppm of carbon monoxide, would be converted to a percentage (e.g., 4%).

The "4" would be reported. But it would be reported as 4 ppm, not as 4%.

Substituting ppm for the %, is the method for falsifying the data. The falsifiers decided to take advantage of laymen who would foreseeably not be familiar with ppm/% data reporting, and thus the falsifications would go undetected for years. Of course, Dr. Holt knew there was a hazard, and so testified.

Additionally, of course, the falsifiers simply did not report any figures at all for most of the toxic materials involved. In order that they could avoid prison for their falsifications, they wanted to keep the substitution process to a minimum, so they could pretend simply having made a mistake, if and when caught.

The symptoms displayed by Mr. Robert Shirock relative to his unresponsiveness to safety (under OSHA, AR 1-8, the AR 385 series, etc.) demonstrate his lack of "substantial capacity to appreciate the wrongfulness of his conduct" and "to conform his conduct to the requirements" involved, principles from People v. Matulonis, 115 Mich. App. 263, 320 N.W.2d 238 at 240 (1982). He demonstrates inability to comprehend the danger from tobacco smoke, even though such data has been called to his attention. The agency has known for many years that the presence of tobacco smoke causes diseases including but not limited to "chronic bronchitis, emphysema, asthma, and coronary heart disease" as listed in 32 C.F.R. 203 and AR 1-8.

Those diseases arise from continued violation of safety principles, including but not limited to safety laws, safety court precedents, and safety standards. For example, the safety standard for carbon monoxide is 50 p.p.m. as noted in 29 C.F.R. 1900.1000.Z. It shows continued exposure to quantities in excess of the standard to cause diseases such as "chronic bronchitis, emphysema, asthma, and coronary heart disease," etc., as is known by the fact of the issuance of the limits.

A technique for fraud is the deliberate, planned, premeditated under-reporting of a danger. See Bulloch v. U.S., 95 F.R.D. 123 (1982). The fraudulent studies issued under the auspices of Mr. Shirock did not fool USACARA, as is evident from its 25 January 1980 Report. EEOC has already twice noted that that Report was not abided by; see the 23 February 1982 and 8 April 1983 EEOC decisions. In brief, fraudulent under-reporting of the toxic levels continued. Mr. Shirock does "not respond to" and "is not motivated by normal stimuli," words borrowed from Dr. Lyle Tussing, Psychology for Better Living, 1959, p. 345. The hazard from just that one substance alone (carbon monoxide) is well-established. The safety standards are exceeded many times over. "The smoker of cigarettes is constantly exposed to levels of carbon monoxide in the range of 500 to 1,500 parts per million when he inhales the cigarette smoke," as noted by Dr. G. H. Miller, in Jour. of the Indiana St. Med. Ass'n., Vol. 72(12), pp. 903-905 at 904, December 1979. "Original research on the physiological effects of carbon monoxide was completed in the 19th century."

Premeditated fraud by the under-reporting technique constitutes "improper means . . . unacceptable as a part of the judicial process," Bulloch, supra, at 143. "It strikes us as highly irregular and inequitable to expect a defendant to prepare a defense against accusations known to be untrue by the accuser," Nye v. Parkway Bank & Trust Co., 114 Ill.App.3d 272, 448 N.E.2d 918 at 919, n. 2 (1983). The agency adverse "experience" with tobacco smoke over many years culminated in the issuance of 32 C.F.R. 203 listing of diseases caused by it, which shows what the agency's "own people thought," Litton Sys., Inc. v. AT & T Co., 700 F.2d 785 at 811 (1983). The USACARA Report shows likewise what the agency's "own people thought" about the under-reporting, i.e., the fraud by the installation being done "in a manner calculated to delay the day when" the safety "mandate" of rules such as AR 1-8, OSHA, the AR 385 series, etc., "would become fully effective." Mr. Shirock's misconduct is designed "for the injury that the process" of under-reporting "alone will work," cf. Litton Sys., supra, at 810.

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Precedents on fraud provide insight concerning the knowingly false MSPB claims that the installation banned smoking in the personnel office, etc., when in fact, compliance "actions were not even attempted," as EEOC noted 8 April 1983, p. 5. The compliance process has not even started. The MSPB claims are frauds, and falsifications. The MSPB falsehoods bring to mind "a promise made without any intention of performing it . . . one of the forms of actual fraud," Langley v. Rodriguez, 122 Cal. 580, 55 P. 406 (1898). The repeated MSPB falsehoods, and refusal to retract even when notified repeatedly, by me and by the 8 April 1983 EEOC decision, confirms "willful misrepresentation and the making of false statements," and that I "complained of these misrepresentations," cf. Matter of Looby, 297 N.W.2d 487 (1980).

The falsehoods from MSPB on the ban on smoking, on "standards," and on other actions that the installation "allegedly took," were stated by MSPB in the past tense. MSPB claimed that the "actions" cited by MSPB had already taken place, and were extant, in essence, before 17 March 1980, and that I was not satisfied. The past tense used by MSPB, and recognized by EEOC on 8 April 1983, shows the criminal nature of the MSPB misconduct. MSPB officials chose to fabricate claims (using the past tense, not the future tense) of "actions" the installation "allegedly took." The criminality of the MSPB claims is evident from the fact that the installation opposed, and opposes, taking such actions, and that I agreed that refusal had occurred, so the record showed no evidence that the claimed "actions" had happened.

The use by MSPB of the past tense emphasizes the MSPB criminal misconduct. MSPB officials made false claims. Data from principles on fraud, provides insight on the falsification aspects by MSPB (in violation of 18 USC 1001). Data on the time aspects is cited on the matter of fraud, in terms of time. "In general, to constitute actionable fraud, a false representation must relate to an existing or pre-existing fact, Entron Inc. v. General Cablevision, 435 F.2d 995, 997 (5th Cir.1970); Poliakoff v. National Emblem Insurance Co., 249 So.2d 477, 478 . . . cert. denied, 254 So.2d 790 (Fla.1971)," Cavic v. Grand Bahama Development Co., Ltd., 701 F.2d 879 at 883 (1983). The MSPB falsehoods meet that criteria. The MSPB claims issued by Mr. Ronald Wertheim, and others, were "false when made," as "such actions" as were alleged "were not even attempted," and in fact, had been (and are) refused; indeed, the installation agrees that what MSPB claimed was "not even attempted." See the corroboration of MSPB crimes, issued 20 June 1983, by Mr. Victor Russell, p. 8, n. 6, "The agency denies it ever made such an offer." The words "ever made" refer back, to the past tense.

The misconduct by MSPB relates to the past, as distinguished from "a promise of future action . . . standing alone," Cavic, supra, at 883, and cases cited therein. Here, of course, the MSPB falsehoods were stated in past tense terms. Moreover, they are not "standing alone," but in context with other MSPB misconduct, are part of the pattern of falsehoods, ex parte communications, disregard of standards of proof required, etc., etc., as evident throughout the case. The MSPB misconduct meets criteria for both fraud and falsification, as juxtaposing the two concepts shows. The time aspects alone make this clear. Penalties for both aspects of MSPB misconduct are sought.

There is a particular reason why it is not "incumbent upon" the reviewer "to determine the exact quantity" of the hazard at issue, in addition to the reason evident from Centoni v. Ingalls, 113 Cal.App. 192, 298 P. 47 at 48 (1931). Hazard amounts, like other amounts not amenable to quantification, "do not have to be quantified," Meil v. Piper Aircraft Corp., 658 F.2d 787 at 790 (1981). The principle on why quantification is unnecessary is sufficiently clear to you the reviewer, from those cases alone.

But other material also shows the non-necessity for quantification of the hazard. For example, see the safety case, Nat'l. Rlty. & C. Co., Inc. v. OSHRC, 489 F.2d 1257 at 1265-7 (1973). The safety duty "adjective is unqualified and absolute: A workplace cannot be just 'reasonably free' of a hazard." "All preventable forms and instances of hazardous conduct must . . . be entirely excluded from the workplace." Indeed, to show violation "hazardous conduct need not" even "actually have occurred" since "inadequacies may sometimes be demonstrated before employees have acted dangerously." The duty is to get rid of hazards even before they start, even before any quantification could even begin. Here, the severity of the hazard has already been confirmed not only by the 20 June 1983 issuance from MSPB, but is also clear from overwhelming medical evidence and published reports.

The Cal. Law Rev., Vol. 64(3), p. 715, May 1976, gives examples on how "the presence of occupational hazards can be objectively demonstrated" apart from quantification of hazard levels, especially where, as here, the employer is lying and denying a hazard such as by false claims of having already banned it, by under-reporting, and by other unlawful devices to evade quantification. P. 715 gives examples for "objectively" demonstrating "the presence of occupational hazards" that overcome such employer misconduct. Note that in the case at hand (tobacco hazard), all of these means of "objectively" showing a hazard, have already been done here: Hazards are shown by any one or more of the following means other than quantification: "injuries that were redressed by workmen's compensation" in other cases; the existence of "a safety standard" on the matter; "the subject of a published study" (here, tens of thousands); and finally, a hazard is "objectively" proven when "the risk is apparent to the 'ordinary person.'" Here, all of these aspects exist, not merely one or more.

The above shows why quantification is unnecessary, under various principles of law, including before OSHA. But the key reason why quantification is unnecessary relates to the underlying reason for how a tobacco hazard comes about. "Overwhelming clinical evidence supports characterizing smoking . . . as a disease," Mich. Law Rev., Vol. 81(1), p. 240, Nov. 1982. A disease means the presence of people with the disease. Even one mentally diseased person dangerous to himself and others, is one too many, under Michigan law, and under civil service rules issued under 5 C.F.R. 752. Thus, as long as there is even one smoker, a hazard exists. Tobacco smoke, a by-product of the disease, arises only from the preceding presence of a person with the disease. Quantifying smokers as distinct from smoke avoids the problem of employer under-reporting.

Smoker brain damage explains the unresponsiveness to the normal stimuli concerning the quantities of tobacco smoke-produced carbon monoxide. It has been known for years that "cigarette smoking causes increased exposure to carbon monoxide (CO). A CO concentration of 4% (40,000 ppm) in cigarette smoke can lead to a lung CO concentration of 0.04 to 0.05% (400 to 500 ppm)," data from the U.S. Department of Health, Education, and Welfare, Public Health Service, National Institute for Occupational Safety and Health (NIOSH), "NIOSH Current Intelligence Bulletin 31," 5 February 1979, entitled, "Adverse Health Effects of Smoking and the Occupational Environment," p. 2.

None of the data from the installation or MSPB demonstrates responsiveness to such normal stimuli. Such unresponsiveness to normal stimuli is foreseeable from the fact that smoking "causes insanity," as noted by Matthew Woods, in J.Am.Med.Ass'n., Vol. XXXII(13), p. 685, 1 April 1899. Indeed, "tobacco as one of the causes of insanity" was noted by Samuel Solly, in The Lancet, Vol. I for 1857, Issue 1746, p. 176, 14 February 1857. Cf. the DSM-III, 1980. Smoking as a cause of organic mental disorder has been known longer in medicine than such twentieth century discoveries as on penicillin, etc.

"A CO concentration of 4% (40,000 ppm) in cigarette smoke" is far in excess of the 50 ppm limit cited in 29 C.F.R. 1910.1000.Z. Howevoer, local and MSPB officials do not demonstrate normal responsiveness to reality. "The most marked deviation from normal human behavior is shown by those individuals who are psychotic (insane in the legal sense of the term). These persons are suffering from a real derangement of their mental lives, so severe that they do not respond to and are not motivated by normal stimuli. Generally, they have very little insight into their own conditions," data from Lyle Tussing, in Psychology for Better Living, 1959, p. 345. Cf. data from Lennox Johnston, in The Lancet, Vol. 2 for 1942, Issue 6225, p. 742, 19 December 1942, tobacco "addicts are usually unaware of their disturbance of judgment."

"In many cases, brain damage results in fairly specific" impairments, and "Among the more common of these are . . . Acalculia--Loss of ability to do simple arithmetic," data from James Coleman, in Abnormal Pyschology and Modern Life, 5th ed., 1976, p. 477. Such data provides insight on smoker claims of compliance. Their bizarre output cites one digit (%) results, garbled and jumbled into ppm reporting. Such error by them produces results erroneous 1000-fold.

Cf. Allen Calvin, et al., Psychology, 1961, p. 432, on "Brain Injury," "a patient . . . may not be able to tell whether 9 is larger or smaller than 5 . . . an apparent lack of awareness of his defect." Inability to comprehend percentages as distinct from ppm data, and using results 1000-fold different as interchangeable, demonstrates the severity of smoker mental derangement, and their impairment of orientation to reality. Since smoking "causes insanity," including on realizing whether numbers are "larger or smaller than" other numbers, their insane claims of compliance with OSHA are the product of their organic mental disorder.

 Affiant's initials: _____

The under-reporting of the tobacco smoke quantities went so far as to include claiming having already banned smoking. EEOC rejected that untrue claim, in its 8 April 1983 rejection of MSPB erroneous acceptance of the claim. Such "protection" action had, in reality, had not even been "attempted."

Under-reporting smoking behavior is part of a pattern of impaired ethical controls, memory loss, and other symptoms displayed by smokers, as a result of the brain-damaging effects of smoking. The eminent Dr. Alton Ochsnor was "One of the early leaders in lung cancer," as noted in the medical journal Preventive Medicine, Vol. 2, pp. 611-614 at 611, 1973. Smokers delay action to correct matters until conditions become permanent and irreversible, i.e., "unfortunately, too late . . . 'too much damage had been done,'" p. 614. The reason for this is apparent, "in the post-mortem examinations of inveterate smokers, cretinism is always present," data from J.B. Neil, in The Lancet, Vol. I(1740), p. 23, 3 Jan. 1857. Cf. the FTC Report 1968, referenced in Louisiana Law Review, Vol. XXIX, p. 607, n. 85, 1969, "'Every regular cigarette smoker is injured . . . all regular cigarette smokers studied at autopsy show the effects.'" The brain of smokers is invariably adversely effected, far more so than the body; i.e., smokers become brain damaged first, then body deterioration sets in. The addiction is the key; a healthy brain is not addicted to poison. Brain damage comes first; then addiction, then a body-wide spectrum of injuries, sometimes called by the name of diseases.

Smokers admit the danger generally "unfortunately, too late," as Dr. Ochsner notes. Such data explains smoker under-reporting the tobacco smoke levels in this case. Cf. Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19, cert. denied 375 U.S. 865 (1963). The testimony in that case included data from Dr. Ochsner, noted in Cigarette Country, by Susan Wagner, 1971, at 104, "There was a period between 1946 and 1948 when certain studies were made that indicated that there was no causal relationship between cancer and smoking, the surgeon testified. But in 1949, he said, it was found that hospital records regarding the smoking records of patients were incorrect. 'If we asked a patient if he smoked he would say "no," and we would find out that he had stopped the day before. . . . A special smoking history form was later devised for cancer patients."

Smokers under-report. Smokers under-reported in this case. EEOC caught them. I "need protection" from smoker behavior that conceals a hazard for years, in violation of AR 1-8 and other rules. Please approve this case.

The under-reporting has perverted purposes, including smoker desires to have their "sadistic life quite unimpeded," they "liked blood" and the "powerless" aspects of their victim, insight obtainable from A. A. Brill, in Internat'l Journal of Psychoanalysis, Vol. 3(4), pp. 430-444 at 437-8, Dec. 1922. The under-reporting left their "sadistic life quite unimpeded," and concealed the harm (tobacco-caused lung injury) for years.

The under-reporting of the tobacco quantities involved arises from smoker symptoms of mental illness. Thus, Dr. Francis J. Holt testified that I "needed some protection from" smokers (T. 14). Army access to data on smoker behavior from "around the world" is evident from documentation including but not limited to In re "Agent Orange" Product Liability Litigation, 97 F.R.D. 542 (1983). Smokers want their "sadistic life quite unimpeded," and concerning me (based on my successful 25 Jan. 1980 outcome of my June 1979 grievance), "to feel that" I am "powerless." Installation smokers (unlike less mentally ill smokers) "liked blood," i.e., refused to alter their non-compliance with the conditions precedent of AR 1-8, i.e., "liked" asthma, chronic bronchitis, heart disease, etc., even going so far as to cause such in me. Cf. data from A. A. Brill, in Internat'l. Journ. of Psychoanalysis, Vol. 3(4), pp. 430-444 at 437-8, December 1922.

In order to keep their "sadistic life quite unimpeded," the installation smokers under-reported tobacco smoke levels, even going so far as to claim having banned smoking--a clearly false claim. It took many years to have the false claims overturned, until 8 April 1983 when EEOC, p. 5, noted that "protection" "actions were not even attempted." The hazard was confirmed 20 June 1983 by Mr. Russell's issuance.

Smoker under-reporting is common. They want their "sadistic life quite unimpeded." Under-reporting is a method of achieving their perverted goal. Such behavior is a separate and additional danger, concerning which I "need protection."

Tobacco-induced brain damage is another factor in smoker under-reporting. Note The Lancet, Vol. I(1751), p. 303, 21 March 1857, ". . . smoking causes insanity . . . ." Indeed, "in the post-mortem examinations of inveterate smokers, cretinism is always present," The Lancet, Vol. I(1740), p. 23, 3 Jan. 1857. "The permanent destruction of brain tissue is reflected in . . . Impairment of inner reality and ethical controls--with lowering of behavioral standards . . . ," characteristics of brain damage cited by Dr. James C. Coleman, in Abnormal Psychology and Modern Life, 5th ed., 1976, pp. 460 - 461. Impaired ethical controls help explain the under-reporting. (The vast Army access to data, including on the effects of brain damage, explains why the Army placed multiple conditions precedent in AR 1-8.)

Brain damage has another result, as Dr. Coleman notes at 477, listing examples of impairments "resulting from brain damage" including "Acalculia--Loss of ability to do simple arithmetic." Such loss of ability explains local under-reporting, including confusing ppm and per cent data, disregarding the limits set by OSHA, etc.

Sadism, impaired ethical controls, and acalculia--all are factors in smoker under-reporting the tobacco smoke quantities. In smoker brain damage, moreover, "there is not the least thought of possible impropriety," since "a grandeur narcosis" as well is involved, data from James L. Tracy, M.D., in Med. Rev. of Reviews, Vol. XXIII(12), pp. 815-820 at 818, December 1917. All these factors interrelate to produce under-reporting, another behavior I "need protection" from.

"It strikes us as highly irregular and inequitable to expect a defendant" (me) "to prepare a defense against accusations known to be untrue by the accuser" (installation), insight from Nye v. Parkway Bank & Trust Co., 448 N.E.2d 918 at 919, n. 2 (1983). This is clearly the case where, as here, the installation's "own documents proved" that its claims "were 'purely bull.' 664 F.2d at 894," Litton Sys., Inc. v. AT & T Co., 700 F.2d 785 at 810 (1983). The installation "had no realistic hope that" reviewers of integrity "would approve" its claim since, at least since 19 June 1979, with the installation's own legal analysis rejecting its claims, "its own people thought that" installation claims "were 'purely bull,'" Litton Sys., supra, at 811. Reviewers with integrity (EEOC, MESC, etc.) all rejected the local claims.

The installation claims were made without an advance notice, specificity, or right of reply given to me. No job qualifications standards were ever cited, for the reason that there are no such requirements. Smoking is not a requirement. Even if it were an "undue hardship" to control the endangerment, that would not create job requirements; but of course, there is no "undue hardship" since a "business necessity" and qualification requirements are needed for even beginning the process of claiming hardship. Moreover, there are benefits, and benefits only, in enforcing AR 1-8 criteria against endangerment, as well as against the pre-endangerment (pre-sick leave) aspects of smoking. Local insistence on citing only "smoking" per se is "'purely bull.'" The real issues relate to "facts beyond mere" smoking behavior as such. Cf. People v. Wolfe, 449 N.E.2d 980 at 987 (1983), "We have here, however, some facts beyond mere improper passing." Likewise, "We have here . . . some facts beyond mere" smoking as such. When there are "some facts beyond mere" one level of behavior, sanctions (civil and criminal) begin to arise. At the "some facts beyond" "the line," the "one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line," Boyce Motor Lines, Inc. v. U.S., 342 U.S. 337 at 340 (1952), juxtaposed with Wolfe, supra. See an example of smoker behavior crossing "the line," discussed in Commonwealth v. Hughes, 468 Pa. 502, 364 A.2d 306 (1976), wherein there were "some facts beyond mere" smoking as such. Likewise, here there are "some facts beyond mere" smoking as such. There is endangerment, and pre-endangering aspects.

No specificity has been provided. For example, no job qualifications data has been provided. That lacking voids the case ab initio. Claims made apart from "job requirements and qualifications" are "'purely bull.'" Here, "the job requirements and qualifications" have "never been" cited (and there has been no advance notice in which they could have been, for me to reply), much less, "formally changed," Sabol v. Snyder, 524 F.2d 1009 at 1011 (1975). MSPB knows better than to sustain the local misconduct, but does so maliciously, defying principles of Stalkfleet v. U.S. Postal Svc., 6 MSPB 536 at 541 (1981), on the necessity "to examine the position descriptions"; cf. Coleman v. Darden, 595 F.2d 533 (1975). The installation has not offered either "'relief'" to control the endangerment, or specificity. Refusing specificity is "not reasonable in relation to" civil service specificity rules, so damages for the lacking are sought; cf. Brandt v. Olympic Const., Inc., 449 N.E.2d 1231 at 1234 (1983), in the context of not making "a reasonable offer of settlement," including specificity and relief.

Quantities

JAN 2 1985

Doctors' analyses of the dangers of tobacco smoke show that doctors are not "hung up" on quantities. For example, see data from Edward J. Huth, M.D., in Annals of Internal Med., Vol. 69(1), pp. 163-165 at 164, July 1968, applicable to forced/involuntary smoking, "The evidence that smoking, especially cigarette smoking, causes avoidable illness and death is convincing and unavoidable evidence. This evidence . . . continues to accumulate . . . any physician who was not convinced . . . should read" more. Note the advice is to "read," and not to do mathematical computations on quantities. Tobacco smoke is inherently dangerous; hence, doctors study death rates; and the medical literature is replete with studies of death and disability rates, not of quantity rates.

Doctors, especially, do not ask smokers to tell them quantity rates. People suffering from acalculia, and suffering from impaired orientation for time, place, and person are not the ones to ask.!!

Even if local smokers could do mathematics, which they clearly can't, they would not be able to remember any answers long enough to write them down, and report them.

Doctors emphasize essentials. Tobacco amounts, like other unnecessary amounts, "do not have to be quantified," cf. Meil v. Piper Aircraft Corp., 658 F.2d 787 at 790 (10th Cir. 1981). Tobacco amounts "do not have to be quantified" to recognize that the hazard caused the problem at issue. Tobacco amounts "do not have to be quantified" to provide "protection" from smoker dangerousness, behavior, abusiveness, inability to conform to rules, refusal to even allow the review process to occur, etc., etc.

Note that "any physician who was not convinced . . . should read" more, Huth, supra.

It has long been established that "smoking causes insanity," data from long before such modern data as, e.g., penicillin, as is apparent from The Lancet, Vol. I(1751), p. 303, 21 March 1857. Thus, it is not reasonable to ask insane people about the very matter which caused their insanity. It is not reasonable to ask smokers about tobacco smoke quantities. A sane answer from a smoker should not even be expected. (That is not necessarily the smoker's "fault." The problem is with the person who asked the smoker). The proper answer to dealing with smokers, is not to question them about their mental disorder, quantities involved that caused it, etc. A proper way to deal with smokers is noted in AR 1-8 (32 CFR 203), and a like approach from Dr. Huth, supra, at 164, "Each physician has a duty to . . . discourage the use of tobacco . . . act in his community and society to discourage and discomfort the smoker." Mathematical computations from smokers should not be solicited; acalculia is not competent mathematics. Treating smoker input/acalculia the same as competent input is not fair to smokers. Smokers need encouragement to recover; treating acalculia-caused input as acceptable is counter-productive to smoker recovery.

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The extortion and embezzlement committed by installation officials with the active assistance of MSPB officials arises from their mutual hostility to rules on safety, mental health, etc. The decision process by installation officials to commit extortion to try to coerce me to retract my requests for compliance with AR 1-8, etc., began in 1979. One of the early examples of their coercive and unlawful intent included "derogatory references" "in an agency's publication," apt words from the 23 Feb. 1982 EEOC decision, p. 2. When that did not deter me, or cause me to withdraw my requests for compliance, "the suspension came about" on 17 March 1980, data from Col. Benacquista's deposition, p. 47.

Note aspects of what comprised "the sequence leading up to . . . the time when the suspension came about." First, see Dr. Holt's testimony, p. 42, on the widespread hazard, "there's a hazard for all these other people. . . . Yes. Yes. . . . People smoking in their vicinity is hazardous to them."

Note p. 41, "They're not allowed to remain in the vicinity of a health hazard. . . . Maybe they'd be getting so-called administrative leave. . . . You get rid of the hazard? That's correct." The correct status when there is a hazard is definitely excused absence. This is well-established information in the civil service.

P. 41 continues, "you don't punish people for hazards." How would an employee such as me be punished for the behavior of other people causing a hazard. Dr. Holt provides the answer on what would be punishment for a person such as me seeking a halt to a hazard: "They'd be on sick leave."

Putting me on sick leave, and then medically "disqualifying" me despite the "consistent and clear evidence" of my ability to perform the duties of record, was clearly recognized on 9 April 1980 (by Mr. Perez) and on 8 April 1983 (by EEOC headquarters) as punishment for me. They recognized a suspension or termination when they saw one.

Installation insubordination against AR 1-8 threshold conditions precedent before smoking can be "permitted" is typified by Col. Benacquista's denunciation of AR 1-8, "It doesn't make sense to have a Command getting involved in the personal habits of its employees . . . ." (Dep. p. 25). Thus, there were other "complaints of people with regard to smoking," and "I understand there were others," admitted Col. Benacquista, p. 11. But he refused compliance, and punished me for seeking compliance, by having me put on sick leave, as an extortion measure. Note p. 11 of the 25 Jan. 1980 USACARA Report, "the other nonsmokers also have rights even though they have not actively pursued such rights," or complained ineffectively and unsuccessfully. On the other hand, I, a trained personnel specialist familiar with rules and grievance procedures, filed and <u>won</u> the favorable Report on the very first try.

Why suspend me? Installation officials oppose a precedent of compliance in any work area whatever. Compliance in my work area would lead, foreseeably, to others' successfully obtaining compliance in their work areas. I declined to retract my request for compliance, so was suspended/terminated, to prevent the compliance process from starting.

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The extortion case of U.S. v. Wilford, 710 F.2d 439 (CA 8, 1983), provides especial insight when compared with Rookard v. Health and Hospitals Corp., 710 F.2d 41 (CA 2, 1983). Extortion involves effort to pressure a person to do, or not do, something against his will. Extortion is thus an additional offense above and beyond reprisal. Rookard is a wrongful discharge case related to reprisal. Wilford is an extortion case. My situation involves extortion, and then even so much as embezzlement of my pay by installation officials.

The wrongful discharge case provides insight. Rookard was "asked to" do certain improper acts. She noted multiple employer acts of misconduct. Others "resented" her "decision and therafter ostracized her." Here, smokers clearly "resented" my desire to have rules enforced and obeyed. They retaliated with worse than having me merely "ostracized." They retaliated with vicious accusations, overruling of medical input, firing me, and refusing to allow review by impartial outsiders such as USACARA (after USACARA ruled in my favor 25 Jan. 1980).

At 44, Rookard reported misconduct by the employer to the government. "She returned the permits to the State Education Department and advised the Department that they had been invalidly issued." Here, I noted that smoking was "permitted" invalidly, i.e., without the threshold conditions precedent being met. USACARA agreed that the conditions must be met, on removing smoke, not causing discomfort, etc. Note the parallel with Rookard's situation, impartial review by the "HHC's Inspector General's Office" was supportive of Rookard. (Here, numerous reviews have supported me: USACARA, OPM, MESC, EEOC, etc.) (Note, though, that that refers to reviews the installation could not obstruct; now the installation obstructs my efforts to obtain a review of the misconduct after 25 Jan. 1980, once I was fired 17 March 1980.)

Note p. 46, n. 5, "Rookard's high position, combined with the Inspector General's report finding merit in her allegations . . . could reasonably have been expected to prompt an investigation of the claim of retaliatory discharge." Here, I have a personnel background, have written job descriptions, have used Handbook X-118, and obviously know that smoking is not in any way a job requirement. Hence, there is no basis at all for disqualification. (The first step in classifying is review of standards; the first step in reviewing a claim that a person does not meet requirements, is to see whether a requirement as alleged, exists.) Here, the installation has no case, and is misusing the agency data on smoker mental disorder in order to take advantage of MSPB officials.)

At 47, "The conclusion is inescapeable that . . . shabby treatment of" me "and the discharge were both intended to make it clear to" local "personnel that blowing the whistle would not be tolerated and would be met with swift retribution." Installation hostility to AR 1-8 is clear. Compliance with it "would not be tolerated," and my requests for compliance were "met with swift retribution." Here, the installation went well beyond the misconduct noted in Rookard, supra. See extortion cases such as Wilford, supra.

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Extortion is clear. See cases such as People v. Atcher, 65 Mich.App. 734, 238 N.W.2d 389 (1976), and United States v. Wilford, 710 F.2d 439 (CA 8, 1983). Note apt points from Wilford (extortion in an employment situation). There the extortion related to behavior "of unlawfully demanding" funds, p. 441. Here, the behavior admitted by Col. Benacquista, consisted "of unlawfully demanding" a withdrawal of my request for compliance with pertinent rules.

Note p. 442, "At least one driver refused to pay the fee." Some people react that way to extortion. Here, the installation decided on overruling the "consistent and clear evidence" of my being "able to return to work" on 17 March 1980 and thereafter, i.e., the installation decided on my "suspension or termination" 17 March 1980 and thereafter, an apt phrase from the 8 April 1983 EEOC decision, p. 6.

Note p. 443, n. 5, "The Hobbs Act, 18 U.S.C. § 1951, provides in pertinent part . . . (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Cf. Atcher, supra, and Michigan law (which must also be obeyed). Note that a government position is a type of "property." Note that I did not not consent to withdrawing my request for rule compliance/enforcement. Hence, the installation went beyond extortion, to outright embezzlement--the failure to remit my pay. All such misconduct was done "under color of official right."

Note p. 443 further, on the offenders reaction when caught, "The union also agreed to refund membership fees to several drivers." Convictions are valid anyway. Here, the criminal misconduct by installation offenders must be prosecuted even if the installation were suddenly to agree to comply with the rules, implement the 25 Jan. 1980 USACARA Report, provide a safe job site, and/or place me on excused absence pending providing a safe job site. Col. Benacquista, "Dr." Holt, C. Averhart, E. Hoover, R. Shirock, etc., have committed offenses against society, not just against me.

Note that extortion charges would apply even if I had been agreeable to being coerced into retracting my request for compliance with AR 1-8, etc.

Note p. 444, n. 9, "It is well settled that the requisite 'fear' under the Hobbs Act may be fear of economic loss." See also the cited authorities. Here, I have been faced with actual "economic loss" as well as "fear of economic loss" in addition to that already inflicted. Moreover, tobacco smoke kills. Killing people produces much worse "loss."

The various offenders "associated" themselves "in some way with the criminal venture and willfully participated in it as" they "would in something" they "wished to bring about," p. 448. All the cited persons "participated in" the offenses--albeit "under color of official right" tailored to misconduct within their individual roles. "Dr." Holt "participated" with "color" of pretended medical "right." The overruling of the "consistent and clear evidence" was "participated in" by several offenders--all who "wished to bring about" their common goal of hostility to AR 1-8, etc.

The extortion and embezzlement committed by installation officials with the active assistance and cooperation of MSPB officials is clearly unlawful. It is in violation of well-established principles of law against ex parte communications. Especially, it is in violation of principles of law contained in cases such as U.S. v. Wilford, 710 F.2d 439 (1983); People v. Atcher, 65 Mich. App. 734, 238 N.W.2d 389 (1976); and State v. Gates, 394 N.E.2d 247 (1979). Installation officials oppose AR 1-8, and committed extortion and embezzlement to coerce from me a change in my anticipated testimony.

AR 1-8 shows that "an environment reasonably free of contamination . . . does not endanger life or property, cause discomfort or unreasonable annoyance to nonsmokers, or infringe upon their rights." Those are characteristics of a complying environment. It is clear that compliance "actions were not even attempted," as EEOC rightly noted 8 April 1983, p. 5. The installation chose to use a pattern of embezzlement and extortion, because it "refuses to alter" the non-compliance (the smoker behavior at issue). As in Atcher, supra, the extortion constituted a series of demands that I alter my anticipated testimony, and to assert compliance where such in fact did not exist. See Col. Benacquista's testimony, "The job was available. All he had to do was to say, 'I agree that this is reasonably free of contaminants,'" p. 62. Col. Benacquista wanted me to overrule the 25 Jan. 1980 USACARA Report. For example, see p. 14, Item III.B. and D., "Management has not provided information which proves that the air in Mr. Pletten's work area is reasonably free of contamination," and, "there is no evidence that an analysis of the air content was made . . . ."

Compliance "actions were not even attempted." EEOC is right. Col. Benacquista admitted why compliance actions were not even attempted, "It doesn't make sense to have a Command getting involved in the personal habits of its employees . . . ," p. 25. Such insubordination against the AR 1-8 threshold conditions precedent before smoking can be "permitted" (as distinct from the "ban" issue) crossed the line, from insubordination, to criminal misconduct. Col. Benacquista and installation smokers are not the first smokers to cross the line from insubordination into criminality; see Com. v. Hughes, 468 Pa. 502, 364 A.2d 306 (1976), for another example. (See also cases such as U.S. v. Tedesco, 635 F.2d 902).

By 17 March 1980, it was clear to the installation that, unless criminal misconduct by them were effected, I would not alter my anticipated testimony. So by 17 March 1980, installation officials decided to commit the extortion/embezzlement noted in the record. (Actions such as "derogatory references" "in an agency's publication" --noted by EEOC 23 Feb. 1982--had not been successful in coercing me into retracting my request for compliance actions to begin.) The embezzlement took the form of the suspension noted by EEOC. See Col. Benacquista's recollection of "the sequence leading up to, I guess, the time when the suspension came about," p. 47. It is clear from his testimony that "the sequence leading up to . . . when the suspension came about" 17 March 1980 and thereafter comprised my declining to alter my anticipated testimony, despite the efforts to coerce me into retracting.

Installation officials committed extortion, embezzlement, etc. There is no defense for them. Thus, the refusal of processing of my requests for review took place as a calculated obstruction pattern. Obstructing people from working is extortion as in, for example, U.S. v. Wilford, 710 F.2d 439 (1983).

Installation hostility to AR 1-8, OSHA, etc., is clear. That hostility and negativism toward compliance actions has the effect that installation cooperation with the 25 Jan. 1980 USACARA Report was non-existent. The installation "refuses to alter" its non-compliance, as EEOC accurately noted 8 April 1983, p. 6. Installation negativism against compliance actions produced "the sequence leading up to . . . the time when the suspension came about," evident in Col. Benacquista's testimony, p. 47. Note Col. Benacquista's insistence that I had to agree to alter my anticipated testimony, "All he had to do was to say, 'I agree that this is reasonably free of contaminants,'" p. 62.

See Dr. Holt's insubordination against the AR 1-8 conditions precedent, "I would just want a statement that he can tolerate the work environment as is," p. 71. Dr. Holt's negativism against AR 1-8 is clear. His negativism is especially apparent considering his testimony, p. 14, that I "did need protection . . . from the" smokers. His negativism is egregious. Note his testimony, p. 42, admitting the widespread hazard at the installation, "And there's a hazard for all these other people. . . . Yes. Yes. . . . People smoking in their vicinity is hazardous to them."

When there is a hazard, that is when the threshold conditions precedent in AR 1-8 do not provide for smoking to be "permitted." However, when I declined to alter my anticipated testimony, that was "the time when the suspension came about," p. 47 of Col. Benacquista's testimony. See a similar extortion case, People v. Atcher, 65 Mich.App. 734, 238 N.W.2d 389 (1976).

Dr. Holt wanted "a statement" supporting the hazard "as is." Col. Benacquista wanted the same. Compare pages 62 and 68, his demand for retraction of a change in the environment. The medical letters emphasized that I was "ready, willing, and able to go to work" in accordance with the job requirements and qualifications of record. Col. Benacquista characterized the references to the hazard as "not addressing . . . that other problem" concerning "'just the way that environment is today,'" i.e., a hazard as Dr. Holt made clear. Col. Benacquista noted that "if you looked at them closely it's quite clear that what the doctor was saying was that the environment in his present work space was not reasonably free of contaminants," p. 24. Dr. Holt said the same about the hazard to others, p. 42, "People smoking is their vicinity is hazardous to them."

See the 25 Jan. 1980 USACARA Report, p. 11, para. II.F., "the other nonsmokers also have rights even though they have not actively pursued such rights." Installation officials committed extortion and embezzlement against me to try to coerce me to stop my requests that "actively pursued" rule compliance. That is why they overruled the "consistent and clear evidence" of my ability to work. Extortion is clear. Embezzlement is clear.

MSPB Pattern of Multiple Errors JAN 2 1985

1. It has not "even recognized" the lack of X-118 requirements, a lacking repeatedly pointed out by OPM, including as recently as 30 Jan. 1984. Cf. the like USACARA analysis 25 Jan. 1980, p. 9. The accurate 8 April 1983 EEOC analysis confirms MSPB "incorrect interpretation of the applicable regulations," p. 6.

2. The unlawful local and MSPB intent in firing me before even starting to begin the compliance process is to preclude and obstruct EEOC. Under EEOC processes, my cases (cited 23 Feb. 1982 by EEOC) seek an initial start of the compliance process. The installation and MSPB fear EEOC integrity in noting their gross misconduct. Their unlawful intent is to obstruct EEOC processes on my behalf. EEOC has already noted aspects of the obstruction. The obstruction is not "random," but is purposeful. MSPB is anti-EEO, cf. Lamphear v. Prokop, 703 F.2d 1311 (D.C.Cir. 1983).

3. The threshold conditions precedent before smoking can even be "permitted" have been noted by EEOC and USACARA, "only to the extent that it did not cause discomfort or unreasonable annoyance to others," EEOC, p. 5. MSPB fixates on the word "threshold," but refuses to even address the real "threshold," the various rules EEOC and others have so astutely pointed out. The installation "refuses to alter" its non-compliance with the real "threshold" requirement, as EEOC accurately noted, p. 6.

4. Smoking has been locally "permitted" without regard to the real "threshold" criteria. The fixation on the word "ban," is diversionary, to divert attention off the improperly "permitted" smoking/endangerment. The diversion of attention onto the word "ban" is designed to obscure reality. The use of the word "ban," by innuendo is designed to connote that smoking is properly "permitted" under the "threshold" criteria, an innuendo obviously false, and lacking in specificity. (Mr. Russell's repeated references to the hazard, by themselves, show violation.)

5. MSPB ignores the legal principle that "the loss which must be borne by someone should be suffered by the person at fault," Kuhn v. Zabotsky, 224 N.E.2d 137 (1967). Smokers cause the danger, not me. Hence, excused absence is warranted.

6. MSPB "incorrect interpretation of the applicable regulations" includes disregard of the duty as "necessary" under safety, which threshold duty must be met before ever reaching the "reasonable" aspects of "accommodation." That was first among the points I won in the 25 Jan 1980 USACARA Report, p. 14. See also EEOC accurate recognition of the word "necessary," 23 Feb. 1982, p. 2.

7. MSPB ignores the unsafe smoker behavior. Smokers are not allowed to be "accommodated" unless they can show compliance with the "threshold" conditions precedent. Since they cannot show such, MSPB has twisted the rules on their head, to claim the issue is "accommodating" people such as me whose behavior is complying with the threshold.

8. Mr. Russell distorted the MESC analysis in refusing res judicata effect. Cf. Valparaiso U. Law Rev., Vol. 13, p. 485, 1979, "a person with only a right arm has a disability, but the same person is unimpaired in relation to jobs which only require one arm." Smoking is not "required". Hence, I am "unimpaired" in law.

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Improper Testimony

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MSPB unlawfully honors improper testimony. Local personnel (E. Hoover, J. Benacquista, D. Ztallings, etc.) who are insubordinate against safety rules, qualifications rules, AR 1-8, etc., and whose views have no legitimacy, gave incompetent and irrelevant testimony. See People v. Matulonis, 115 Mich.App. 263, 320 N.W.2d 238 (1982), even "an expert witness's opinion of the law is both incompetent and irrelevant. People v. Drossart, 99 Mich. App. 66, 76-77, 297 N.W.2d 863 (1980)." The views of insubordinate people such as the above, show only their insubordination, and confirm it.

Note the grotesque horror in the 20 June 1983 corrupt issuance from V. Russell, p. 4, citing "Dr." Holt's legal opinion. His personal views are incompetent and irrelevant, especially when contrasted with the 19 June 1979 installation legal office's own unqualified and absolute analysis, "Army Regulation 1-8 does give officials the authority to ban smoking in areas under their jurisdiction," Exhibit 8g of the 25 Jan. 1980 USACARA Report. EEOC noted similarly, "the agency had the authority to ban smoking from its buildings," p. 5 of the 8 April 1983 accurate EEOC analysis. All levels of the agency have the authority. Indeed, they have the duty to cease permitting smoking (as distinct from banning it) whenever the uniform threshold conditions precedent for permission are unmet. Note the other outrages committed by V. Russell, p. 8, ignoring the professional analyses, while honoring the incompetent and irrelevant insubordinate denunciations of obeying AR 1-8.

MSPB officials are corrupt. Their being personally corrupt explains their refusal to honor the uniform threshold conditions precedent before permission for smoking is authorized. That personal corruption explains their accepting incompetent, irrelevant and insubordinate views, in brazen defiance of the fact that those insubordinate views have been rejected by all reviewers of integrity.

Note how MSPB officials insist on proving and re-proving their personal corruption. Note their bizarre insistence on limited areas such as restrooms. They do this without citing any of the uniform threshold conditions precedent that apply there as well. USACARA and EEOC and the installation's own legal office understand the legal duties/conditions apply everywhere. Causing a hazard in a rest room is unwise and dangerous, cf. Rushing v. Texas Co., 199 N.C. 173, 154 S.E. 1 (1930). "An employer has a duty to prevent and suppress hazardous conduct by employees, and this duty is not qualified," NR & CCI v. OSHRC, 489 F.2d 1257 at 1266, n. 36 (1973).

MSPB officials premise their decision on the endangerment, but refuse to apply safe rules to control the hazard. (They use the criminal tactic of two sets of books.) And "knowing full well" the wrongfulness, they continued their misconduct 24 Oct. 1984. Cf. NAACP v. DPOA, 591 F.Supp. 1194 at 1196 and 1219 (1984), there "the union did nothing." Here, the installation "did nothing. Its officials, indeed, testify denouncing the rules. That is incompetent.

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Corrupt Misprocessing/Consolidating Cases

The installation refuses to allow any review of my case except by MSPB, which the installation corrupted and/or bribed by ex parte means, i.e., without a hearing, as EEOC alluded to, p. 3, 8 April 1983. Note the 23 Feb. 1982 EEOC decision, citing case 01.81.0324, "Wrong information conveyed to Merit Systems Protection Board." MSPB officials are clearly receptive and amenable to false input from the installation; the installation, knowing full well that this is the case, is protecting MSPB (which it has corrupted) by refusing review.

Writing corrupt reports is a technique in obstruction of justice, as is clear in the case of U.S. v. Shoup, 608 F.2d 950 (1979). Corrupt report writing in this case uses the technique of consolidating my cases, using data from later cases to justify actions in prior cases, disregarding that personnel at TACOM have changed, etc. (Of course, the obstruction of justice began with Col. Benacquista's corrupt extortion actions, admitted in his deposition, p. 62, demanding altered testimony from me. Cf. People v. Atcher, 65 Mich.App. 734, 238 N.W.2d 389 (1975), and U.S. v. Kibler, 667 F.2d 452, cert. denied, 456 U.S. 961 (1982).)

The corrupt use of consolidation techniques is clear in the case. The record shows this. MSPB behavior does not show honesty. It invents false claims of actions taken; EEOC caught it; it refuses to even admit the extent to which EEOC caught its falsehoods. Even with honest reviewers (which MSPB is not), "Consolidation is improper where the overlap of proofs is merely incidental and where consolidation may prejudice a party because of possible confusion by the trier of fact. Sullivan v. The Thomas Organization, PC, 88 Mich.App. 77, 86; 276 N.W.2d 522 (1979), cited in Cohen v. Cohen, 125 Mich.App. 206 at 212, 335 N.W.2d 661 at 663 (1983). MSPB cannot use Gen. Stalling's views from the removal case to justify suspending me years before he came to the installation. In fact, MSPB cannot lawfully use any data from the removal case, to justify my suspension. They are separate, and must be justified independently. Since no reasons were found by MSPB from the suspension cases to justify my being suspended, clearly there were none at the time, much less, in an advance notice/specificity. The suspension must be reversed therefore. Once it falls, there is no absence upon which to allege justifying the removal. So then the removal fails also.

Once MSPB and installation offenders are brought to trial for their multiple crimes, then and only then, may their cases be consolidated, as their unlawful behavior is part of a "common plan." See People v. McCune, 125 Mich.App. 100, 336 N.W.2d 11 (1983). Consolidating their cases is a quite different matter, from consolidating mine. Whatever their position then may be on consolidating their cases, a careful analysis will be foreseeable from the court then--more consideration than MSPB has given me.

Consolidating cases is clearly a calculated obstruction of justice tactic by MSPB. No rule of law mandates consolidation, so please reverse; cf. Biafore v. Baker, 119 Mich.App. 667, 326 N.W.2d 598 (1982). Worse, here the consolidation is corrupt.

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MSPB officials have demonstrated a pattern of behavior that includes but is not limited to "incorrect interpretation of . . . applicable regulations." MSPB officials have likewise demonstrated a pattern of assertions "not supported by . . . evidence." See the accurate EEOC analysis, p. 6, 8 April 1983. The MSPB pattern of unresponsiveness to normal stimuli reflects "a real derangement of . . . mental lives" of MSPB personnel, insightful phraseology borrowed from Dr. Lyle Tussing, Psychology for Better Living, 1959, p. 345. Such MSPB "real derangement" is foreseeable since "individuals with psychopathic personality makeup, who tend to exploit power for selfish purposes and have little concern for ethical values or social progress, often become leaders," data from Dr. James C. Coleman, Abnormal Psychology and Modern Life, 5th ed., 1976, p. 10. Such real derangement is also foreseeable based upon the prevalence of smoking ("obviously widespread," as the DSM-III, p. 178, notes), and smoking has long been known to cause insanity.

The symptoms of mental illness displayed by MSPB officials include unresponsiveness to normal legal principles. MSPB officials reverse reality--thus confirming the reality, indeed the severity, of their tragic derangement. For example, Victor Russell on 20 June 1983 references the danger inflicted upon me, a blameless victim of tobacco-inflicted injury. His symptoms show disregard for the well-established legal principles cited in Kuhn v. Zabotsky, 9 Ohio St.2d 129, 224 N.E.2d 137 at 141 (1967), "the loss . . . should be suffered by the person at fault." Instead, the severity of his unresponsiveness to well-established stimuli is his bizarre view that "the person who is blameless, mentally sound and injured should be required to suffer the loss" of pay, job, career, etc. Mr. Russell displays "real derangement," i.e., is "insane in the legal sense of the term." Cf. People v. Matulonis, 115 Mich.App. 263, 320 N.W.2d 238 at 240 (1982).

The insane, oblivious to reality, do not even recognize rules; hence, they cannot conform to them, and cannot comprehend the wrongfulness of the failure. Here, MSPB officials have not even recognized that smoking is not to be initially even "permiited" unless the threshold conditions precedent are first met. The "real derangement" that MSPB officials parade includes their use of the word "threshold" repeatedly--without comprehension of where the "threshold" burden is. The installation has to "prove" compliance with the "threshold" conditions precedent. Yet MSPB officials, confirming their "real derangement," base the adverse action against me on the installation refusal "to alter" its non-compliance with the threshold conditions precedent. (The extant danger warrants excused absence for me, i.e., I should not "suffer . . . loss," a simple application of a well-established legal principle. Cf. Snyder v. Four Winds Sailboat Centre, Ltd., 701 F.2d 251, re "some very simple principles of law." Excused absence reflects such application, yet mentally disturbed MSPB officials lack such comprehension.)

MSPB officials neither direct elimination of the hazard, nor excused absence for me pending actions to halt the hazardous smoker behavior. Multiple precedents and technical studies show the hazard--in terms of smoker mental disorder, the harm to smokers, the harm to nonsmokers, the ingredients tens, hundreds, or thousands of times above OSHA limits, etc. Thus, there is no excuse for not following the pertinent "very simple principles of law."

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The 8 April 1983 EEOC decision is accurate. It is consistent with the prior 23 February 1982 decision on the installation pattern of misconduct (refusal of the installation to implement the 25 January 1980 Report, misprocessing my requests for relief from that refusal, and for relief from other installation misconduct). The 23 February 1982 EEOC decision was not appealed by the installation, and is res judicata, including on the refusal by the installation to have implemented the USACARA Report. The installation anger at that Report did "extinguish" the compliance process, so it never began, despite my many pleas for the compliance process to begin.

EEOC has noted the local pattern of misconduct. Part of the local misconduct includes ousting me summarily on 17 March 1980. The local EEOC representative, Mr. Henry Perez, Jr., twice noted and documented in writing references to my termination. He did this in a 9 April 1980 letter, and in his report in Docket No. 01.82.1399, 2 September 1981. He provided these materials to the installation each time. Such analyses provide insight on why the installation decided on refusal to process my EEO complaints, and on why the installation has refused to implement the 23 February 1982 decision, and on why the installation and MSPB devised the joint effort to oppose MSPB jurisdiction and use only ex parte communications.

The 8 April 1983 EEOC decision noted MSPB disregard "of the applicable regulations," "the evidence in the record as a whole," and disregard of installation disregard and non-recognition of the rules and of the 25 January 1980 USACARA Report. The EEOC analysis is accurate. Indeed, the MSPB errors EEOC found and documented are part of a pattern of MSPB errors. Other MSPB errors have been noted by various appellate courts. Examples include but are not limited to:

Lanphear v. Prokop, 703 F.2d 1311 (1983). MSPB refused to accept an "EEO office" finding of discrimination. Here, MSPB ignores the USACARA Report, the EEOC analyses, the MESC and OPM analyses, etc. MSPB officials display an arrogant, "know-it-all," attitude; all reviewers but them are wrong, in their opinion. At 1313, Mr. Redenius displays an attitude like that of MSPB refusal of jurisdiction, but nonetheless deciding aspects of "merits" without regard for "applicable standards of proof." The court noted, "Redenius also stated that he had not needed to interview appellant since he was already well aware of" (alleged) facts. MSPB clearly feels it can ignore rules on hearings and on evidence--in a like attitude of arrogance of feeling "already well aware of" (alleged) facts. EEOC showed MSPB its errors, at p. 5, compliance "actions were not even attempted." (EEOC is right; the installation did "extinguish" even attempting compliance, due to the anger of installation personnel such as Mr. Hoover at the USACARA Report, and at me for having brought it about (as Ms. Bacon confessed 29 April 1980).)

Rustrata v. MSPB, 549 F.Supp. 344 (1982). MSPB failed to take account of all the pertinent rules. Here, MSPB ignored what was presented, and made intentionally false claims of actions taken, actions "not even attempted." It refuses me a hearing to present my case, as EEOC noted, p. 3. MSPB ignores all other reviewers, and the numerous court precedents showing the full "authority" involved, and refuses to even comment on/address the lack of a requirement for smoking, excused absence during the pendency of a hazard, etc.

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MSPB ignores the basic rules involved, the facts, the lack of job qualifications requirements for smoking, time limits including time limits for reaction to an EEOC decision, and the source of the endangering conduct at issue. The rules are directed against those who commit the endangering, not against those endangered. MSPB ignores the entire hiring and employment process, including its very beginnings. See Standard Form 171, which asks about smoker diseases "which might be a hazard to you or to others," and lists diseases caused by smoking, "heart disease, a nervous breakdown, epilepsy, tuberculosis, or diabetes." Civil service principles want to avoid employment of dangerous people. No SF 171 questions relate to diseases caused by not smoking; not smoking does not cause diseases, and is not dangerous to self or others. Thus, MSPB insistence on misrepresenting the source of the endangering conduct is not only wrong, it is malicious. SF 171 was developed by the CSC, now OPM. OPM, unlike MSPB, has some competent staff members, who have noted the installation failure to show a nexus with the source of the conduct. The critical nexus is the source, not the mere fact of the danger. OPM decisions to date are based on the fact that dangerous conduct by others (smokers) is no showing at all concerning me. That others are dangerous is not a showing of "incompatible with either use service or retention in the position" for me. What the danger by others does show, however, is a basis for excused absence for the victim(s) of the endangering conduct by others (smokers).

MSPB chooses to ignore basic civil service rules, and basic principles of employment. On the other hand, MESC is competent, so it supported my being ready, willing, and able to work. MESC was informed and aware of the hazard, but its people are competent. MSPB employees to date have not demonstrated competence. Thus, they ignore the MESC decision, based on the well-established principle that the endangering conduct of others does not properly result in adverse action against the person (me) on the receiving end of the dangerous conduct. Various precedents show that people who are dangerous to themselves and others can be, and are, denied unemployment compensation. My conduct (not smoking) is not dangerous to anybody, myself or others. Since the MSPB position denouncing the competent analysis of MESC was rendered sua sponte, the MSPB position is "'purely bull,'" Litton Sys., Inc. v. AT & T Co., 700 F.2d 785 at 810 (1983). Thus, "steep penalties" against MSPB for its behavior are warranted. Installation officials "had no realistic hope that" a competent reviewing organization such as MESC would violate the well-established principles on persons who are really discharged for being a danger to themselves or others in terms of their own conduct. Thus, the installation "neglected to" "request a redetermination" by MESC when given the opportunity 14 Aug 1981; since the installation "neglected to follow" "this course," res judicata applies, Reed v. Allen, 286 U.S. 191 at 198 (1932), cited in Fed. Dep't. Stores, Inc. v. Moitie, 452 U.S. 394 (1981).

Smoking is dangerous and does "affect third persons," McIntosh v. Milano, 403 A.2d 500 at 512 (1979), i.e., smokers are dangerous to themselves and others. Thus, SF 171 asks about smoker diseases. MSPB has not "even recognized" smoker "conduct" as the source of the problem. It simply uses the misleading word "environment," maliciously to obscure the dangerous smoker conduct. MSPB misuses words "for the injury that the process alone will work upon" me, Litton Sys., 810.

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The criteria cited by MSPB in Mosely v. Department of the Navy, 4 MSPB 220 (1980), have no relevance to my situation--a situation of an external hazard. When there is an external hazard, employees are placed on excused absence pending correction of the hazard. This is well-established.

MSPB use of irrelevant criteria is inexplicable. It is not specified as applicable in situations of external hazards by any "command of . . . law," U.S. v. City of Chicago, 549 F.2d 415 at 435 (1977). MSPB has not provided any basis for the use of the Mosely criteria. Chicago, supra, at 431, continues, "The logic of criterion-related validity assumes that the criterion possess validity." MSPB "assumes that the" Mosely criteria "possess validity," but MSPB has offered no evidence, no "command of . . . law," no studies, no nothing, to support the bare assertion.

At 432, Chicago, supra, indicates, "No studies . . . were ever introduced into evidence. Mere testimony that" something "has been validated, without a record of validation, is insufficient . . . Albemarle, 422 U.S. at 428 n. 23, 95 S.Ct. 2362 . . . ." There has been no "testimony" that the Mosely criteria have "been validated" or are relevant to a situation of an external hazard. There has been no testimony showing that there is some "business necessity" for using the Mosely criteria. But even if MSPB had attempted to offer some "testimony" on the relevance of the Mosely criteria, that would not be sufficient. Evidence backing up such "testimony" would be needed, in the form of "a record of validation," such as by "studies." But the record is devoid of any effort at all, even de minimis, for showing the relevance of the Mosely criteria. Mr. Pletten has asked for an advance notice from the agency, for specificity, for the right to reply, etc., but has been refused. MSPB is supposed to review cases from agencies, not be the initial source for the allegations.

Chicago, supra, continues, "Here, the vagueness of the governing criteria and the defendant's failure to offer any articulable standards to guide the application of these criteria" shows discrimination. The accused discriminating government officials "failed to demonstrate" validity. Here, the situation is the same. The installation failed to demonstrate the validity of the Mosely criteria. MSPB likewise "failed to demonstrate" their validity. Thus, excused absence/duty time is appropriate as I have pointed out since the very beginning appeal in this matter.

EEOC and USACARA have shown the installation pattern. The installation "repeated violations . . . have been established. . . . Victims of discrimination suffer irreparable injury, regardless of pecuniary damage. See United States v. Hayes International Corp., 415 F.2d 1038, 1045 (5th Cir. 1969); Ethridge v. Rhodes, 268 F.Supp. 83 (S.D.Ohio 1967)," Vietnamese Fishermen's Ass'n v. Knights of the KKK, 543 F.Supp. 198 at 218 (1982). It is clear that irreparable harm is being directed against me, by the use of unvalidated Mosely criteria, "because in our society" "other nonsmokers" "are willing to work for less" than compliance with rules such as AR 1-8, cf. Bullock v. Pizza Hut, Inc., 429 F.Supp. 424 (1977). Hence, the Mosely criteria are "clearly an inappropriate factor under the law." The use of unvalidated criteria against me is part of the reprisal pattern.

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Lanphear v. Prokop (MSPB), 703 F.2d 1311 (1983), provides insight with its similarities to my situation. MSPB claims are "belied" (at 1319); "simply not borne out by the Record Evidence" (at 1318); "decisively refuted by the evidence" (at 1317); etc. The analysis of the MSPB claims brings to mind other "'purely bull'" assertions, which "its own people thought" invalid, data from Litton Systems, Inc. v. Am. Tel. & Tel. Co., 700 F.2d 785 at 810-811 (1983).

Lanphear filed an EEO complaint, just as I have done. There, "the EEO office issued a recommended decision . . . The MSPB refused to accept this recommendation. Appellant filed a second complaint . . . When this complaint was also rejected by the MSPB, appellant brought the present action," at 1313-1314. The parallel with my case is remarkable. Here, EEOC has issued support of my position on 23 February 1982 and on 8 April 1983. EEOC cited my first decision which "the agency failed to abide by" since it (the 25 January 1980 USACARA Report on my 28 June 1983 grievance) was in my favor, and refuted the installation's claims on lack of "authority," and on a standard of "reasonable" as distinct from "necessary." EEOC noted the installation reaction, "the agency refuses to alter" its behavior, even after being told. So "appellant filed even more EEO complaints." Among them, one of them was a "second" complaint.

At 1315, n. 27, "an employer is held to the reason it articulates for rejecting an employee. If that reason proves pretextual, a court is not to substitute an alternative justification of its own accord." Compare this legal principle, with the MSPB behavior of 18 June 1981, claiming different reasons than the installation ever claimed. The installation had abandoned its claims of lack of "authority," etc., and relied on only a one-word "explanation"--"cannot." There was not even the slightest clue that the installation had any inkling of using "undue hardship" criteria in relation to AR 1-8. The very idea was, and is, nonsense. Yet MSPB, sua sponte, fabricated claims along "undue hardship" lines, even though "The agency does not argue" it. It was not the installation, but "the Board decided" it--arguing the installation's case for the installation, instead of judging the case, with the "employer . . . held to the reason it articulates." MSPB had previously been caught, in Horne v. MSPB, 684 F.2d 155 (1982), likewise disregarding "the grounds invoked by the agency," words from SEC v. Chenery, 332 U.S. 194 at 196, 67 S.Ct. 1575 at 1577, 91 L.Ed. 1995 (1947). MSPB evidently does not respond to normal stimuli, such as court precedents in general, and court precedents directed to MSPB in particular.

There, in Lanphear, supra, at 1313, MSPB claimed that it "had not needed to" follow established rules, "since" it "was already well aware of" the facts. MSPB has a pattern. Mr. Baumgaertner and Mr. Wertheim, etc., felt that they "had not needed" to follow rules on hearings, "applicable standards of proof," etc., since they were "already well aware of" the facts!! The installation feels likewise; it refuses to allow the compliance process to begin. Corrective "actions were not even attempted." Thus, installation officials refuse to speak to me, refuse to acknowledge correspondence, etc. For example, they did not reply to the 7 and 8 July 1981 acceptances. They refuse advance notice, reply rights, etc.; they were "already well aware of" their refusal to comply with the rules and their desire to fire me regardless of the rules.

Pattern of MSPB/Adverse Action Decision Errors JAN 2 1985

The 8 April 1983 EEOC decision accurately notes "that the decision of the Board constitutes an incorrect interpretation of the applicable regulations and is not supported by the evidence in the record as a whole." A pattern of such disregard of rules and evidence by reviewers of federal employee adverse actions is "a piece in a mosaic which, along with other evidence," is pertinent for "demonstrating a general discriminatory intent" and other unlawful intent, insight from Kyriazi v. Western Elec. Co., 461 F. Supp. 894 at 924 (1978). Examples of MSPB/adverse action decision errors are noted by courts, and include but are not limited to the following examples of the improper pattern:

MSPB anti-EEO bias:
Lamphear v. Prokop, 703 F.2d 1311 (D.C.Cir.1983)

Failure to be specific in notices/letters to employee:
Money v. Anderson, 208 F.2d 34 (D.C.Cir. 1953)
Burkett v. U.S., 402 F.2d 1002 (Ct.Cl. 1968)
Cooper v. U.S., 639 F.2d 727 (Ct.Cl. 1980)

Disregarding personal motives of government officials in taking action against employee:
Knotts v. U.S., 121 F.Supp. 630 (Ct.Cl. 1954)

Ex parte communications from management:
Camero v. U.S., 375 F.2d 777 (Ct.Cl. 1967)
Jaret v. U.S., 451 F.2d 623 (Ct.Cl. 1971)
Brown v. U.S., 377 F.Supp. 530 (D.N.D.Tex. 1974)

Disregarding internal agency analysis:
Spann v. McKenna, 615 F.2d 137 (3rd Cir. 1980)

Refusal to let employee have a hearing to present his case:
Churchwell v. U.S., 414 F.Supp. 499 (D.S.D. 1976)
Goodman v. U.S., 358 F.2d 532 (D.C.Cir. 1966)
Hanifan v. U.S., 354 F.2d 358 (Ct.Cl.1965)

Incomplete Analyses by Reviewers:
Rustrata v. MSPB, 549 F.Supp. 344 (D.D.C. 1982)
Horne v. MSPB, 684 F.2d 155 (D.C.Cir. 1982)
Williams v. Veterans Admin., 701 F.2d 764 (8th Cir. 1983)

Misprocessing disability cases:
Turner v. OPM, 707 F.2d 1499 (D.C.Cir. 1983)
Parodi v. MSPB, 690 F.2d 731 (9th Cir. 1982)

Closed mind in dealing with the employee so refuses to really consider employee input:
Elchibegoff v. U.S., 106 Ct.Cl. 541 (1946)

Disregarding uncontradicted input from employee:
Ceja v. U.S., 710 F.2d 812 (Fed., 1983)

The accurate 8 April 1983 EEOC analyses shows multiple local and MSPB errors like the above. The pattern was further confirmed by EEOC in its 23 February 1982 decision. Here, there is clearly a continued pattern of government "intransigence in failing . . . to redress any of its . . . acts, plus its additional acts" in disregard of the rules and the evidence and time limits, cf. Claiborne v. Illinois Cent. R. R., 583 F.2d 143 at 154 (5th Cir. 1978). The OSHA statute, 32 C.F.R. 203, the 25 January 1980 USACARA Report, the EEOC analyses--all are "designed to disrupt" the "status quo" pattern of local and MSPB violations; cf. U.S. v. Los Angeles, 595 F.2d 1386 at 1391 (9th Cir. 1979). Government "intransigence" is clear.

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Gambling by the Installation/MSPB

In NAACP v. DPOA, 591 F.Supp. 1194 at 1199 (1984), "the City took a gamble . . . ." Here, the installation and MSPB "took a gamble" many ways.

As is clear from the USACARA and OPM analyses, there are no medical requirements/qualification requirements for the presence of tobacco smoke. All the medical letters relate to a non-requirement, and the letters uniformly confirm that I am ready, willing, able, and eager to work. The installation and MSPB "took a gamble" when they acted to overrule and ignore those letters, and refuse to ever accurately refer to them.

The installation and MSPB "took a gamble" when they claim that actions took place prior to 17 March 1980, when in fact, compliance "actions were not even attempted," as EEOC accurately noted.

The installation and MSPB "took a gamble" when they try for a "dis"qualification, apart from a qualification requirement. They "took a gamble" again when they misdirect the case onto "accommodation," years after my ouster, without citing any X-118 or job description requirement against which to measure such.

They "took a gamble" when the EEOC analysis was ignored, and MSPB altered the time sequence, to superimpose alleged reasons (from the admitted removal), to apply years before, to the period before 17 March 1980. Clearly, there was no specificity in the suspension cases. That is why MSPB took data from the removal case file, to somehow retroactively try to sustain the suspension. (Gen. Stallings was not even at the installation in 1980; trying to support a 1980 action by using 1982 testimony is clearly a malicious abuse, and confirms lack of advance notice/specificity.)

They "took a gamble" when they premised an ouster on a common hazard, without regard for the well-established fact that in cases of endangerment, excused absence is the proper status.

They "took a gamble" when they ignored the 9 April 1980 letter from EEOC official Henry Perez, Jr., noting my then already obvious termination.

They "took a gamble" when they ignored the July 1981 acceptances of the actions MSPB said happened, in its 18 June 1981 decision. They "took a gamble" again when they refuse to even reference or discuss the July 1981 acceptances.

They "took a gamble" in firing me, before the decisions on my suspension were completed. They "took a gamble" that no reviewer would possess the integrity to note using removal data file material, to sustain the prior suspension (retroactivity in violation of fundamental due process/civil service principles.)

They "took a gamble" in finally (after many years) admitting smoker "desires" (as distinct from validated official job requirements), in view of my multiple appeals from 1980 on, citing that the adverse action was personal; cf. Knotts, v. US, 121 F.Supp. 630.

MSPB Pattern of Behavior (Fragmentation) JAN 2 1985

MSPB officials continually omit critical facts such that "the Commission is unable to perceive how the Board was able to reach any conclusion" (EEOC decision, 8 April 1983, p. 5). MSPB officials cause such reactions in others by their bizarre behavior.

MSPB officials display severe disorientation of perception. Compliance "actions were not even attempted," as EEOC noted, p. 5, and that is why the installation is premising ouster of me, on the extant hazard. Note the common hazard, "there's a hazard for all these other people . . . Yes. Yes," as Dr. Holt testified (p. 42). Since the safety rules have not yet been attempted to be enforced, that is why there is a common hazard. MSPB officials are dealing with an installation at zero percent (0%) compliance, with the regular rules. MSPB officials, disoriented in their perceptions, claim that having the installation come up to 100% compliance under safety laws, is somehow an "undue hardship" under some other law. As a part of their symptom pattern, MSPB officials try to play one law off against another.

As part of their symptom pattern, MSPB officials "seem quite willing to make false" statements, "in which facts are distorted to achieve a result," pertinent words from U.S. v. Marshall, 488 F.2d 1169 at 1171 (1973). Cf. obstruction of justice cases on altering reports, e.g., U.S. v. Shoup, 608 F.2d 950 (1979). Compliance "actions were not even attempted," as EEOC accurately noted. All of the MSPB claims of actions taken (past tense) were false. MSPB assertions (without specificity) on 24 Oct. 1983 of some undefined "improving" are criminally false, in brazen defiance of 18 USC 1001. "It strikes us as highly irregular and inequitable to expect a defendant" (me) "to prepare a defense against accusations known to be untrue by the accuser," Nye v. Parkway Bank & Trust Co., 114 Ill.App.3d 272, 448 N.E.2d 918 at 919, n.2 (1983). Here, far from "improving," the installation is premising removing me on the extant hazard--which AR 1-8 precludes as a condition precedent from even existing. That is the hazard Dr. Holt admitted.

In schizophrenia (symptoms of which MSPB personnel are displaying), "clarity of thought is lost in the confusion," data from Dr. Lyle Tussing, in Psychology for Better Living, 1959, p. 357. Claiming that accommodation occurred, while admitting a hazard simultaneously in the same document does "seem feeble-minded" and shows "Their indifference, their lack of judgment." Cf. DSM-III criteria, p. 188, on "bizarre delusions (content is patently absurd and has no possible basis in fact)," and on "incoherence, marked loosening of associations, markedly illogical thinking." Also note MSPB's "digressive, vague" terms, "marked impairment in role functioning," and "overvalued ideas," p. 189. Dr. Holt admits the common hazard, p. 42, "People smoking in their vicinity is hazardous to them," yet MSPB alleges somehow to the contrary, claiming in effect by alluding to accommodation, that all condition precedent rules have been met (e.g., no endangerment, no discomfort, etc.). If there were no danger, that voids the case against me. If there is a danger, that is a regulatory violation, itself voiding the case. MSPB displays "markedly illogical thinking" in not comprehending that.

No Advance Notice/Specificity

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No advance notice/specificity has been provided, despite the duty to have provided such data. Since the installation provided no advance explanation before suspending/terminating me, MSPB invents after-the-fact assertions that themselves lack specificity, and alters the past, to make the later claims, somehow explain prior events. MSPB brazenly flouts principles of law referenced in Horne v. MSPB, 684 F.2d 155 (1982). Cf. N.R. & C. Co., Inc. v. OSHRC, 489 F.2d 1257 at 1267 (1973), MSPB "suggestions, while not unattractive, came too late in the proceedings." I am "unfairly deprived of an opportunity to cross-examine or to present rebuttal evidence and testimony when it learns" pseudo-specificity "only after the" decisions sustaining adverse action come forth. In the civil service, specificity must be provided in advance; cf. Money v. Anderson, 208 F.2d 34 (1953). Please reverse the decisions, for lack of specificity and advance notice, and direct that no additional ousters can occur without advance specificity (e.g., X-118 requirements for smoking, if any; job description requirements for tobacco smoke, if any; quantities required; locations and buildings required; etc.)

Specificity is lacking; MSPB disregard thereof is deliberate, to maliciously and corruptly obstruct me as a nonsmoker from being able to defend against advance charges and allegations made known in advance.

Examples of lack of specificity, such that MSPB knowingly invented post-ouster claims, without following EEOC guidance to allow a hearing, to cross-examine installation and MSPB officials on their corrupt, mutual behavior pattern, utilizing mutual ex parte communications, hostile to AR 1-8 and other rules:

What union bargaining agreement? When? What clauses? What advance notice/specificity?

What supposed enforcement difficulties? What lobbies? What restrooms? What buildings? What restrooms? (Men's and/or women's)? What private offices? Hpw many? How often? What duration?

What relevance of smoker "desires" to the Handbook X-118? to the job description?

What requirement for tobacco smoke, if any? Which chemicals? How many? How much? How often? What duration? What advance notice/specificity on this?

Why not "more ventilation" instead of just "less smoking" Why not honor USACARA's guidance, p. 14, on 25 Jan. 1980?

How many buildings does Mr. Pletten service? How many do his co-workers, if any, service? What do coworkers, if any, do? Does one classifier service the entire workforce? Are there any proofs from management/co-workers (if any) saying this?

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Insight on the bizarre behavior of Ronald Wertheim, Robert Taylor, etc., is found in the Mich. Law Rev., Vol. 79(4), p. 754, March 1981, "criminal actions resulting from mental disease are often purposeful, intentional, and ingeniously planned." Such data provides insight on their bizarre insistence on limiting the case to only "accommodation," and then their perverted insistence that "accommodation" is somehow, inexplicably, "unreasonable."

(As EEOC accurately noted, there is no recognition of the existence of the 25 Jan 1980 USACARA Report, or of AR 1-8. Those are not "even recognized." Indeed, their very existence is not even acknowledged.) From the standpoint of reviewing the odd behavior of specimens undergoing analysis, the very fragmented way they handle the case is of professional interest for a better understanding of mentally diseased, and otherwise deviant individuals. Their extreme limitation on the issue they wish to address is of pathologic significance, and of interest for those studying the behavior of abnormal individuals.

The great emphasis I have placed on AR 1-8 and on the 25 Jan. 1980 USACARA Report is clear. The behavior of R. Wertheim, R. Taylor, etc., to ignore such aspects so they can fixate on only "accommodation" is a foreseeable tactic used by mentally diseased people, i.e., "actions resulting from mental disease are often purposeful, intentional, and ingeniously planned."

It does take effort of a type to carefully avoid addressing the actual issues raised: no job requirements shown, the existence of a hazard, excused absence during the pendency of the hazard, etc. (Of course, smoker mental illness is the cause of the hazard, so controlling mentally ill smokers as dangerous to themselves, precludes any need for ever reaching later steps in the series of instructions involved, on safety rules regarding the hazard to others such as me, on negligence and nuisance rules, and on the many other threshold conditions precedent before smoking can ever be even initially "permitted" under AR 1-8, etc.) It does take effort for R. Wertheim, R. Taylor, etc., to evade the actual issues raised, and to fixate on "accommodation" instead of on rules to halt the unlawful accommodation of smokers.

For them to evade addressing the actual issues raised, "intentional" action is involved, as evident from the Mich. Law Rev., supra. Their evasion of the issues raised, to fixate on the issue they choose instead of the issues actually raised, is "purposeful, intentional, and ingeniously planned," as is foreseeable in mental disease.

No doubt there is "discrimination" in this case, as distinct from an "accommodation" issue. The discrimination is the insistence on singling me out to show "practice" or some "accommodation" matter, as distinct from a "rule of law." Such fixation is to be reversed; cf. Biaforę v. Baker, 119 Mich.App. 667, 326 N.W.2d 598 (1982); Tex. & Pac. Ry. Co. v. Behymer, 189 U.S. 468 (1903); the various decisions from EEOC, MESC, USACARA, etc., going by rules vs. "practice," etc. AR 1-8 is "designed to disrupt" practice, cf. U.S. v. Los Angeles, 595 F.2d 1386 at 1391 (1979).

Mental disorder is a significant and prevalent medical problem. More precisely, mental disorders are a prevalent medical problem. There are many disorders. The problem "is obviously widespread," as noted by the DSM-III, 1980, p. 178. It is foreseeable that disturbed individuals would be employed by MSPB as presiding officials and Board members, since "individuals with psychopathic personality makeup, who tend to exploit power for selfish purposes and have little concern for ethical values or social progress, often become leaders," data from Dr. James C. Coleman, Abnormal Psychology and Modern Life, 5th ed., 1976, p. 10.

In this context, MSPB opposition to the safety duty is foreseeable, even though a specific victim, such as me, does not foresee such deviance and hostility to law, cf. McAfee v. Travis Gas Corp., 137 Tex. 314, 153 S.W.2d 442 (1941). The safety "adjective is unqualified and absolute," and "All preventable forms and instances of hazardous conduct must . . . be entirely excluded from the workplace," Nat'l. Rlty. & C. Co., Inc. v. OSHRC, 489 F.2d 1257 at 1265-7 (1973). The law is clearly established. The hazard from smoker conduct is well established. AR 1-8 and 32 C.F.R. 203 list diseases caused by tobacco smoke. The Army was familiar with the hazard of tobacco smoke long before the reference to such problem in Austin v. State, 101 Tenn. 563, 48 S.W. 305 (1898). Clearly, "the detrimental effects of cigarette smoking on health are beyond controversy," Larus & Bro. Co. v. FCC, 447 F.2d 876 at 880 (1971). Hence, there is "No cause because no change in circumstances," data from FPM Suppl. 752-1, S3-2.b.(1), Inst. 25, 11 October 1976.

Mr. Russell's symptoms include his irritability at the safety "adjective," i.e., his hostility to the word "free" as in "free" of a named hazard. See his symptoms, which he has voluntarily paraded for examination, 20 June 1983, including on p. 5, n. 3. Mr. Russell, like other MSPB officials, opposes the legal duties involved. Agencies are required to obey their own rules, as well as the laws of the land. They must also obey the criminal laws, including those of the State and area involved. Mr. Russell does not respond to and is not motivated by such stimuli.

"An analysis of the studies that deal with the components of cigarette smoke shows that carbon monoxide comes in the highest concentrations (approximately 3% to 5%) of all the potentially harmful elements in cigarette smoke," data from Dr. G. H. Miller, in Journ. of the Indiana St. Med. Ass'n., Vol. 72(12), p. 904, December 1979. Carbon monoxide levels of 30,000 to 50,000 ppm are far in excess of the 29 C.F.R. 1910.1000.Z limit of 50 ppm. Mr. Russell opposes the legal requirement concerning workplaces, i.e., on mandatory compliance with the safety "adjective," the word "free."

Moreover, Mr. Russell's reasoning ability is disturbed. The status on hazards does not include terminations of persons who report hazards. The correct response is (a) excused absence, and (b) compliance with the safety adjective thereafter. Mr. Russell has not demonstrated such comprehension. Thus, his symptoms of mental illness include the use of extra-legal phraseology ("lesser standard," p. 5, n. 3), i.e., hostility to the word "free."

In law, "'The lunatic must bear the loss occasioned by his torts, as he bears his other misfortunes,'" Barylski v. Paul, 38 Mich.App. 614, 196 N.W.2d 868 at 870 (1972). This includes MSPB lunatics. The record shows that there are no requirements for smoking; i.e., the installation has not even begun to begin developing an advance notice. Yet no MSPB officials (Martin Baumgaertner, Ronald Wertheim, Robert Taylor, Stephen Manrose, Victor Russell, etc.) have ever demonstrated the mental capacity to comprehend the lacking. Worse, insane people reject input from rational reviewers (USACARA, MESC, EEOC, etc.) ruling in my favor.

USACARA noted the lacking of job requirements on smoking, and expressly so stated, p. 9, 25 January 1980. OPM made a like analysis 30 January 1984. No personnel function and no court has ever found smoking to be a job requirement matter. The legal principle is well established. ". . . those individuals who are psychotic (insane in the legal sense of the term . . . do not respond to and are not motivated by normal stimuli," data from Lyle Tussing, Ph.D., Psychology for Better Living, 1959, p. 345. Cf. the like definition on insanity in People v. Matulonis, 115 Mich.App. 263, 320 N.W.2d 238 at 240 (1982). MSPB personnel lack substantial capacity to conform to the pertinent legal principles and to appreciate the wrongfulness of not complying. The type of persons who become MSPB presiding officials and Board members is evident from data that "individuals with psychopathic personality makeup, who tend to exploit power for selfish purposes and have little concern for ethical values or social progress, often become leaders," data from James. C. Coleman, in Abnormal Psychology and Modern Life, 5th ed., 1976, p. 10. Such is foreseeable, and the employer is responsible, even though a specific victim such as me, does not foresee such deviance in leaders, cf. McAfee v. Travis Gas Corp., 137 Tex. 314, 153 S.W.2d 442 (1941).

The installation has not identified any requirement for smoking, and certainly not for endangerment, discomfort, etc. There is no such requirement. Insane MSPB officials lack substantial capacity to conform to such reality. For example, see the severity of his mental derangement paraded by Victor Russell 20 June 1983, p. 9, his ravings on whether "MESC considered the hazard." The hazard is not required. Sane people understand this. Psychopaths at MSPB clearly lack such capacity. Cf. data from Eugene A. Schoon, in Valparaiso University Law Review, Vol. 13, 1979, p. 485, "For instance a person with only a right arm has a disability, but the same person is unimpaired in relation to jobs which only require one arm." Thus, p. 461, "the employer has no particular problems because the individual's ability is not affected." Claims of "undue hardship" (sua sponte from MSPB itself) do not respond to normal stimuli on first establishing job requirements, and then on providing an advance notice.

Here, of course, the hazard is external; thus, excused absence applies. The hazard causes broken arms, via accidents, for example, and also causes multiple diseases including those cited in AR 1-8. Smokers clearly endanger themselves and others by their behavior, another fact beyond Mr. Russell's mental ability to comprehend, p. 7. See his word salad reference to Stalkfleet v. USPS, 6 MSPB 536 (1981).

The record shows that Ersa Poston, Ronald Wertheim, Robert Taylor, etc., of MSPB are displaying mental illness. It is undisputed that they are mentally ill, and have been mentally ill for years. They clearly meet the criteria cited in People v. Matulonis, 115 Mich.App. 263, 320 N.W.2d 238 at 240 (1982), in terms of them being unable to "conform" their "conduct" and issuances to reality, much less "to the requirements of the law." Moreover, they do not "possess substantial capacity to appreciate the wrongfulness of" their "conduct" and issuances contrary to reality.

The definition cited in Matulonis, supra, "is . . . a standard . . . whether it usually is complied with or not," Tex. & Pac. Ry. Co. v. Behymer, 189 U.S. 468, 23 S.Ct. 622, 47 L.Ed. 905 (1903). Their issuances are the product and foreseeable output of mental illness, which includes aspects of fragmentation, delusions, confabulations, etc. For example, their symptoms of mental illness include a fixation on claiming that the job site was "improved." Their problem of brain damage as displayed shows confabulation, i.e., no explanation at all of the gap--just exactly (specifically) how were the local smokers "improved" so they would stop causing insanity in themselves? Were they rehabilitated? Have they been committed as mentally ill and dangerous people, as in Rum River Lumber Co. v. State, 282 N.W.2d 882 (1979)? Which ones? C. Averhart? E. Hoover? F. Holt? R. Shirock? Since MSPB issuances are themselves the product of mentally ill MSPB officials, specificity is not only lacking locally, but also at MSPB. When MSPB officials themselves are mentally ill, they foreseeably lack substantial capacity to even recognize the lack of specificity. That is, they are unresponsive to the normal stimuli of issues of specificity--a characteristic of legally insane people, as noted in Psychology for Better Living, 1959, p. 345, by Dr. Lyle Tussing.

Mental illness in MSPB officials has been established in accordance with a standard. The severity of the mental illness(es) within the range of mental disorder meeting the standard for mental disorder, is made clear by comparison with behavior of already committed persons. Cf. data from Dr. Benjamin Rush, in Essays, 2nd ed., 1806, at 262, "Persons labouring under that state of madness which is accompanied with a sense of misery, are much devoted to it" (tobacco), "hence the tenants of mad-houses often accost their attendants and visitors, with petitions for TOBACCO." Committed individuals can tell the difference between smoking____ not smoking_____. MSPB officials do not have such a grasp on reality as to be functioning at even that level of quality of committed individuals. (Cf. Jacobs v. MHD, 276 N.W.2d 627 (1979).)

That so severely disturbed individuals would be ranking officials at MSPB is foreseeable since mentally ill people or "individuals with psychopathic personality makeup . . . often become leaders," data from Dr. James C. Coleman, in Abn. Psych. and Modern Life, 5th ed., 1976, p. 10.

 Affiant's initials: _____

MSPB Pattern of Behavior (Fragmentation) JAN 2 1985

What MSPB Says	What MSPB Leaves Out
Claims of "improving" the working environment without citing any specificity	Regulatory compliance "actions were not even attempted," much less, the last step in the process (accommodation)
Admission that EEOC found that MSPB incorrectly interpreted the applicable regulations	Continued negativism toward the EEOC finding that MSPB claims are not supported by evidence
Repeated references to the word "accommodation" (all references are in a vacuum, apart from requirements of record)	MSPB never says what Handbook X-118 and job description requirements exist for which accommodation might apply
Repeated references to the hazard	No reference whatsoever to the OSHA, civil service and Army rules precluding hazards
Claims that I (as distinct from the classification office as a whole) service the "entire facility"	No references to what coworkers, if any, do; how serviced organizations are divided among coworkers; and the frequency of reallocating organizations serviced among coworkers
Allegations that I say I need accommodation (as distinct from requesting control of the admitted hazard, and excused absence pending same)	No mention of the fact I meet all the qualifications requirements of record, hence, no requirements exist to be "accommodated"
Cites smoker "desires"	Makes no mention of the many precedents showing that "desires" do not make requirements, much less, validated requirements, with advance notice/specificity
Cites private offices, corridors, lobbies, and restrooms (concrete examples)	No reference to the USACARA/EEOC/AR 1-8 guidance that smokers are not allowed to cause danger and discomfort anywhere; no specificity linking such areas to the essential duties of the job; no reference to common-areas ventilation capabilities to deal with such tiny percentage of the installation
Unsubstantiated allegations re union involvement and agency rule (taken out of context)	No reference to the fact that neither unions nor employers can override/negotiate government-wide rules, such as on accommodation

The Ex Parte Contacts, By Themselves, Require Reversal of the Case Herein

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Once again, ex parte contacts are the issue. Note the pattern of errors of appeals offices sustaining adverse actions improperly. See cases such as Sullivan v. Dep't. of Navy, 720 F.2d 1266 (1983); Ryder v. U.S., 585 F.2d 482 (1978); Camero v. U.S., 375 F.2d 777 (1967); etc. The pattern of condoning ex parte contacts is "a piece in a mosiac" to "establish" the "claims" at bar, cf. Kyriazi v. Western Elec. Co., 461 F.Supp. 894 at 924 (1968).

Here, the entire case has involved multiple ex parte communications, as EEOC noted 8 April 1983, p. 3. These arise from the installation refusal to implement AR 1-8, 29 CFR 1910.1000.Z, FPM Supp. 752-1, etc., on controlling dsngerous people (smokers). Installation reprisal motives (especially by Col. Benacquista, and E. Hoover) arise from the fact of the personal effect on them, if compliance were initiated.

Examples of ex parte actions against me (of which I learn only after the fact, due to the refusal to allow review/hearing, despite the duty cited repeatedly, as by EEOC) include:

The secret preparation of the newspaper comments against efforts to obtain compliance.

The 12 March 1980 memo signed by Mr. Hoover, challenging the continued grant of excused absence under FPM 630.11 due to the hazard.

Col. Benacquista's decision to overrule the medical confirmation of my ability to work. See his deposition admitting the suspension, p. 47; his purpose, to pressure me to stop referencing the hazard, pp. 62-63; and his frank admission that he was the person who made the medical decision, p. 13, overruling the medical input from the examining doctors. Note also the coordination with him, for the 28 March 1980 retroactive letter from Mr. Hoover. (Deciding on sick leave matters is not a Chief of Staff level function--except in a reprisal situation.)

Mr. Hoover's 18 April 1980 letter opposing MSPB review, admitting overruling excused absence due to the hazard (a hazard Dr. Holt testified to, p. 42).

Mr. Hoover's sham pretense my job takes me throughout the facility, as distinct from C. Averhart's testimony, p. 30, of me as 1/5 of the staff, doing a proportionate share, as per staffing ratios for classifiers. The fabrication by Mr. Hoover is markedly unlike his data sent to OWCP 19 Aug. 1980, referencing the "primary work site," and other areas in "might" go terms (i.e., in 1/5 the facility). Mr. Hoover is not disinterested; the AR 1-8 threshold conditions precedent before smoking can be "permitted" (as distinct from a ban) affect him.

The ex parte pressure on Dr. Holt at the beginning, caused loss to me of my irretrieveable "valuable opportunity" for him to have continued following FPM 630.11, cf. Sullivan supra, at 1273. Unpressured by Col. Benacquista and E. Hoover, the excused absence rule he admits knowing of (p. 41) would have been followed.

The Installation Was Successful in Corrupting/Bribing MSPB Officials

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It is undisputed that the installation corrupted/bribed MSPB officials. Note the 23 Feb. 1982 EEOC decision. The pattern of events before and after that decision is explained by a review of the multiple installation ex parte communications with MSPB, and of the corrupt MSPB issuances and reactions that resulted. Corrupting/bribing government officials to secure pro-tobacco behavior does occur, e.g., U.S. v. Goins, 593 F.2d 88 (CA8, 1979). Corruption/bribery to obtain false/distorted issuances does occur, e.g., U.S. v. Shoup, 608 F.2d 950 (CA3, 1979). Here, corruption/bribery of MSPB officials is undisputed. That the installation has succeeded in corrupting/bribing MSPB officials is clear from the peculiar behavior pattern MSPB officials have displayed, examples of which include their:

Willingness to accept installation ex parte communications.

Refusing me opportunity to present my evidence in a hearing.

Making multiple false claims of installation actions, when such were not even attempted.

Not even recognizing the agency's own rules.

Disregarding the 25 Jan. 1980 USACARA Report in my favor.

Disregarding the lack of any specificity/advance notice citing any requirement for tobacco smoke.

Ignoring the legal opinions/court precedents showing the authority to not permit, as well as to ban, smoking behavior.

Disregarding the safety duty ("necessary"), to fixate on an extralegal and unauthorized standard ("reasonable").

Disregarding the time limits for decision.

Refusing to react lawfully to the EEOC decision dated 8 April 83.

Disregarding the MESC decision, and that there is no requirement for tobacco smoke/danger.

Disregarding the repeatedly raised issue that smoking is personal (the opposite of a requirement), and that civil servants cannot lawfully be ousted for others' conduct.

Refusing to address the issue of excused absence applicable when there is a hazard.

Refusing to distinguish between not permitting smoking (under AR 1-8 threshold conditions precedent), and banning smoking.

Installation corruption/bribery of MSPB officials is undisputed. Installation corruption/bribery of MSPB officials has been successful in obtaining MSPB misprocessing of my appeals.

Bribery to obtain pro-tobacco behavior is a matter of public record, in U.S. v. Goins, 593 F.2d 88 (1979). Refusing to do one's job of providing complete analyses, an MSPB duty, does "constitute an attempt to obstruct 'the due and proper administration of the laws,'" pertinent words from U.S. v. Browning, 630 F.2d 694 at 701 (1980). Corruption involves not developing a proper written issuance, as in that case. Here, MSPB officials engage in like refusal to do proper analyses.

The tactics of criminal obstruction of justice can be noted as occurring within certain parameters. For example, even a corrupt report means that some report was issued. The element of the "giving of incomplete and misleading answers" distinguishes corrupt from non-corrupt reports.

Here, MSPB insists on emphasizing not the case framed by the installation (disqualification), but something else: the lack of an alleged rule which "forbade smoking throughout the agency facility," p. 5, n. 5 of the 24 Oct. 1984 corrupt issuance. The corruption is obvious: MSPB notes the alleged lack of one rule. But it totally ignores the lack of the critical rule for sustaining the agency case: a qualification requirement on tobacco smoke. There is no such rule. OPM (whose expertise is entitled to deference) can cite none. USACARA likewise can cite none. The installation, knowing full well this lack, can cite none. There has been no advance notice/specificity alleging a requirement.

The entire series of MSPB issuances is skewed off-course. MSPB has mishandled other nonsmokers' cases also, e.g., Parodi v. MSPB, 690 F.2d 731 (1982), etc., never mentioning the lack of a qualification requirement (and not mentioning that in hazards, two effects must occur: elimination of the hazard under safety rules, and excused absence for endangered employees, pending the correction of the hazard.)

The calculated MSPB criminal obstruction of justice of course involves the use of its false statements, which EEOC has already noted. But incomplete analyses form a major portion of the calculated MSPB obstructions. They utterly disregard the lack of the threshold condition precedent for a disqualification case: a qualification requirement.

Note the contrast with a non-corrupt decision, NAACP v. DPOA, 591 F.Supp. 1194 (1984). That decision does not bewail the lack of a law governing union contract negotiations. Instead, starting p. 1210, it cites principles and precedents covering the matter. In contrast, MSPB cites the lack of an alleged rule, and stops its analysis at that point. The alleged lack is the beginning point for analysis, not the end point. The incompleteness is the calculated MSPB obstruction of justice tactic. MSPB disregards the lack of a qualification requirement despite such fact being expressly brought to its attention; see my deposition, p. 4, etc.

Incompleteness and misdirecting the case onto other matters than the merits (the lack of a qualification requirement) is premeditated, calculated MSPB criminal obstruction of justice.

The installation has no case on the merits. There are no X-118 qualifications requirements for smoking. EEOC has already noted that the installation has not "even recognized" the agency's "own regulations" such as AR 1-8. Since there is no case, MSPB offenders E. Poston and R. Wertheim decided to make false statements, for the criminal purpose of diverting attention away from the merits. See the multiple false claims they issued 18 June 1981. MSPB and local criminals knew that the claims were fabrications. EEOC was likely to note the falsehoods, and in fact did so, on 8 April 1983. EEOC had noted similarly on 23 February 1982. Between February 1982 and April 1982, there was ample opportunity (in that period alone) for "'advising or procuring false testimony or statements,'" words from U.S. v. Browning, 630 F.2d 694 at 701 (CA10, 1980), such as is evident in the local and MSPB issuances thereafter, and continuing.

The period between September 1980 and June 1981 was also ample time for arranging (ex parte, by telephone), "'advising or procuring false testimony or statements,'" which falsehoods have been so brazenly recorded by MSPB 20 June 1983, and in the 8 November 1983 brief. The incentive for falsehoods by local and MSPB offenders is clear: their common hostility to AR 1-8, plus the added incentive of avoiding criminal prosecutions once the initial falsehoods were decided upon. Crime upon crime is a foreseeable occurrence in the criminal element. Browning, supra, is an example; the use of obstructive tactics arises from prior misconduct, when a review poses a risk of penalty, for prior misconduct.

MSPB officials, as well as local officials, have made false statements. Thus, additional false statements are designed to protect themselves individually and severally. Their misconduct began with their common hostility to AR 1-8. They decided to use falsehoods to obstruct it. One crime leads to another, and "one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line," Boyce Motor Lines, Inc. v. U.S., 342 U.S. 337 at 340, 72 S.Ct. 329 at 331, 96 L.Ed. 367 (1952). Cf. a like situation of crossing "the line" from disregard of an employer rule on smoking, over to criminal misconduct, Com. v. Hughes, 468 Pa. 502, 364 A.2d 306 (1976). Here, the various MSPB and local offenders expect foreseeably to benefit from the additional falsehoods and diversions used, to benefit by obstructing the criminal prosecutions that will foreseeably result from their initial falsehoods and violations.

The evidence of benefit to MSPB and local offenders is distinguishable from that in another obstruction of justice case, U.S. v. Shoup, 608 F.2d 950 at 956-7 (CA3, 1979). One of the persons involved "was to receive no compensation in exchange for his actions," p. 956. The court answered, at 957, "There would be little justification for placing on the prosecution the burden of proving that each conspirator expected to benefit . . . The agreement itself, along with other evidence of criminal or fraudulent purposes, demonstrated that the parties to it (1) manifested a disposition to criminal activity and (2) posed an enhanced danger to the community by their concerted, mutually enforcing actions." The local and MSPB behavior "poses distinct dangers quite apart from those of the substantive offense," which started as merely violations of AR 1-8. Cf. Boyce Motor, and Hughes, supra.

MSPB officials provide false and distorted data in their output which are purported to be MSPB decisions, as distinct from their own personal views. When MSPB falsehoods are caught, for example, by EEOC, MSPB officials corruptly refuse to acknowledge the extent of their falsehoods noted by EEOC. See the 8 August 1983 issuance, and the 24 Oct. 1984 issuance.

Recall that EEOC found that MSPB was wrong two (2) ways: (1) "incorrect interpretation of the applicable regulations, and (2) claims "not supported by the evidence in the record as a whole," p. 6, i.e., claims of "actions . . . not even attempted," p. 5, of the acdurate 8 April 1983 EEOC decision. Note that the accurate EEOC analysis of that date and of 23 Feb. 1982 is undisputed; nonetheless, MSPB refuses to note its own errors, and refuses to honor undisputed data, cf. Ceja v. U.S., 710 F.2d 812 (1983).

MSPB liars refuse to admit that their assertions of actions taken, were and are false, and were and are at all times, known by MSPB personnel to be false, as a matter of law. Note the 24 Oct. 1984 issuance, p. 2, refusing to note that MSPB claims were found to be false. Note the intentional falsehood on p. 6, footnote 7, citing "the accommodations offered by the agency," when MSPB officials are well aware that no offer has ever been made; and that the criminally false 18 June 1981 claims alleged that actions had already occurred (not just "offered"). Distorting the time sequence, and making false claims, are criminal violations of 18 USC 1001. The reviewer is requested to seek criminal prosecution of MSPB offenders.

Note that compliance "actions were not even attempted," as EEOC accurately noted 8 April 1983, and 23 Feb. 1982, p. 2. Note the continued MSPB pattern of falsehoods, p. 6, footnote 6, and on p. 1 of the 24 Oct. 1984 issuance, re-stating the criminal falsehood of the installation having done something "improving his working environment."

When bribery of government officials occurs, false statements by them are foreseeable. Bribery to obtain pro-tobacco behavior is noted in U.S. v. Goins, 593 F.2d 88 (1979). Here, a pattern of falsehoods by MSPB officials is clear, and is undisputed. MSPB officials are receptive to falsehoods, and to making and re-making false statements. Installation guilty knowledge of MSPB corruption/criminal proensities clearly explains installation refusal to process EEOC Docket No. 01.81.0324, "Wrong information conveyed to Merit Systems Protection Board," in defiance of the EEOC command of 23 Feb. 1982.

The installation "refuses to alter" its "smoke-filled environment," a fact accurately noted by EEOC on 8 April 1983. The entire thrust of MSPB assertions is to let the installation continue to do nothing. Any "improving" was "not even attempted." MSPB refuses to even quote or paraphrase EEOC accurately. Such refusal shows MSPB guilty knowledge of MSPB crimes.

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MSPB Corruption Produces Misrepresentations

In cases of corruption, obstruction of justice, bribery, etc., a pattern of falsehoods and misrepresentations is to be expected as output from the corrupted/bribed officials. Here, deciding officials have not "even recognized" the rules, and have violated 18 USC 1001 by making false claims of actions which "were not even attempted," as EEOC accurately noted 8 April 1983.

In cases where deciding officials have been corrupted, rules of law would commonly be disregarded. Here, the X-118 has been ignored. As installation officials recognize, but have corrupted MSPB to ignore, I meet all the requirements and qualifications of record. Ousting me was for extortion purposes, as is clear from Col. Benacquista's testimony.

The case involves this question, Can a person who meets all the qualifications and requirements of record be ousted for (alleged) failure to meet a non-existent requirement ("desires")?

All reviewers of integrity (MESC, USACARA, etc.) say no. The rules say no. But installation officials have corrupted MSPB with ex parte communications to say yes.

The case involves this question, Can a person be ousted premised on an endangering job situation when the agency's own rules preclude premising a case on a danger?

All reviewers of integrity say no. The rules say no. But installation officials have corrupted MSPB into ignoring the threshold conditions precedent before smoking can even be "permitted" --in order to obtain MSPB acquiescence to say yes.

Ousting a person who meets the qualifications and requirements of record, on a charge of not meeting a non-existent requirement (admitted to be merely non-management, personal "desires," p. 5, footnote 5, 24 Oct. 1984 issuance), is clearly a brazen prohibited personnel practice.

MSPB corruption is clear. MSPB ignores rules of law, and its own precedents. MSPB "corrupt obstructing or impeding of due and proper administration of the law" and rules involved is "tied to the giving of incomplete and misleading answers" and output, pertinent words from U.S. v. Browning, 630 F.2d 694 at 698 (1980).

MSPB disregards the duty to note the requirements of record ahd the job description, a duty it references in Stalkfleet v. U.S. Postal Service, 6 MSPB 536 (1981). "Workmen are not employed to smoke," MTM Co. v. MCP Corp., 49 F.2d 146 at 150 (1931). The Handbook X-118 and my job description agree, but MSPB has been corrupted to ignore them, without my being provided any advance notice/specificity to explain why.

 Affiant's initials: _____

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The record shows extreme under-reporting of the quantities of tobacco smoke at the installation, even to the extreme of claims of having banned smoking. EEOC noted the extreme under-reporting in its accurate 8 April 1983 decision. Compliance "actions were not even attempted," p. 6. AR 1-8 precludes smoker behavior when it does "endanger life . . . cause discomfort or unreasonable annoyance" etc. Actions to comply with those threshold conditions precedent "were not even attempted." The installation "refuses to alter" its non-compliance. It has long been known "that the detrimental effects of cigarette smoking on health are beyond controversy," Larus & Bro. Co. v. F.C.C., 447 F.2d 876 at 880 (1971). The local violations (emphasis--violations, plural) were obvious. The compliance process had not even started. Violations of multiple legal principles were obvious; that is why claims of having banned smoking were fabricated by "liar . . . scoundrel" officials; cf. Bishop v. E. A. Strout Realty Agency, 182 F.2d 503 at 505 (1950).

The "liar . . . scoundrel" officials claimed that controlling the hazard requires only "reasonable" efforts vs. "necessary" efforts. Their trying to divert attention off the actual requirement ("necessary") was among their first lies. Rejecting their false claim came about early on. See the USACARA Report, 25 Jan 1980, p. 14, para. III.C., use of the word "necessary" in rebuttal of the installation opposition. The duty to use the right word was one of the matters first ruled on in my favor, but the "liar . . . scoundrel" officials refuse to follow either the law or the Report, in defiance of the principles referenced in Spann v. McKenna, 615 F.2d 137 (1980).

The safety adjective is <u>not</u> "reasonably free" of a hazard, but is instead "unqualified and absolute," Nat'l. Rlty. & C. Co., Inc. v. OSHRC, 489 F.2d 1257 at 1265 (1973), a well-established fact despite the opposition of the "liar . . . scoundrel" personnel. Such "liar . . . scoundrel" personnel fabricated the claims of having banned smoking in order to conceal their violations. EEOC on 8 April 1983, fortunately for me, pointed out that the claims were untrue, i.e., "not even attempted."

Dangerous smoker behavior is required to be controlled, as the "liar . . . scoundrel" personnel know. (Since they refuse to obey the rules, they resort to pretending that the hazard has been eliminated, and to that end, they under-report the quantities of tobacco smoke extant, even going to the extreme of alleging a ban on smoking, as EEOC noted.) The liar/scoundrel personnel know that dangerous smoker behavior is supposed to be controlled. Numerous precedents cite examples of control and/or penalties for the lack of control. These examples include but are not limited to:

Shimp v. N. J. Bell Telephone Co., 145 N.J.Super. 516, 368 A.2d 408 (1976): smoker control under OSHA
Jones v. Eastern Greyhound Lines, Inc., 159 Misc. 662, 288 N.Y.S. 523 (1936): a negligence case on smoker misconduct/abusiveness
Hentzel v. Singer Co., 138 Cal.App.3d 290, 188 Cal.Rptr. 159 (1982): a mistreatment by smokers case
Smith v. Western Elec. Co., Mo.App., 643 S.W.2d 10 (1982): smoker control under safety rules
Rum River Lumber Co. v. State, Minn., 282 N.W.2d 882 (1979): a mistreatment/abusiveness by a smoker case

The source of the danger is the critical "nexus" that MSPB and the installation ignore "for the injury that" ignoring it "alone will work upon" me, Litton Sys., Inc. v. AT & T Co., 700 F.2d 785 at 810 (1983). Their injurious intent is clear from their disregard of the MESC decisions in my favor. Precedents show that unemployment compensation can be denied to people who are dangerous to themselves and others. Being on the receiving end of dangerous conduct by others is not a basis for claiming that a person is unable to work. MESC understands that. MSPB shows that it lacks capacity to comprehend that basic fact of employment/labor law. MESC went by rules, facts, and precedents, as it was "obligated to" do; cf. Marco Sales Co. v. F.T.C., 453 F.2d 1 at 7 (1971), "That an administrative agency is obligated to provide petitioner with an explanation for the difference in their treatment, is well established." MSPB has jumbled me in with persons whose conduct is dangerous to themselves and others, and has taken me out of the category of persons endangered by others' conduct. Persons who are endangered by others do not, repeat not, receive charges to sick leave, terminations, etc. MSPB has refused "to provide" me "with an explanation."

MESC was provided data on the danger, and on the unqualified and absolute safety duty to suppress the hazard. MESC was provided with a pertinent case citation, Shimp v. N. J. Bell Tele. Co., 368 A.2d 408 (1976) (T. 37), and with two references to 5 U.S.C. 7902 (T. 23 and 24). The duty is to provide safe working conditions; the installation has not provided me "with an explanation for the difference in . . . treatment." Other hazards are suppressed; and such suppression is not called "accommodation." Why the difference? Why the different label in this case? A century of cases do not label control of smoking as accommodation. Cases relative to tobacco are brought under pertinent laws (safety, tort liability, workers' compensation, the police power, etc.) I cite the same precedents. Why does MSPB insist on using only one law (on accommodation), and then simultaneously claim--that law is of no value? Why doesn't MSPB respond to the precedents?

MSPB is out of step, not MESC. Controlling smoking is "relatively trivial," Diefenthal v. C.A.B., 681 F.2d 1039 at 1042 (1982). The fact that the installation refuses to comply with rules, is not a cause of action against me. For me to prevail, I only needed to show ability to work in a safe worksite, and I did. That is all that is needed to prevail, with MSPB, but MSPB officials lack integrity, hence, do not conform their behavior to the specifications of law.

Controlling smokers is "relatively trivial." It is done "rather easily," Mich. Law Rev., Vol. 81(6), May 1983, p. 1481, n. 671, when an employer wants to comply. The "duty" is "to implement measures that will insure that violations will not occur," U.S. v. John R. Park, 421 U.S. 658 at 672 (1975). Cf. Quilici v. Village of Morton Grove, 695 F.2d 261 at 267 (1982), on a "right . . . so limited . . . that a ban . . . does not violate that right." Contrast that "right" (which is referenced in the Constitution), with smoking, which is not so mentioned. Controlling smoking is "relatively trivial."

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Government Lawyers' Misconduct: Obstruction of Justice

The installation has the burden of proof in this disqualification case, of showing a qualification requirement for tobacco smoke, and for showing that that (non-existent) requirement is unmet. Instead, in a clear and brazen effort at obstruction of justice, attention is diverted onto "accommodation," without any showing of what requirement for tobacco smoke presence is supposedly to be accommodated. Bribery to obtain pro-tobacco behavior is clear in cases such as U.S. v. Goins, 593 F.2d 88 (1979).

Cf. cases such as U.S. v. Browning, 630 F.2d 694 (1980), and Matter of Grimes, 414 Mich. 483, 326 N.W.2d 380 (1982). Both cases involved corrupt dealings with actual or potential witnesses. P. 384 cites R. Grimes as "in effect, counseling" a person "to make false or misleading statements." (Here, Dr. Holt has testified of the hazard, p. 42, "there's a hazard for all these other people. . . . Yes. Yes. . . . People smoking in their vicinity is hazardous to them." Clearly, 32 CFR 203 does not allow smokers to endanger people; neither does 29 CFR 1910.1000.Z. The fact of the admitted violation is conclusive evidence of non-compliance with the rules. An adverse action "cannot be effected if there is lack of compliance with departmental regulations," Piccone v. U.S., 407 F.2d 866 at 872 (1969).)

Here, the compliance process has never started. Despite my multiple efforts to obtain action from management (mandated by AR 1-8), nothing was done, and "there's a hazard for all . . . Yes" remains the fact. No attitude survey of non-smokers was taken, even though periodic attitude surveys of the workforce are an integral part of management-employee relations (my job for years). Management refuses to answer my letters, and refuses to process my cases. Such management refusal to act shows disdain that pales into insignificance by comparison, the union inaction cited in NAACP v. DPOA, 591 F.Supp. 1194 at 1218 (1984), "No response at all was given" and repeated admissions of "could not even recall," a common response in the installation transcripts.

Here, no installation effort to even show a job qualification requirement for tobacco smoke, much less, a "business necessity" for such a requirement if there were one (which there is not), was made. Note the questions asked by the installation lawyer, Emily S. Bacon. She disregards the fundamental lacking the case. It is the installation's job to prove its case. It is clear from the depositions of management officials who would foreseeably be called by her as witnesses to allege such a requirement (personnel background individuals such as E. Hoover, C. Averhart, J. Kator, E. Bertram, etc.), that she never asked. There are no such requirements, "knowing full well," avoided the matter--no evidence at all to show the threshold condition precedent for a disqualification case: a qualification requirement.

Clearly, MSPB lawyers and officials, "knowing full well" my pointing out the lacking (deposition, p. 4), have obstructed justice by their disregarding the lack, and by their evasive manuevers to distract attention off the lack of merits. Is the legal system like me, in the face of this, "virtually defenseless"? (a pertinent phrase from Grimes, supra).

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Starting Point Wrong As Used for Obstruction of Justice

The record shows criminally false statements by MSPB on a pattern basis. MSPB diverts attention off the merits, the lack of any job qualification requirement at all for tobacco smoke. Tobacco smoke is not necessary for any part of the job, much less, "the essential functions."

Upon receipt of the corrupt 8 August 1983 MSPB issuance, a review showed criminal refusal by MSPB to admit the extent to which EEOC had caught MSPB falsifications, falsifications committed in calculated, brazen defiance of 18 USC 1001. The criminal misrepresentation of the issues involved, showed that MSPB had already made up their minds to continue their pattern of misconduct. Bribery to obtain pro-tobacco behavior is clear, as in U.S. v. Goins, 593 F.2d 88 (1979).

An uncorrupt, unbribed analysis of the issue even from the wrong perspective of trying to see if "accommodation" were applicable, should proceed along these lines (thus promptly showing that "accommodation" is the wrong direction--to an uncorrupt, unbribed reviewer):

Step One. Identify the job requirements and qualifications of record to learn whether tobacco smoke is listed as required. Upon finding no such requirement, immediately recognize that accommodation is the wrong direction.

Another approach would be along these lines. Ask oneself, Is not smoking normal, or is smoking what is not normal? Note that nonsmoking is the norm. "Accommodation" of a person in the normal group (nonsmokers) would promptly be recognized as a contradiction. It is up to smokers to request permission for their other-than-normal behavior. Not smoking is not called a disease or cause of disease; whereas in the medical literature, smoking is called a disease and a cause of diseases and injuries.

Another approach would be along these lines. Is the matter of "accommodation" even relevant? Would a decision either way actually resolve the case? No. When a hazard is involved and beyond control, excused absence applies. See FPM 630.11. "Accommodation" issues are irrelevant to that.

Another approach would be along these lines. The installation admits that there is a hazard (Dr. Holt's deposition, p. 42). Safety rules specify employer prevention and suppression of hazardous conduct by employees. See NR & CCI v. OSHRC, 489 F.2d 1257 at 1266, n. 36 (1973). Compliance is called routine rule enforcement, not "accommodation." Accommodation is irrelevant.

Another approach would be along these lines. The hazard is a common hazard. Hazardous conduct is to be prevented and suppressed regardless of whether someone (e.g., Mr. Pletten) calls attention to the matter. Dealing with the common hazard for the others, would obviate any need to reach the instant case. Once the installation comes into compliance, individual cases such as this one would not even arise.

MSPB corruption caused them to go astray, especially with their wrong starting point for analysis.

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It is undisputed and, indeed, beyond disputing, that MSPB has engaged in making false statements. For example, relative to the 18 June 1981 issuance from R. Wertheim, etc., the 20 June 1983 issuance from V. Russell indicates that "The agency denies it ever made such an offer" as MSPB had alleged, p. 8, n. 6. Clearly, the 18 June 1981 issuance was not "technically accurate."

However, conviction for a criminal offense(s) of the type that MSPB has engaged in, does not become precluded even where there is "a technically accurate report," U.S. v. Shoup, 608 F.2d 950 at 959 (CA3, 1979). In creating MSPB, Congress "had bargained for an impartial evaluation" function. Smoking is personal, and adverse actions against federal employees such as me are not allowed for the personal reasons of others, Knotts v. U.S., 121 F.Supp. 630 (Ct.Cl.1954), a case oft-cited in my appeals. The local and MSPB behavior show that each deciding official has "colored his findings to further his personal goals." Installation officials do this because they want to "keep" smoking "going," cf. State v. Gates, 394 N.E.2d 247 at 249 (1979). Thus, deciding officials have "failed to remit" proper decisions, and thus, culpable individuals have "failed to remit" pay owed.

Shoup, supra, at 959, cites U.S. v. Manton, 107 F.2d 834 (2d Cir. 1939), "in which the defendant, a judge . . . protested that his conviction was improper because the prosecution had not proved that his decisions in the challenged cases in fact were incorrect." MSPB officials recognize that such argument would be particularly unavailing here. The MSPB issuances are not "technically correct." EEOC has already noted false aspects. USACARA long ago called attention to AR 600-20, which local and MSPB persist in ignoring. OPM and MESC have rejected the local claims. Etc., etc.

Shoup, supra, at 957, cites precedents. The U.S. Supreme Court has observed that "Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish." Here, of course, adverse action against a federal employee such as me is more than "one criminal" official "could accomplish." MSPB decisions (over a protracted period) involve more than what "one criminal" official "could accomplish." Here, false statements arise from multiple persons--from personnel officials, from the safety office, from legal personnel, from different echelons, from Chicago and D.C. MSPB officials, etc. "Group association for criminal purposes" such as falsification, diversionary tactics, etc., as evident here, clearly "poses distinct dangers quite apart from those of the substantive offense," Shoup, supra, at 957, n. 13, which "substantive offense" is the smoking in violation of AR 1-8.

Here, MSPB and local offenders have mutually conveyed their receptiveness to crime. They are amenable to commit offenses. This proclivity arises from the hostility to AR 1-8. Thus, compliance "actions were not even attempted." Local and MSPB "Concerted action" to obstruct AR 1-8 compliance "actions" being initiated "both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality."

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The record makes clear that MSPB has chosen to rehash and redecide the precise same issues as USACARA had already considered on 25 January 1980 in resolving Mr. Pletten's 28 June 1979 grievance in his favor. Considering the finality of grievance decisions under Army rules as discussed, for example, in Spann v. McKenna, 615 F.2d 137 (1980), MSPB has clearly erred. USACARA confirmed the full installation "authority," the fact that the real standard on matters of endangerment is "whatever action is necessary," not "reasonable, to suppress the endangerment, and that Mr. Pletten's desire to not smoke is not a matter of "suitability and qualification standards." "Workmen are not employed to smoke," as a long line of cases make clear, including but not limited to Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corp., 49 F.2d 146 (1931).

Once Mr. Pletten prevailed on all the issues which MSPB is now rehashing, and deciding differently, that should have ended the matter under Army rules on resolving cases. Mr. Pletten won; and the installation should have provided a non-endangering work site. Instead, it worsened the situation for Mr. Pletten. While Mr. Pletten did not foresee that this would happen, it was clear that installation management had no intention of complying with AR 1-8, or with any Report telling them to do so. The first evidence of this, is that the installation has not complied, even yet; secondly, the MSPB decisions are all premised on the extant endangering job site, "which the agency refuses to alter," despite AR 1-8, 32 C.F.R. 203, and the 25 Jan 80 USACARA Report, and EEOC findings (23 Feb 82 and 8 April 82) that the Report was not implemented. A third evidence of local intent is the discussion in the 23 Feb 82 EEOC decision concerning Mr. Pletten's complaint "that in an agency's publication derogatory references were made to his physical handicap." That happened in late 1979, after his June 1979 grievance, and before the 25 Jan 80 USACARA Report. Clearly, management saw the handwriting on the wall, and decided to begin to discredit Mr. Pletten, a process that has continued thereafter, and been joined in by MSPB. The installation refused to process Mr. Pletten's complaint about the "derogatory references," and EEOC commanded the installation to process the case. Knowing its guilt, the installation has refused to comply.

Smoking is not part of Mr. Pletten's employment, not as a matter of law, and not as a matter of fact. Smoking is not, as a matter of law, a part of either "duties" or "environment"; those are aspects subsumed under "employment," which smoking is not part of. Once USACARA ruled on all the salient points now being rehashed by MSPB, no changes in authority, rules, or job requirements occurred. For example, "the job requirements and qualifications had never been formally changed," Sabol v. Snyder, 524 F.2d 1009 at 1011 (1975). MSPB has not provided any reasons on how the standards and criteria have suddenly, and mysteriously, "changed." The MSPB claims that the standard is "reasonable" vs. "necessary" as ruled by USACARA; that "authority" is lacking; and that smoking is a job/qualifications requirement concerning which Mr. Pletten can be disqualified if he cannot meet that (non-existent) "requirement"--these claims are "annulled because of the absence of any finding . . . or consideration of" the contrary USACARA findings, Cantlay & Tanzola v. U.S., 115 F.Supp. 72 at 82 (1953). The "ultimate finding" purporting to justify his disqualification "must necessarily depend upon subordinate factual findings" on each point, N. Pac. R. Co. v. U.S., 241 F.Supp. 816 (1965). Lacking same, the installation case must be reversed.

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At the time of the 17 March 1980 adverse action against me, the installation claims were based on Dr. Holt's odd view and legal opinion that compliance actions of any type "cannot" be done. No claims of lack of "authority" or of "unreasonable" were made. Such claims had been abandoned based on the USACARA rejection of them on 25 January 1980. The MSPB fraud pattern beginning 20 June 1983 is malicious in its revival of claims that the installation had abandoned. The adverse action, if supportable at all (which it is not, based on lack of X-118 criteria on smoking, no notice, etc.), must relate to the reasons actually used. See Horne v. MSPB, 684 F.2d 155 (1982).

Victor Russell's corruption is clear. His behavior shows "the giving of incomplete and misleading answers" and decisions, insight from U.S. v. Browning, 630 F.2d 694 at 698 (1980). That he is a corrupt official is undisputed. His pattern is undisputable. His pattern of "incomplete and misleading answers" is in writing. Examples of his "incomplete and misleading" statements include but are not limited to the following:

P. 7 cites Stalkfleet v. U.S. Postal Service, 6 MSPB 536 (1981). However, he does not even mention its emphasis on the "position description," "legitimate job requirements," "the complete duties, responsibilities and qualifications," etc. Smoking is not a job requirement. It is not an X-118 qualifications requirement. It is not even cited in my job description. It is not required in any job description. My background includes being a Position Classification Specialist, who has reviewed and developed many job descriptions. The requirements must be stated <u>first</u>, but Mr. Russell disregards that. His misconduct is "tied to the giving of incomplete and misleading answers" and quotations.

P. 5-6 of Mr. Russell's issuance purport to address "specificity." Mr. Russell's malice is such that he does not cite any at all. No X-118 criteria are cited at all. No facts supporting the agency's conclusion of "cannot" are cited. No medical statements require a "smoke-free" job site, yet he claims that some do, without any at all being identified. No explanation of my duty location is stated. No statement that there is a hazard is evident in the agency claims; yet Mr. Russell has overruled the agency denial of a hazard, and said there is one. No specificity proving a hazard is evident in the agency input. No explanation for refusing the normal status for a hazard is given (i.e., excused absence), even though Dr. Holt admitted that was a viable alternative. The agency did not even claim that people had made any "offers" to try resolution; yet now the agency claims multiple "offers" were made. Etc., etc. Mr. Russell demonstrates that he is "tied to the giving of incomplete and misleading answers."

P. 7 misrepresents my "retaliation" input. Mr. Russell claims he "would have to find that" the statements showing my ability to work "were in retaliation." Mr. Russell lacks integrity. The "retaliation" arises from the overruling of the medical statements showing my ability to work. Mr. Russell gives "incomplete and misleading answers."

Mr. Russell's behavior demonstrates "corrupt obstructing or impeding of due and proper administration of the law."

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The local and MSPB team effort to divert attention off AR 1-8 onto "accommodation" and what agencies not under AR 1-8 are doing on the issue of smoking is part of the pattern of falsifications and other misconduct designed to obstruct AR 1-8 and a review on the merits. Local and MSPB officials object to AR 1-8 because compliance with it would have "effectively killed" smoking where it does "endanger . . . cause discomfort or unreasonable annoyance," etc., a concept from U.S. v. Browning, 630 F.2d 694 at 697 (CA10, 1980).

As a diversionary tactic, Mr. Robert Taylor on 8 August 1983 misrepresented my case. The MSPB pattern of falsifications began years ago. MSPB opposes AR 1-8; Mr. Taylor is so opposed to it that he does not even refer to it. His behavior is especially improper considering that EEOC had clearly called attention to AR 1-8, and I and USACARA on 25 January 1980, have made it (along with AR 600-20) the basis for my requests for relief. It is not necessary to reach other issues. Nonetheless, in defiance of EEOC and of my representation on the nature of the issues involved, Mr. Taylor insisted on phrasing the issue in terms of "whether the appellant is a handicapped person for whom a reasonable accommodation can be made." That issue is, of course, irrelevant. AR 1-8 is to be enforced directly. So are <u>all</u> the legal principles that have been successfully cited by nonsmokers in the hundreds of cases that have been brought on the matter of harm and problems generated by tobacco smoke. Nonsmokers' cases arose long before the "accommodation" criteria came into existence.

Mr. Taylor's malicious misrepresentation of the issue has no relevance at all. His malice is further noted by his refusal to specify doing what EEOC said to do. The record shows emphatically that I desire to raise the issue of the fraudulent local application for my disability retirement. The application was a condition precedent for a later effort to remove me. A proper notice was not sent; no reply was allowed therefore. No X-118 qualifications requirements were cited, hence, reply was not possible. Other violations were also clear. A hearing on that fraud is necessary. Since the conditions for a proper application were not met, the subsequent removal "action was never commenced," a concept from Siemering v. Siemering, 288 N.W.2d 881 at 883 (1980). It is thus not necessary to reach the issue of the later removal. However, Mr. Taylor refuses to consider my position.

Until the prerequisite rules are obeyed, it is not possible to reach "accommodation" issues. Cf. Browning, supra, at 701 on "'advising or procuring false testimony or statements,'" here, false input from the agency on accommodation--an irrelevant subject. The 8 August 1983 issuance "acted in a manner to produce a result which would obstruct the investigation." Mr. Taylor clearly asked for irrelevant material. His behavior must be viewed in the context of the falsifications by MSPB, including his own false claim of an "improved" job site (26 Jul 82). Mr. Taylor's request is worse than the behavior in U.S. v. Tedesco, 635 F.2d 902 (CA1, 1980), cert den'd., 452 U.S. 962 (1981). Mr. Tedesco claimed that he "did not endeavor to influence a witness because he made no explicit . . . request for specific testimony." He was convicted anyway. Here, Mr. Taylor clearly attempted to misdirect the case off the merits, onto "accommodation," i.e., onto a "specific" matter, an irrelevant matter.

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The 8 November 1983 brief from Robert Nutt and Steven Klatsky contains multiple false statements. Their purpose is clear. Their claims are "tied to the giving of incomplete and misleading answers," designed, arranged and procured for "corrupt obstructing or impeding of due and proper administration of the law," U.S. v. Browning, 630 F.2d 694 at 698 (CA10, 1980). While the brief is a series of falsehoods, misrepresentations, and other fraud, it provides insight that serves to emphasize the MSPB pattern of fraud. For example, consider the misconduct of Victor Russell on 20 June 1983. On page 2, Mr. Russell says that "the appellant now states a willingness to return to duty under the accommodations that were identified in the Board's Order of June 18, 1981." Mr. Russell's misconduct includes but is not limited to misrepresenting the time frame of my stated "willingness to return." It is not merely "now," but all along. Moreover, compliance actions with AR 1-8 are not properly characterized as "accommodations."

According to Mr. Russell, and the 8 November 1983 issuance refutes him, "The agency denies it ever made such an offer" as he lists, p. 8, n.6. The 8 November 1983 issuance makes claims of numerous offers. Mr. Russell cites none of those offers. Mr. Russell's behavior is "tied to the giving of incomplete and misleading answers," if numerous offers were in fact made. Mr. Russell's mis-conduct is particularly heinous if he ignored other offers, considering my admitted "willingness to return" based on the one and only "offer" ever alleged by the installation or MSPB, albeit the 18 June 1981 claims were fraudulently couched in past tense terms, whereas Mr. Russell couches them in other than past tense terms. The entire case is clearly based on local and MSPB "giving of incomplete and misleading answers."

According to the 8 November 1983 issuance, p. 10, "all of the buildings in which Mr. Pletten worked or needed to work had been posted with no-smoking signs." Mr. Russell clearly found the claim from the "testimony and the record evidence" as unworthy of belief. He gave the claim cited 8 November 1983, p. 10, no credibility whatsoever. Considering my willingness to return with just what Mr. Russell claims are compliance with "some lesser standard," if that, Mr. Russell's disregard of the overwhelming actions now claimed by the agency, can only be described as heinous maliciousness of the worst sort.

Clearly, in the matter of Robert Nutt and Steven Klatsky v. Victor Russell, one or more deliberate liars is evident. My position is impartial: the innuendo of each, that the other is a liar, is right.

Each of the three shows his behavior as "tied to the giving of incomplete and misleading answers." Their purpose is "corrupt obstructing or impeding of due and proper administration of the law."

According to the liars cited 8 November 1983, "all of the buildings in which Mr. Pletten worked or needed to work had been posted with no-smoking signs." That is clearly far more than just in the Civilian Personnel Office. The agency refused to take even limited measures, as EEOC noted 8 April 1983. Now, the agency commits fraud in the extreme, by making the outrageously false claims of 8 Nov 83.

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MSPB officials such as E. Poston, R. Wertheim, R. Taylor, S. Manrose, etc., have made false claims asserting an "improved" work site. The notorious 18 June 1981 issuance included multiple false statements, including a claim of "prohibiting smoking in the entire Civilian Personnel Division," p. 4. When MSPB officials make brazen false claims, they demonstrate that they are receptive and amenable to the receipt of false claims. They demonstrate their own personal lack of integrity, but especially, they demonstrate a receptiveness to falsehoods.

Receptiveness to falsehoods includes but is not limited to (a) willingness to make false statements, (b) unwillingness to retract false statements when notified by an appellant, (c) unwillingness to retract false statements when a reviewer such as EEOC calls attention to the falsehoods, (d) issuance of request for comments on a diversionary matter instead of on the merits, (e) failure to initiate sanctions or disciplinary action against perpetrators of falsehoods, etc. MSPB receptiveness to false statements is clear. The MSPB attitude is clearly demonstrated by its misrepresentation of the 8 April 1983 EEOC decision. MSPB refuses to admit its falsehoods. It refuses to recognize the pertinent rules. It refuses to address the merits.

The 8 November 1983 issuance takes advantage of the MSPB proclivity for falsehoods, diversions, misrepresentations, etc. Obstruction of rules such as on merits, qualifications, specificity, safety, etc., is the plan that MSPB and the agency have decided upon. Ex parte communications, especially by telephone, are a method by which obstruction is carried out. Falsehoods, and advising or procuring falsehoods, contrary to the written record are evident as a consequence. On 8 April 1983, EEOC noted that "evidence in the" written "record would indicate" that "such actions" as "The Board cited" "were not even attempted," pp. 4-5.

Criminals do get caught. For example, see U.S. v. Browning, 630 F.2d 694 (CA10, 1980). His "argument, although ingenious, is insufficient," so "'advising or procuring false testimony or statements'" and/or other violations, do result in penalties. Ex parte communications, "although ingenious," do not conform to the written "record," hence, they are "insufficient" to have the installation case prevail. EEOC caught the offenders.

Falsehoods, diversions, and other obstructions involve "seeking to influence the verdict of" MSPB unlawfully. Their violations are not "subtle," but are clumsy. Their efforts at "obstruction of the enforcement of the laws" and rules involved include but are not limited to diversions onto "accommodation," and off the merits--the prerequisite before even reaching "accommodation" issues. Browning, supra, at 700, indicates that "Any reasonable man would realize that conduct which sought to mislead and did mislead the government . . . was unlawful." False claims of an "offer" arise from MSPB "'advising or procuring false testimony or statements,'" and indeed, from MSPB's own false claims. MSPB officials are receptive to falsehoods, and are amenable to receiving them. Here, falsehoods serve to buttress the initial MSPB misconduct. Since MSPB officials have already made false statements, they are subject to prosecution. Hence, "'advising or procuring'" additional "'false testimony or statements'" is personal. Thus, the MSPB and agency team effort to obstruct "the enforcement of the laws" has come about.

When falsifications have occurred, and when witnesses have been counseled in committing perjury, and have been rehearsed in the subtle aspects of the offense, one of the standard defenses of an otherwise "virtually defenseless" "legal system," is the filing of additional cases. The rehearsed perjuries, for example, occur in Case # 1. Case # 2 exposes some perjuries. Case # 3 exposes more. Etc., etc. Case # X is then the case in which penalties or sanctions are imposed against the offenders. The ways by which falsehoods are exposed are "so well established in our jurisprudence as to require no citation," cf. 16 January 1981 A.S.H. letter, p. 3 (MSPB Docket CHØ75209201, etc.)

The filing of numerous cases is essential to show mass falsifications--to expose them promptly. Inexperienced personnel may have "a somewhat pristine view . . . of the general integrity of government officials," Bulloch v. U.S., 95 F.R.D. 123 at 143 (1982). That case shows a long, long delay, since multiple proceedings were not initiated by the plaintiffs who themselves clearly held a like "pristine view . . . of government officials."

Here, the installation offenders do much worse than merely "disclose only selectively the information . . . necessary . . . ." They make clear-cut false statements. Premeditated defiance of 18 U.S.C. 1001 is shown. They know their claims are false. Thus, they engage in "flight" from "and resistance to" review, Wangerin v. State, 243 N.W.2d 448 at 453 (1976). The local and MSPB conduct is much worse than in Bulloch, supra. There, even the culpable government submitted to a trial "May 10-13, 1982" (p. 124) on a case initiated "February 1981" (p. 142). Here, the delay has been much greater. That matter has its time-frame subsumed within the period involved here.

Here, the installation deliberately obstructs justice by its refusal to process cases. The installation, it may be said, does not have "a somewhat pristine view . . . of the general integrity of" MSPB officials. It has data confirming that MSPB officials are clearly willing to make false statements. It has data confirming that MSPB officials are willing to ignore the agency's own regulations. It has data confirming that MSPB officials are clearly willing to engage in ex parte communications. MSPB falsifications are so brazen that MSPB officials are even willing to misrepresent the bases upon which EEOC rendered its 8 April 1983 decision (the facts as well as the rules were ignored by MSPB). Thus, the installation does not have a "pristine view" of MSPB willingness to commit offenses. MSPB officials are so exceptionally willing to make false statements, that the installation did not even hestitate to have its own witnesses lie. Since the installation and MSPB decided (ex parte, verbally) to be a team in this case, the lies were needed to support the initial misconduct by MSPB officials, in prior cases. But what they overlooked (and this is a professional technique*for exposing falsehoods), is that while the installation could refuse to process my cases, the installation let a few cases be processed, albeit on a de minimis level. See the EEO counselor reports. Criminals are caught when they slip up; here, the "slip up" was the processing of a few overlooked, long-ago cases, in the 1979-1980 time-frame. *(Be professional: file much.)

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Robert Taylor's hatred of AR 1-8 is so extreme that he refuses to even acknowledge its existence, even after EEOC has called it to his attention. His malicious desire to obstruct the initiation of compliance with AR 1-8 is evidenced by his diversionary tactic, 8 August 1983, of switching emphasis from the merits. He opposes even the initiation of review on the merits.

To unlawfully obstruct review on the merits (X-118 requirements for smoking, if any; the "business necessity" for such, if any; the lack of specificity; etc., etc., etc.), Mr. Taylor maliciously claims that the issue is "whether the appellant is a handicapped person for whom a reasonable accommodation can be made," p. 3. MSPB had already made multiple false claims based on the ex parte communications with the installation. In situations of obstruction of justice, soliciting, advising, and/or procuring perjured testimony is foreseeable, even though the victim of such solicitation of falsehoods does not foresee such; cf. McAfee v. Travis Gas Corp., 137 Tex. 314, 153 S.W.2d 442 (1941), on other unforeseeable improper behavior (unforeseeable by the nonsmoker, but the employer of the offender is nonetheless liable).

The 8 November 1983 falsifications are what Mr. Taylor solicited, advised, procured, or otherwise obtained. Following his unlawful lead, the 8 Nov 83 input continues the pattern of diversion and falsification clearly evident throughout the MSPB issuances, issuances from Mr. Taylor, from R. Wertheim and E. Poston, etc. Their pattern of falsehoods is a continuous pattern. Their purpose is obstruction of justice, including but not limited to the obstruction of AR 1-8, civil service rules on qualifications, on specificity, on merits, etc., and rules on safety, mental disorder, negligence, falsification, extortion, embezzlement, etc.

Criminal law covers the solicitation, procuring, or advising the making of false statements. The MSPB issuances and the local issuances contain multiple false statements. USACARA, EEOC, etc., have called attention to them. Cf. obstruction of justice principles noted in U.S. v. Browning, 630 F.2d 694 at 701 (CA10, 1980), "'The authorities . . . hold that advising or procuring false testimony or statements comes within the prohibition of the obstruction of justice statutes,'" and multiple citations therein. That case covers "an attempt to obstruct 'the due and proper administration of the laws.'" Those words provide insight in this case. MSPB and local diversions and falsifications are designed, premeditated, and planned for that purpose, "to obstruct 'the due and proper administration of the laws.'"

The lack of local and MSPB integrity is clear. Multiple reviewers have already found the installation claims untrue. MSPB is out of step--because MSPB officials lack integrity. They are using concepts "of one statute in order to escape liability under another statute" (indeed, under many statutes and rules including but not limited to AR 1-8.) However, principles of one law "may not be used to justify" their "deliberate violation" of the many other rules, Browning, supra, at 704. Their "advising or procuring false testimony or statements" is designed "to escape liability under" other rules, which must also be obeyed. Falsehoods may not be used at all, and definitely not "to escape liability."

The 8 August 1983 issuance from Robert Taylor, and the 8 November 1983 issuance from Robert Nutt and Steven Klatsky "constitute an attempt to obstruct 'the due and proper administration of the laws,'" words borrowed from U.S. v. Browning, 630 F.2d 694 at 701 (CA10, 1980). They are diverting attention off the merits. They ignore the fact that there are no X-118 or other qualifications requirements for smoking. They oppose enforcing AR 1-8 directly. They oppose implementing the 25 January 1980 USACARA Report directly. Instead, they divert attention off the merits and onto "accommodation." However, the basic rules "cannot be made to jump through the procedural hoops for" accommodation, a principle adapted from Sethy v. Alameda County Water Dist., 545 F.2d 1157 at 1162 (CA9, 1976). Cf. Browning, supra, at 704, for this concept: "Principles of" accommodation "may not be used to justify . . . violation of" AR 1-8, OSHA, etc., etc.

EEOC has already noted a like concept and fact. The offenders have not "even recognized" the agency's "own regulations." The MSPB issuances after 8 April 1983 continue the disregard of the rules. The 8 August 1983 issuance follows in that pattern. Local and MSPB "obstruction of the enforcement of the laws"and rules involved is clear. Their diversions and falsehoods demonstrate that. My "case is based on all of the basic facts and the reasonable inferences which flow from those facts and these speak loudly to the proposition that the attempt was made to misrepresent the" issue, to ignore the merits, to disregard AR 1-8, to divert attention onto "accommodation," to make false claims, etc., etc., in order to achieve "obstruction of the enforcement of the laws" and rules involved, cf. Browning, supra, at 700.

It is clear that beginning with my initial appeal in 1980, the installation and MSPB "acted in a manner to produce a result which would obstruct the investigation," p. 701. Denials of jurisdiction, refusing a hearing, making false claims--all these actions and more "and the reasonable inferences which flow from those facts" and the use of ex parte communications, are for "obstruction of the enforcement of the laws" and rules involved. The obstruction pattern did not cease when EEOC issued its 8 April 1983 decision. Instead, the offenses by the installation and by MSPB were intensified.

Browning, supra, is similiar to this situation in the use of ex parte communications. The installation and MSPB behavior includes "giving of incomplete and misleading answers" and decisions. The X-118 is ignored. AR 600-20 is ignored. The 25 January 1980 USACARA Report is ignored. The pattern is evident in all the MSPB issuances, particularly in the 18 June 1981 issuance, the 20 June 1983 issuance, those from Mr. Robert Taylor, and the installation and agency briefs, especially the 8 November 1983 issuance. USACARA has already covered the matters of "reasonable" and of "authority." The disregard of the multiple rules, of AR 600-20 in particular, and of the issue as presented by me in March 1980, involves installation and MSPB "giving of incomplete and misleading answers" and decisions.

The corrupt motive is that compliance with the safety and AR 1-8 criteria would have "effectively killed" smoking where it does "endanger . . . cause discomfort or unreasonable annoyance," etc. MSPB and the installation jointly oppose the regulation, so they give "incomplete and misleading answers" and decisions "to obstruct" AR 1-8.

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MSPB "corrupt obstructing or impeding of due and proper administration of the law" and rules involved is "tied to the giving of incomplete and misleading answers," words from U.S. v. Browning, 630 F.2d 694 at 698 (CA10, 1980). The 20 June 1983 issuance from Victor Russell is a prime example. Mr. Russell's use of "incomplete and misleading" statements includes but is not limited to the following:

"Contrary to the appellant's assertion, a total ban on smoking is not authorized by AR 1-8," p. 8. Mr. Russell leaves out USACARA's Report as the source of the statement. He ignores AR 600-20. He ignores the "agency" aspects, "the agency had the authority," as EEOC noted 8 April 1983, p. 5. He ignores the regulatory term, "permitted." He ignores the contrary analysis from the installation's own legal office. He disregards the duty to suppress hazardous conduct. He disregards the numerous other legal principles and precedents for employers' not permitting smoking. He disregards resolution in the direction of improving ventilation. Clearly, Mr. Russell's unlawful behavior is "tied to the giving of incomplete and misleading answers."

"Moreover, the appellant has produced no evidence suggesting that any government installation has completely banned smoking to accommodate a handicapped person," p. 8. Mr. Russell ignores the fact that AR 1-8 applies to my agency, not to other agencies. AR 1-8 is designed to disrupt danger and discomfort from tobacco smoke. The issue is the rule and its enforcement, "not whether other" installations "may properly or improperly be" acting, Gacayan v. OPM, 5 MSPB 358 (1981). Mr. Russell ignores my actual job location. He ignores the rights of the other nonsmokers. He ignores the 25 January 1980 USACARA Report. Clearly, Mr. Russell's unlawful behavior to obstruct the initiation of compliance actions is "tied to the giving of incomplete and misleading answers."

Dr. Holt testified that he relied" on medical input, p. 5. Dr. Holt overruled the medical evidence. Col. Benacquista and Mr. Hoover were involved in the overruling of the medical evidence. Mr. Russell's misconduct is "tied to the giving of incomplete or misleading answers."

Mr. Russell does "not find relevant the issue of whether some lesser standard was being met by the agency," p. 5, n. 3. The standard is "unqualified and absolute," so the job site will be "free from recognized hazards." That is the standard set by law. It is not "a lesser standard." The installation has to comply with its own, and all, rules before initiating adverse action, Piccone v. U.S., 407 F.2d 866 (1969). Compliance by suppressing the hazard would preclude even the possibility of initiating adverse action against me, as any adverse action would be directed against the causers of the danger. Mr. Russell's offenses are "tied to the giving of incomplete and misleading answers."

Mr. Russell disregards "OPM's rejection of the" installation claims, p. 2. Mr. Russell ignores the fact that OPM noted the total absence of rule compliance. There are no X-118 or other requirements for smoking. Mr. Russell ignores the fact that requirements must be set forth first. His behavior is "tied to the giving of incomplete or misleading answers."

Mr. Russell's behavior is an example of "corrupt obstructing or impeding of due and proper administration of the law."

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Further Examples of the MSPB Pattern of
Deliberate Errors and Distortions JAN 2 1985

The pattern of MSPB falsifications and distortions is a continuing pattern. The pattern does "constitute an attempt to obstruct 'the due and proper administration of the laws,'" pertinent words borrowed from U.S. v. Browning, 630 F.2d 694 at 701 (1980). EEOC has already rejected the MSPB misconduct ("incorrect interpretation of the applicable regulations," assertions "not supported by the evidence in the record as a whole") on 8 April 1983. EEOC is right. (Cf. Ceja v. U.S., 710 F.2d 812 (1983).) (undisputed).

Note the MSPB corrupt pattern. P. 1 lies about the installation basis for ousting me. Cf. the USACARA Report, 25 Jan. 1980, and Col. Benacquista's testimony, p. 62 of his deposition, in light of the lack of any Handbook X-118 job requirement for tobacco smoke. Note C. Averhart's testimony, p. 73, answering, "Did you consider Mr. Pletten handicapped? I don't know. I don't really think of it in that sense." See the 11 Nov. 1983 brief from Environmental Improvement Associates, p. 1, noting my "meeting all job requirements and qualifications on record." Note that MSPB continues to ignore the evidence. USACARA never couched my case in "accommodation" terms under the Rehabilitation Act of 1973. Since I meet all the requirements of record, Col. Benacquista admitted, "The job was available," if only I would agree to his extortion, to alter my anticipated testimony, cf. People v. Atcher, 65 Mich.App. 734, 238 N.W.2d 389 (1976).

Note the MSPB corrupt pattern. MSPB officials lie about the explanation for the installation ousting me. MSPB corruptly fabricated references to reasonable accommodation being considered by installation officials back in March 1980. Installation officials had considered no such thing. C. Averhart's confession is clear. MSPB officials have revised/distorted the events back then, and altered the past to conform to their current assertions about accommodation. The installation has not couched the case in "accommodation" terms--not until years later, and only then, following MSPB's corrupt lead. MSPB does not rule on the installation case as presented. MSPB disregard of the actual case made by the installation violates long standing rules of law; and MSPB has been caught and warned before on this type of violation. See Horne v. MSPB, 684 F.2d 155 (1982). Where MSPB officials are corrupt, as by ex parte communications (written and/or verbal) with installation officials as in this case, MSPB officials repeat old errors, and repeat them intentionally.

MSPB has defied the EEOC analysis, by the subterfuge of altering the past. Such distortions of the past actual claims by the installation are reflected in footnote 7, p. 6 (the phrase "not entitled to accommodation"), a claim made without the installation ever having considered the matter in the terms in which MSPB has retroactively couched the case.

Note Gen. Stalling's testimony, p. 9, confessing never having read or referred to the regulations. P. 15 emphasized that dealing with hazard was not even "considered." He was unaware of the hazard upon which his own installation is basing the case, p. 11, and unaware of the USACARA Report, p. 13. Thus, MSPB has misrepresented the past and ignored the record, once again. (Cf. Sullivan v. Navy, 720 F.2d 1266 re E. Hoover and Gen. Stallings).

The 4 Oct. 1984 Issuance Continues the Pattern of MSPB Errors

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Continued MSPB refusal to address the lack of any job requirement for the presence of tobacco smoke. USACARA on 25 Jan. 1980, p. 9, noted the lack of any rqquirement. OPM noted likewise on 30 Jan. 1984. MSPB is corruptly trying to overrule USACARA, in defiance of Army rules; cf. Spann v. McKenna, 615 F.2d 137 (1980). MSPB officials are corruptly seeking to expand their jurisdiction outside their authorized realm.

(There are no requirements for tobacco smoke. Hence, on the merits, there has never been any basis for disqualifying me for failure to meet the requirements. That smoking involves merely smoker "desires" is clear from MSPB footnote 5, p. 5. Such "desires" do not establish requirements in the Handbook X-118 or in the job descriptions of nonsmokers such as me. Cf. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (1971), and Sabol v. Snyder, 524 F.2d 1009 at 1011 (1975). No advance notice and no specificity even asserting, much less proving, any requirement for smoking ("desires") has come forward from the installation. Thus, the installation case has not "commenced," cf. Siemering v. Siemering, 288 N.W.2d 881 at 883 (1980).)

Continued MSPB refusal to acknowledge USACARA's analysis is clear. The MSPB misconduct is especially outrageous, as it shows a deliberate contempt for USACARA, and for EEOC, which called MSPB errors to MSPB attention so bluntly.

Continued MSPB contempt for the merits (i.e., the lack of any requirements) leads to disregard of validation criteria, if any attempt were made to formally change the Handbook X-118 and the job description to require smoking. Note U.S. v. City of Chicago, 549 F.2d 415 at 429-434 (1977). If smoker "desires" are to become job requirements formally established, validation issues would then arise. Is tobacco smoke really required for the job to be done. Can classifiers read job descriptions without tobacco smoke being present, or is tobacco smoke required? What about for writing job descriptions? Reading classification standards? Giving credit or extra points for tobacco smoking ability? Clearly, tobacco smoke is not a requirement.

Continued MSPB contempt for USACARA is clear. USACARA noted the hazard, p. 7, and the duty ("less smoking or more ventilation"), p. 14. MSPB has summarily expanded its jurisdiction to include rejecting USACARA reports. The compliance process with the USACARA report has not even started. EEOC noted the disregard of USACARA twice, on 23 Feb. 1982, and on 8 April 1983. The EEOC analyses are accurate and are undisputed. This data is undisputed; cf. MSPB obligations in such a situation, Ceja v. U.S., 710 F.2d 812 (1983). MSPB corruption is such that it refuses to go by the record and decide the case presented by the installation; cf. Horne v. MSPB, 684 F.2d 155 (1982). The installation has premised its case on the extant danger, i.e., has premised its case on violating 32 CFR 203. The heinousness of MSPB corruption is clear; agencies are supposed to show that they have complied with their own rules before they can impose adverse action; see Piccone v. U.S., 407 F.2d 866 (1969).

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MSPB and local offenders have designed a pattern of joint misconduct based on their mutual opposition to AR 1-8. It is remedial and preventive. It is "designed to disrupt" "the status quo" of smoker behavior, a concept from U.S. v. City of Los Angeles, 595 F.2d 1386 at 1391 (CA9, 1979). However, "the agency refuses to alter" the status quo, as EEOC noted 8 April 1983, p. 6. The corrupt MSPB behavior in support of the installation refusal to initiate compliance actions arises from MSPB and local opposition to AR 1-8. Compliance actions on "the rights of the non-smokers" would have "effectively killed" smoking in those locations where it does "endanger . . . cause discomfort or unreasonable annoyance," etc., cf. U.S. v. Browning, 630 F.2d 694 (CA10, 1980), another situation where behavior would have been "effectively killed" by compliance.

Browning, supra, at 701, indicates that "'the word "corruptly" has been given a broad and all-inclusive meaning . . . to encompass obstruction'" of the enforcement of the laws. Corruption includes arranging, "'advising or procuring false testimony or statements.'" The record shows continued MSPB and local false statements, diversions, misrepresentations, etc., all "tied to the giving of incomplete and misleading answers" and decisions. Non-existent standards are cited by local and MSPB officials. They ignore AR 600-20, the USACARA Report 25 January 1980, the lack of X-118 qualifications requirements for smoking, and the lack of job description requirements for smoking. MSPB demonstrates repeatedly that it is receptive and amenable to a constant flow of false information from the installation. The falsehoods are in addition to the misrepresentations and the incompleteness. The other non-smokers' rights are ignored. Compliance for them would automatically resolve the hazard for me, without my ever having to even file a grievance, even the initial one that brought about the 25 Jan 80 USACARA Report. Smoking is personal, and adverse actions against federal employees are not allowed for personal reasons. Tobacco smoke is a hazard, as has been known for centuries; circumstances have not changed. MSPB and the local offenders have based their entire behavior on fraud, obstruction of the rules, and disregard of evidence, all of which misconduct involves and is "tied to the giving of incomplete and misleading answers" and decisions.

MSPB is amenable to, and receptive to, receipt of falsehoods. It is receptive to ex parte communications. Falsifications arranged, advised or procured in a local situation, involve local, in-person, face-to-face contacts, to develop the falsehoods. Here, ex parte communications have been continually objected to by me. Here, "each" local and MSPB ex parte communicator and "conspirator expected to benefit from the conspiracy," U.S. v. Shoup, 608 F.2d 950 at 957 (CA3, 1979), based on their common hostility to AR 1-8. Local and MSPB officials "seem quite willing to make false affidavits" and decisions, "in which facts are distorted to achieve a result," U.S. v. Marshall, 488 F.2d 1169 at 1171 (CA9, 1973). Facts are distorted concerning my position, Dr. Holt's behavior in overruling the evidence, the "authority" involved, AR 1-8 being forced through the "hoops" of accommodation, location of my job, AR 1-8 linkage with AR 600-20, referencing non-existent OSHA standards while ignoring the OSHA law and duty, falsely citing me instead of USACARA as the source for analysis of AR 1-8, etc., etc.

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MSPB falsification occurs on a pattern basis. MSPB officials lie again and again. On 18 June 1981, MSPB officials noted that the installation had done nothing (compliance "actions were not even attempted," EEOC, 8 April 1983, p. 5), so MSPB liars decided to fabricate actions. Liars such as Ersa Poston and Ronald Wertheim invented claims of non-existent actions, non-existent health standards, etc. People lie for reasons. MSPB officials lie in order to salvage the installation non-case. MSPB officials repeatedly show that they are "quite willing to make false" claims, "in which facts are distorted to achieve a result" consistent with local and MSPB hostility to AR 1-8 and other rules. Cf. U.S. v. Marshall, 488 F.2d 1169 at 1171 (1973).

Local and MSPB hostility to AR 1-8 is demonstrated so profusely throughout the record because of its foreseeable impact if it is ever complied with. Compliance will "effectively kill" smoking in locations where it does "endanger . . . cause discomfort or unreasonable annoyance . . . chronic bronchitis, emphysema, asthma, and coronary heart disease," etc., noted in AR 1-8. The local and MSPB common goal of opposing AR 1-8 is the source of their pattern of "giving . . . incomplete and misleading answers" and decisions.

The installation had done nothing. Thus, MSPB officials invented claims of actions, recorded 18 June 1981. In the self-deceived criminal minds of MSPB and local offenders, no "acceptance" from me and my doctor was foreseeable. MSPB and local criminals, like other criminals, can be caught when they overlook things. Here, catching their falsehoods was done by EEOC.

When criminals are exposed to the probability of capture, some become more vicious. That is what happened as the record shows here. Many cases show the problem of arranging, "'advising or procuring false testimony or statements,'" U.S. v. Browning, 630 F.2d 694 at 701 (1980), and citations therein. By ex parte communications, the installation had arranged, caused, or procured the false statements issued 18 June 1981 by E. Poston and R. Wertheim. My appeal to EEOC and, especially, the acceptance of the MSPB claims, resulted in yet more arranging, "'advising or procuring false testimony or statements.'" The urgency of arranging falsehoods would have been intensified when EEOC issued its 23 February 1982 decision in my favor, calling attention to multiple installation violations, including its disregard of the 25 January 1980 USACARA Report telling the installation to comply with AR 1-8.

The 8 November 1983 issuance from Robert Nutt and Steven Klatsky shows that such arrangements, advising and procuring of false testimony occurred. Repeated references to non-existent events are clear-cut evidence of the criminal behavior that has transpired among local and MSPB offenders. MSPB is amenable to falsehoods. It is receptive to falsehoods. It is receptive to misrepresentations and diversions. MSPB support of criminal behavior is thus assured, so the installation feels it takes no risks by submitting falsehoods to MSPB. "Group association for criminal purposes . . . makes possible . . . ends more complex than those which one criminal could accomplish," U.S. v. Shoup, 608 F.2d 950 at 957, n. 13 (1979), e.g., the adverse action here.

Criminal Use of Two Sets of Standards

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In criminal situations, criminals use various techniques. One technique is the use of two sets of records such as accounting records. Here, the record shows a similar criminal technique. The case is premised on a hazard being extant, which would involve the use of safety rules of law for resolution. But instead of using safety rules, corrupt offenders use other than safety rules.

When smokers are dangerous, courts use safety-oriented principles. For example, see Keyser Canning Co. v. Klots Throwing Co., 94 W.Va. 346 at 361-363, 118 S.E. 521 at 527-528 (1923). The court said of the dangerous smoker, security personnel "ought to have put him out of the building. . . . Defendant was bound in this case to use proper care to prevent . . . smoking on its premises. . . . According to its own evidence, defendant knowingly permitted a dangerous agency to remain upon its premises, under circumstances which show a want of due regard for its neighbor's and its landlord's rights." Here, the installation has not even "recognized" its agency's rules, and the well-written USACARA recitation of AR 1-8 and AR 600-20.

Under AR 1-8/32 CFR 203, tobacco smoke is not allowed to even reach the danger level. (Adverse action cannot lawfully be premised on a condition which rules preclude from existing, if recognized.) Threshold conditions precedent before smoking can be "permitted" are clear from the rules. Under them, as USACARA correctly noted, "it is clear that the rights of smokers exist only insofar as discomfort or unreasonable annoyance is not caused to nonsmokers," p. 12. EEOC accurately noted, "The agency does not argue nor does the record support that it ever complied . . . ," p. 5. MSPB has disregarded this uncontradicted and accurate analysis, in defiance of its duty brought to its attention in cases such as Ceja v. U.S., 710 F.2d 812 (Fed., 1983).

In deliberate defiance of its own principles, MSPB has corruptly used two sets of books/references: one on the hazard, one on smoking. Instead of referencing the Army rules, it has wandered off on tangents to cite some other case in the Veterans Administration. What other agencies do is irrelevant to the Army duty to comply with Army rules. The case involves our rules, "not whether other" agencies or installations "may properly or improperly be" acting, Gacayan v. OPM, 5 MSPB 358 (1981). We have "no access to their . . . records . . . we have no basis for a comparison." The case involves "applicable law and regulation," "not whether other" agencies "may properly or improperly be" applying/not applying safety rules/other than safety rules.

MSPB corruptly chose to cite an irrelevant precedent where rules on hazards may or may not apply, depending on ventilation compliance, if any. Here, the case involves the lack of X-118 requirements. (Whether there is/is not a hazard, does not create X-118 requirements; hence, the adverse action must be overturned. Cf. the lack of a rule of law in Biafore v. Baker, 119 Mich.App. 667, 326 N.W.2d 598 (1982).)

MSPB Pattern of Misconduct

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MSPB behavior continues to "constitute an attempt to obstruct 'the due and proper administration of the laws,'" pertinent words from U.S. v. Browning, 630 F.2d 694 at 701 (1980). MSPB has brazenly refused to recognize AR 1-8/32 CFR 203, whereunder "it is clear that the rights of smokers exist only insofar as discomfort or unreasonable annoyance is not caused to nonsmokers," pertinent words from the 25 Jan. 1980 USACARA Report, p. 12. Under Army rules, the USACARA Report is to be implemented, cf. Spann v. McKenna, 615 F.2d 137 (1980). (MSPB is clearly unlawfully seeking to expand its jurisdiction, to include authority to overrule USACARA).

P. 5 is an outrageous MSPB re-argument of the installation position that failed to impress USACARA. MSPB, like the installation, hates AR 1-8 threshold conditions precedent for permitting smoking. They ignore the broadest intendment of AR 1-8, upon which both USACARA and EEOC have focused, but which the installation and MSPB disregard. Disregarding the threshold conditions precedent before smoking can be permitted is "equivalent to a repeal of the statute, since it would be a continuing invitation to the" installation "to forbear compliance with" the conditions precedent, pertinent words from American Zinc Co. v. Graham, 132 Tenn. 586, 589, 179 S.W. 138 (1915), cited in California Law Rev., Vol. 64(3), May 1976, p. 712. Cf. 82-1 ARB 8206, 22 Jan. 1982, pp. 3941-3948, which answers the specious MSPB assertions made without advance notice/specificity. MSPB's opposition to AR 1-8 does "open a door to complete abrogation of this policy," and MSPB arguing against "enforcement of such" regulation "is specious. The role of a supervisor is to enforce applicable rules and regulations, whatever they may concern," p. 3947.

MSPB is arguing with USACARA. Instead of deciding the case, it has chosen to defy well established principles noted in Horne v. MSPB, 684 F.2d 155 (1982), to decide the case presented in the advance notice, if any, from the installation. Here there was no advance notice/specificity, so MSPB (wanting to rule in favor of the installation without regard for rules of law) disregards the lack of an installation case for ousting me. (There is no requirement for tobacco smoke; the case is premised on leaving the hazard uncorrected.)

The outrageous claim that "banning" smoking is necessary throughout the entire installation confirms that the hazard is installation-wide, i.e., no compliance anywhere on-post. (If there were even one non-endangering site, that would obviate references to a total ban. The claim is premised on a zero (0) compliance factor.) Moreover, the claim that my job takes me everywhere on-post confuses me with the office. The classification office services the entire base. The claim by MSPB lacks specificity as to what my coworkers do. MSPB has clearly decided to libel my co-workers with its innuendo that they are nonexistent and/or do not service any portion of the installation. The claim that one person (me) services the entire installation is specious.

Criminal Falsifications by MSPB Continue

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MSPB officials have already been caught making false statements. Note the accurate EEOC analysis, 8 April 1983, p. 6, observing MSPB behavior as "not supported by the evidence . . . ." MSPB officials use outright falsehoods to divert attention from the truth. For example, note the repeated falsehood, located most recently on p. 4 of the 24 Oct. 1984 issuance, alleging that my "position requires" me "to move about the entire facility on a continuing basis."

Analysis of MSPB issuances begins with keeping in mind typical behavior patterns of criminals. Note the book, The Criminal Personality, Vol. 1, A Profile for Change, 1976, by Samuel Yochelson, Ph.D., and Stanton E. Samenow, Ph.D. "The criminal is a master at diversion," p. 500. Clearly, "integrity is foreign to his way of life," p. 306. Also, a criminal "has usually committed many undetected crimes," p. 408. At 444-445, "From the criminal's point of view, it certainly makes sense for him to tell any story that will reduce personal liability . . . calculated lying are among the means to accomplish this end."

Words such as "calculated lying" definitely describe MSPB behavior. MSPB liars such as Ronald Wertheim had made false claims of actions taken (past tense), but in reality, "such actions" had "not" been "even attempted," as EEOC noted, p. 5. Those falsely alleged actions (admittedly undated and non-specific) supposedly related somehow to my actual work area. Since I and my doctor promptly accepted, MSPB officials (their lies now caught) decided via ex parte means to pretend an outlandish expansion of my work area, to include the "entire facility." The claim was made for the criminal purposes stated above.

MSPB criminals have decided "to tell any story that will reduce personal liability" for their prior crimes, including their false claims--falsehoods in violation of 18 USC 1001.

Non-criminals reading this will recognize that at a large installation such as ours, each position classifier services only a percentage of the installation personnel. They will immediately perceive that there is a classifier: serviced personnel ratio. No one classifier services everybody or all locations. Such claim as has been made (alleging one classifier does all) is false, disregards the organizational impossibility thereof, and disregards the gross violation of sound classifier: serviced personnel ratios. It disregards: what do the co-workers do? No advance notice/specificity has been provided showing a local disregard of classifier: serviced personnel ratios established by the agency, showing organizational assignments actually meted out, etc. No advance notice/specificity has been provided; hence, the ouster must be reversed on that basis.

Note C. Averhart's deposition, p. 2, citing us as "ended up in the same branch," and me as "one of your employees . . . Yes." Her p. 30 states, "We had five people there to do the job." P. 44, "the branch has grown since Mr. Pletten left." (Q: What do those people do?) No advance notice/specificity has been provided concerning the numbers of classifiers who do/do not service the "entire facility." (I don't, and didn't.)

No Collective Bargaining Role

As a matter of law, there can be no bargaining agreement role to operate as a bar, in this case of disqualification, even if matters of smoking per se, or the hazard per se, are muddled in with the real issue: disqualification based on alleged failure to meet a non-existent qualification requirement. EEOC has expertise in dealing with discrimination, including that perpetrated by unions in collusion with employers. EEOC expertise is entitled to deference, which MSPB has unlawfully disregarded. EEOC has already found multiple MSPB errors of law and fact. There has been no "compliance with any of the applicable standards of proof required of an agency," p. 4, 8 April 1983 EEOC decision. The union, even if it wanted to interfere (which is not shown) has no lawful role on qualifications, hazards, etc., as is clear from the accurate EEOC finding of fact, p. 5, "the agency had the authority to ban smoking from its buildings," which is simply the authority of any employer to direct the workforce (regardless of any considerations of hazards, discomfort, nuisances, etc.) "Workmen are not employed to smoke," MTM Co. v. MCP Corp., 49 F.2d 146 at 150 (1931). Consent of the employer is a condition precedent for smoking, and "reasons given for failure or refusal to act or give consent are immaterial" (citations omitted), data from Evans v. PVPP & IR, 144 Neb. 368, 13 N.W.2d 401 at 402 (1944).

The union has no lawful role to allow disqualifications of non-unit members such as me, to allow hazards, etc.--all matters governed by government-wide regulations. See 5 USC 7117.

Unions have a limited role, especially because of the "Janus-headed" nature of unions, a pertinent adjective from Evans v. Sheraton Park Hotel, 5 EPD 8079, p. 6922, quoted, 503 F.2d 177 at 184 (1974). The insightful word certainly describes the limitations on the union ability to represent all its members, discussed in depth in NAACP v. DPOA, 591 F.Supp. 1194 (1984). P. 1210 evidences that "the Court must be especially sensitive to the fact . . . ." A "Janus-headed union" has difficulty "to safeguard" the operation of law.

This may be true here. "Assuming arguendo that the expectations of some employees" (or unknown union officials) "will not be met, their hopes arise from an illegal system," U.S. v. Bethlehem Steel Corp., 446 F.2d 652 at 663 (1971). "Only if a challenged practice is found to be essential to overriding, legitimate . . . business" (not personal "desires"), repeat, "business purpose . . . can the practice in question be allowed to stand" (citations omitted), Nance v. UCC, CPD., 397 F.Supp. 436 at 455, item 14 (1975). No advance notice/specificity has been provided in these regards, even if there were something to present, which after all these years, there clearly is not.

Due to the "Janus-headed" nature of unions, they vacillate both ways. See Soc. Sec. Admin. v. Goodman, 82-1 ARB 8206 (1982), pp. 3945-6. Unions have no role. MSPB speculation is no proof of anything. MSPB has repeated its error EEOC already rejected.

No Union Role Shown

JAN. 2 1985

MSPB on 24 Oct. 1984, p. 5, speculates instead of proves anything concerning the unknown "collective bargaining agreement." Thus, it has still not complied with the 8 April 1983 EEOC decision. No advance notice/specificity has been provided concerning the existence of any such agreement; any clauses on qualifications; and relevance, if any, to personnel specialists/management officials such as myself, who are not part of the "unit"(s) covered by such agreement(s), if any. (Recall that this is a case on disqualification, not on smoking per se, and not on tobacco danger per se. The threshold condition precedent for a disqualification case, is a qualification requirement. Here, OPM and USACARA (with expertise of record to which deference must be shown) deny any such requirement exists.

No collective bargaining agreement has been shown. OPM guidance such as the Handbook X-118 is not negotiable, as a government-wide regulation, 5 USC 7117. No union request to bargain on any matter pertinent to this case has been provided. There certainly has been no advance notice/specificity alleging this. Despite the insurmountable obstacle whereby I have to answer MSPB's charges in a vacuum, without specificity, the legal principles are clear. Personnel action (ouster) for disqualification when there is no qualification requirement to meet, is the epitome of a prohibited personnel practice, 5 USC 2302. (Note the 30 Jan. 1984 OPM letter denying a requirement exists, and USACARA said likewise, p. 9).

Any union role, if any, would undoubtedly seek adherence to the qualification requirements of record. Discrimination is historically a personnel action apart from validated job requirements. The proper functioning of a union role is defined within certain parameters in cases such as NAACP v. DPOA, 591 F.Supp. 1194 (1984). At 1212, "'The union has an affirmative obligation to oppose employment discrimination against its members,'" citing Bonilla v. OS Co., 697 F.2d 1297 at 1304 (1982). Note Dr. Holt's testimony, "there's a hazard for all these other people. Isn't that also true? Yes. Yes. . . . People smoking in their vicinity is hazardous to them." P. 12, "Is smoke in the air good for any human being? No, it's not good for anybody. No." When there is a common hazard, causing people to become handicapped (with conditions expressly listed in 32 CFR 203), the union has an affirmative action duty.

Unions cannot discriminate, Brotherhood of R.R. Teamsters v. Howard, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952). The case of Soc. Sec. Admin. v. Goodman, 82-1 ARB 8206 (1982), shows affirmative action by a union. Note NAACP, supra, at 1210, "the Court must be especially sensitive to the fact that the duty of fair representation arose as a doctrine to protect minorities," lest "discriminatory policies by unions would have the authority of a law." MSPB displays no sensitivity at all--no comprehsensive analysis at all, just a brazen conclusionary assertion without any evidentiary input from the union at all. Letting the employer speak for the union, and imply hostility, is a libel on the union.

Phony Issue re Alleged Union Contract JAN. 2 1985

MSPB officials have an undisputed pattern of making false and distorted claims. They misrepresent what happened in March 1980 when they alter the past to pretend installation recognition of an alleged "accommodation" matter, when no such installation consideration had occurred, and none has yet. MSPB officials even go to the extreme of not properly summarizing what EEOC said in rejecting the MSPB misconduct. Thus, the pattern of MSPB misrepresentations is clear. The pattern of MSPB misconduct has now been extended to include misrepresentations on p. 5 of the 24 Oct. 1984 issuance.

Recall that this is a case on "medical disqualification," not one on smoking. A disqualification case alleges that there is a federal-wide requirement for something, and/or that there is a job descriptuon requirement. For such a case to be commenced, a requirement is a condition precedent. Government-wide regulations such as the Handbook X-118 are non-negotiable. Job descriptions are non-negotiable. Hence, as a matter of law, no union contract could cover this "medical disqualification" case. No advance notice, and no specificity, has been provided showing any union contract.

Moreover, personnel specialists, like other management personnel, are not part of any "unit" to which a contract may apply. No advance notice/specificity has been provided showing any relevance whatsoever of any alleged bargaining agreement. See also the 30 Jan. 1984 OPM letter. If the Handbook X-118 were subject to negotiations, with bargaining agreements covering qualification requirements, OPM would have such knowledge to have been able to respond with qualification data requested.

Moreover, note that the installation case is premised on a hazard posing a danger. The case is not on the issue of banning a non-hazard. Here, the hazard is not to be "permitted" as distinct from being "banned" (the conditions precedent for permitting smoking do not exist, e.g., ventilation able to "remove smoke," no endangerment, no discomfort, etc.). Hence, the matter of a ban is not properly reachable, since smoking has not yet been properly "permitted" considering the premising of the case on the extant danger, i.e., premising the case on not meeting the conditions precedent for permitting smoking.

Hazards are controlled under laws such as OSHA, 5 USC 7902, 5 CFR 752, FPM Suppl. 532-1, S8-7a, 29 CFR 1910.1000.Z, etc. Such federal-wide issuances are non-negotiable. No advance notice/specificity has been provided alleging that rules on hazards have been negotiated, or that any bargaining agreement has any coverage whatsoever. Moreover, enforcing rules on hazards involves sovereign immunity, cf. Jacobs v. Mental Health Dep't., 88 Mich.App. 503, 276 N.W.2d 627 (1979). Hence, the allegation that some unstated agreement is even a "question" is a fraudulent allegation. Moreover, accommodation rules are government-wide, and are themselves non-negotiable. A "question" does not "prove" anything; MSPB is making errors such as EEOC has already rejected.

No Union Role JAN. 2 1985

NAACP v. Detroit Police Officers Ass'n., 591 F.Supp. 1194 (1984), provides insight on the local and MSPB pattern of errors. For example, note the 24 Oct. 1984, p. 5, intentionally misleading reference to an unstated union contract, concerning which no advance notice/specificity was provided. Note that EEOC has long experience with union efforts to obstruct the rights of discriminated against groups. Such union efforts have been unlawful since at least the time of Brotherhood of R. R. Trainmen v. Howard, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1022 (1952). In contrast to EEOC competence, note MSPB's hostility to EEO principles in, e.g., Lamphear v. Prokop, 703 F.2d 1311 (1983). The MSPB pattern of errors is "a piece in a mosaic which, along with other evidence," is pertinent for "demonstrating a general discriminatory intent" and other unlawful intent, Kyriazi v. Western Elec. Co., 461 F.Supp. 894 at 924 (1978).

Contrast the outrageousness of the MSPB speculations in a perfunctory, non-analytical way, with the lengthy detail and analysis in Detroit, supra. Note that correspondence with the union and employer is cited and discussed. Note that clauses of the contract are cited and analyzed. Note the thoroughness; the decision covers printed pages 1196-1221 (25 pages printed, undoubtedly over 40 pages typed). Contrast that with the miniscule MSPB bare assertions of the type EEOC has already rejected. (Even if the MSPB claims were true, which they are not, no advance notice/specificity has been provided, voiding the action de novo. Cf. Siemering v. Siemering, 288 N.W.2d 881 at 883 (1980).

MSPB ignores that unions can argue either way on the matter of smoking per se. So does management. See, e.g., Soc. Sec. Admin. v. Goodman, 82-1 ARB 8206 (1982), pp. 3945-6. Here, no advance notice/specificity has yet been provided even alleging a union contract, much less any clause on smoking, much less, any relevancy to me (a management person excluded from the alleged bargaining unit(s), if any).

Here, the ouster of me is premised on disqualification, and on a hazard. No union is allowed to negotiate OPM's medical retention standards, Handbook X-118 guidance, etc. Government-wide regulations are not negotiable. Congress has delegated to OPM the job of developing, issuing, validating, etc., on qualifications criteria. The installation and MSPB are unconstitutionally repealing the Congressional delegation of responsibility to OPM. Even if the union wanted to negotiate qualifications requirements, which it does not so far as the record shows, disregarding the actual Congressional delegation to OPM is an unconstitutional repeal of OPM's jurisdiction. No contracts or unstated contracts can "stand in the way of full and complete remedies for constitutional violations," NAACP, supra, p. 1201, not even "state laws."

Relative to hazards, unions are commonly anti-hazard: their raison d'etre. The Congressional safety law is not negotiable. "Congress itself defined the basic relationship . . . placing . . . worker health above all other considerations . . . ," Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 at 509, 101 S.Ct. 2478 at 2490, 69 L.Ed.2d 185 at 202 (1981). Smoking as a hazard is not negotiable.

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Controlling Smoking is Not Negotiable, As a Matter of Law

Sovereign immunity is not negotiable. That is the legal doctrine upholding the control of smokers. See Jacobs v. Mental Health Dep't., 88 Mich.App. 503, 276 N.W.2d 627 (1979).

Unions have no role to limit sovereign immunity. For example, when the prosecutor prosecuted the smoker whose smoking led to a fire which in turn led to deaths, there was no role for a union to allege any type of immunity for smokers from criminal laws when smokers harm or kill people as a consequence of their smoking. See the case of Commonwealth v. Hughes, 468 Pa. 502, 364 A.2d 306 (1976), upholding the indictment for manslaughter of the smoker, whose smoking on-the-job resulted in harm.

When smokers worsen their behavior against a nonsmoker who seeks rule compliance, recourse applies as a matter of law, for the reprisal. Legal rights granted by law cannot be taken away by a union. See Hentzel v. Singer Co., 138 Cal.App.3d 290, 188 Cal.Rptr. 159 (1982).

The issue of tobacco which arose in a marital situation was not subject to any collective bargaining agreement. Note that the court decided, in the case of Bradley v. Murray, 66 Ala. 269 at 274 (1880).

Tobacco and smoking behavior arise in the criminal law context repeatedly. See multiple cases including but not limited to Com. v. Thompson, 53 Mass. (12 Metc.) 231 (1847); In re May, 82 F. 422 (1897); Austin v. Tennessee, 179 U.S. 343, 21 S.Ct. 132, 45 L.Ed. 224 (1900); People v. Hudgins, 125 Mich.App. 140, 336 N.W.2d 241 (1983); U.S. v. Bunney, 705 F.2d 378 (1983); and 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), etc.

There is no role for a collective bargaining agreement specification on smoking. Collective bargaining involves matters of "employment." Note that "the act of smoking in itself is not in the course of the employment, but . . . the employer will be liable for damages caused by smoking," George v. Bekins Van & Storage Co., 33 Cal.2d 834, 205 P.2d 1037 at 1042 (1949). Note that smoking involves smoker personal desires, "a purpose of his own," Dickerson v. Reeves, Tex.Civ.App., 588 S.W.2d 855 (1979). "Workmen are not employed to smoke," MTM Co. v. MCP Corp., 49 F.2d 146 (1931). Smokers causing harm is "entirely independent of the relationship of employment," Hill-Luthy Co. v. Industrial Commission, 411 Ill. 201, 103 N.E.2d 605 (1952).

Collective bargaining agreements relate to matters of "employment," not to matters such as smoking "entirely independent of the relationship of employment." As a matter of law, smoking is not a negotiable matter, as smoking does not meet the threshold condition precedent requirement for negotiability: the matter must be "in the course of the employment." Smoking behavior does not meet that threshold condition precedent.

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Penalties for Installation Having Overruled the
"consistent and clear evidence"
of my being
"able to return to work" on
Mon., 17 March 1980 and thereafter

Installation officials overruled the "consistent and clear evidence" of my being "able to return to work" on 17 March 1980 and each day thereafter. The installation sadism of overruling the "consistent and clear evidence" of my being "able to return to work" on 17 March 1980 and thereafter "was untrue and . . . made . . . knowing it was untrue and knowing the high degree of probability that it would inflict emotional distress," an apt principle from Hume v. Bayer, 157 N.J.Super. 310, 428 A.2d 966 at 967 (1981). The smoker sadism of overruling the "consistent and clear evidence" of my being "able to return to work" on 17 March 1980 and thereafter "resulted in" my "losing" my "job and . . . position . . . plus the benefits which" I "had by virtue of . . . position," pertinent insight from Armstrong v. Morgan, 545 S.W.2d 45 (Tex.Civ.App., 1977).

Damages are to be awarded to me, based on the pertinent principle that "the loss which must be borne by someone should be suffered by the person" (or agency) "at fault," Kuhn v. Zabotsky, 38 Ohio Ops.2d 302, 224 N.E.2d 137 at 141 (1967).

Note precedents relative to employer misconduct:

Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976)

Cancellier v. Federated Dep't. Stores, 672 F.2d 1312 (CA9, 1982)

Hill v. Nettleton, 455 F.Supp. 514 (1978)

Zarcone v. Perry, 572 F.2d 52 (CA2, 1978)

Claiborne v. Illinois Cent. R. R., 583 F.2d 143 (CA5, 1978)

Note Zarcone, supra, as particularly apt here. The outrageous, sadistic, and vicious act of "raw power" here in brazenly overruling the "consistent and clear evidence" of my being "able to return to work" on 17 March 1980 and thereafter, dwarfs the short-term outrageous exercise of "raw power" by government official Perry. Note that for that short-term incident, the offender Perry was fired.

OVERVIEW OF RELIEF SOUGHT:

An award of the "loss" in full, for all pay for all the years involved, plus applicable interest.
An award of punitive damages commensurate with the outrageousness and duration of the wrong, especially in view of the many notices reporting the violations--all of which notices were ignored.
Criminal prosecution of all offenders re the extortion, embezzlement, etc., cf. People v. Atcher, 238 N.W.2d 389, and State v. Gates, 394 N.E.2d 247.
Commitment of the mentally ill offenders, cf. Rum Riv. Lbr. Co. v. St., 282 N.W.2d 882, and Jacobs v. MHD, 276 N.W.2d 627.
Permanently halting "Dr." Holt's malpractice by canceling his license.
Other relief as appropriate.

"Dr." Holt's negligence is clear. The "consistent and clear evidence" that I am and was "able to return to work" at all times was overruled. Please provide an appropriate settlement including a monetary settlement for the installation/"Dr." Holt's negligence.

"Dr." Holt's disregard of "consistent and clear evidence" of my being "able to return to work" has been clearly verified, and repeatedly. Please approve a monetary settlement based on his negligence in view of precedents including but not limited to Hume v. Bayer, 157 N.JSuper. 310, 428 A.2d 966 (1981), and Armstrong v. Morgan, 545 S.W.2d 45 (Tex.Civ.App., 1977).

"Dr." Holt's reports, like Dr. Morgan's report, claimed "that appellant was in very bad physical condition." "Dr." Holt's claims, made repeatedly, have been repeatedly verified as false. That "Dr." Holt's claims are false is shown by "consistent and clear evidence."

Note p. 46 of Armstrong, supra, further noting, "The statements contained in Dr. Morgan's letter resulted in appellant's losing his job and his position . . . plus the benefits which he had by virtue of his position." That misconduct provides insight on "Dr." Holt's misconduct. Indeed, "Dr." Holt's misconduct is far worse, as it was protracted, and he repeated his false claims repeatedly. He did so even after being told of his error repeatedly. Please provide a settlement based on his negligence. "Dr." Holt ignored "consistent and clear evidence" of my being "able to return to work." Please issue a "make whole" decision on my behalf. Note the pertinent principle, "the loss which must be borne by someone should be suffered by the person" (or agency) "at fault," data from Kuhn v. Zabotsky, 38 Ohio Ops.2d 302, 224 N.E.2d 137 at 141 (1967).

Here, the data on my being "able to return to work" has been repeatedly confirmed as "consistent and clear." Thus, note Hume v. Bayer, supra, at 967, on false information from a doctor, "Taken in their totality, the facts, if believed, permit the further inference that this statement was untrue and . . . made . . . knowing it was untrue and knowing the high degree of probability that it would inflict emotional distress . . . The . . . staff refused to administer any . . . relievers to him and ignored plaintiff's pleas for an explanation . . . ." "For several days" plaintiff was "unable to obtain reliable information."

Here, "Dr." Holt's misconduct is more than for merely "several days." "Dr." Holt overruled the "consistent and clear evidence" of my being "able to return to work" "knowing" that his claims were "untrue and knowing the high degree of probability that" his claims contrary to the "consistent and clear" evidence "would inflict emotional distress" as a bare minimum. "Dr." Holt's misconduct was perpetrated "knowing the high degree of probability that" I would lose my "job and . . . position . . . plus the benefits . . . had by virtue of" my federal "position."

"Dr." Holt's malpractice/negligence is clear. It has been verified repeatedly. Please "make whole" my "loss" in accordance with the pertinent principles of law.

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The "consistent and clear evidence of record" of my being "able to return to work on" 17 March 1980 led me to "return" on that day and on repeated occasions thereafter, as authorized by principles evident in Bevan v. N. Y. St. Tchrs. Retirement System, 74 Misc.2d 443, 345 N.Y.S.2d 921 (1973). Like me, the employee was at all times ready, willing, and able, even insistent and demanding, to perform all of his official duties of record.

Like me, that individual repeatedly returned to attempt to be allowed to perform his official duties of record. However, he was not allowed to do so. Like me, he was "not afforded an opportunity to present his evidence in a hearing before" action was taken to "suspend or terminate" him, apt words from the 8 April 1983 EEOC decision, pp. 3 and 6, pertinent to that individual as well.

Like him, I repeatedly tried to be allowed to perform my official duties of record. (Cf. the 30 Jan. 1984 OPM letter on the Handbook X-118 as pertinent to my job description of record.) Note that, at p. 925, in Bevan, supra, the "court holds that insofar as . . . the . . . Law allows for the enforced retirement . . . without a prior adversary hearing, it violates the due process clause of the Fourteenth Amendment. (See Snead v. Dept. of Social Services of the City of New York, 355 F.Supp. 764, decided March 13, 1973.)" Also see other authorities, cited on p. 924.

Civil service rules do not allow suspensions, and terminations, without advance notice. Applications cannot be filed for a person's disability retirement without first providing an advance notice, specificity, and opportunity to reply. These principles are well established, and known to all civil servants, except at TARCOM and at MSPB. Civil service rules specifically forbid retroactive penalties against employees, refusal of advance notice, refusal of specificity, refusal of reply rights, etc.--the multiple egregious installation violations repeatedly approved by MSPB.

Like Bevan, I too repeatedly tried to return to duty to perform my official duties of record. However, the joint unlawful actions of Col. Benacquista and "Dr." Holt in overruling the "consistent and clear evidence" were for the criminal purpose of extorting a retraction of my request for the installation to begin to comply with AR 1-8. "The job was available. All" I "had to do" to satisfy their extortion demands "was to say, 'I agree that this is reasonably free of contaminants,'" words quoted from Col. Benacquista's confession of the extortion, MSPB Dep. p. 62. ("Dr." Holt has, of course, later admitted the hazard; see the 20 June 1983 MSPB issuance replete with references to the danger: toxic chemicals many times in excess of 29 C.F.R. 1910.1000.Z limits. Clearly, installation officials knew all along that the claims of safety, even to the extreme of pretend-that smoking was banned, were untrue all along.)

Cf. principles of extortion in People v. Atcher, 65 Mich.App. 734, 238 N.W.2d 389 (1975) (intimidation of a witness), and U.S. v. Wilford, 710 F.2d 439 (CA 8, 1983) (extortion to coerce a person in an employment context). The installation extortion gave rise to behavior forbidding me to return to duty, overruling the "consistent and clear evidence." Please cause an appropriate settlement, to include bringing appropriate criminal charges against "Dr." Holt, J. Benacquista, E. Hoover, C. Averhart, R. Shirock, etc.

The installation subjected me to the presence of uncontrolled mentally ill individuals in the chain of command. Having hired and retained such persons was negligence per se. At least as long ago as 1960, "the World Health Organization expressed the opinion that the stresses on persons in high positions are often too great for normal people. It suggested that, as a consequence, individuals with psychopathic personality makeup, who tend to exploit power for selfish purposes and have little concern for ethical values or social progress, often become leaders," data from Dr. James C. Coleman, in Abnormal Psychology and Modern Life, 5th ed., 1976, p. 10, referencing the publication, World Mental Health, Vol. 12, 1960. These apt words well describe the behavior of persons such as E. Hoover, F. Holt, C. Averhart, J. Benacquista, etc. It is clearly negligence per se for the installation to have employed and retained such individuals.

"Humiliation and embarrassment lie at the core of the evil which the . . . Civil Rights Act was designed to eradicate," Ky. Com'n. on Hum. Rts. v. Fraser, 625 S.W.2d 852 at 855 (Ky. 1981). "The Civil Rights Act was the culmination of a long fight against another great evil in our society: discrimination. The evils at which it aims are entirely different from those of the" other referenced "statute," Freeman v. Kelvinator, Inc., 469 F.Supp. 999 at 1000 (D.Mich. 1979). Clearly, the mental health law was designed to deal with yet "another great evil in our society," mental illness.

Characteristics of the tragedy of mental illness are well-established. One such characteristic is noted by Dr. Karl Menninger, in The Crime of Punishment, 1966, 1968, p. 99, on the matter of "common knowledge that the belief that others are mentally ill rather than oneself is one of the commonest signs of mental illness." Also, note the long-established data on smoking as a cause of mental illness.

When mentally ill people are left uncontrolled, it is foreseeable that they will, as a by-product of their mental illness, engage in their mentally ill behavior patterns that have become a part of them.

One of those known behavior patterns, accusing others, is, along with the danger posed directly by physical means, thus "at the core of the evil which the" mental health law "was designed to eradicate." There is a "strength and importance of the State's policy in combating" mental illness, a principle extracted and adapted from Batav. Lodge No. 196, L.O.M. v. N.Y. St. Dep't. of H. R., 316 N.E.2d 318 at 319 (1974). That mentally ill people would cause "Humiliation and embarrassment" (aspects of dangerousness to people) is foreseeable. Preventing mentally ill people from inflicting their dangerousness and abusiveness on others does "lie at the core of the evil which the" mental health law "was designed to eradicate." Thus choosing such persons as "leaders" would have the foreseeable result as here exists: they "exploit power for selfish purposes . . ." etc., i.e., for their own smoking. Hence, subjecting me to such persons confirms the installation's negligence per se in hiring/retaining such persons. Please cause an appropriate monetary settlement for me.

Please fashion an award that takes cognizance of the installation negligence in terms of failure to provide safe co-workers, and thus, failed to provide a safe job site. Dr. Holt's negligence plays a primary rôle in the negligence. As installation physician charged with the duty to advise management, it is clear and indeed, incontestable, that he has been remiss in not properly advising management, but instead has simply served as a rubber stamp. "Soundness of moral fibre to insure the proper use of medical learning is as essential to the public" and employee "health as medical learning itself. Mere intellectual power and scientific achievement without uprightness of character may be more harmful than ignorance. Highly trained intelligence combined with disregard of the fundamental virtues is a meance," Lawrence v. Brd. of Registration in Medicine, 239 Mass. 424 at 429 (1921). Here, Drs. Dubin and Salomon have found it necessary to protect me from the hazard clearly known to Dr. Holt, and from the harassment and danger caused by smoker mental disorder. See their various letters, including those of 5-27-80 and 28 April 1980. Dr. Holt refuses to recommend a proper job site, based on his own personal ideas of what "authority" exists. He ignores all professional analyses, based on his personal insistence on smoking. His own smoking has adversely affected his judgment.

Dr. Holt is well aware that conditions such as mine are not "associated with its abuse or dependent on intervening fortuitous events," data on the danger posed by tobacco smoke, in Banzhaf v. FCC, 405 F.2d 1082 at 1097 (1968). Leaving your agency to struggle with the deception inflicted by the agency on me for so many years, is misconduct on his part, considering the Army's vast and awesome data on injuries (sometimes called diseases) caused by second-hand smoke, data obvious from AR 1-8 based on 32 CFR 203, and In re 'Agent Orange' Product Liability Litigation, 97 F.R.D. 542 (1983).

Ignoring rules for his own personal reasons is unacceptable medical behavior. Please fashion an appropriate award based on Dr. Holt and the installation's negligence. Dr. Holt has ignored the "duty to inform . . . to advise the . . . authorities so that appropriate action might be taken," a legal principle from Darling v. Charleston Comm. Mem. Hosp., 33 Ill.2d 326, 211 N.E.2d 253 (1965). Dr. Holt has ignored this. He has not informed or advised anyone of smoker mental illness, a long-established medical fact, so that smokers themselves can be controlled as persons dangerous to themselves and others. If management failed to act, he failed to inform the "authorities." He refused to even start the process, though he knew that tobacco smoke does "not result from a work process and could be remedied rather easily," data from Mich. Law Rev. Vol. 81(6), p. 1481, n. 671, May 1983. Instead, tobacco smoke is a symptom of the presence of mentally ill people (called smokers). Smoking is "one of our most serious diseases," data from L. Johnston, in The Lancet, Vol. 263(6732), p. 482, 6 Sep. 1952, and many other sources, including the DSM-III, etc. Dr. Holt has been negligent in terms of failure to utilize the extant medical data on smoker mental disorder, and negligence is the cause of the situation. Please render an award based on installation negligence.

Why did smokers engage in abusiveness against me? Why should your agency render a favorable decision for me? Why did my doctor react as he did? For the answer, note the danger posed by smoker behavior. Protection includes both the behavioral and the environmental aspects.

The answer as to why smokers engaged in "derogatory references" against me in both "an agency's publication" and in ordering an irrelevant psychiatric examination, explains both why smokers pose a grave danger and react abusively towards nonsmokers such as me (a person trained to obtain rule enforcement effectively, as witness the successful outcome of the proceedings with USACARA, EEOC, in showing the multiple violations of rules on behavior).

The answer for why "derogatory references" were made against a nonsmoker such as me is that "smoking causes insanity," data from The Lancet, Vol. I(1751), p. 303, 21 March 1857. The answer, tobacco-induced brain damage in smokers, explains the abusiveness of smokers in my situation. The Army taught me, as a personnel specialist, rule compliance and rule enforcement, and methods to obtain such. In the situation of applying that training to smoker violations, their symptoms of mental disorder, delusions of grandeur, and reality denial, etc., were triggered.

"Tobacco makes the user feel like parading . . . ." Indeed, it "makes the user feel like parading . . . the manner and act of taking the narcotic. The narcosis is a grandeur narcosis," data from James L. Tracy, M.D., in Medical Review of Reviews, Vol. XXIII (12), p. 818, Dec. 1917. Smoker abusiveness is triggered when they feel that their "parading" activities are considered a violation of rules. Here, the threshold conditions precedent for even "permitting" smoking do not exist under AR 1-8. The testimony of Dr. Holt confirms the hazard, for example.

"In the narcosis there is not the least thought of possible impropriety in" tobacco "use, or in anything connected with its use," Dr. Tracy continues. As a consequence of their brain damage, the installation smokers have not "even recognized" the agency's "own regulations," as EEOC pointed out 8 April 1983, p. 5. Such non-recognition is a part of the symptom pattern of brain damage. See data on "Brain Injury," in Psychology, by Allen D. Calvin, et al., 1961, p. 432, "When the cerebral cortex is damaged, certain symptoms arise directly from the fact of damage . . . an apparent lack of awareness of his defect." Cf. data from The Lancet, Vol. 2(6225), p. 742, 19 Dec. 1942, by Lennox M. Johnston, tobacco "addicts are usually unaware of their disturbance of judgment."

Dr. Tracy continues, "And in still less degree is there anything like self-censure. So far, in fact, does this grandeur impression carry, that to the user of tobacco any opposition to its use at once suggests that there is mental abnormality in those who would interfere with its use." Dr. Holt testified that I "needed some protection," but which was never provided, and which smokers clearly lack the mental capacity to provide. Thus, to provide "protection" for me, please rule favorably.

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Dr. Francis J. Holt testified that I "needed some protection from people smoking here in his work environment . . . . And I agree. He did need protection" (MSPB Trancript, p. 14). The record shows such need for "protection from" smokers. Smoker abusiveness and symptoms are evident throughout the record. Examples include but are not limited to the following:

"in an agency's publication derogatory references were made" about me, noted in the 23 Feb 1982 EEOC decision, p. 2. "The agency improperly rejected appellant's complaint" about that 19 Sep 1979 misconduct, circulated and disseminated to the entire workforce (thousands of employees). Clearly, "protection from" such misconduct is needed. (The misconduct is behavioral, not only "environmental").

"the agency failed to abide by the" 25 Jan 1980 USACARA Report, and its "recommendation of ways the agency had to" meet the threshold conditions precedent before smoking could be initially "permitted." "The agency does not argue nor does the record support that it ever complied with the recommendations of the grievance examiner," noted in the 8 April 1983 EEOC decision, p. 5. Compliance "actions were not even attempted." The refusal to alter the non-compliance with the threshold conditions precedent violates Army guidance on the finality of USACARA Reports; cf. Spann v. McKenna, 615 F.2d 137 (1980). Clearly, "protection from" such multiple incidents of misconduct is needed. (Disregarding a grievance report is behavior.)

"as early as February, 1980, appellant was denied EEO counseling," noted in the 23 Feb 1982 EEOC decision, p. 2. Clearly, "protection from" such behavioral misconduct is needed.

"When the agency failed to abide by the" 25 Jan 1980 USACARA Report, "appellant" attempted to file "even more EEO complaints" to secure implementation as required by Army rules (cf. Spann v. McKenna, supra). To obstruct my effort to have Army rules implemented at TARCOM, "The agency, additionally, went so far as to utilize erroneous information or miscalculations upon which to base its" phony "rejection" s. "See Appendix." This data is from pp. 2-3 of the 23 Feb 1982 EEOC decision. Dr. Holt testified that I "did need protection" specifically "protection from" smokers. Their behavior is what "protection" is needed "from," not only the "environmental aspects."

Since I kept trying to have the USACARA Report implemented, the installation reacted by a "decision to terminate" me on 17 March 1980 without advance notice. See the 9 April 1980 analysis by EEOC official, Henry Perez, Jr. Dr. Holt testified that I "needed some protection from" smokers. A termination without advance notice is "behavior," and "protection from" behavior is needed, in addition to protection from the unsafe "environment which the agency refuses to alter," which is so "smoke-filled" that phony claims of a ban on smoking were made as a diversionary tactic. See the 8 Apr 1983 EEOC decision, pp. 4-6. Clearly, "protection from" smokers and their misconduct is "needed" concerning their behavior as well as concerning the environment.

Note that "protection" "actions were not even attempted." Thus, you are asked to render a favorable decision.

Dr. Francis Holt testified about me that "he needed some protection from people smoking . . . . And I agree. He did need protection" (T. 14). Army access to data on smoker behavior "around the world" is evident from the vast Army resources noted in In re "Agent Orange" Product Liability Litigation, 97 F.R.D. 542 (1983). Army resources pre-date Dr. Benjamin Rush, Surgeon General in the Continental Army under George Washington. Army concern is evident in medical writings such as Milit. Med., Vol. 142(5), pp. 397-398, May 1977; AR 1-8; the 25 Jan. 1980 USACARA Report, etc. The Army has access to medical literature of the centuries, around "the world."

Dr. Holt testified, "And I agree," I "need protection" "from people smoking" (smokers). Soon after my (about-to-be-successful) grievance was filed, "derogatory references were made" about me "in an agency's publication" 19 Sep 1979, behavior (as distinct from "environment") noted by EEOC 23 Feb 1982 in its decision, p. 2. Installation smokers (concerning whom I "needed some protection") were under-reporting the levels of tobacco smoke, and resented the fact that USACARA would rule in my favor. That is why "derogatory references" in order to malign me began even before the USACARA Report was issued. Installation officials (concerning whose behavior I "need protection") saw the handwriting on the wall. They had never implemented AR 1-8, and they knew it. They knew "protection" "actions were not even attempted" concerning the threshold conditions precedent before smoking could be "permitted."

Army access to data "around the world" includes The Lancet, Vol. I(1740), 3 Jan. 1857, p. 23, "in the post-mortem examinations of inveterate smokers, cretinism is always present," since "smoking causes insanity." Smoking "causes insanity," "to repeat again familiar facts," noted by Dr. Matthew Woods, in J.A.M.A., Vol. XXXII(13), p. 685, 1 April 1899. The "familiar facts" that smoking "causes insanity" are facts of medicine known longer than, for example, the comparatively modern "facts" about penicillin, and other comparatively recent discoveries in medicine. And cf. the DSM-III, pp. 159-160 and 176-178 for early symptoms (after merely "at least one month"). In this background and context, note Dr. Holt's testimony that I "needed some protection from" smoker behavior.

The "derogatory references" 19 Sep 1979 and the order for examination by Dr. David Schwartz (issued by C. Averhart, E. Hoover, etc.) are smoker behaviors and abusiveness that I "need protection" "from." Requests by nonsmokers such as me for implementation of AR 1-8 and the USACARA Report are responded to abusively by smokers because smoking "causes insanity" and delusions of grandeur. "So far, in fact, does this grandeur impression carry, that to the user of tobacco any opposition to its use at once suggests that there is mental abnormality in those who would interfere with its use," data from James L. Tracy, M.D., in Medical Review of Reviews, Vol. XXIII(12), p. 818, Dec. 1917. Smoking "causes insanity," whereas not smoking does not. Smokers engage in "derogatory references" (from which I "need protection") as part of their symptom pattern.

Legal Principles for Considering Quantities of Tobacco Smoke

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Tobacco is "wholly noxious and deleterious to health . . . always harmful . . . inherently bad, and bad only," Austin v. State, 101 Tenn. 563, 48 S.W. 305 at 306 (1898), and thus "the detrimental effectings of cigarette smoking on health are beyond controversy," Larus & Bro. Co. v. F.C.C., 447 F.2d 876 at 880 (1971). Forced/involuntary smoking "is a danger inherent . . . not one merely associated with its abuse or dependent on intervening fortuitous events," Banzhaf v. F.C.C., 405 F.2d 1082 at 1097 (1968).

In this case, the danger is already established. The 25 Jan. 1980 USACARA Report, p. 7, noted that forced/involuntary "smoking does constitute a safety hazard to" me. The 20 June 1983 issuance from Mr. Victor Russell shows the hazard, and is replete with references thereto. Thus, principles of law such as res judicata and estoppel apply. The government has premised all of its actions (the "suspension or termination") on the extant hazard "which the agency refuses to alter," as EEOC noted 8 April 1983, p. 6.

"Wherever . . . there is a positive physical effect produced, and the poison administered operates to derange the healthy organization of the system, temporarily or permanently . . . there is an injury which, whenever it is reasonably appreciable, may be regarded as within the statute," People v. Carmichael, 5 Mich. 10, 71 Am.Dec. 769 (1858). A "suspension or termination" due to a lung injury caused by the tobacco smoke quantities involved is "appreciable." Thus, in addition to "protection" from your agency, penalties up to life in prison under Michigan law are also appropriate and warranted. The installation having proven the hazard to the point of the 20 June 1983 issuance being replete with references to the hazard proven by the installation, is considered a confession of both the hazard and of "appreciable" "injury" under Michigan law. Considering the penalties that the installation confession of the hazard should bring upon the culprits (life in prison), the installation confession has great weight.

Considering the extreme lapse of time, as well as the effect of res judicata and estoppel principles of law, it is not "incumbent upon" the reviewer "to determine the exact quantity," since the amount was and is "in such quantities that it caused damage to" me "and prevented peaceful enjoyment of the" job site by the installation's own confession; cf. Centoni v. Ingalls, 113 Cal. App. 192, 298 P. 47 at 48 (1931). Cf. Mandell v. Pasquaretto, 76 Misc.2d 405, 350 N.Y.S.2d 561 (1973); Alcorn v. Mitchell, 63 Ill. 553 (1872); and Adams v. Hamilton Carhartt Overall Co., 293 Ky. 443, 169 S.W.2d 294 (1943), and other rulings de-emphasizing quantity, as even one violation is one too many. "OSHA has concluded that, when dealing with a carcinogen, no safe level exists," 43 Fed.Reg. 5947 (1978), and "a single biological event produced by a very small number of molecules of the carcinogen may be sufficient to initiate the irreversible" condition, 42 Fed.Reg. 54151 (1977).

Assuming Arguendo that the Local/MSPB Criminally False Claims are true, what follows:

Installation and MSPB criminal falsehoods in calculated, brazen challenge to 18 USC 1001, are undisputed. Note the installation's non-processing of EEOC Case 01.81.0324, "Wrong information conveyed to" MSPB (ref. 23 Feb. 1982 EEOC decision). The installation has guilty knowledge of having corrupted MSPB, and having corrupted MSPB successfully.

See U.S. v. Bethlehem Steel Corp., 3 EPD 8257, 446 F.2d 652 (1971). Assuming arguendo that the installation and MSPB false claims are true:

-the job takes me to every building, room, lobby, men's and women's restroom, corridor, whatsoever on the premises, without my having any coworkers whatsoever to do anything. Solution: obtain some coworkers, assign them some organizations to service, of the "five people there to do the job" (Averhart Deposition, p. 30). Other solutions are obvious.

-that not smoking is abnormal, and smoking is the norm, hence, nonsmokers are the ones to be accommodated. Solution: Smoking is a disease, not not smoking. Not smoking is the norm. (Smokers are the ones to seek accommodation).

-criminally false claims of agency actions (unstated) as "improving . . . working environment." Solution: The hazard still exists, as Dr. Holt admitted, p. 42, and as my personal physician stated 17 March 1980. Admit that EEOC is right; nothing was done by the installation.

-a total ban on smoking is the only way to "remove smoke." Solution: Correct the ventilation deficiencies Dr. Holt admitted, p. 25. Note the distinction between the uniform threshold conditions precedent to be met before smoking can be "permitted" (as distinct from a ban)

-that the issue is smoking relative to solution, but that the issue is the danger relative to the problem. Solution: Apply safety rules such as in NR & CCI v. OSHRC, 489 F.2d 1257 (1973) and ATMI v. Donovan, 452 U.S. 490 (1981) to deal with the admitted endangerment under rules on dangers.

-emphasis on what my alleged requirements are. Solution: Emphasize that the job requirements of record are the key (smoking is not listed in the Handbook X-118, as OPM noted, and USACARA agreed, p. 9, 25 Jan. 1980). Stop overruling the doctors of record and their repeated showing of my ability to work. Stop emphasizing me, and note the problem for all nonsmokers. A solution for them, solves the matter for me (without my even having then to ask and call attention to myself).

-claim of MSPB jurisdiction. Solution: Admit that MSPB lacks jurisdiction except to reverse the case for lack of a qualification requirement by which to disqualify me.

The evidence is "consistent and clear evidence" of my being "able to return to work" on 17 March 1980 and thereafter. I tried to return on 17 March 1980, and on subsequent occasions, but was turned away, despite my being "able to return to work."

"The unlawful discrimination committed in this case was blatant and intolerable. . . . In addition," I was "verbally abused" and in writing. "It is evident that such conduct . . . cannot be tolerated," Batavia Lodge No. 196, L.O.M. v. N.Y. St. D. of H. R., 35 N.Y.2d 143, 316 N.E.2d 318 (1974). Note "when damages for mental anguish may be awarded. However, recovery should not be based solely on common-law strictures as would be applied in determining liability for a tort. Recovery here . . . is based on a statute which effectuates a State policy," p. 319. Here, recovery is sought based on the law and rules applicable for your agency, as well as on the multiple pertinent legal principles on safety, on mental health, on nuisances, on assault, on malpractice, on negligence, on violence, on abusiveness and harassment, on discrimination, etc., etc., on them separately, and on them collectively.

At 319, "We have previously had occasion to speak of the strength and importance of the State's policy in combating discrimination" (citations). Here, note "the strength and importance" of all the pertinent laws, rules, and principles. Their violations constitute negligence per se. To briefly reference material stated elsewhere, mental health laws were designed to forestall harm by mentally ill people; OSHA was designed to control hazards; 32 C.F.R. 203 was designed to have ventilation to "remove smoke," etc., etc. Each rule was designed to prevent the type of effects we see here.

At 319, "there can be no doubt that the extensive powers granted" under each law, rule, and principle, "reflect the broad thrust of . . . fundamental policy" of each of them. Thus "is authorized . . . a variety of sanctions, including the 'awarding of compensatory damages to the person aggrieved . . . .'"

At 319, "In Matter of State Comm. for Human Rights v. Speer, 29 N.Y.2d 555, 324 N.Y.S.2d 297, 272 N.E.2d 884, we held that the statute did authorize the awarding of compensatory damages for mental suffering and anguish to aggrieved individuals." At 320, "The extremely strong statutory policy of eliminating discrimination," controlling mentally ill people, promoting safety, eliminating hazards, controlling nuisances, removing smoke, preventing malpractice, preventing harassment for seeking rule enforcement, etc., etc., "gives . . . more discretion in effecting an appropriate remedy than . . . under strict common-law principles. The main goal of the common-law right . . . was to provide private remedies. In the case at bar, the right is statutory and involves a vindication of public policy as well as a vindication of a particular individual's rights. . . . this is particularly so where, as here, the discriminatory act" and each and every separate rule violation "is intentionally committed."

Please direct an appropriate settlement for each and every violation, and for each segment of duration. Cf. Zarcone v. Perry, 572 F.2d 52 (1978), and the duration of misconduct there, and use an appropriate multiplier factor considering the duration here.

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Please reverse the suspension/termination noted by EEOC personnel 9 April 1980 and 8 April 1983. The applicable standards of proof required of an agency were not followed, as EEOC has already confirmed, i.e., there is no qualification requirement of record, as OPM confirmed 30 Jan. 1984. Hence, MSPB's jurisdiction is limited to reversing the adverse actions for lack of the threshold condition precedent requirement upon which to initiate them.

Note that MSPB has severely skewed and misrepresented its jurisdiction. First, it denied any jurisdiction at all. Then, years afterward, it suddenly reversed itself utterly, and insisted on full jurisdiction, while ignoring the merits (no requirement, hence, no MSPB jurisdiction except to reverse the ouster). MSPB has misrepresented its jurisdiction, and fixated on matters over which it has no jurisdiction considering the lack of the threshold condition precedent requirement. As soon as the lack is noted, MSPB must reverse, and instantly, at that point, its jurisdiction ceases.

MSPB refuses to honor the accurate OPM analysis, refuses to cite the lack of any smoking-related requirement, and ignores my testimony, p. 4, encl. 9. MSPB ignores the misconduct by J. Benacquista, E. Hoover, etc., despite the clear guidance of Sullivan v. Navy, 720 F.2d 1266 (1984). Here, excused absence was clearly cited by Dr. Holt as applicable, as in any hazard situation. Note the multiple admissions against interest with which the record is replete. It is clear why every reviewer of integrity has ruled in my favor.

The necessity for the routing of this case through OPM arises from the facts and data noted herein, particularly pages 136-194. MSPB is clearly unresponsive to me directly. (It even has gone to the extreme of misrepresenting EEOC's 8 April 1983 findings, editing them most unethically). However, OPM is in the direct line of review for MSPB, such that this case must be reviewed by MSPB. This appeal through OPM to MSPB is thus another effort to try to obtain MSPB responsiveness on the merits. MSPB misrepresented what EEOC said. Perhaps an OPM transmittal will have success. Please expedite such.

The accurate 30 Jan. 1984 OPM letter, encl. 1, is appreciated.

This letter is requesting reversal of the suspension and termination based on all the foregoing data. The rules of law that apply show MSPB jurisdiction limited to reversal for lack of a threshold condition precedent requirement for commencing the ouster. (That lacking shows a prohibited personnel practice as well). The ex parte communications by themselves warrant reversal, as does the lack of advance notice/specificity. Appropriate remedial action, including but not limited to that cited on pp. 200-211, and/or other or different applicable remedial action, is sought. Please expedite your corrective measures.

Sincerely yours,

Leroy J. Pletten

Leroy J. Pletten

Encls. 17

Enclosures

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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