Inconsistencies /Due Process Violations Overview

A. The "Decision to Terminate" Lacked 30 Days Advance Notice

1. This situation involves the TACOM "decision to terminate" Leroy J. Pletten, Position Classification Specialist, GS-221-12.

2. Local Equal Employment Opportunity Commission (EEOC) official Henry Perez, Jr., cited TACOM's already clear "decision to terminate" Mr. Pletten as of April 1980 (Exhibit 7).

3. Documents by TACOM's own officials, its EEO Officers, confirm. Gonzellas Williams cites October 1979 (Exhibit 9), and Kenneth Adler cites February 1980 (Exhibit 8).

4. Federal law 5 USC § 7513.(b) (Exhibit 32) mandates due process in the form of a 30 days *advance* notice of charges to accused employees, and provides rights to collect affidavits in one's defense. The Supreme Court has upheld due process as a constitutional right, *Cleveland Bd of Educ* v *Loudermill*, 470 US 532; 105 S Ct 1467; 64 L Ed 2d 494 (1985).

5. What is an advance notice? It is a "statement or citation of the written regulations . . . said to have been violated [and a] detailed statement of the facts" to show the violations. *Boilermakers* v *Hardeman*, 401 US 233, 245; 91 S Ct 609, 617; 28 L Ed 2d 10, 21 (1971). See also paragraphs 93-100, *infra*.

6. This dual rule/fact combination requirement is specified in FPM Supplement 752-1, "Adverse Actions by Agencies," § S4-1c.(1), page 46 (Exhibit 13). The 30 days advance notice must state not only "what the employee was doing" but also "*why* what the employee was doing was wrong," i.e., must state the laws/rules violated. TACOM rambles about smoking, but smoking is listed as an example offense by smokers, not by nonsmokers.

7. TACOM did not provide notice 30 days in advance of the "decision to terminate" noted by the aforesaid EEO personnel (Perez, Adler, and Williams, Exhibits 7-9). By itself, without more, TACOM erred. Mr. Pletten thus remains on the rolls. *Sullivan* v *Navy*, 720 F2d 1266, 1273-4 (Fed, 1983); *Hanifan* v *U.S.*, 173 Ct Cl 1053; 354 F2d 358, 364 (1965).

B. Michigan Awarded Pletten Unemployment Compensation.

8. The local Army base TACOM is part of the unemployment system. In Michigan, said unemployment system is of course managed by the State of Michigan Pursuant to the evidence of TACOM's "decision to terminate" him, Mr. Pletten sought unemployment compensation.

9. Unemployment cannot be granted to ineligible people, for example, employees suspended or removed for misconduct, or in non-pay status with their employer for other disqualifying reasons. Absent a 30 days advance notice of charges, and subsequent decision affirming same, no such disqualifying factor could exist against Mr. Pletten. None did.

10. Nonetheless, TACOM opposed Mr. Pletten's unemployment compensation claim, alleging disqualifying reasons (re smoking, notwithstanding that smoking is listed as a violation by smokers, not nonsmokers, Exhibit 13). The State of Michigan was initially deceived by TACOM. But unlike TACOM and its hostile working environment and hatred and contempt for and fear of due process, Michigan respects due process of law, so when Mr. Pletten asked for a formal hearing, same was promptly scheduled, and conducted.

11. At hearing, all evidence was of course in Mr. Pletten's favor, including testimony from his former Employee Relations GS-13 supervisor, Helen F. Cochran. TACOM offered no evidence that the Pletten was guilty of anything, of any disqualifying factor in law or fact.

12. Michigan accordingly granted unemployment compensation to Mr. Pletten in July 1981, retroactive to January 1981 (Exhibit 14). TACOM repeatedly appealed. Each of its three appeals was denied, in September 1981, May 1982, and June 1982 (Exhibits 17-19).

13. Michigan in short followed the law, MCL § 750.27, MSA § 28.216 (Exhibit 34), banning what TACOM alleges (without evidence, and certainly not from the job description or other official documentation) by innuendo is a "medical qualification requirement." Michigan law bans what TACOM pretends is required! Federal laws 29 USC §§ 651-678 and 5 USC § 7902.(d) (Exhibit 33) require employers/agencies to "eliminate work hazards and health risks." Michigan followed the obvious principle that an employee's not meeting a non-requirement—no matter how emphatically proven—"can ***never*** prevent performance of the job." ***Montgomery Ward*** v ***Bureau of Labor***, 16 FEP 80; 280 Or 163; 570 P2d 76 (1977).

C. TACOM's Leave without Pay (LWOP) Cover Story

14. This refers to the time during which TACOM was fighting / appealing Michigan's decision in favor of Mr. Pletten. Mr. Pletten by then had been the subject of the "decision to terminate" for almost two years.. No return to duty date existed. It was clear that TACOM had imposed a ***de facto*** termination. It was clear that TACOM would never allow Mr. Pletten to return. TACOM was refusing him access to the EEOC 29 CFR § 1613 forum in which review would even occur. TACOM went to the extreme in June 1981 of cancelling the investigation (Exhibit 31) being done in the said EEOC 29 CFR § 1613 review forum.

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15. Unemployment compensation would of course be clearly warranted under such clear termination circumstances.

16. TACOM management decided to falsify, to fake a return to duty (RTD) date. That might bluff Michigan.

17. TACOM's method of falsifying, of faking RTD date, was to issue paperwork claiming that such a date existed! This refers to the Leave Without Pay (LWOP) cover story TACOM retroactively invented. See Standard Form (SF) 50 (Exhibit 15). Therein TACOM falsified, faked that Mr. Pletten had a RTD date! – 13 December 1981!

18. A lay reader untrained in reading SF-50's might be bluffed. But to the trained eye, the SF-50 is flawed, defective. First, LWOP must follow the regulations including TACOM's Regulation 600-5, Chapter 14, e.g., p 19 (Exhibit 16), on leave. LWOP must be *requested by the employee*! Mr. Pletten had not requested! (indeed, opposed it).

19. Second, the LWOP's SF-50, Box 14, has a glaring flaw/defect. Form SF-50 has a box, Box 14, that states the legal basis or authority. The box is blank!! The SF-50 cites no authority, no legal basis! TACOM knows it has none. In contrast, for legitimate requested and authorized LWOP, the authority for genuine LWOP is "DAM" under "Reg. 630.101." (See the *OPM Guide to Personnel Data Standards*.)

20. Third, no reasons in Box 30 are stated. The "decision to terminate" had long since been made, as the EEO documents show (Exhibits 7-9). TACOM issued the retroactive SF-50 for the LWOP *after* Mr. Pletten (pursuant to EEOC's Mr. Perez' April 1980 letter, Exhibit 7) had testified to the State of Michigan with respect to his unemployment that he had been "fired." (MESC Transcript, p 9) To obstruct this fact, is why TACOM issued the LWOP SF-50 pretending that Mr. Pletten had the aforesaid RTD date of 13 December 1981!

21. The State of Michigan was not fooled by this TACOM bluff. TACOM of course had no intention to let Mr. Pletten return to duty. The pretended RTD date was sheer fabrication and fraud. The "decision to terminate" had long since been made, as the various EEO memos show (Exhibits 7-9). TACOM of course did not intend to follow through, did not intend to allow Mr. Pletten to return to duty.

22. As time would reveal, pursuant to the hostile work environment, TACOM indeed did not let Mr. Pletten return to duty (RTD). TACOM continued to keep Mr. Pletten away, again, without authority to do so. Knowing it lacked authority, TACOM issued no LWOP Extension SF-50 (code 773 in the *OPM Guide to Personnel Data Standards*). Issuing such a document would verify, confirm, its refusing to return Mr. Pletten to duty on 13 December 1981, the false cover story date on the SF-50, Box 12 (Exhibit 15). TACOM issued no SF-50 at all for 13 December 1981 - 22 January 1982, leaving that gap in the personnel records.

D. <u>Inconsistences in the Subsequent Record</u>

23. The lack of an SF-50 for the 13 Dec 1981 - 22 Jan 1982 gap period confirms that there is neither authority nor a personnel code (773) for the gap. TACOM refused to let Mr. Pletten return to duty on its own chosen date, 13 Dec 1981, nor cited "reasons" in a notice as mandated by the 30 days advance notice law, 5 USC § 7513.(b). So it must be reversed.

24. About two years had now gone by since the "decision to terminate" (Exhibits 7-9). Now as its LWOP bluff (Exhibit 15) had failed, TACOM decided to proceed to actually issue a SF-50 to record its "decision to terminate" Mr. Pletten. This would be in addition to the *de facto* termination that had already long since occurred (Exhibits 7-9).

25. Again, as people who fabricate, confabulate, make things up, may not get their story straight, TACOM committed more inconsistencies. The documents TACOM now belatedly chose to issue (SF-52 and SF-50), themselves contain even more inconsistent terminology. These inconsistencies refer to two wholly different types of personnel action: "terminate," "separation-medical disqualification," and "removal."

26. The inconsistent terminology relates to wholly different personnel actions, tantamount to the difference between (a) "medical discharge" and (b) "dishonorable discharge."

27. The former ("medical discharge") is for inability to meet some specified medical requirement(s) stated in the job description, whereas the latter (removal, "dishonorable discharge") is for misconduct in violation of conduct rules, e.g., the "Table of Penalties," typically for willful, insubordinate, or repeated misconduct wherein prior discipline (warning, admonition, reprimand, suspension) failed to correct the pattern of misconduct.

28. Here, the Standard Form 50 (SF-50), Notification of Personnel Action (Exhibit 11), cites "removal" as the "nature of action" (Box 12). But the explanation (Box 30) cites nothing of a misconduct nature, e.g., no "Table of Penalties" rule violation.

29. Instead, the SF-50 alleges some "medical disqualification," but inconsistently, one for which no medical qualification requirement exists! — neither by regulation nor by job duty in the job description. Review of the Position Classification job description and medical qualifications of record (Exhibit 20) reveals no such requirement has ever existed, nor has ever been applied to any other employees, not even those on the same Pos. Class. job description.

30. Federal Personnel Manual Supplement 296-33, p 11, p 12, and p 15 (Exhibit 12), distinguishes among the various personnel action terms, "termination," "removal," etc. Example:

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

31. A "removal" is only effected pursuant to pre-identified (30 days prior) written notice of charges of violating conduct rules, e.g., the "Table of Penalties" or performance standards, citing the rules and/or performance standards allegedly violated, and citing examples, incidents, dates, witness names, etc., and any prior corrective action (warnings, unsatisfactory ratings, reprimands, suspensions, etc.) having failed to secure improvement.

32. A "removal" for civilians is tantamount to a "dishonorable discharge" for the military, and is thus the most damaging personnel action. It is a quite different action than. say, a medical discharge.

33. "Termination" in contrast to "removal" is "where the employee is not at fault," p 15 (Exhibit 12). One example cited is "disability."

34. Court precedents say likewise. See _Jones_ v _J. J. Security_, 767 F Supp 151, 152 (ED Mich, 1991), citing _Gantz_ v _City of Detroit_, 392 Mich 348, 356; 220 NW2d 433 (1974):

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

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

36. See also the Removal SF-50 (Exhibit 11), Box 14, "Authority," which cites "ZLM, Auth 5 USC 7512," as the authority for the action. But the correct code for "removal" is "RAH." See the "Legal Authority" section of the said _OPM Guide to Personnel Data Standards_.

37. Clearly, prima facie, as TACOM's own inconsistent documentation shows, TACOM issued no 30 days advance notice prior to the "decision to terminate." Thus, as a matter of law, Mr. Pletten must be deemed as not terminated but rather remaining on the rolls. _Sullivan_ v _Navy_, 720 F2d 1266, 1273-4 (Fed, 1983); _Hanifan_ v _U.S._, 173 Ct Cl 1053; 354 F2d 358, 364 (1965).

E. <u>Whistleblowing Background</u>

38. In the background of all these inconsistent actions in TACOM's hostile work environment is TACOM's retaliation against Mr. Pletten's whistleblowing.

39. Mr. Pletten's whistleblowing was pursuant to Army Regulation 385-10.3-5, *inter alia*:

> "Reports of unsafe or unhealthful conditions. *a*. Reports of unsafe or unhealthful conditions by Army personnel are important in detecting hazards that cause accidents. Such reports will be handled at the operating level to ensure prompt, efficient processing. However, provision will be made as outlined below for personnel to bring such complaints directly to installation level, bypassing intermediate commands or supervisory elements. . . . Commanders will publicize all channels for reporting unsafe or unhealthful conditions, emphasizing personnel responsibility for making such reports."

40. Mr. Pletten's whistleblowing pursuant thereto, included, for example, to OSHA (Exhibit 1), Safety Office (Exhibit 2), Inspector General (Exhibit 3), in context of data the Army admits by Proclamation (Exhibit 4) and Literature Review (Exhibit 5).

41. TACOM management opposed compliance with the regulations and laws which were the subject of Mr. Pletten's whistleblowing, pursuant to his adherence to Army Regulation 385-10.3-5, so they, in this hostile work environment situation, retaliated against Mr. Pletten.

42. See, for example, the retaliatory 5 October 1979 memorandum (Exhibit 6) by Personnel Officer Archie Grimmett urging the Commanding General (MG Oscar C. Decker, Jr.) to refuse Mr. Pletten an "Open Door" meeting. MG Decker accordingly refused to meet him.

43. Such refusal of access to the "Open Door" is retaliatory, see, e.g., <u>*EEOC*</u> v <u>*Board*</u>, 957 F2d 424 (CA 7, 1992); <u>*EEOC*</u> v <u>*General Motors Corp*</u>, 826 F Supp 1122 (D ND Ill, 1993). This early (October 1979, Exhibit 6) hostile working environment event shows retaliation already decided upon by TACOM management.

F. <u>TACOM Violation of Its Own Discipline Regulation</u>

44. Throughout the "decision to terminate" (or "remove," or "separate," TACOM terms varied as per no 30 days advance notice stating for the record which term was meant), the record shows that TACOM never complied with its own Regulation 600-5, Chapter 18, its own discipline regulation. This aspect is so significant as to warrant analysis in its own right, which see.

G. Review Cancelled by TACOM

45. Pursuant to Equal Employment Opportunity Commission (EEOC) regulation 29 CFR § 1613, Mr. Pletten sought EEO review of TACOM's hostile work environment, actions and retaliation against him in 1979 and thereafter, including the "decision to terminate."

46. Said 29 CFR § 1613 renders EEO review a multi-step process including (a) counseling, (b) investigation, (3) local on-site formal hearing with cross-examination, (4) written decision, etc., and specifically in that progressive case-record developing order.

47. (This thorough EEOC review system is in sharp contrast to the minimalist MSPB process, which provides only for a hearing, and even that at a distant expensive notorious out-of-state location, and, worse, even that, if and only if MSPB feels like it. MSPB's is a wholly subjective standard, entirely arbitrary and subject to capricious/malicious denial without regard to evidence, and with no, or frivolous, or false statement(s) as to why the refusal of even that minimal step.)

48. Thus, to obtain the genuine thorough review in a professional progressive case-record developing system, TACOM foresaw that Mr. Pletten naturally would choose EEOC's 29 CFR § 1613 forum. After the counseling step, investigation was to begin, and USACARA Investigator Jonell Y. Calloway was assigned.

49. USACARA investigators are trained (a) to gather evidence including affidavits and (b) to apply the rules on disciplinary actions including terminations. In Spring 1981, affidavits were in fact in process of being obtained from witnesses, fellow employees, staff, etc.

50. TACOM management realized and feared that same were in Mr. Pletten's favor:

> a. exposing TACOM's hostile work environment and TACOM's policy of insubordination against, hostility to, non-compliance with the rules at issue,
>
> b. TACOM's defiance of the preceding mandatory 25 Jan 1980 USACARA Report in Mr. Pletten's favor (see _Spann_ v _Army, Gen. McKenna, Gen. John R. Deane, Jr., et al._, 615 F2d 137 (CA 3, 1980), citing Army Civilian Personnel Regulation 700, Chapter 771, for the mandatory nature of same),
>
> c. Mr. Pletten's being guilty of no offense, instead, his being an award-winning, respected and exemplary employee,
>
> d. TACOM's violation of due process with respect to the "decision to terminate" without notice,

e. the ouster as cited by the three EEO officials (Exhibits 7-9) as a matter of common knowledge among TACOM employees,

f. TACOM's retaliation against Mr. Pletten,

g. and other information as may have been provided by the witnesses in their affidavits being obtained by Investigator Calloway.

51. So TACOM management wanted the in-process investigation cancelled regardless of regulation mandating investigation. TACOM management asked agency attorney Emily S. Bacon (a) to violate her duty to the agency, (b) to represent them in their opposing agency and other rules, (c) to serve in essence as their personal attorney while being paid by the government, (d) to *ex parte* contact USACARA, (e) to arrange peremptory cancellation of the in-process investigation, and (f) to state a false pretext–that she would falsely pretend the arranging of an EEOC hearing!

52. Emily S. Bacon agreed to do this (Exhibit 31), to act in personal capacity to represent the offending officials as distinct from the Army as an institution wanting its rules enforced.

53. Re her false pretextual claim of supposedly scheduling a hearing (without the case record having been developed by a completed investigation which she had maliciously aborted), she knew that neither she nor TACOM had any intention of ever allowing an EEOC hearing. So her hearing claim was "a promise made without any intention of performing it [as] one of the forms of actual fraud," *Langley* v *Rodriguez*, 122 Cal 580; 55 P 406 (1898). EEOC's position is that an agency failure to adequately develop the record subjects the agency to adverse inference. *Hashimoto* v *Dep't of Housing and Urban Development*, EEOC Appeal No. 01A24642 (May 11, 2004).

54. No such hearing as personal attorney Emily S. Bacon alleged, has ever, repeat, ever, been even attempted, nor scheduled, much less, convened.

55. Worse, once the case file with the evidence and affidavits assembled by Investigator Calloway, was thus turned over to TACOM (Exhibit 31), that was the last ever seen of said evidence and affidavits. To obstruct and prevent Pletten from (a) defending himself against TACOM's multiple violations and retaliations, (b) from replying to the ouster, (c) from using the data in any other subsequent forum, TACOM refused and continues to refuse to provide a copy of any of the assembled evidence and affidavits to Mr. Pletten.

H. TACOM Inconsistency Leading to "Removal" SF-50

56. The "decision to terminate" had long since been made, as the various EEO documents show (Exhibits 7-9).

57. It was now late 1981. Pursuant to the de facto October1979 "decision to terminate" Mr. Pletten (Exhibit 9), Michigan had long since been granting Mr. Pletten unemployment compensation effective as of the beginning of that year (Exhibits 14, 17-19).

58. TACOM still had not issued an advance notice of charges against Mr. Pletten, notwithstanding that doing so is mandatory under both the Constitution (due process of law, a constitutional right, *Cleveland Bd of Educ* v *Loudermill*, 470 US 532; 105 S Ct 1467; 64 L Ed 2d 494 (1985)), and federal law 5 USC § 7513.(b).

59. In order to effect a personnel action, management must submit a request. Such request is made and recorded on a Standard From 52, Request for Personnel Action.

60. Note the SF-52 requesting the "termination" of Mr. Pletten in January 1982 (Exhibit 10). Box K shows no "clearances" by the appropriate offices, meaning classification and placement or employment.

> a. The absence of a classification clearance with respect to the job description verifies that the alleged requirement implicit in the SF-52 is not there (in the job description).
>
> b. The absence of a placement or employment clearance verifies that the qualification requirement implicit in the SF-52 does not exist for the occupation.

61. Indeed, no such requirement exists, neither in the job description, nor for the personnel occupation (Exhibits 20-30). See pertinent precedents such *Commonwealth* v *Hughes*, 468 Pa 502; 364 A2d 306 (1976) (the firefighter deaths smoker-caused fire case immediately preceding the promptly issued Department of Defense Instruction 6015.18 aka 32 CFR § 203; and *Shimp* v *New Jersey Bell Tele Co*, 145 N J Super 516, 523; 368 A2d 408, 411 (1976). *Shimp* is a smoking-permission-cessation case. *Shimp* verified that it is not necessary to fill the air with tobacco smoke for the job to be done. There is "no necessity to fill the air with tobacco smoke in order to carry on defendant's [Army personnel] business."

62. Thus, "the job requirements and qualifications had never been formally changed" to even reference tobacco smoke neither in the job description nor any medical qualifications

requirements data (not even *de minimis* reference), quoted from *Sabol* v Snyder, 524 F2d 1009, 1011 (CA 10, 1975). The duty is to "examine the position descriptions," look for "legitimate job requirements," Coleman v Darden, 595 F2d 533 (1979), Stalkfleet v Postal Service, 6 MSPB 536, 541 (1981). Tobacco smoke is not "in the requirements for any position," 5 USC § 2302(b)(6) (Exhibits 20-30). Non-requirements "can *never* prevent performance of the job," *Montgomery Ward* v *Bureau of Labor*, 16 FEP 80; 280 Or 163; 570 P2d 76 (1977). Indeed, the last, only, statement by anyone at TACOM citing medical qualification requirements of Mr. Pletten's job was the verification that Mr. Pletten met same (issued in August 1969 when TACOM hired him, Exhibit 20).

63. Management recognized that Mr. Pletten meets all the qualifications of record (Exhibits 20-30), met them since 1969, and was still meeting them. Hence, management never charged/accused Mr. Pletten of not meeting the qualifications of record, certainly not in a pre-decision 5 USC § 7513(b) 30 days advance notice.

64. Likewise, TACOM never initiated a qualifications-based Fitness for Duty Medical Examination of Pletten, as he would forthwith pass same, due to his meeting the medical qualification requirements of record, met them then, continues to meet them now.

65. TACOM, if it believed it has a case, would have arranged such an exam. TACOM's not doing so confirms that TACOM knows it has no case for "medical disqualification."

66. Inconsistently, the January 1982 SF-52 asked for "Separation - Medical Disqualification" (Exhibit 10), a no-fault action (Exhibit 12). The date is very early January 1982, Box B, meaning, the first SF-52 Request by the entire Directorate for the year 1982, as shown by the SF-52 number, A-82-1 (Box B).

67. Let's give TACOM the benefit of the doubt, let's say the earliest 1982 workday, 2 January 1982. As the SF-50 became effective 22 January 1982, that 2 January 1982 date is clearly only 20 days notice, not the required 30 days advance notice.

68. But although the SF-52 asked for a no-fault (Exhibit 12) "Separation - Medical Disqualification" (Exhibit 10), that is not what the resultant SF-50 (Exhibit 11) says. It says something different, "Removal" – an "employee at fault" action (Exhibit 11).

69. The change to "Removal" –an "employee at fault" action wholly different than a no-fault medical separation – is handwritten in on the typed SF-52 in Box K(5) (Exhibit 10). The date shows 8 January 1982. That is a mere 14 days before the effective date, clearly only 14 days notice, not the required 30 days advance notice. And one must also factor in additional delay, for mailing time.

70. Clearly, whichever date (2 or 8 January 1982, or some subsequent date of receipt of the mailed SF-50 (Exhibit 11)), none meets the 30 days advance notice rule, whereby the agency must alert the accused employee in advance of what the agency intends to do.

71. In sum, an advance notice about medical separation, had there been one with the requisite specificity citing job description and medical qualification requirements of record and saying which one(s) TACOM was accusing Mr. Pletten of not meeting, is wholly different than an advance notice about a removal, tantamount to dishonorable discharge, based on alleged misconduct under, e.g., the "Table of Penalties.".

72. Here, this major change in nature of action is not even written on the official document until a mere 14 days before the effective date. This is clearly not the required 30 days advance notice.

I. <u>There Can Be No Medical Qualification "Requirement" For Banned Behavior</u>.

73. With respect to the alleged "medical qualification requirement" (alleged by the SF-50, Exhibit 11, para 30), the referenced behavior is prohibited by law, MCL § 750.27, MSA § 28.216 (Exhibit 34). Note also 29 USC §§ 651-678 and 5 USC § 7902.(d) requiring employers/agencies to "eliminate work hazards and health risks." What is prohibited by law cannot be required!!

J. <u>There Can Be No Medical Qualification "Requirement" For An Unlisted Matter</u>.

74. A "medical qualification" requirement must be recorded in official documents, typically the job description, and the medical form signed by the TACOM physician.

75. Of course, no such "medical qualification" as TACOM alleged, was listed on either document, nor any other personnel file document of record, nor anywhere else (Exhibits 20-30). Everyone involved in this case knew this at the time, and still knows it.

76. TACOM knew this, and knew it had no basis for claiming such, as to do so, it would have to petition for a law change, and change the Job Description for all TACOM's Position Classification Specialists, GS-12. (All doing uniform identical duties, all were on the same job description for uniformity.)

77. TACOM did not even make an effort to change the job description! The other employees would have been impacted. In short, "the job requirements and qualifications had never been formally changed," *Sabol* v *Snyder*, 524 F2d 1009, 1011 (CA 10, 1975), to even reference what TACOM alleged on Exhibit 11 (not even *de minimis* reference).

78. Pursuant to 5 CFR § 339.202 (Exhibit 29), medical qualifications must be written and have written rationale, and be "uniformly applied" as distinct from invented retroactively to rationalize removal of one employee.

79. Pursuant to 5 CFR § 339.203 (Exhibit 30), medical qualifications must be "essential for successful job performance," and "clearly supported by the actual duties of the position and documented in the position description" whereas tobacco smoke is none of these.

80. In reality, there is "no necessity to fill the air with tobacco smoke in order to carry on defendant's business," *Shimp* v *New Jersey Bell Tele Co*, 145 N J Super 516, 523; 368 A2d 408, 411 (1976), e.g., to do Position Classification duties. *Shimp* is the smoking-permission-cessation case immediately preceding the promptly issued DOD Inst. 6015.18; 32 CFR § 203). *Shimp* had found "no necessity to fill the air with tobacco smoke in order to carry on defendant's business," here, to classify positions).

81. No such medical qualification requirement exists. See denials by the qualifications writing agency, OPM and again, by the Dept of Army itself, and by its superior agency, Dept of Defense, by the US Dept of Labor and the Office of Management and Budget, and by the Mich. Dept of Civil Rights (Exhibits 22-28).

K. TACOM Violated the Duty to Investigate.

82. Management has a duty to investigate *before* it initiates adverse action. This investigative duty is known in both the private section, *Grief Bros Coop Corp*, 42 Lab Arb (BNA) 555 (1964) and *Combustion Engineering, Inc*, 42 Lab Arb (BNA) 806 (1964) (seven point criteria), and the federal sector, *Douglas* v *Veterans Admin*, 5 MSPR 280, 305-306 (1981) (twelve point civil service criteria) and *Yorkshire* v *MSPB*, 746 F2d 1454, 1456 (CA Fed, 1984) (five-point civil service criteria).

83. The seven point private sector criteria of *Grief Bros Coop Corp*, 42 Lab Arb 555, and *Combustion Engineering, Inc*, 42 Lab Arb 806, *supra*, are as follows:

(1) Forewarning employee of possible consequences of conduct.

(2) The allegedly violated rule or order must be reasonably related to orderly, efficient, and safe operations.

(3) Before administering discipline, employer is to investigate whether employee did, in fact, violate or disobey the rule or order.

(4) Employer investigation must be conducted fairly and objectively.

(5) In investigation, employer must obtain sufficient evidence or proof that employee was guilty as charged.

(6) Employer must apply its rules, orders, and penalties evenhandedly and without discrimination.

(7) Degree of discipline must be reasonably related to seriousness of offense and employee's record?

"'No' answer to one or more normally signifies that just and proper cause did not exist." [Here, all answers are NO, both on the merits, and pursuant to TACOM fear to allow investigation.]

84. The twelve point civil service investigation criteria of *Douglas* v *Veterans Admin*, 5 MSPR 280, 305-306 (1981) are:

(1) Nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated. (No offense cited)

(2) Employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position (none alleged by TACOM)

(3) Employee's past disciplinary record (none, exemplary employee).

(4) Employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability (exemplary employee, received awards and was elected by coworkers to two terms as their representative on the CWF Council).

(5) Effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties (exemplary employee, received awards and pay increases for quality work).

(6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses (wholly inconsistent)

(7) Consistency of the penalty with any applicable agency table of penalties. (wholly inconsistent, see, e.g., McLeod v Dept of Army, 714 F2d 918 (CA 9, 1983)

(8) Notoriety of the offense or its impact upon the reputation of the agency (none alleged by TACOM).

(9) Clarity with which the employee was on notice of any rules violated in committing the offense, or had been warned about the conduct in question (no notice at all, actions were retroactive, without notice, warning, etc.)

(10) Potential for the employee's rehabilitation (none needed as no "removal" level offense cited)

(11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter (definitely in retaliation as shown starting with at least the 5 October 1979 closing of the Commander's "Open Door" policy (Exhibit 6), and as admitted by Col. John J. Benacquista).

(12) Adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others (no breach, hence no sanctions appropriate).

References: 5 C.F.R. § 731.202(c); Federal Personnel Manual, ch. 751, subch. 1-2 Dec. 21, 1976); CSC Board of Appeals and Review, Memorandum No. 2; Francisco v Campbell, 625 F2d 266, 269-70 (CA 9, 1980); Howard v U.S., Civ. LV-77-219 RDF (D Nev, 3 July 1980) (Mem. Order at 9); Giles v U.S., 213 Ct Cl 602; 553 F2d 647, 650-51 602 (1977); Boyce v U.S., 211 Ct Cl 57; 543 F2d 1290, 1294 (1976); Tucker v U.S., 224 Ct Cl 266; 624 F2d 1029, 1034 (1980); Byrd v Campbell, 591 F2d 326, 331 (CA 5, 1979); Clark v U.S., 162 Ct Cl 477, 485 (1963).

85. The court-stated five point civil service criteria of Yorkshire v MSPB, 746 F2d 1454, 1456 (CA Fed, 1984), are:

(1) Where the agency engaged in a "prohibited personnel practice" (5 § 7701(g)(l) (here, e.g., a non-existent qualification requirement denied by all pertinent agencies including Army)

(2) Where the agency's action was "clearly without merit" (5 § 7701(g)(l)), or was "wholly unfounded," or the employee is "substantially innocent" of the charges brought by the agency (here, no "charges" at all were brought to justify "removal" tantamount to dishonorable discharge)

(3) Where the agency initiated the action against the employee in "bad faith," including:

a. Where the agency's action was brought to "harass" the employee;

b. Where the agency's action was brought to "exert improper pressure on the employee to act in certain ways" (both admitted by Col. John J. Benacquista, Chief of Staff)

(4) Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced" the employee (here, for some three decades)

(5) Where the agency "knew or should have known that it would not prevail on the merits" when it brought the proceeding (evident from the fear of allowing investigation, the obstructions, the omission of the normal review of the SF-52's involved, e.g., not allowing Mr. Pletten to see the SF-52 (unlike in e.g., the Charla J. Inabnitt case) and no certification of any such medical qualification requirement as retroactively alleged, nor of any such in the job description).

86. TACOM refused to investigate. The whole purpose of the peremptory "decision to terminate" (Exhibits 7-9) was to harass and punish Mr. Pletten for his exercising protected rights, including but not limited to his whistleblowing pursuant to AR 385-10.3-5.

87. When at Mr. Pletten's repeated request, investigation was attempted via the after-the-fact EEO process under 29 CFR § 1613, TACOM cancelled it (Exhibit 31).

88. Said exhibit 31 overrules TACOM's Kenneth R. Adler, TACOM EEO Officer, who pursuant to Mr. Pletten's seeking review in the EEOC 29 CFR § 1613 review system, had attempted in 1981, however belatedly re incidents beginning 1979, to secure investigation. While this was after-the-fact investigation, in contrast to the management duty to do a before-the-fact investigation, it would at least be better than nothing.

89. However, TACOM Command Management overruled this effort, caused cancellation of investigation (Exhibit 31).

a. TACOM management feared investigation by an investigator trained in personnel adverse action rules and processes, as affidavits and other evidence being collected by the investigator foreseeably supported Mr. Pletten.

b. Management via its personal attorney Emily S. Bacon falsely informed the investigating officer that an EEOC hearing would be held without the investigation provided for by the said EEOC Regulation 29 CFR § 1613. EEOC had not agreed to this disregard of its regulation.

c. The TACOM claim of a hearing to be held was false. No such hearing as alleged was in process, nor has ever been scheduled, nor has same ever occurred, notwithstanding Mr. Pletten's decades of efforts to secure same.

d. TACOM management was well aware that if they allowed Mr. Pletten review in the EEOC forum, (a) his case would be heard at the very same office where its Henry Perez, Jr., worked, maybe even by Mr. Perez himself; and (b) Mr. Perez's letter (Exhibit 7) showing the notice-less "decision to terminate" would be Exhibit A. TACOM management determined to prevent / obstruct EEOC review. The TACOM goal was to force Mr. Pletten into the notoriously hostile-to-whistleblowers MSPB and federal court system.

e. As a further obstruction matter worsening the already hostile work environment, TACOM has refused to provide said affidavits to Mr. Pletten. They have never been provided to him notwithstanding his decades of efforts to secure same, and TACOM's duty to provide same as part of the evidence with respect to his ouster/removal.

L. <u>Ouster is Premature While Appeal Is Pending</u>.

90. Clearly Mr. Pletten's seeking review was pending. Nonetheless TACOM was forcing the ouster process without waiting. Case law shows that the contrary should occur.

91. Even mere separation of an employee for disability (not to mention, disciplinary "removal," Exhibit 11) is premature while appeals are in process. *Piccone v U.S.*, 186 Ct Cl 752; 407 F2d 866 (1969). The moving party, here TACOM, is "not permitted to proceed . . . where the parent's [here, employee] appeal remains pending," *Family Independence Agency* v *Melissa Kucharski*, 468 Mich. 202; 661 NW2d 216; Lexis 939 (2003).

92. In sum, an "agency's action is [not] fully effective to separate the employee for all purposes; as is often the case in judicial proceedings, an appeal or application for review by the Commission suspends the final operative effect of the initial decision. It follows that an employee who has been deprived of a procedural right by the Commission must be regarded as not yet lawfully removed and thus entitled to his pay otherwise due," *Hanifan* v *U.S.*, 173 Ct Cl 1053; 354 F2d 358, 364 (1965).

M. TACOM Has No Basis for Termination/Removal.

93. To even begin to have a basis for beginning the discipline process, even at a mere reprimand or suspension level, much less, a termination or removal, a federal agency must, as cited in, e.g., paras. 4-5 *supra*, first comply with federal law 5 U.S.C. § 7513.(b) and case law pursuant thereto, which jointly and severally preclude agencies from taking such actions absent reasons cited of record with advance opportunity for employee to respond.

> "(b) An employee against whom an action is proposed is entitled to–
>
> "(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
>
> "(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer . . .
>
> "(4) a written decision and the specific reasons therefor at the earliest practicable date."

94. Federal regulation 5 C.F.R.§ 752 in the Code of Federal Regulations implements and details the federal discipline system established by the pertinent federal law, 5 U.S.C. § 7513.(b). It carries on the Federal Personnel Manual 752-1 material. Employee Relations Specialists are to be thoroughly familiar with these rules, hence, violation of same is willful, deliberate, malicious, indicative of hostile work environment.

95. TACOM did not provide any, much less, "numerous examples of specific errors," *Long* v *Air Force*, 683 F2d 301 (CA 9, 1982), for the reason that Mr. Pletten had committed NO "specific errors"whatsoever, and was in fact, receiving awards, recognition, pay raises! for excellent performance better than colleagues. See also *Smith* v *Dept of Interior*, 9 MSPR 342, 344 (1981), the accusing agency must provide "specific examples" of "alleged

performance deficiencies" "to meet the 'specificity' test" as "[a] notice of proposed adverse action is required to be specific enough so that the employee is presented with sufficient information to enable him or her to make an 'informed reply.' S. Rep. No. 95-969, 95th Cong., 2d Sess. 50 (1978), *U.S. Code Cong. & Admin. News* 1978, p 2723, Report of the Senate Committee on Governmental Affairs."

96. Reasons to be adequate must specify not only the incidents but also "names . . . places . . . dates" of the employee's alleged misdeeds and witnesses thereto, *Money* v *Anderson*, 93 US App DC 130, 134; 208 F2d 34, 38 (1953). (In Pletten's case, neither alleged incidents nor any such specificity was cited by the agency).

97. Reasons cannot be merely conclusory, *Mulligan* v *Andrews*, 93 US App DC 375, 377; 211 F2d 28, 30 (1954). (Here, no non-conclusory reasons are shown in the controlling document of record, neither the SF-52, "Request for Personnel Action (Exhibit 10)," nor the SF-50, "Notification of Personnel Action (Exhibit 11).")

98. Charges must have reasons with specificity so as to enable the accused to do more than merely "general denials," *Deak* v *Pace*, 88 US App DC 50, 52; 185 F2d 997, 999 (1950). (TACOM has never provided specifics, only the generalities shown heretofore.)

99. TACOM did not provide reasons that were both "lengthy and detailed," to which the employee could respond, *Baughman* v *Green*, 97 US App DC 150; 229 F2d 331 (1956).

100. TACOM cited no specifics at all, much less, "item by item," *Mandel* v *Army TACOM*, 509 F2d 1031, 1032 (CA 6) cert den 422 US 1008 (1975). (In Pletten's situation, none were provided, neither generally nor "item by item." The Mandel case at TACOM shows that TACOM knows better than to fail to provide specifics.)

N. Cannot Be an Ouster Based on Approved Leave.

101. The "decision to terminate" occurred in 1979 (Exhibits 7-9). But thereafter, as a cover-up, TACOM issued the LWOP documentation (Exhibit 15) notwithstanding regulatory prohibition of same (Exhibit 16). But even assuming arguendo the LWOP as somehow legitimate, federal employers cannot use "approved leave" as basis for discipline such as a removal. *Bond* v *Vance [Army]*, 117 US App DC 203, 204; 327 F2d 901, 902 (1964); *Washington* v *Dept of Army*, 813 F2d 390, 394 (CA Fed, 1987). (I didn't request! and forced LWOP is prohibited by the agency's own regulation 600-5.14-27 and 28 (Exhibit 16). Moreover, TACOM had overruled its own chosen examining doctor specialist Dr. David Schwartz who had supported Dr. Jack Salomon's view of Mr. Pletten being ready, willing, and able to perform all duties of record.)

O. Agencies Cannot Violate Their Own Regulations.

102. The record shows violation of the agency's own regulations. Agency violation of its own regulations has long been judicially rejected, see, e.g., *Watson* v *Dept of the Army*, 162 F Supp 755 (1958); *Piccone* v *U.S.*, 186 Ct Cl 752; 407 F2d 866, 871 (1969); *Service* v *Dulles*, 354 US 363; 77 S Ct 1152; 1 L Ed 2d 1403 (1957), so is no excuse.

P. Army's Own Review Corroborates Violation.

103. Army lawyer Capt. Scott D. Cooper reviewed the Pletten situation: "The MSPB [erroneously] ruled that it had no jurisdiction [not for the correct 29 CFR § 1613.403 now § 1614.302(b) regulatory reason but on the pretext] that it had no jurisdiction over enforced leave cases because enforced leave was not an adverse action (this is no longer good law; after *Valentine* v. *Department of Transportation*, 31 M.S.P.B. 358 (1986), enforced leave is now an adverse action)," "Handling Tobacco-Related Discrimination Cases in the Federal Government," 118 *Military Law Review* 143, n 206 (Fall 1987).

Q. Violation of Laws/Regulations is Discriminatory.

104. See also this principle: "The failure to comply with promulgated regulations, which must go through a considerable vetting process before they take effect, may be viewed as intentional discrimination." *Association for Disabled Americans, Inc* v *Concorde Gaming Corp*, 158 F Supp 2d 1353, 1362 n 5 (SD Fla, 2001) (an ADA case).

105. Here, the term would be retaliation for Mr. Pletten's whistle blowing as noted by Archie Grimmett's retaliatory October 1979 memorandum (Exhibit 6) to the Commanding General, compounded by Mr. Pletten's immediately subsequent whistle blowing to the Inspector General of the Department of the Army 19 November 1979 (Exhibit 3).

R. Conclusion.

106. The evidence shows due process violations and inconsistencies. But both due process and consistency are mandatory. See FPM Supplement 752-1, "Adverse Actions by Agencies," § S4-1d.(3), page 46 (Exhibit 13). Such inconsistencies warrant ruling for the accused employee. *Yorkshire* v *MSPB*, 746 F2d 1454, 1457 n 4-5 (CA Fed, 1984). And due process is a constitutional right, *Cleveland Bd of Educ* v *Loudermill*, 470 US 532; 105 S Ct 1467; 64 L Ed 2d 494 (1985). Wherefore, reversal of the termination is warranted.

Exhibits

Whistleblower Data / Correspondence Examples
1. Letter from OSHA refuting TACOM claims against Surgeon General data, p 60, Table 4
2. Sample Safety Whistleblowing
3. Summary of Whistleblowing Letter from Army Inspector General
4. Army Proclamation
5. Army USAARL Literature Review (cover)

Retaliation in the Form of Closing the Commander's "Open Door"
6. by TACOM Civilian Personnel Officer Archie Grimmett, 5 October 1979

Termination Related: TACOM's Inconsistent Claims
7. "decision to terminate" observed by EEOC's Henry Perez, Jr., April 1980
8. evident February 1980 per TACOM EEO Officer Kenneth R. Adler
9. "dismissal" evident by 30 October 1979 per TACOM EEO Officer Gonzellas Williams
10. SF-52 requesting non-disciplinary discharge of Pletten, o/a 2 January 1982
11. SF-50, "Removal" tantamount to disciplinary dishonorable discharge, 22 Jan 1982
12. Federal Personnel Manual Supplement 296-33, p 11, p 12, and p 15
13. FPM Supplement 752-1, "Adverse Actions by Agencies," § S4-1 c.(1), page 46, on "why"

Unemployment Granted by State of Michigan Effective Months Before 22 Jan 1982
14. Pro-Pletten Anti-TACOM Unemployment Decision July 1981
15. TACOM's retroactive bluff SF-50 pretending mere LWOP
16. TACOM's own Regulation, p 19, forbidding said LWOP
17. Decision Likewise September 1981
18. Decision Likewise May 1982
19. Decision Likewise June 1982

Qualifications Denial Related
20. by TACOM (the only medical qualifications document ever issued on Mr. Pletten from TACOM, verifying his medical eligibility)
21. SF-50, qualifications waiver, on the same job re which later "disqualified"
22. by Army's superior agency, Department of Defense
23. by Department of the Army
24. by Office of Personnel Management
25. again by Office of Personnel Management
26. by the US Department of Labor
27. by the Office of Management and Budget
28. by the Mich. Dept of Civil Rights.

29. 5 CFR § 339.202, medical qualifications must be written and have written rationale, and be "uniformly applied" as distinct from invented retroactively to rationalize removal of one employee

30. 5 CFR § 339.203, medical qualifications must be "essential for successful job performance," and "clearly supported by the actual duties of the position and documented in the position description" whereas tobacco smoke is none of these. In reality, there is "no necessity to fill the air with tobacco smoke in order to carry on defendant's business," *Shimp* v *New Jersey Bell Tele Co*, 145 N J Super 516, 523; 368 A2d 408, 411 (1976), e.g., to do Position Classification duties (the smoking ban case immediately preceding the promptly issued DOD Inst. 6015.18; 32 CFR § 203). And see *Commonwealth* v *Hughes*, 468 Pa 502; 364 A2d 306 (1976) (the immediate preceding case of a smoker-caused fire in turn causing firefighter deaths)

Investigation Cancellation
31. USACARA June 1981

Laws

32. 5 USC § 7513.(b), law requiring 30 days advance notice *before* decision, and mandating that agencies must follow Office of Personnel Management guidance

33. 5 USC § 7902.(d), law requiring agencies to "eliminate work hazards and health risks," law banning what TACOM claims is somehow a medical qualification requirement! albeit without TACOM ever citing any written record of such a so-called requirement in any document it has issued (medical qualifications list, job description, performance standards, or anything)

34. MCL § 750.27, MSA § 28.216, law banning what TACOM claims is somehow a medical qualification requirement! albeit without TACOM ever citing any written record of such a so-called requirement in any document it has issued (medical qualifications list, job description, performance standards, or anything).