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California Institute of Technology Jet Propulsion Laboratory and Dennis Byrnes and Scott Maxwell and Larry D'Addario and Robert Nelson and William Bruce Banerdt. Case 31-CA-030208, 31-CA-030249, 31-CA-030293, 31-CA-030326, and 31-CA-088775

March 12, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On May 6, 2013, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent and the General Counsel both filed exceptions, supporting briefs, and answering briefs; and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

¹ The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge, for the reasons set forth in his decision, that Charging Party Robert Nelson did not lose the protection of the Act under *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953), because Nelson did not disparage the Respondent's or NASA's products or services. In addition, *Jefferson Standard* provides that employee communications to the public may lose the Act's protection under certain circumstances, but Nelson's email was sent only to the Respondent's own employees. For this additional reason, Nelson retained the Act's protection.

Chairman Pearce does not agree with the standards governing restrictions on employee use of employer email systems established in *Register Guard*, 351 NLRB 1110, 1114-1119 (2007), enf. denied in relevant part sub nom. *Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). Nevertheless, he agrees with the judge and his colleagues that, even applying those standards, the Respondent violated Sec. 8(a)(1) by discriminatorily enforcing its policies to restrict the Charging Parties' Sec. 7 activity.

In addition, although Chairman Pearce agrees with the judge and his colleagues that, in context, a reasonable employee would not understand sec. 2.3 of the Respondent's Ethics and Business Conduct policy to interfere with Sec. 7 activity, in doing so he finds it unnecessary to pass on whether *Ark Las Vegas*, 335 NLRB 1284 (2001), and *Lafayette Park Hotel*, 326 NLRB 824 (1998), enf. 203 F.3d 52 (D.C. Cir. 1999), were correctly decided.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, California Institute of Technology Jet Propulsion Laboratory, Pasadena, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. March 12, 2014

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Miguel A. Manriquez, Esq., for the General Counsel.
J. Al Latham Jr. and Cameron W. Fox, Esqs. (Paul Hastings, LLP), of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on January 22-25, 2013. Each individual charging party filed a charge, the first of which was filed on May 9, 2011, and the General Counsel issued the amended consolidated complaint on October 26, 2012. The complaint alleges that California Institute of Technology Jet Propulsion Laboratory (JPL) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by disciplining employees Robert Nelson, Dennis Byrnes, Scott Maxwell, Larry D'Addario, and William Bruce Banerdt because they engaged in protected, concerted activity. The complaint also alleges that JPL violated Section 8(a)(1) by maintaining an unlawful rule and disciplining employees pursuant to that rule. JPL filed a timely answer that admitted the allegations in the complaint concerning the filing and service of the charges, interstate commerce and jurisdiction, and the discipline taken against the employees; it denied it had violated the Act.

Member Miscimarra agrees that Sec. 2.3 of the Respondent's Ethics and Business Conduct policy is not overly broad in violation of the Act, but he disagrees with the standard set forth in the first prong of the test in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), which was relied upon by the judge; Member Miscimarra advocates for a reexamination of this standard in an appropriate future case.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and JPL, I make the following

FINDINGS OF FACT

I. JURISDICTION

JPL, a corporation, is a Federally funded research and development center operated by the California Institute of Technology with an office and place of business in Pasadena, California, where it annually purchases and receives goods or services valued in excess of \$50,000 directly from points outside the State of California. JPL admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

This case involves scientists and engineers working at the National Aeronautics and Space Administration's Jet Propulsion Laboratory located in Pasadena, California. The California Institute of Technology (Cal Tech) operates that facility for NASA; JPL is a division of Cal Tech. NASA owns all the equipment at the facility, including the computers, and requires that JPL maintain certain standards and abide by certain rules in using its equipment. About 5000 persons work there. JPL employees were not subject to U.S. Government background checks at the time they were hired, but that changed as a result of Homeland Security Presidential Directive (HSPD) 12. HSPD 12 required Federal Government employees and employees for contractors with the Federal Government to be subject to a uniform standard for obtaining badges to enter Federal facilities. NASA interpreted this directive to require all contractor employees such as those working for JPL to submit to background checks. Employees were required to complete certain forms or be fired. Several employees objected that some of the information sought on the forms was a violation of their privacy. They also felt that submission to the background checks as a condition of continued employment adversely affected their working conditions.

On April 20, 2007, JPL management announced that it was beginning the process for background investigations of the employees. JPL conducted informational meetings about the badging requirements at which employees voiced their concerns. This prompted the JPL to inform employees that "[I]f you are unhappy with or disagree with the badging requirements, you should address your concerns to me. . . ." On June 11, 2007, JPL reminded employees "[I]f you do not want to surrender the information to allow your background to be checked and identity to be verified, then you cannot work" at JPL. A number of non-JPL employees regularly enter the facility to perform work tasks; they are subject to the same badging requirements as JPL employees.

So in 2007, about 28 employees filed a suit against NASA, the Department of Commerce, and others, both individually and on behalf of a class of employees, and also moved for a preliminary injunction to prevent NASA from requiring the employees to complete a questionnaire form by the deadline or be fired. The U.S. District Court denied the motion, but upon

appeal the Ninth Circuit granted a preliminary injunction. The Supreme Court reversed. *NASA v. Nelson*, ___ U.S. ___, 131 S.Ct. 746 (2011). The Court assumed, without deciding, that the Constitution protects a right to informational privacy, but the Court held that the right was not violated by requiring the employees and others to complete certain forms. On January 19, 2011,¹ JPL's deputy director, General Eugene L. Tattini, sent a message announcing the Supreme Court's decision; that message went to JPL employees as well as nonemployees who also perform work at the JPL facility. Several of the plaintiffs in the lawsuit, including the Charging Parties, and others discussed the fact that they felt General Tattini's message did not give employees sufficient information about the actual impact of the Supreme Court's decision. So they decided, again with other employees, to get more information to the employees. The details of that process follow below.

B. Email Messages and Discipline

1. Scott Maxwell

Scott Maxwell has worked for JPL since 1994; he currently works as the Mars rover driver for the Mars Science Laboratory Curiosity Mission. This is the rover that landed on Mars in August 2012. He was a plaintiff in the lawsuit described above. On January 27, Maxwell sent a message to employees listed on JPL's division 38 listserv; Maxwell used the NASA-owned computer and used his JPL email address in doing so. That message discussed the Supreme Court decision and stated:

Over three years ago, we received notice that we were compelled, at risk of losing our jobs, to participate in a new badging process. There are aspects of the process that alarm us: how our personal information will be protected; specific questions that are unconstitutional; a requirement that we authorize open-ended background investigations into the most intimate details of our private lives; a requirement that we authorize anyone with information or records about us to turn it over to the government, overriding any prior confidentiality agreement; a set of criteria (the so-called "suitability matrix") that NASA intended to use to evaluate our suitability for continued employment. The suitability matrix covers nearly every category of human behavior, including financial stability, sexual experience, and other morality judgments.

....

NASA then decided to require an investigation that is *unlimited* as to nature and scope. Investigators can ask any question they want, and they can ask any source they want (including neighbors, ex-spouses, landlords, former employers—anyone).

....

Along the way we have had some significant victories. For instance, the suitability matrix has been jettisoned; the government, three days prior to filing their brief in the Supreme Court, ended its use and disavowed the specific criteria that included medical history, personal opinions, political beliefs, participation in advocacy, and a host of issues protected by the First Amendment.

¹ Unless otherwise indicated, all dates that follow are in 2011.

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There are reasons to be hopeful. While the Supreme Court has ruled that it is legal for NASA to ask the challenged questions, it does not require NASA to do so. NASA can still determine the nature and scope of the investigators' questions and the methods to evaluate the results. Since JPL is a federally funded research and development center (not civil service), NASA can follow the lead of federal agencies (such as the Department of Energy and National Science Foundation) that do not require extensive background checks for employees in similar low-risk job categories at their FFRDCs. However, NASA could instead choose to move forward with the original process, in which case you may be asked to submit what the 9th circuit described as an "unbounded and standardless inquiry." If NASA decides to impose these procedures and you are uncomfortable with them, it may be that your only recourse is to discuss your concerns with your personal attorney and sympathetic coworkers.

.....
 We will continue to work for a less odious process, and we will urge NASA to adopt policies like those of DoE and NSF. These procedures would be compliant with regulations and would not entail intrusive background investigations. We have no regrets about initiating this lawsuit, and we are proud of what we have accomplished. We very appreciate the support and encouragement we have received from the JPL community and throughout the country.

Robert Nelson, Dennis Byrnes, and Susan Foster

On behalf of the JPL plaintiffs in the HSPD 12 case, *Nelson et al. vs. NASA et al.*

Approximately 773 persons received that message. Maxwell understood that all these persons are required to have the new badges and therefore might be interested in the message, although not all persons on the listserv were JPL employees. Several employees responded by sending Maxwell email messages expressing gratitude and support. As more fully described below, Maxwell's message was the product of a collaborative effort that included Robert Nelson, Dennis Byrnes, Susan Foster, Maxwell, and other plaintiffs in the lawsuit.

On February 10, Maxwell was summoned to JPL's ethics office. Present was Lani DeBenedictis, who is JPL's ethics officer, and two other persons. DeBenedictis said that her office had been swamped with complaints about the email messages that had been sent. She asked Maxwell what prompted him to send the email. Maxwell explained that the Supreme Court's decision and HSPD 12 raised ethical and work issues that he felt would be appropriate to discuss with his work colleagues. DeBenedictis gave Maxwell a copy of JPL's policies concerning correct use of sponsor resources; those policies are detailed below. Maxwell was already familiar with some of them and protested that he had not discussed political, religious, or social issues in the email message; DeBenedictis responded that that was not the issue, the issue was spam; she claimed that Maxwell's email went to 773 persons. She then gave Maxwell a copy of JPL's spam policy. Maxwell read the policy and then said that the email message he sent was not spam under that policy. DeBenedictis then responded that the issue was Maxwell's unethical use of sponsor resources.

On April 6, Maxwell was given a written warning from John Wright, his supervisor, and Elizabeth Kay-Im, his section manager that indicated as follows:

The JPL Ethics Office and Human Resources have completed their investigation concerning allegations that you distributed unsolicited bulk e-mail entitled "Supreme Court Decision" using JPL resources on January 27, 2011.

After receiving complaints from employees, the Ethics office found that you sent unauthorized, non-work-related e-mails to JPL employees in Division 38. In addition to JPL employees, it was found that the emails you sent were also sent to individuals outside of JPL. For example, the e-mails were sent to Universities, entities in the public sector and private sector, and governmental agencies throughout the United States.

These e-mails reached a total of 773 persons.

The specific policies that were reviewed were:

- JPL Policy Rules! Doc ID # 40152, Spam
- JPL Rules! Doc ID #58712, Commercial and Political Endorsements
- JPL Rules! Doc ID # 58572, Ethics and Business Conduct
- JPL Rules! Doc ID #58720, Use of JPL and Sponsor Resources

As part of this investigation, you were given the opportunity to discuss the circumstances of this case and to explain your perspective and answer questions. I have received the results of this investigation and after careful consideration of the issues and information obtained, I am in agreement with the following findings:

Spam/Unsolicited Bulk Email—You were in violation of JPL Policy Rules! Doc ID # 40152, because your e-mails were unsolicited and sent in bulk, and were non-business-related. In addition, the emails were perceived by some recipients as soliciting support and offensive in tone.

Use of JPL Identity to Imply Preference/Endorsement—You were in violation of JPL Rules! Doc ID #58712, Commercial and Political Endorsements because both the content of the emails and the circumstances under which the emails were sent could imply JPL's endorsement or approval of the individuals' private legal action and the political, social, or legal issues underlying the lawsuit. Also, JPL's image and success in competing for public funding requires a clear perception of impartiality in its dealings and JPL employees must refrain from any action that suggests JPL officially endorses or supports a private cause.

Improper Use of JPL position (Acting Outside Official Capacity)—You were in violation of policy JPL Rules! Doc ID # 58572, Ethics and Business Conduct because you transmitted content that was outside of your official Laboratory capacity (engineering and scientific endeavors). Also, the email sent by you is not pertinent to JPL activities and thus is unsuitable for widespread internal and external distribution. In addition, you misused your access to JPL distribution lists

to transmit an e-mail inappropriate in size, frequency, and content.

Improper Use of JPL and Sponsor Resources—You were in violation of JPL Rules! Doc ID #58720, Use of JPL and Sponsor Resources because you attempted to share and promote your personal positions on political, social, legal, and public policy issues. None of which relates to JPL business or work.

In addition to violating the above policies, this action was reported to be offensive and disruptive by a number of JPL employees. Use of JPL email to this extent also overburdens the JPL emails systems, which could impact the system's ability to deliver work-related messages.

Based upon the results of the investigation you are being given this Written Warning for violating the JPL policies identified in this disciplinary document. Effect immediately, you are instructed to comply with the JPL policies concerning the use of JPL resources. You must ensure that you use JPL resources only to conduct JPL business and not to advocate personal views. Going forward, you are only authorized to use JPL resources, including email, for activities directly related to your JPL work. If you violate these policies again, you will be subject to further disciplinary action, up to and including termination of your employment.

At the bottom of the warning, Maxwell wrote that the matter was not discussed to his satisfaction and he was not in agreement with the findings. At the same time, Maxwell was given portions of the JPL policies referenced in the warning, including the following:

Spam

Defined as unsolicited commercial e-mail (UCE) and/or unsolicited bulk e-mail (UBE). Spam is distributed either by a mass mailing to individual addresses, by inappropriate submissions to mailing lists, or by inappropriate submissions to Usenet newsgroups. Most Spam contains forged headers and "From" lines. These are employed in order to conceal the actual origin of the message.

2.0 Commercial and Political Endorsements

Note: An endorsement or testimonial is a written or spoken statement, extolling the virtue of a thing, product, or service.

2.1 Except as set forth below, JPL's identity name or logo shall not be used in any way which could imply a commercial or political endorsement of any organization, product, private venture, individual, group, or cause.

2.2 JPL's image and success in competing for public funding requires a clear perception of impartiality in the dealings with the general and business public. Therefore, JPL employees shall refrain from any action that could reasonably be perceived or implied as an endorsement or official preference by the Laboratory, Caltech, or NASA. Prohibited actions include written, oral, and electronic correspondence, either from the Laboratory or with any Laboratory identification.

....

2.4 Federal laws and regulations, as well as our prime contract with NASA, prohibit lobbying by JPL employees. Unsolicited communications with legislative or executive branch agencies that could be interpreted as lobbying should be vetted by the Office of Legislative Affairs.

Maxwell was given the entire section of JPL's ethics and business conduct policy, consisting of eight sections spanning six typewritten pages. Maxwell's warning did not specify what portion of the policy he violated. I reproduce below only two sections of that policy; JPL relies on the first and the General Counsel on the second.

Ethics and Business Conduct

....

2.2 JPL employees shall not use their JPL positions in a manner which is motivated by the desire for personal gain for them or persons with whom they have personal, business, professional or financial ties.

2.3 As representatives of JPL, employees shall avoid any actions which could reasonably be expected to adversely affect, or give the appearance of adversely affecting, the independence and objectivity of their judgment, interfere with the timely and effective performance of their duties and responsibilities, or discredit the Laboratory.

Finally, Maxwell was given the entire section use of JPL and sponsor resources; this consisted of five sections and six pages. I reproduce only those portions having any bearing on this case.

Use of JPL and Sponsor Resources

Laboratory resources are provided for the conduct of JPL business, the performance of work related duties, professional education and training. These resources should not be used for personal activities except to the extent authorized either by written Laboratory policy or in support of activities approved by the Director or Deputy Director. Resources include all . . . computers, computer accounts and services, software, e-mail . . . the name of Caltech or JPL. . .

While limited use of some Laboratory resources for activities not directly supporting JPL work may be authorized, no Laboratory resources may be used to:

- Promote, sell, or trade goods or services for any promotional or profit-making endeavor;
- Share your views, promote, or take positions on political, religious, or social issues, or
- Conduct personal business, except as described below.

Limited, occasional use of electronic information resources for personal, non-business purposes is understandable and acceptable as long as such use:

- Does not adversely affect the performance of the employee's official duties or the effective functioning of their organization;
- Is of reasonable duration and frequency,
- Is not prohibited by the organization's management or these requirements, and

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- Does not violate state or federal laws, compromise intellectual property rights, or result in embarrassment to the Laboratory, Caltech, or a sponsor.

....

Email and Internet Usage

Within all the above guidelines, limited use of email and the internet for personal non-business purposes is acceptable with the following being expressly prohibited:

- Spamming, hacking, or cracking.
-
- Sending communications which are . . . harassing . . . derogatory to individuals or organizations . . . against JPL/Caltech policy, or otherwise contrary to the best interests of the Laboratory.

I have set forth the content of JPL's policies at issue in this case; I have described the written warning received by Maxwell. I now compare the policies to the assertions in the written warning. The April 6 warning states that he violated the "Use of JPL Sponsor Resources" policy because he attempted to "share and promote" his "personal positions and views on political, social, legal, and public policy issues." But JPL's Director of Engineering and Science and Director of Directorate 3 Leslie Livesay conceded that "legal and public policy issues" are not specifically referenced in the use of JPL and Sponsor Resources policy. The April 6 written warning indicates that Maxwell was in violation of the "Commercial and Political Endorsements" policy because the January 27 email "could imply JPL's endorsement or approval of the individuals' private legal action and the political, social, or legal issues underlying the lawsuit." However, JPL's Commercial and Political Endorsements policy does not mention legal actions, legal issues, social issues, or lawsuits. The April 6 written warning cites the Ethics and Business Conduct policy, which contains several subparts none of which are specifically identified in the written warnings, as a reason for the disciplines. Livesay was asked to point out which subpart of the Ethics and Business Conduct policy was violated by the January 27 emails, and she testified that the prohibition of use of JPL positions in a manner which is motivated by the desire for "personal gain" under Section 2.2 of the Ethics and Business Conduct policy was violated. Livesay stated that the use of JPL positions for "personal gain" was the only part of the Ethics and Business Conduct policy that was violated. However, on cross-examination, however, Livesay admitted that there is no reference to "personal gain" in the written warning. In other words, the assertions of misconduct in the written warning and the policies allegedly violated simply do not match up.

JPL has an internal grievance procedure so Maxwell filed a grievance to protest his written warning. In part he wrote:

- In its preface, the memo says that my email went to individuals outside of JPL. I don't know whether this is true, but I note that I sent my email to a single address—a division mailing list provided by JPL and presumably intended for communication

with work colleagues. Every single member of this mailing list has a JPL badge number, implying that they work for JPL (whether they are housed at the institution or not) and would be legitimately interested in changes to JPL's badging situation that were the subject of the email. However, it is interesting to note that this paragraph does not specifically allege any wrongdoing—any violation of JPL policy—so perhaps it is not an accusation to which I need to respond.

- The memo says that my email was in violation of the spam policy . . . because it was unsolicited, sent in bulk, and not business-related.

This is first flatly untrue, in that the email was in fact business-related. Prior to my email, Dr. Elachi met with all managers to discuss this very subject; General Tattini sent Labwide email (much further-reaching than my email) on this very subject; and my own Division Manager, Tom Luchik, discussed this matter with the entire Division (and publicly offered his own personal opinion on the subject as well). These actions by my management clearly demonstrate the business-related nature of my communication.

In addition, I note that I commonly receive email that is unsolicited and sent in bulk, as widely or more widely than my email was sent, and not all business-related. I can forward you plenty of examples, but I mean the sort of thing like an announcement that So-and-So has named his child. As far as I know, these email messages do not routinely result in institutional discipline.

- The same paragraph notes that some recipients of my email perceived it as attempting to solicit support. This may be, but since the email carefully did "not" attempt to solicit support, I don't understand why it's an issue.
- Next, I'm told that I violated policy # 58712 (use of JPL identity to imply preference/endorsement of commercial or political endeavors). In contrast to what this paragraph says, no reasonable person reading my email could possibly have thought that it implied JPL endorsement of a private legal action. Moreover, the supposedly endorsed action is neither commercial nor political, so I am not in violation of that policy for that reason.
- The memo then accuses me of acting outside my official Laboratory capacity. Again, as demonstrated above, the issue in question is work-related, and sending email on a work-related issue to my colleagues is not outside my official Laboratory capacity.
- The same paragraph goes on to state that my email was not pertinent to JPL activities. I'm frankly at a loss to understand how this could possibly be true—again, I will content myself with noting the

plainly work-related nature of the communication, as demonstrated before me by Dr. Elachi, General Tattini, and Tom Luchik, who all used sponsor resources to communicate with the Lab on the same matter.

- The same paragraph says that the email was inappropriate in size, frequency, and content. I believe the “content” piece of this has already been addressed: it was work-related. I don’t see how a single email could be over any reasonable “frequency” line. Further, it is much smaller than most other email messages that I receive, which are commonly bloated by HTML, attached images, and so on. So I cannot see how it could possibly have been inappropriate in “any” of size, frequency, or content, much less (as the accusation runs) all of those at once.
- I am then accused of violating policy # 58720, the use of JPL sponsor resources, supposedly because I attempted to share and promote my views on political, social, legal, and public policy issues. While this is strictly true—I mean, I did that—the memo misrepresents the policy it claims to quote.

That policy actually says I may not share my views on political, religious, or social issues (a prohibition I agree with, incidentally). I did none of those things, and so I believe I am not in fact in violation of the policy. In addition, this might be a good time to remind you yet again that my management repeatedly discussed this very issue, in various forums including but not limited to email, and including the expression of their personal opinions, thus clearly establishing its work-related nature.

- I am told that my actions were reported as offensive and disruptive. This might be true; I have no way of knowing, since the feedback I received was entirely positive. But in any case, as far as I can tell, it is not a violation of any JPL policy to say things that some people perceive as offensive and disruptive. (Indeed, I would claim that a healthy engineering institution “requires” exactly that from time to time.)

I wonder: If General Tattini’s Labwide email messages about HSPD-12 were reported to the Ethics office as offensive and disruptive, would they stop? Probably not. So that is not actually the rule, or in any case it is not the rule that is applied to people other than myself.

- In the same paragraph, I was told that my email could overburden the JPL email system. This is a farcical claim on its face. I sent a single, relatively small message to a few hundred people, and it was delivered within seconds. JPL’s email system might not be what it once was, but it’s not so creaky and precarious that it can’t handle that.

For the reasons stated above, the written warning is unfair and illegitimate. I have not violated any JPL policy as they existed at the time of my action, and in particular I have clearly not violated the policies that the written memo accuses me of violating.

Accordingly, the warning should be expunged from my record.

On May 9, JPL’s director of human resources responded to issues raised in Maxwell’s well-reasoned grievance as follows:

I have reviewed the matter along with your requests and supporting documentation. I have concluded that a full investigation of this matter was conducted and that based upon the investigation findings your manager determined that you did violate JPL policy. The warning that you received was intended to ensure that you understand our policies and understand that your conduct violated those policies. The purpose of the warning is to help you avoid committing further infractions. As such, the written warning is not subject to the formal resolution/grievance procedure.

2. William Bruce Banerdt

William Bruce Banerdt works for JPL in its science division as a principal scientist, a position he has held for about 8 years; he began working for JPL in 1977. Around 300–350 persons work in the science division. Banerdt was also a plaintiff in the lawsuit that reached the Supreme Court, described above. On January 27, Banerdt sent the identical message Maxwell had sent, except that it also contained the following preface:

Dear Division 32 Colleagues:

Last week the Supreme Court issued its opinion in the case of *Nelson v. NASA* (concerning the implementation of badging under HSPD-12), ruling in favor of the government. The ruling resulted from a lawsuit by myself and 27 other JPLers who complained that the background investigations associated with the new badges are overly intrusive. The opinion was unanimous but very narrow, and its impact on JPL employees is currently uncertain. As explained by Deputy Director Tattini in a lab-wide email, “we will need to work with NASA to determine how the ruling affects the issuance of badges and its impact on badging applications currently in the system.”

It is clear that this ruling will have some effects on those of us that work at JPL, and I think it is in everyone’s best interest for us to be informed as we begin the next step in this process. So for those of you that are interested, a detailed explanation of the ruling and its possible ramifications is available by the 28 plaintiffs, appended below.

Banerdt used his NASA-owned work computer to send that message and he sent it to all persons in his division via a JPL listserv that reached about 330 persons. Banerdt, like Maxwell and other employees described below, reviewed drafts of the message and made suggestions. Those who participated in the process decided that they each should send the email message to those employees in their section or division.

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On February 15, Banerdt was summoned to DeBenedictis' office. DeBenedictis told Banerdt that there was an ongoing investigation concerning the email incident, including his email. DeBenedictis said that they were trying to get a better understanding of what happened to develop guidelines that could be used in the future so that everyone was both able to communicate but didn't make such a big impact. She explained that the emails were an "unprecedented avalanche" that had gone to a total of about 8000 persons. DeBenedictis said that the emails appeared to be a coordinated effort and Banerdt agreed that it had been. She explained that the investigation was triggered by a number of complaints JPL received from managers and employees concerning the emails, but she refused to tell Banerdt how many complaints were received. DeBenedictis asked Banerdt whether he volunteered to send the email or whether he had been asked to do so. Banerdt explained to her that he guessed he volunteered because he participated in creating the message with the others who also sent similar messages. He explained that it had been a group effort by those employees who had come to create the message by consensus by the drafting the message, making comments, and editing the message as a group. DeBenedictis mentioned the JPL policies against spamming, misuse of government resources, and misrepresentation of JPL positions as official positions. She asserted that the email messages were advocating a political position; Banerdt expressed his disagreement with that assertion. DeBenedictis asked whether the messages were something of general interest to the JPL community and Banerdt said he believed they were. She stated that the messages went to people outside of JPL; in response Banerdt commented that it did not surprise him because the email listserv included non-JPL employees who come on to the facility and are therefore subject to, and interested in, the badging requirements. Banerdt also told DeBenedictis that he would not have sent the email message that Nelson sent, described below, because it was too big.

On April 6, JPL gave Banerdt a written warning with attachments identical to the one given to Maxwell, fully described above, except that it indicated that Banerdt's email message was sent to 589 persons. Banerdt was simply told that he was given the written warning; no further explanation was provided.

3. Larry D'Addario

Larry D'Addario has worked as principal engineer at JPL since 2004. He works in the communications and radar division that encompasses about 640 persons. D'Addario was a plaintiff in the lawsuit.

On January 27, D'Addario sent an email message to his colleagues in his division. It was identical to the message sent by Maxwell, but it also had a preface from him as follows:

On January 19, the Supreme Court issued its opinion in the case of *Nelson v. NASA*, ruling in favor of the government. As explained by Deputy Director Tattini in a lab-wide email, "we will need to work with NASA to determine how the ruling affects the issuance of badges and its impact on badging applications currently in the system." The opinion was very

narrow, and its impact on JPL employees is currently uncertain.

The ruling resulted from a lawsuit by 28 JPLers who complained that the background investigations associated with the new badges are overly intrusive. A more detailed explanation of the ruling is available in a letter to JPL employees by the 28 plaintiffs, a copy of which is attached.

D'Addario also added the following postscript to the message:

This letter . . . [was] produced by concerned employees of JPL and other NASA centers as private citizens using personal resources and [is] not endorsed by JPL, Caltech, or NASA.

D'Addario too was summoned to DeBenedictis' office; this occurred on February 10. DeBenedictis told D'Addario that the meeting was about the email message he had sent. She pointed out that four individuals had sent similar emails and in total the messages reached over 8300 persons and that her office had received some complaints about emails. So D'Addario asked if he was accused of violating any rule, and DeBenedictis referred him to the rules concerning use of sponsor resources and spam. D'Addario, who had prepared for this meeting, handed her a copy of the rule concerning sponsor resources and asked how he had violated that rule. DeBenedictis was unable to answer; instead she said she would get back to him the following week. DeBenedictis asked whether he had prepared the email himself and he explained that he had prepared the preface himself but the lengthier message was prepared jointly by a group of employees. DeBenedictis asked D'Addario why he had sent the message and he replied that he thought it was obvious from its content. During the course of the meeting D'Addario also asked DeBenedictis to provide him with the definition of spam; he also asked whether anyone in his line management chain had complained about the email message. On February 16, DeBenedictis provided D'Addario with copies of several rules implicated by her investigation and answered:

I have not reviewed all the notifications related to the January 27th emails but I can assure you that as of today I did not receive a contact from your specific line management to discuss our fact-finding on the matter.

On April, 6 JPL gave D'Addario the now familiar written warning; his written warning indicated that his email was sent to 637 persons. D'Addario, like Maxwell, filed a written grievance; it was rejected on the same basis as Maxwell's grievance.

4. Dennis Vincent Byrnes

Dennis Vincent Byrnes worked for JPL from 1988 until his retirement on April 1, 2012. He was chief engineer for flight dynamics at the time of his retirement. He worked in division 34 with about 600–700 persons.

On January 17, Byrnes sent the email to the people on the listserv for his division. He prefaced the message with his own comments that follow:

To my colleagues in Division 34:

The U.S. Supreme Court ruled last week on the case brought by myself and 27 other JPL employees against the federal

government over the badging implementation under HSPD12. The statement below explains some of the ramifications of this decision for us as Caltech employees at a federal government site.

I have appreciated the expressions of support and interest over the past 3+ years from many of you, as well as the expressions of disagreement and questioning of our position from others. I hope that we can continue to have open civil discussion under the JPL Values of Openness and Integrity.

It is interesting to note that today's LA Times has an editorial (copied in today's JPLSPACE in JPL in The News), "Not so fast, nosy Government," recognizing our success in the SC decision which presumed a Constitutional right to informational privacy for all even while allowing the specific questions for the federal contractors on a federal site.

Byrnes received his written warning on April 6; it indicated that his message was received by 4715 persons. It was otherwise identical to the other written warnings except that it also contained the following additional paragraph:

More recently, it was discovered that you sent an unnecessary email to Ms. Kimberly Lievens from JPL's Office of Communication and Education on April 3, 2011. JPL considers your email to Ms. Lievens to be sarcastic rhetoric without any work-related content. Such messages are considered a nuisance and are expected to stop immediately. In addition, you are to remove the non-work-related information from your JPL email signature line: "*HSPD-12—It's voluntary! Sign or Starve, Your Choice—but now you can wait!*"

I now describe that background necessary to understand this additional paragraph, and it begins back with the oral argument before the Supreme Court. During that oral argument the Acting Solicitor General told the Supreme Court that the badges at issue were of such importance that they would allow employees to get within 6–10 feet of the space shuttle as it is being repaired and refueled for launch. The plaintiffs strongly protested that the Acting Solicitor General misrepresented this as a fact to the Supreme Court; more details of this follow in the section below concerning the discipline of Robert Nelson. On April 1, 2011, Lievens, a manager in JPL's public service office, sent an email message to all employees announcing the launch of the Space Shuttle Endeavor from the Kennedy Space Center in Florida. In the announcement Lievens also added:

The Public Service Office has a limited number of STS-134 Car Placards for the NASA Causeway for JPL employees that would like to attend a shuttle launch. The NASA placard is valid only with a NASA badged employee (your JPL/NASA Badge).

Byrnes apparently could not resist pointing out the apparent contradiction between that message and the oral argument representation made by the Government; he replied to Lievens:

I wonder if you can help me out here?

Why would a JPL employee with a PIV II badge need such a placard? The Department of Justice (acting Solicitor General

Katyal in oral arguments to the US Supreme Court and verified to the Washington Post) has indicated that NASA has said such a badge is "of such importance that it allows holders to get within 6-10 feet of the Space Shuttle as it is being repaired and refueled for launch."

Thus, your message should make clear that the placard is only necessary for those such as myself who only have the One NASA badge, or for those who wish to bring guests. I think it is important that your message be clarified, since this is such an important issue for NASA. Those JPL employees with the PIV II badge should be made aware that they are allowed to drive onto site at KSC and walk right up to the Shuttle any time they wish to.

Thanks,
Dennis

—
HSPD-12—It's voluntary!"
Sign or Starve, Your Choice—But now you can wait! :-)

Byrnes had previously sent emails with the motto following his signature line without repercussions from JPL. So this was the background that led to the inclusion of the additional paragraph in Byrnes' written warning. Byrnes reacted to the paragraph in his written warning by sending the following message to Deputy Director Tattini:

[I]n the written warning to me I was also reprimanded for sending an email to Kimberly Lievens regarding the Space Shuttle placards. If you believe that I was sarcastic, then you must also believe that DOJ lied to the Supreme Court. If that is true how can you then believe that being upset over it is a "nuisance" and "without any work related content?" On the other hand if the statements given to the Court and verified by NASA are in fact true, then what I said to Ms. Lievens is not sarcastic at all and JPL employees with PIV II badges should know what their privileges are at KSC regarding the Shuttle. .

Byrnes also reacted to the written warning by modifying his signature line to read as follows:

According to Form SF-85
Signing is Voluntary
According to Randy Aden, Manager of Security
You can "Sign or Starve, Your Choice"
According to Deputy Director Tattini
With the Injunction, now you can wait.

In Byrnes' view, this rectified the admonition in the written warning that the earlier version was not work related. But JPL disagreed; on April 11 it gave Byrnes a final written warning. That warning recounted the relevant information from the previous written warning, how Byrnes had modified the information below his signature line, and continued:

This behavior was insubordinate as you violated the April 6, 2011 written warning. Furthermore, your severe lack of judgment in deciding not to follow my instructions indicated your lack of respect for me, Mr. Aden, Gen. Tattini and the positions we hold at JPL.

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Over time now there have been occasions when you have emailed members of management with unprofessional quips and comments that are unnecessary and offensive. And, you have sent communications that, in my judgment, contain accusatory questions regarding claims of questionable merit. This behavior is harassing and an excessive waste of management time. If you have a workplace concern you may bring it to my attention or the attention of the appropriate office, however, you must raise your concerns respectfully.

Dennis, you are receiving this final written warning due to your insubordinate behavior, violating the April 6 written warning, and causing an excessive waste of management time to deal with your unprofessional actions. Effective immediately I expect you will cease these unprofessional, inappropriate actions, and I expect you to focus on your work. You must immediately remove all information from the existing email signature panel other than your name, official job title and JPL contact information. Failure to follow any and all directions in this final warning and in your written warning (April 6, 2011), or failure to adhere to JPL's rules, policies or requirements, will result in further disciplinary action, up to and including immediate termination of your employment.

During the meeting at which he was given this final written warning Byrnes commented that it was really quite amazing that this Solicitor General can lie to the Supreme Court and he was being disciplined for his signature line.

5. Robert M. Nelson

Robert M. Nelson first began working at JPL in 1978; he chose not to comply with the badging procedure and instead retired in 2012. At the time he retired, Nelson was a senior research scientist; he conducted research in nature of the origin of evolution and the solar system. He worked in the earth and space sciences division, consisting of about 600 persons.

On January 21, Nelson sent a very lengthy email message (consisting of 25 pages in paper form) to less than 100 persons in JPL's senior research scientist community. The message gave a description of Nelson's view of the political aspects underlying the arguments made to the Supreme Court, a detailed description of the oral argument with Nelson's commentary, and a lengthy description and reaction to the acting Solicitor General's apparent factual misrepresentation to the Supreme Court. Nelson's commentary included the following portions that JPL singles out as offensive:

The Solicitor General's ignorance of NASA procedures might be understandable given the generally low level of knowledge that Justice Department Officials exhibited throughout this case. But NASA's tepid and contrived response now suggests the agency is working with the Department of Justice in an attempt to mislead the Supreme Court by bolstering [the solicitor general's] dissemination of false information.

.....

Susan Foster, a science writer with over four decades of experience at JPL added, "The NASA I grew up with highly valued its integrity. One of NASA's core values has been to 'embrace truthfulness and trust, and to have the moral courage and obligation to be open, honest and ethical in all that we do.' Even though we had serious disagreements over NASA badging practices, I had believed that the Government would present their case honestly. It is painful to learn that NASA and the Department of Justice seem willing to abandon these values in their effort to trample on the civil liberties of NASA contractor employees."

.....

Dennis Byrnes, Chief Engineer for Flight Dynamics at JPL said, "Yesterday, I wrote to John Shannon, NASA Program Manager for the Space Shuttle Program, requesting that he clarify this patently misleading statement by the acting Solicitor General Katyal. The stated position is so outrageous that any rational, honest public official should be quick to correct it, regardless of any personal feelings on this issue before the Court."

On April 20, JPL gave Nelson a memorandum that read:

Subject: Re: Final Written Warning

I have recently been made aware of an email that you sent to the JPL SRS community on January 21, 2011 with the subject "Report on the recent ruling by the Supreme Court in the HSPD12 case." As a reminder, you are on a final written warning for conduct issues and misuse of JPL resources (June 15, 2007). Your final written warning is still in effect and I must remind you that, should you fail to comply with the instructions contained in that document, or if you violate ethics policies again or otherwise violate JPL rules, policies or requirements, you will be subject to further disciplinary action, which may include termination of your employment.

The June 15, 2007 final written warning concerned an email message that Nelson sent on June 13, 2007. That message too pertained to the developing badging requirement. According to JPL in the June 15, 2007 final written warning, Nelson's message violated JPL's rules for ethical conduct and use of resources and attempting to "ensnare" other employees into doing so.

I take from the General Counsel's brief this useful summary of the recipients of the email messages described above.

	Date of Email	nasa.gov	hq.nasa.gov	jpl.nasa.gov	Total JPL Affiates non-jpl.nasa.gov	Total Recipients
Nelson	1/21/11	0	0	97	0	97
Maxwell	1/27/11	7	0	723	50	773
Banerdt	1/27/11	4	0	513	75	588
D'Addari	1/27/11	4	0	615	22	637

o						
Byrnes ⁹	1/27/11	629	8	3,472	1,747	5,219
					Total:	¹⁰ 7,217

⁹ Footnote is missing?

¹⁰ Although Jt. Exh. 2, which summarizes the total recipients of all of the January 27, 2011 concerted emails, shows that 8134 is the total of recipients, this number includes the recipients of employee John Walker's January 27 email. John Walker is not a Charging Party, therefore, 7217 is the accurate count of the total recipients of emails sent by the Charging Parties in this matter.

C. Past Practice

Having described above JPL's written policies concerning emails, I now describe its actual practice. JPL allows employees to send email messages to other employees concerning JPL supported events such as ice cream socials held at work, holiday parties (including a listing of the music an employee selected to be played there), and a memorial service for a deceased employee. On November 27, 2012, a JPL manager sent an email message to some 4500 persons soliciting contributions for the United Way of Greater Los Angeles. He urged employees to make the contributions via payroll deductions and promised to award a plaque to the JPL division with the highest percentage of persons contributing. A number of employees responded with angry emails. For example, Scott Allen replied:

For an organization claiming the lack of obligation to participate, there sure seems to be a lot of pressure to participate. Email from JPL asking for charity is inappropriate. Email from anyone suggesting that THEIR charity should be MY charity is inappropriate. This does not belong in the workplace. Period.

Incidentally, recent email statistics indicate that out of the 80+ replies that I have received in support of REMOVING JPL's United Way campaign from their email list, it has been a strong 98% in the direction of what I have stated above.

Kiri L. Wagstaff replied:

I have the same view as Scott. I also find JPL's heavy marketing of one particular charity to be inappropriate. If any charitable solicitations are permitted, then all should be. I was specifically told last year when I asked that no other charitable efforts can be promoted at JPL. There is an ethical inconsistency here. I think Scott's solution is best: no charitable pushed by management at all.

Stanley Butman replied:

Mega dittos Scott!

I started out at JPL contributing, like everybody else (to a designated 'favorite charity). However, I froze the amount upon learning several decades ago that the head of UW was paid a scandalous \$400,000/yr plus perks. . . . I will henceforth reduce my contributions to nothing. The whole idea of institutional solicitation is repugnant. It is pressure. Thank you for courageously speaking out. Let's hear more from everyone.

Taguhi Arakelian's email stated, in part "I don't want my employer to necessarily know or control to what charities I contribute or refuse to contribute through JPL."

Richard G. Webster's email message in this long email string was:

I agree completely with the comments that limiting choices and then encouraging participation is an ethical problem. My wife and I support numerous charitable organizations at the grassroots level. We find this not only more satisfying, but also more efficient. I think we should run this approach by . . . the ethics office again.

Larry D'Addario, who as described above had some familiarity with JPL's ethics office, wrote in part:

This would seem to be a matter that should be referred to Ethics for an investigation. If they are objective, they will find management's action in promoting United Way to be unethical.

Other employees criticized the critics. Seth Chazanoff emailed:

Oh, come on folks.

Compared with many organizations this is a really low key campaign.

We have a choice of going on the United Way link . . . or not. Nobody in management is going to check up on us. . . .

Others responded in a light-spirited nature. After the JPL manager referred to "United Way Superheroes" in an email message he sent to employees, Nick Finland's email response was:

I agree with the sentiments expressed by colleagues; however, if at all possible, I would enjoy a further exploration of superhero costumes.

Others became indignant about the growing list of email messages they were receiving. Chuck Morris wrote: "Please stop replying all." Similarly, Janet Mu messaged: "OK . . . really now, please do not hit 'reply to all'" and Randy Ram hit "unsubscribe." Finally JPL management weighed in as follows:

Hi everyone,

This email distribution list goes to over 4600 people, and it was not intended to be unmoderated.

Out of respect for people's time, the . . . management team would like to ask you not to reply to this email address until we can fix the situation.

Speaking to your concerns about the United Way, Leslie, Rene and the team want to hear your feedback about the campaign and they are committed to a positive work environment.

So please direct your comments either directly to Tom or myself and do not reply to all to this distribution.

But William Stromberg pushed back, replying to all:

All;

There have been a number of requests distributed through "Reply to All" not to use "Reply to All" to make your opinion about this known. I for one have found the responses enlightening and given the source of the original message quite ap-

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appropriate. It's easy enough to filter the messages if you don't want to receive them.

JPL also allows employees to email each other concerning van pooling to a farewell luncheon held off campus, a holiday party held off campus at a restaurant for the cost of \$25, retirement receptions held on campus, collecting money for retirement events, lost computer glasses, a black glove that was found, found car keys, chicken and garlic bread being available outside the section office next to the copier on a first come, first serve basis, then pizza, zucchini bread, and cookies being available at the same location (and a followup message later announcing that the food was all gone), the birth of an employee's child (and a followup message indicating the name of the child), the death of an employee's spouse (and money collection), an employee's surgery (and money collection),² the death of the father of an employee (and money collection), an invitation to come and eat leftovers from an employee's going away luncheon, leftover food from an employee's birthday party, an account of an employee's memorial service,³ an invitation to join a softball team, an invitation to a baby shower, and so on.

In addition, emails have been used for matters unrelated to work. For example, on January 26, 2009, an employee sent a message to about 20 other employees announcing that: "My niece is selling Girl Scout Cookies again this year. They are \$4.00 a box. Her goal is to sell 200 boxes. I will leave an order form on Sherrie's counter this afternoon." On September 16, 2011, an employee sent the following emails message:

I'm not ordinarily prone to spamming our entire Section, but I just got this e-mail from Amazon that says today's Local Daily Deal is \$25 worth of food at Dish in La Canada for only \$12 (52% off)—So I thought I should pass it along in case anyone wanted to take advantage of it for their lunch today!

² I give a specific example sent on September 19, 2008:

Hi All,
We collected \$300 for. . . . We spent \$82 on a beautiful arrangement from Jacob Maarse to be delivered tomorrow. The cash and cards we all signed will be taken to her early next week by Leila Meshkat and/or Margaret Smith. If you want to check out the flower arrangement go the Jacob Maarse website and look for the "Panama" style flower arrangements. I still have a card on my counter for anyone who still wants to sign/contribute. Any more cash donated will go straight to. . . .

³ I give another example. On May 1, 2009, the following was sent:
Hello everyone,

Below is the link to my .mac account and our beloved friend ...'s video. Please feel free to download and share the link with others. Although it should be very straight forward, please let me know if you encounter any difficulties or problems. I have tested it out on both a PC and Mac and for the most part it works well. The only glitch is that it's a little slow queuing up so I suggest you let it buffer for a minute or two before playing. For downloading, there are four different sizes. You can download to an iphone, ipod, computer etc., just choose the correct size. If none of these options work for you, please drop me an e-mail and I will send you a DVD.

Lastly, I can't thank you (the cast of characters in ...'s life) enough for the amazing photos you provided. They are truly a treasure that documents a life well lived and something that ... and ... (...'s parents) can take comfort in. Thank you.

Details below (clickable link to get deal). In case the link in the forwarded e-mail doesn't work, here is a direct link:

<http://...>

Dish is located at
734 Foothill Boulevard
La Canada, CA 91011
818-790-5355

I've set Reply-To: to my e-mail address so please address all follow-ups/complaints/rants to me ☺

....

If you've ever heard a killer cover or rockin' remix, you know that sometimes even the classics can benefit from an update. Today's deal is destined to be a chart-topping hit: Pay just \$12 and receive \$25 to spend on food and drinks at Dish . . . in La Canada

This family-style restaurant takes traditional down-home classics and gives them a gourmet punch-up with organic produce, artisan ingredients, and new spins on old recipes. Take a seat at one of the hand-painted tables in the cozy dining room and feast on dishes like grilled pork chops with spicy apple chutney, penne pasta tossed with fresh spinach, grilled chicken, and white-wine sauce, and pitch-perfect gumbo with andouille sausage. Make sure to compliment your meal with a selection from the extensive wine list. Trust us—this little number is bound to get stuck in your head.

The print version of this email message is a bit over 3 pages long; it was sent to about 200 people.

On May 16, 2011, an employee sent the following email message to about 4500 persons at JPL:

The Arroyo Seco fire road above JPL is once again open! The signs have been removed on the lower road as well as Brown Mtn. Rd. In their place is a warning sign about erosion, loose rocks, and falling trees. I've been up all of the local trails over the past month under a research permit from the Forest Service and can attest to the fact that the road is nearly gone in places and one bridge on the Arroyo is burned out, causing a detour. The Arroyo Seco trail is impassable above Paul Little Picnic area, but the waterfall is very nice. Upper Brown Mtn Rd is passable, but heavily overgrown. The flowers are quite nice right now, especially the lupine. El Prieto trail was almost completely obliterated, but is slowly becoming easier to negotiate. Remember to watch for rattlesnakes—I saw two on the trail a couple weeks ago.

On November 2, 2009, Robert Nelson, a plaintiff in the lawsuit as described above, sent an email message concerning the death of Qian Xuesen a/k/a Tsien Hsueshen as follows:

Dear Colleagues in Division 32.

I noted in yesterday's Los Angeles Times . . . a report of the death of Qian Xuesen, one of JPL's early pioneers in rocketry. He was 98 and is regarded as father of the Chinese Space program. He was named Aviation Week's Man of the Year in 2007.

During his tenure at Caltech in the 1940's he was a close associate of JPL's founders, particularly Theodore Von Karmin

and Frank Molina, JPL's first two directors. During the "Red Scare" period in the late 1840's and 1950's, Qian, like Molina, was connected by the police officials to individuals who were deemed to have inappropriate political beliefs. Without public trial he was placed under effective house arrest and his deportation to the Peoples Republic of China was ordered. However, the deportation was not carried out because the FBI feared that he would be an asset to the Chinese. Qian steadfastly denied the unsubstantiated allegations.

He was released in 1949 and left the United States. Upon returning to China he began his work on the Chinese rocketry and space program.

Much debate remains regarding the charges against Qian. Many who have studied the case maintain that Qian might well have remained in the United States and worked in our program had he not been subjected to the charges. He might well have been high in the management of JPL today.

The Qian case is just one more example of the dangers created by those who investigate and place judgment upon the political backgrounds of others.

This is not uncommon, particularly for foreign born scientists. A more recent example is the imprisonment of Wen Ho Lee. However, in the Lee case, ultimately the President of the United States issued a formal apology for the damage done to Lee by police officials.

The study of history is important because it helps us to develop our responses to contemporary situations. I leave it to each of us to draw their conclusions about the Qian at their own comfort levels.

Nelson was not disciplined for using JPL resources to express those views. On April 22, 2010, Nelson sent employees the following email message:

Dear Colleagues in Division 32:

I need not preach to the choir the proposition that the great scientific problem of the next century is how to address anthropogenic⁴ contribution to climate change. Recently NASA Associate Administrator Ed Weiler noted that NASA and JPL are increasing their commitment to this effort. During the period in which this is happening we employees, as individuals, might also wish to increase our commitment to addressing the carbon problem. I would like to suggest for your consideration a personal act that each of us might undertake that could have an important leveraging effect in efforts to educate our communities.

Most of us own homes. We have neighbors who know that we are scientist at JPL. They hold us in high regard commensurate with their perception of the talented engineers and scientists that work here (and properly so). Therefore, measures that we take in modifying our homes are noticed by our neighbors and have a mushrooming effect.

So, I suggest that each JPL homeowner seriously make the investment in installing solar photovoltaic panels on the roofs of their homes. If we do it, our neighbors will take note.

I speak from the following experience. Several years ago my wife and I had photovoltaic panels installed on our roof along with an inverter that synchronized the output to our 220 VAC electric service. The project was done by a local contractor and a large fraction of the cost (circa 40%) was shared by the Pasadena Department of Water and Power. There was an additional Federal Tax Credit of several thousand dollars. Since then we have had an annualized zero balance electric consumption bill.

.....
In the time since we have done this several neighbors have taken notice. A few have made the change also. The Pasadena Department of Water and Power has been so excited by the early success that they now permit homeowners to place as many panels on their roof as they would like AND THE DWP IS GLAD TO BUY BACK ANY SURPLUS AT THE PREVAILING RATE. The reason for this is obvious. In Southern California we summer daytime peaking electric consumption. The avoided cost of providing electricity on a hot summer afternoon is many times the cost of providing electricity 12 hours later. It works for the DWP, it works for the consumer and it works for controlling the carbon problem.

Any JPL colleagues who might wish to visit our home are welcome to do so. Please contact me and I will be happy to show you the setup. You can see the panels on our roof from Google Earth. We live at . . .

LADWP, Glendale, and Burbank utilities have similar programs. SCE has something similar.

If we JPL employees do this we will set an example for our communities and enhance the value that our community places in JPL. It is truly a win win.

Nelson was not disciplined for the "controversial" suggestion that human activity contributes to climate change, nor was he disciplined for advocating the use of solar panels.

On the other hand, a JPL employee was given a "documented oral warning" on April 21, 2008, for sending an email message to a JPL customer; in the message the employee indicated that the customer stole intellectual property from JPL. In 2008, JPL terminated an employee during that employee's extended probationary period. That employee had been placed on a performance improvement plan to rectify a number of performance problems. JPL listed about 10 reasons for the employee's termination. One of the reasons was because the employee had use a JPL computer to send an email message inviting certain JPL employees to a barbeque party at the employee's home. Finally, on January 9, 2008, an employee received a documented oral warning selling Mary Kay products while at work and on JPL time and using JPL's computer to solicit JPL employees to purchase those products.

D. The Rule

The complaint also alleges that JPL maintains and unlawful, overly-broad. That rule is:

⁴ To save the reader a trip to the dictionary, Nelson explained that this means items that are generated through human activity.

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Ethics and Business Conduct

....

2.3 As representatives of JPL, employees shall avoid any actions which could reasonably be expected to adversely affect, or give the appearance of adversely affecting, the independence and objectivity of their judgment, interfere with the timely and effective performance of their duties and responsibilities, or discredit the Laboratory.

III. ANALYSIS

A. *Written Warnings*

JPL's brief begins:

The Charging Parties used *governmental* email addresses to spam more than 7,300 people—including high-ranking NASA Program Executives—about a personal lawsuit they had lost against that agency, and to lobby NASA on the issues in that case. Their lawsuit had nothing to do with any term or condition of their employment relationship with . . . JPL. Rather, it challenged new background checks for federal contractors that were forced on JPL as a result of a Presidential Homeland Security Directive (HSPD-12), which was implemented nationwide by NASA.

For reasons set forth below, I disagree with this statement at many levels.

Section 7 of the Act allows employees to engage in concerted activity for the purpose of the mutual aid and protection. *Meyers Industries*, 281 NLRB 882 (1986), *enfd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). The concerted nature of the employees' activities and JPL's knowledge of the concerted nature are obvious from the recitation of the facts set forth above. I also conclude that those activities concerned the working conditions of the employees. The employees sought to limit intrusion into their private lives that was being imposed upon them as a condition of continued employment. *Hoodview Vending Co.*, 359 NLRB No. 36, slip op. at 3 (2012); *Medicenter, Mid-South Hospital*, 221 NLRB 670, 675 (1975). And the fact that the email messages went to employees and officials of NASA as well as JPL does not remove their protected nature. *Five Star Transportation*, 349 NLRB 42, 47 (2007). These Section 7 activities included filing and pursuing the lawsuit; the Board has consistently held that concerted legal action concerning working conditions is activity protected by Section 7. *D. H. Horton, Inc.*, 357 NLRB No. 184, slip op. at 2 (2012); *Le Madri Restaurant*, 331 NLRB 269, 275 (2000); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975); *Host International*, 290 NLRB 442, 443 (1988). Indeed, the filing of the lawsuit also constitutes petitioning activity covered by the First Amendment and the Supreme Court has chastised the Board not to interpret the Act in a way that tramples on that First Amendment activity. *BE & K Construction v. NLRB*, 536 U.S. 516 (2002). Likewise, the employees' commentary about their working conditions and the criticism of the Government's unsubstantiated factual representations made to the Supreme Court during oral argument involve not only activity protected by Section 7 of the Act but also implicate First Amendment freedom of expression concerns that the Board

must consider in determining whether the commentary and criticisms somehow lost the Act's protection. *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966); *Letter Carriers v. Austin*, 418 U.S. 264 (1974); *TNT Logistics North America, Inc.*, 347 NLRB 568 (2006), *revd. sub nom. Joliff v. NLRB*, 513 F.3d 600 (6th Cir. 2008). No extended analysis is needed to conclude that the commentary and criticisms remained protected conduct under Section 7. I reject JPL's contention that Nelson's comments, described above became unprotected under *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). Nelson's comments did not disparage JPL's or NASA's products or services. Rather, his comments expressed indignation over his factually based concerns that the U.S. Government had misled the Supreme Court on a material matter and thereafter refused to acknowledge or correct the misstatement. For similar reasons Byrnes' comments and signature line were part of the concerted activities of the employees that remained protected under the Act.

I reject JPL's contention that it had no choice but to comply with NASA's directives. I start by pointing out that HSPD 12 was not specific as to how the Government was to implement the directive. Other departments in the Government, according to the employees, implemented it a manner less invasive of the privacy of their employees. And the NASA badging requirements morphed and evolved, apparently in response to the concerns voiced by the employees. Finally, there is no evidence that JPL itself could not have sought to influence NASA to address some of the concerns of its employees. NASA and JPL chose the manner in which they implemented HSPD 12 and some employees concertedly complained and sought to change it. The employees have a Section 7 right to do so. JPL also argues that the email messages went to "NASA headquarters." But the facts at trial show, as described above in the General Counsel's chart, that only a small number of emails made it to NASA headquarters and that JPL was able to identify even a smaller number in NASA management positions. But all this is beside the point because I conclude that, in the factual context of this case, contact with NASA officials involved with JPL is conduct protected by Section 7.

I now consider whether the employees lost the protection of the Act by using NASA computers and email systems to send their messages. Employees do not currently have a Section 7 right to use their employer's computers to engage in protected concerted or union activity; if they do so without permission they may be lawfully disciplined for doing so. *Register Guard*, 351 NLRB 1110 (2007).⁵ However, an employer may not allow use of its computers for nonwork-related activities and discriminate against use of the computers for similar Section 7 activities. *Register Guard*, *id.* In this case, JPL has allowed use of its computers for a wide range of nonjob-related purposes, many of which were similar in kind, length, and scope of distribution as the messages sent by five employees. I have considered the testimony of Cozette Hart, JPL's director of human resources; she has held that position for about 8 years. Hart explained that JPL allows its employees to use its comput-

⁵ *Enfd. in part sub nom. Guard Publishing v. NLRB*, 371 F.3d 53 (D.C. Cir. 2009).

er and email systems to communicate with each other concerning JPL sponsored events such as retirement parties, ice cream socials, and the like. She also explained that JPL permits employees to send email messages on matters such as items that have been lost or found, people who are sick or who have died, birth announcements, and the like. She aptly described these communications as being “part of the fabric of every working group in every day work operations.” She continued: “[T]hat is part of, in a work group, what people inform each other about.” But she did not explain why JPL allowing NASA’s computers to be used by employees to make these communications. Hart then declared that JPL did not consider these communications to be “spam” under JPL’s rules in particular or, based on her experience in the human relations field, in human relations operations generally. Hart also frankly admitted that certain email communications that were sent concerning the sale of Girl Scout cookies, the lunch specials at a local restaurant, and United Way antisolicitation comments did not fit comfortably as permissible under JPL rules. But her excuse is that no one complained to her about these communications and that JPL does not otherwise police the use of its computers to find violations of its rules. She criticizes the emails at issue in this case for “[l]obbying for support and lobbying [NASA] to change their position.” This testimony is interesting for several reasons. First, the written warnings do not specifically mention any violations of JPL’s lobbying policy, although JPL has one.⁶ This leads me to conclude that JPL is now searching for additional reasons to justify the disciplines, reasons not actually relied upon. And of course, as described below, the “lobbying” described by Hart is precisely what Section 7 of the Act protects. *Eastex Inc. v. NLRB*, 437 U.S. 556 (1978). She complained that the size of the email distributions, taken together, was “unprecedented.” But this assessment only highlights the concerted nature of the complaints about working conditions. And given that the messages went only to persons who, for the most part, might be impacted by the change of badging requirements, they highlight the pervasive nature of the new badging requirements on JPL’s work force. I have also considered the testimony of Leslie Lynn Livesay, JPL’s director for engineering and science; she oversees about 3500 employees. Livesay indicated that she believes the employees violated JPL policy by sending the email messages to employees and NASA related workers because the messages did not clearly indicate that the messages did not represent the views of JPL. I reject this testimony. Anyone who had been paying the least bit of attention to the long, contentious struggle concerning the badging process would know without a doubt that the messages, which on their faces were clearly authored by plaintiffs to the lawsuit, did not represent JPL’s position. Livesay also claimed that she regarded the messages as being political in nature because they discussed the badging requirements and the Su-

⁶ Sec. 2.4 of the Commercial and Political Endorsements policy states:

Federal laws and regulations, as well as our prime contract with NASA, prohibit lobbying by JPL employees. Unsolicited communications with legislative or executive branch agencies that could be interpreted as lobbying shall be vetted by the Office of Legislative Affairs.

preme Court’s decision regarding those requirements. But I have concluded above that the badging requirements and consequent litigation are matters concerning working conditions; JPL cannot simply label them as “political” and thereby escape following the law of the land. Livesay indicated that Nelson’s message violated JPL policy because it indicated that the “Department of Justice and NASA Headquarters had lied to the Supreme Court” regarding how JPL could get within 6–10 feet of the Space Shuttle while it was being repaired or fueled. But I have disposed of this argument too above. Regarding the numerous email messages protesting JPL’s manner of solicitation for the United Way, Livesay’s excuse for not disciplining those employees was that felt:

[T]his was our fault that this dialogue ensued because we had left the reply all capability open, so for this specific incident, I felt that we would not take, I decided not to take specific action.

And what about the employee in that email ruckus who did not hit the “reply to all” but rather tailored his response to a specific group of employees? Livesay’s answer: “So when it came to my attention, I did not take action and I should have.” In other words, Livesay had an excuse for each potential breach of JPL policy concerning use of computers and sending email messages except for when the employees used the computers to engage in concerted efforts to complain about the badging requirements. I reject these excuses as created after the fact. I conclude that the employees did not lose the protection of the Act when they used NASA’s computers and email systems to send their messages.

Having concluded that the employees engaged in concerted activity protected by the Act, that they were disciplined specifically for that reason, and they did not otherwise engage in conduct whereby they lost the protection of the Act, an analysis under *Wright Line*, 251 NLRB 1083 (1980), is unnecessary. *Register Guard*, supra at 1120. By issuing written warnings to Robert Nelson, Dennis Byrnes, Scott Maxwell, Larry D’Addario, and William Bruce Banerdt because they engaged in protected, concerted activities, JPL violated Section 8(a)(1).

B. The Rule

A rule or policy violates Section 8(a)(1) if it can reasonably be read by employees to chill their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). A rule will also violate Section 8(a)(1) if it has been applied to restrict Section activity. *Lutheran Village*, id. at 647. The General Counsel argues that section 2.3 of JPL’s ethics and business conduct, set forth above, is unlawful in both respects.

Concerning his first argument, the General Counsel focuses on only the following portion of the rule that instructs employees to avoid any action which “could reasonably be expected to . . . discredit” JPL. The General Counsel argues that the rule can reasonably be read to preclude protected activity such as filing an unfair labor practice charge, statements or discussions that criticize JPL’s employment practices, or protest its pay and treatment of its employees.

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The Board and its judges have not so far found a rule using the word “discredit” to be unlawful. To the contrary, when the Board and its judges have considered rules concerning “discredit” they have found the rules to be lawful. *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1291 (2001); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288–289 (1999); *Central Peninsula Hospital*, JD(SF) –37–12 at 21, *Pleasant Travel Services*. JD(SF) –38–10 at 3. The General Counsel contends that section 2.3 is similar to the rule found to be unlawful in *Karl Knaus Motors*, 358 NLRB No. 164 (2012). That case involved a rule that prohibited employees from using “language which injures the image or reputation of the Dealership.” The General Counsel also cites *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012). That case involved a rule that prohibited employees from making comments that “damage the Company, defame any individual or damage any person’s reputation.” Neither case involved a rule that condemned the use of the word “discredit.” Granted, my dictionary⁷ defines the verb form of discredit as follows: “1. To damage in reputation; to disgrace; dishonor. 2. To cast doubt on; cause to be distrusted. 3. To give no credence to; disbelieve.” So the word “discredit” may be synonymous with the words used in those two cases. But the Board did not distinguish the “discredit” cases and I cannot do so, so I will leave that task to the Board. I conclude, as I did in *Central Peninsula Hospital*, supra, that employees would not reasonably read section 2.3 as forbidding activity protected by Section 7.

Some background is necessary before I address the merits of the General Counsel’s second argument. As indicated above, the complaint alleges that JPL used this rule in giving the employees their written warnings. In its original answer, JPL admitted that allegation of the complaint. However, after the hearing closed but before briefs were due, JPL moved to amend its answer to deny that it had relied upon this rule. JPL’s attorney persuasively argued that the admission had been a mistake. Because I did not want to find a violation based on a mistaken pleading, I granted the motion to amend. However, because I felt that the General Counsel might have relied upon the admission and not offered evidence to support the allegation, I held a conference call and invited the General Counsel to move to reopen the record if he had additional evidence that he wished to present on the matter; I indicated my inclination to grant the motion to reopen the record. I also indicated that I would consider the earlier admission as part of the record and I would assess it against the entire record. I also allowed for the possibility that the General Counsel might move to amend the complaint in light of the testimony at the hearing that JPL relied on section 2.2 and not section 2.3 of its ethics policy in meting out the discipline. The General Counsel instead filed a motion for special permission to appeal my ruling to the Board.

There is no direct or even indirect reference to section 2.3 in the written warnings given to the employees. Rather, the justifications in the written warnings concerning the ethics policy seem entirely unrelated to that policy. Nor was it mentioned in any of the meetings JPL held with the employees concerning

the disciplines. I conclude the earlier admission by JPL was simply a mistake. I therefore dismiss this allegation of the complaint.

CONCLUSION OF LAW

By issuing written warnings to Robert Nelson, Dennis Byrnes, Scott Maxwell, Larry D’Addario, and William Bruce Banerdt because they engaged in protected, concerted activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, California Institute of Technology Jet Propulsion Laboratory, Pasadena, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining or otherwise discriminating against any employee because they engage in protected, concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board’s Order, remove from its files any reference to the unlawful written warnings, and within 3 days thereafter notify the employees in writing that this has been done and that the written warnings will not be used against them in any way.

(b) Within 14 days after service by the Region, post at its facility in Pasadena, California, copies of the attached notice marked “Appendix.”⁹ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

⁷ *American Heritage Dictionary* (New College Edition) (1976).

with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 6, 2011.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 6, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline or otherwise discriminate against any of you because you engage in protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful written warnings given to Robert Nelson, Dennis Byrnes, Scott Maxwell, Larry D'Addario, and William Bruce Banerdt, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the written warnings will not be used against them in any way.

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