

Media Advisory HSPD#12 JPL

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National Labor Relations Board Upholds Sanctions Against Caltech

Contact: Robert M. Nelson, 818-635-5536

rmnelson2@earthlink.net

For Immediate Release:

A three-member panel of the National Labor Relations Board, upholding last year's decision by an administrative law judge, ruled last Wednesday that the California Institute of Technology had engaged in unfair labor practices. Last May, Judge William G. Kocol found that Caltech had violated the National Labor Relations Act when the institute disciplined five employees at the Jet Propulsion Laboratory who used email to communicate with colleagues about a Supreme Court decision pertaining to JPL employee privacy rights. Caltech administers JPL under a contract with NASA.

In 2011, Caltech issued letters of reprimand to five JPL employees because they used JPL's internal email system to discuss the implications of a recent Supreme Court ruling on the working conditions at JPL. The five employees had been plaintiffs in the Supreme Court case. The Supreme Court ruled that personal background investigations into the intimate details of the private lives of JPL employees were legally permitted as part of the process of issuing employee identification badges used for access to the JPL facility. The investigation requirement had been imposed by NASA in response to Homeland Security Presidential Directive #12 (HSPD12), issued by President George W. Bush after the 9/11 attacks.

The disciplined JPL employees' email had discussed alternative approaches to the badging process and noted that NASA had wide discretion regarding the nature and scope of the background investigations. The Caltech disciplinary citations alleged that the employees had violated work rules. The five employees then filed charges with the NLRB. Upon review in 2012, the NLRB Regional Office in Los Angeles found that the employees had engaged in 'protected concerted activity' as defined by the National Labor Relations Act and that Caltech's actions against them were unlawful. Caltech was asked to remove the disciplinary citations. Caltech refused. The Regional Office then filed a formal complaint, and the case was tried before Administrative Law Judge William G. Kocol in Los Angeles on January 22-25, 2013.

Judge Kocol issued his decision on May 6, 2013. He found Caltech at fault and drafted an order that the disciplinary citations be revoked and that Caltech notify all of its employees of this result and provide them assurance that their rights would not be violated in the future. In Wednesday's decision, the NLRB adopted the judge's draft order, putting it into effect and giving Caltech 14 days to comply.

Caltech maintained throughout the proceedings that, by imposing the intrusive background investigations on its employees, it was simply carrying out the directives of NASA. In his opinion Judge Kocol stated, *"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 in 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."*

At the trial before Judge Kocol, Leslie Livesay, JPL's Director for Engineering and Science, testified that the disciplinary citations were justified because the employees had not included a statement specifically stating that the opinions expressed in their email were not those of JPL. Judge Kocol strongly rejected Livesay's claim, stating, *"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."*

Caltech Human Resources Director Cozette Hart testified before Judge Kocol that the employees had engaged in "Lobbying for support and lobbying NASA to change their position." Judge Kocol dismissed Hart's contention, stating, *"First, the written warnings do not specifically mention any violations of JPL's lobbying policy, although JPL has one. 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 [National Labor Relations] Act protects."*

The employees hailed the NLRB decision.

Larry D'Addario, a Senior Engineer who works on deep space communication, interplanetary radar, and radio astronomy, said *"JPL/Caltech sought to censor our communications to fellow employees about our working conditions, in clear violation of the NLRA. I was pleased that the judge in our case found Caltech's excuses unconvincing, and that the NLRB in Washington has now affirmed the judge's decision."* D'Addario continues his work at JPL as a Senior Engineer.

Dennis V. Byrnes, JPL's former Chief Engineer for Flight Dynamics, said *"The confirmation by the NLRB of Judge Kocol's ruling is most gratifying. Once again we have been vindicated by an even higher authority for our modest efforts to communicate with our fellow employees over this very important issue of government incursions into our private lives. The disciplinary actions against us have been shown to be the shams that they are. The willingness of JPL management to violate their own policies for their own ends is shocking and very sad. The fact that my 35-year career at JPL had to end over this issue causes me great pain."* Byrnes retired from JPL rather than submit to the privacy intrusions of HSPD#12.

Scott Maxwell, formerly a Driver of JPL's Mars Rover, said, *"I'm enormously grateful that National Labor Relations Board Chairman Mark Gaston Pearce and his panel have concurred with Judge Kocol, who saw through JPL's evasions, shiftiness, and outright lies about their*

unlawful behavior. This ruling is a real victory: it helps ensure that other workers are able to engage in protected, lawful activity, as we did, without fear of punishment from their powerful employers." Maxwell left JPL and is now employed as a high-level software development engineer by a large information technology corporation.

Susan Foster, formerly a Senior Technical Writer at JPL, said, *"Having signed the letter for which my colleagues were disciplined, I am grateful that the NLRB has endorsed Judge Kocol's order recognizing that Caltech illegally disciplined employees who were simply exercising their federally guaranteed workplace rights."* Foster resigned from JPL in 2012 rather than sign the HSPD12 paperwork that she believes violates employees' constitutional rights; she is now a freelance technical editor.

Robert M. Nelson, Lead Plaintiff in the HSPD12 Supreme Court case, welcomed the NLRB ruling saying, *"Throughout this entire episode, I have been astounded that Caltech and JPL, home to the 21st century's leadership in science and engineering, could harbor administrative bureaucrats who develop workplace rules similar to those described in Charles Dickens' 19th century novels. The NLRB deserves the profound gratitude of every scientist and engineer in the country. Caltech should have known that 21st century science cannot be done in a 19th century work environment."* Nelson, a Senior Research Scientist at JPL, left JPL in 2012 rather than submit to the overly intrusive background investigation. He now continues his NASA research as a Senior Scientist at the Planetary Science Institute.

Caltech, having been found in violation of federal law, must comply with remedies specified by Judge Kocol. These include removal of the disciplinary sanctions from the employees' personnel records and posting notices to all employees that it has violated the law and will not interfere with employees' rights to communicate about internal workplace affairs.

Caltech can seek review of the Board's decision by a federal court of appeals. In this case it would be either the Ninth Circuit or the District of Columbia Circuit. Following a ruling by the court of appeals, any party in the case, including the Board, can request further review by the US Supreme Court.

Background:

The JPL legal case evolves from a 2007 federal court hearing in which employees of NASA's JPL sought injunctive relief against their employer, Caltech, and NASA in order to prevent intrusive personal background investigations. (Caltech operates JPL as a federally funded research and development center for NASA.) Caltech and NASA argued that these intrusions were required under Homeland Security Presidential Directive #12, an executive order signed by President George W. Bush. Most JPL employees (including all of the plaintiffs in the case) do no classified work.

On October 3, 2007, Federal District Judge Otis Wright III denied the plaintiffs' motion for a preliminary injunction. The employees appealed to the Ninth Circuit Court of Appeals, and an emergency temporary injunction was granted on October, 5 2007, just hours before JPL was to begin advertising for replacements for those employees who were deemed noncompliant.

A second panel of the Ninth Circuit Court heard arguments on this case on December 5, 2007. On January 11, 2008, the Ninth Circuit Court of Appeals found that "The Appellants have demonstrated serious questions as to certain of their claims on which they are likely to succeed on the merits, and the balance of hardships tips sharply in their favor. We therefore conclude that the district court abused its discretion in denying Appellants' motion for a preliminary injunction, and we reverse and remand." In addition, the Ninth Circuit found that including Caltech as a defendant was justified, stating, "The court found Caltech did do more [than merely follow government orders]--it established, on its own initiative, a policy that JPL employees who failed to obtain federal identification badges would not simply be denied access to JPL, they would be terminated entirely from Caltech's employment."

The Department of Justice petitioned the Supreme Court for review and the case was argued October 5, 2008. The Supreme Court overturned the injunction in 2009.

All court documents relevant to the case can be found at HSPD12JPL.org

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