

Supreme Court To Take On Federal Employee Privacy

By **Allison Grande**

Law360, New York (March 08, 2010) -- The U.S. Supreme Court has elected to review a federal appeals court's decision to grant a request by NASA scientists for a preliminary injunction to halt allegedly deep-reaching background checks on low-risk employees at the space agency's Jet Propulsion Laboratory.

The high court on Monday granted NASA's Nov. 2 petition for writ of certiorari, allowing the agency a chance to argue that the U.S. Court of Appeals for the Ninth Circuit erred in its January 2008 reversal of a lower court's decision to deny the scientists injunctive relief in their challenge to government rules regarding background checks.

Twenty-eight senior scientists and engineers at JPL — which conducts research for NASA in conjunction with the California Institute of Technology — filed suit against NASA, the U.S. Department of Commerce and Caltech in the U.S. District Court for the Central District of California in August 2007, seeking to stop the implementation of new background investigation requirements.

The requirements were created through a 2004 executive order by President George W. Bush, and compelled all federal agencies and facilities to require their workers to have identification badges, according to the complaint.

To get a badge needed to enter JPL's facilities, all workers had to submit to a background check, the suit states. They were required to sign a broad written waiver, permitting investigators to obtain records from their past employment files, and to question friends and associates about their emotional health, financial integrity and general conduct, it claims.

The workers argue that the rules surrounding these background checks are unconstitutional and intrusive, and that they unlawfully allow unknown government officials to ask all

manner of questions about people's personal lives, including sex lives and emotional states.

The district court denied the workers' request for injunctive relief in October 2007, but the Ninth Circuit overturned that decision, ruling that the workers had raised serious legal and constitutional questions that warranted a preliminary injunction barring NASA's policies.

Current law doesn't allow background investigations in the way NASA intended, the appeals court said. According to the law, investigations can only be in the interest of national security if the target of the investigation holds a sensitive position, but in this case the workers are low-risk employees who don't hold sensitive positions, it ruled.

Considering the breadth of questions the workers would be asked, it would be difficult to see how these questions could be narrowly tailored to meet any legitimate need, much less the specific interests that NASA offered, the Ninth Circuit found.

"Asking for 'any adverse information about this person's employment, residence or activities' may solicit some information relevant ... but there are absolutely no safeguards in place to limit the disclosures to information relevant to these interests," the opinion said. "Instead, the form invites the recipient to reveal any negative information of which he or she is aware."

The appeals court also disagreed with the district court's finding that the employees wouldn't suffer any irreparable harm as a result of the policy.

The government filed a petition for a rehearing en banc following the reversal, but the Ninth Circuit issued a new opinion in June 2008 that mooted the appeal.

The U.S. again appealed for an en banc hearing, and lost its bid in a June 2009 vote that "was not close," according to a concurrence that accompanied the denial.

Dan Stormer, an attorney for the scientists, on Monday called the Supreme Court's decision to hear the appeal "disappointing" but remained confident in his clients' position in the suit.

"The informational privacy right is well-founded by constitutional analysis, and the Supreme Court, when fully and properly presented with the information, will find that," he said.

Representatives for NASA and Caltech could not be immediately reached for comment Monday.

The scientists are represented by Hadsell Stormer Keeny Richardson & Renick LLP and

WilmerHale.

The case is NASA et al. v. Nelson et al., case number 09-530, in the U.S. Supreme Court.

--Additional reporting by Richard Vanderford and Shannon Henson

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