

NASA vs. Nelson (2011): Contract Worker Privacy and Federal Background Investigations

Casey Skvorc, PhD, JD
Contractor

Division of Occupational Health & Safety

National Institutes of Health

ABSA Conference Presentation

November 2, 2011

- **The content of this presentation does not reflect the position of any government agency.**
- **The information is for general review and discussion purposes only, and should not be construed as legal advice or counsel.**
- **Contact your legal counsel with any questions you have.**

- **NASA: National Aeronautics and Space Administration**
- **JPL: Jet Propulsion Laboratory**
- **Cal Tech: California Institute of Technology**
- **NACI: National Agency Check with Inquiries**
- **SF: Standard Form**

- **NASA owns the JPL, a space exploration and research facility operated by Cal Tech.**
- **JPL staff are Cal Tech employees assigned to the NASA contract, and do not work with any classified material.**

- **NASA has always required its civil servant employees to undergo a NACI (National Agency Check with inquiries) background investigation.**
- **A 2004 recommendation by the 9/11 Commission resulted in the President ordering uniform identification standards for all federal employees, including contractor employees.**

- **In 2007, NASA initiated the requirement that all contract employees of JPL complete a NACI background investigation.**
- **Failure to complete the background investigation was deemed, by Cal Tech, to constitute a voluntary resignation of employment.**

- **The NACI background investigation requires the applicant to provide employment, residential, military, and educational histories, as well as references, disclosure of illegal drug use, manufacture, sale or possession of drugs within the last year, and whether the worker obtained drug treatment or counseling.**
- **The background investigation also requires the applicant to provide names of designated references.**

- **Each designated reference is asked to provide an explanation of any adverse information that may be known regarding the applicant, including financial integrity, alcohol or drug abuse, employment history, psychological stability, or other matters.**
- **NASA and the Office of Personnel Management (OPM) collect this information, and subsequently determine if the applicant is suitable for employment.**

- **28 JPL contractors sued NASA, alleging the NACI investigation violated their right to privacy, and that the information sought was overly broad and unrelated to their job duties.**
- **The federal district court ruled in favor of NASA and the JPL contractors' application for preliminary injunction was denied.**

The Ninth Circuit Court of Appeals reversed the decision of the federal district court, and ruled in favor of the JPL contractors.

The majority opinion raised objections to the questions contained in the NACI background investigation.

-Inquiries into details of a contractor's potential drug treatment or counseling raised significant constitutional rights of information privacy, *and the government's need to know was not supported by any legitimate interest.*

- **In a decision of 8-0, the Supreme Court reversed the ruling of the Ninth Circuit Court of Appeals, remanding the case to the federal district court.**
- **Verdict in favor of NASA.**
- **Justice Alito delivered the majority opinion of the Court.**

- **Since 1871, the President has had statutory authority to ascertain the fitness of civil service applicants with regards to age, health, character, knowledge and ability for employment. 5 U.S.C. 3302 (2).**
- **The questions contained in the NACI background investigation became mandatory for all applicants for the federal civil service in 1953.**
- **At the JPL, contract and civil service employees perform equivalent job duties.**
- **The Privacy Act precludes the release of background investigation information to the public.**

- **Justice Alito noted that JPL contract employees perform critical tasks for NASA.**
- **For example, JPL contractors who challenged the background investigation procedures included:**
 - **the lead trouble-shooter for the \$568 million Kepler Space Observatory;**
 - the leader of the program that tests all new technology that NASA uses in space; and**
 - one of the lead trajectory designers for the Galileo Project and the Apollo moon landings.**

- **The requirement that federal contractors complete the NACI investigation was found to be a reasonable basis for the Government to ensure the security of its facilities and in employing a competent, reliable workforce.**
- **Constitutionally protected individual privacy rights do not preclude the Government from asking reasonable questions in an employment background investigation that is subject to the Privacy Act's safeguard against public disclosure.**

- **Illegal drug usage is both a *criminal* and *medical* issue; it is reasonable to identify illegal-drug users who are taking steps to address and overcome their problems.**
- **“The Government is entitled to have its projects staffed by reliable law-abiding persons who will efficiently and effectively discharge their duties. Questions about drug usage are a useful way of figuring out which persons have these characteristics.”**

- **The nexus between an agency's background investigation questions and the worker's job performance should be clearly established by agency administrators and legal counsel.**
- **Background investigation procedures, record retention, and information release policies should be reviewed by agency counsel to assure compliance with applicable laws, regulations, and court decisions.**
- **Federal and state statutory provisions, including the ADA, may prohibit specific questions until after a conditional offer of employment is made.**

- National Aeronautics and Space Administration, et al. v. Nelson, et al., 562 U.S. ____ (2011).
Slip Opinion, October Term, 2010, No. 09-530.
- NASA v. Nelson (09-530). Informational Privacy, Employment Background Check, NASA. Legal Information Institute. Koven, Melissa and Pruett, Sarah. <http://www.law.cornell.edu/supct/cert/09-530> (October 27, 2011).

- **Opinion Analysis: Constitutional issue left open. NASA v. Nelson. Dennison, Lyle. SCOTUSblog, January 19, 2011. <http://www.scotusblog.com> (October 27, 2011).**
- **Argument preview: Personal privacy. NASA v. Nelson. Dennison, Lyle. SCOTUSblog, October 1, 2010. <http://www.scotusblog.com> (October 27, 2011).**

- **Employees' Informational Privacy Rights – Supreme Court Decides NASA v. Nelson. Ginsburg, Roy. Dorsey & Whitney, LLP, January 31, 2011.**
<http://quirkyemploymentquestions.com/privacy-rights/employees-informational-privacy-rights-supreme-court-decides-nasa-v-nelson> (October 27, 2011).