United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 17, 2001

TO : James J. McDermott, Regional Director
Byron B. Kohn, Regional Attorney
Tony Bisceglia, Assistant to Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Lockheed Martin Aeronautics Corp. 512-5012-3300
Case 31-CA-25021

This Section 8(a)(1) and (3) case was submitted for advice on whether the Employer discriminatorily enforced its computer use policy against Union e-mail.

The Employer's Corporate Policy Statement provides that the Employer's "property, materials, equipment, facilities, information, and resources" are to be used for the Employer's business. However, the Policy also permits "occasional personal use" during "non-work time" if such use is of "reasonable duration and frequency" and does not "interfere with or adversely affect the employee's performance or other organizational requirements." Employee personal use of company e-mail is specifically authorized under these guidelines.

Since August 2000, the Union has been attempting to organize around 900 engineers and technicians at this Employer facility. On November 29, 2000, an employee composed a satirical e-mail mocking company policy that required orderly work areas. The employee sent this e-mail to managers Poitras and Schuler and 75 other employees including Hartel, who is the Union's organizing chairman. Hartel sent an e-mail reply to all the e-mail recipients asking the employees if they had signed union cards. Hartel's e-mail stated that he had extra union cards on his desk and invited employees to visit him.

Manager Poitras immediately advised Hartel that he couldn't send e-mail or do anything else concerning union activity on company time. Hartel asked the employee who had sent the initial satirical e-mail if the Employer had also warned him about his conduct. That employee replied that Poitras had only told him to be careful during office inspection time in light of his having mocked the Employer's orderly office policy. Hartel returned to manager Poitras, protested what he deemed to be

discriminatory enforcement of the Employer's e-mail policy, and threatened to file Board charges if it happened again.[1]

On March 28, 2001, Hartel and another employee sent an e-mail to around 30 engineers and technicians asking them to contact their Congressman to urge support of the F22 fighter jet program. At the end of the e-mail, Hartel stated: "Sign an authorization card today. Together we can make a difference." The following week, the Employer issued Hartel a verbal warning for sending this e-mail. Poitras told Hartel that he was not allowed to use company assets for union purposes, and that he had done that on working time which was not allowed. Poitras added that this was Hartel's second warning and further discipline could develop if this occurred again.

The Region determined that employees commonly use e-mail to send a variety of non-business messages to all employees, including managers, addressing such topics as medical updates on employees, solicitations to purchase gifts for co-workers, and requests to sign birthday and sympathy cards. The Employer asserts that these messages constitute the kind of "occasional personal use" contemplated by the Corporate Policy Statement. The Employer also asserts that in the past it has formally disciplined 53 employees for computer system misuse. The Employer declined to provide the Region with any documentary evidence in support of this assertion.

The Board has recently addressed this same Employer Corporate Policy Statement and e-mail policy in a decision upholding a 1998 election decertifying a prior union.[2] The union in that proceeding objected to the decertification election on the ground that the Employer allegedly had discriminatorily enforced its e-mail policy in favor of the RD Petitioner and against the union. The Board decided that even assuming, arguendo, that the Employer in fact had discriminatorily enforced its e-mail policy, any such discriminatory enforcement had not interfered with employee election choice. In this decision, the Board noted that the Employer defended its e-mail policy enforcement by asserting that in the past it had disciplined employees for non-work related e-mail use. The Employer's cited examples such as running a travel-related business, advertising an

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[1] The Union filed this charge on April 6, 2001. Poitras' warning of Hartel thus occurred within the 10(b) period.

[2] Lockheed Martin Skunk Works, 331 NLRB No. 104 (2000).

external pornographic website, and sending "inappropriate material" such as off-color jokes and ethnic comments.

We conclude, in agreement with the Region, the Employer discriminatorily enforced its e-mail policy and thus also discriminatorily disciplined Hartel.

The Board has held that an employer may not discriminatorily limit employees' use of e-mail for Section 7 purposes.[3] The Employer's second warning of Hartel clearly evinces disparate, discriminatory enforcement here. Hartel's second e-mail contained two solicitations, viz., asking employees to write their Congressman about the F22 and also to sign a Union card. Poitras ignored the F22 solicitation and warned Hartel about only the Union solicitation. We noted that Poitras warned Hartel about soliciting on work time, which would not be protected activity. However, Hartel's simultaneous solicitation about the F22 also necessarily occurred on work time. The Employer thus clearly enforced its e-mail policy disparately and discriminatory against Hartel's Union solicitation. Based upon this discriminatory enforcement, the Region should argue that the Employer's first e-mail policy enforcement against Hartel - concerning his November 2000 Union e-mail - also was discriminatory.

The above disparate enforcement argument is based upon the Employer's clear disparate treatment of Hartel's March 2001 e-mail. We note that Hartel did not dispute the Employer's contention that he sent this e-mail on work time. Since there currently is no evidence that other employees also sent personal solicitation e-mails during work time, those e-mails are arguably not similarly situated and thus not useful in arguing disparate treatment. [*FOIA Exemption 5*

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[3] E. I. du Pont & Co., 311 NLRB 893, 919 (1993).

[4] [*FOIA Exemption 5*

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Finally, since the Employer disciplined Hartel solely as a result of its discriminatory enforcement policy, that discipline was also discriminatory and unlawful.

B.J.K.