

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

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DEPARTMENT OF THE NAVY .
NAVAL AVIATION DEPOT .
NAVAL AIR STATION ALAMEDA .
ALAMEDA, CALIFORNIA .
Respondent .
and .
INTERNATIONAL ASSOCIATION OF .
MACHINISTS AND AEROSPACE .
WORKERS, LODGE 739, AFL-CIO .
Charging Party .
.

Case Nos. 9-CA-80302
9-CA-80531

Susan E. Jelen, Esquire
For the General Counsel, FLRA

Leo Sammon, Esquire
For the Charging Party

Gilbert Merrill and
Dean Franke
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a consolidated proceeding under the Federal Service Labor-Management Statute, 92 Stat. 1191, 5 U.S.C. section 7101 et seq., (herein called the Statute). It was instituted by the Regional Director of Region IX based upon unfair labor practice charges originally filed on April 20, 1988 and August 26, 1988 respectively, and first amended on July 18, 1988 and December 15, 1988, respectively, and

second amended on December 23, 1988, by the International Association of Machinists and Aerospace Workers, Lodge 739, AFL-CIO (herein called the Union) against the Department of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, California (herein called Respondent). The Consolidated Complaint and Notice of Hearing issued on December 30, 1988, alleges that by that Respondent violated section 7116(a)(1) of the Statute by telling an employee that there is no union representation on weekends and by imposing an overly broad rule prohibiting any union activity on weekends without exception; and, violated section 7116(a)(1), (2) and (4) of the Statute when it suspended an employee in retaliation for his having sought union assistance and for having filed an unfair labor practice charge in Case No. 9-CA-80302.

Respondent's Answer denied the commission of any unfair labor practices.

A hearing was held before the undersigned in San Francisco, California. All parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Post hearing briefs were filed and have been duly considered.

Upon consideration of the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings of fact conclusions of law and recommendations.

Findings of Fact

Walter Mitchell has been employed as an equipment cleaner at Respondent's facility for five years. Until the Spring of 1988 Mitchell had never been disciplined.

On April 9, 1988, Walter Mitchell was working at his regular job, using solvents to strip paint from the surface of an aircraft when supervisor Gary Mitchell, no relation, told him that he wanted Walter Mitchell to clean out the holes in the "aft spar" of another aircraft. Gary Mitchell testified that cleaning the holes was a normal assignment for an equipment cleaner, but later admitted that he did not know, since he was not Walter Mitchell's regular supervisor, whether or not Walter Mitchell had ever done the job. Walter Mitchell testified however, that he was untrained to do the job. Calvin Stevens, another employee stated that the job was one that is handled not by an equipment cleaner

but, by a sheetmetal mechanic. Eventhough there is a factual dispute about which employee, the mechanic or equipment cleaner, is qualified to clean the aft spar holes, Respondent failed to call any mechanics or cleaners to corroborate Gary Mitchell's testimony. As such, a negative inference is drawn that additional testimony would have contradicted Gary Mitchell's testimony. Therefore, it is found that cleaning out the "aft spar" holes is not a job which would normally be performed by an equipment cleaner.

Walter Mitchell and Stevens sought to explain why Walter Mitchell would be hesitant to do the job. Both explained that such a job required the use of an electric drill which could cause costly damage if an inexperienced worker, such as Walter Mitchell, attempted the procedure. In addition, Walter Mitchell stated that only one week earlier he had attended a meeting where foreman Ollie Echols told employees about errors costing the agency needless repair expenses, had warned employees that they should not do jobs which they are not trained to do, and threatened letters of requirement if the employees made mistakes. Walter Mitchell explained this to Gary Mitchell but Gary Mitchell persisted in his order. Gary Mitchell could not recall whether the use of tools had been discussed when he ordered Walter Mitchell to clean the holes.

Gary Mitchell, on the other hand, testified that Walter Mitchell simply refused to do the job without offering any explanation: "He just said he would not do it". Gary Mitchell could offer no reason why an employee would refuse a direct order for no reason. According to Gary Mitchell, Walter Mitchell not only refused to do the job without explaining why, but he also emphasized the refusal with obscenities: "He wasn't going to clean them f----- holes, was his words". Walter Mitchell denied using obscenities during the conversation, and explained that it is not his practice to use profanities at work, not even in casual conversation. In a memorandum of April 26, 1988, Gary Mitchell offered still a different version of the alleged obscenity, claiming that Walter Mitchell had said "I'm not in no military service and I don't take orders, you can go f--- yourself if you think I'm going to clean those holes." Gary Mitchell offered no acceptable explanation why the two versions are different. Three co-employees of Walter Mitchell's, all of whom have known him for about three years and see him at work daily, testified they had never heard Walter Mitchell use obscene language with either co-employees or with supervisors. It is found based on the inconsistencies noted above and or the testimony of the

three co-worker that Walter Mitchell did not use the obscenities attributed to him by Gary Mitchell.

When Gary Mitchell continued to insist on Walter Mitchell's cleaning the aft spar holes, Walter Mitchell apparently asked to talk with the general foreman. After Gary Mitchell discovered that the general foreman was not present, Walter Mitchell asked to see the shop steward, but Gary Mitchell told him that the steward, Calvin Stevens, would not be allowed to talk with Walter Mitchell because "the union is not in effect on the weekends." Walter Mitchell nevertheless went to where Stevens was working, (not more than one minute away) followed by Gary Mitchell. Gary Mitchell told Stevens not to leave his worksite and repeated that there is no union representation on Saturdays or Sundays. Because he was a new and relatively inexperienced steward, Stevens did not challenge Gary Mitchell, and both he and Walter Mitchell returned to their worksites. In crediting Walter Mitchell and Stevens it is found that Walter Mitchell did leave the work site without permission.

Gary Mitchell's version is again different for he claims that Walter Mitchell left his work area while Gary Mitchell was looking for the general foreman and that it took him five minutes to locate Walter, even though Walter Mitchell had only gone 100 yards. Gary Mitchell confirms that he was not challenged by either of the two when told that there is no union representation on Saturdays or Sundays and that both returned to their work sites. Gary Mitchell also stated that the reason he refused to let Walter Mitchell and Stevens talk was because Stevens was working on a project that "required his attention" and was "part of chosen team." Gary Mitchell apparently did not share these concerns with Stevens who was in fact at his work site when he talked with Walter Mitchell. Also, the record shows nothing about the work Stevens was doing on April 9, 1988, which would require his undivided attention and would have prevented him from talking with Walter Mitchell.

Upon returning to their work area, Gary Mitchell warned Walter Mitchell that if he didn't do the "aft spar" job he would be taken "off the clock". At that point Walter Mitchell began putting his tools away, assuming that his workday was over. In crediting Stevens and Walter Mitchell that the aft spar job could not be performed by Walter Mitchell since it was normally done by another job classification and that Walter Mitchell was not trained for this job, it is found that Walter Mitchell's action in putting his tools away was reasonable based on Gary Mitchell's statements about taking him off the clock since he did not know how to do the job. It was

about 11:00 a.m. approximately 30 minutes before the scheduled 11:30 a.m. lunch break so Walter Mitchell returned to Stevens for advice. Stevens advised him to clean up, have lunch, and then to check with Gary Mitchell before going home. After lunch Walter Mitchell following Stevens instructions checked with Gary Mitchell, who told him that he had changed his mind and was not taking Walter Mitchell off the clock and that he should remain at work. Gary Mitchell also told him that he was going to lose 1.3 hours of pay because he had left the work area at 11:00 a.m. Gary Mitchell offered no explanation as to why he had been inclined to send Walter Mitchell home if he didn't do the "aft-spar" job but after allegedly being cursed and after Walter Mitchell allegedly disappeared for one and one-half hours, he decided not to send Walter Mitchell home and also decided not to require him to do the "aft-spar" job.

Gary Mitchell entered only 6.7 hours on Walter Mitchell's time card on that day, but gave no indication to either Walter Mitchell or Stevens of any intention to otherwise discipline Walter Mitchell.

Gary Mitchell did nothing about the April 9, 1988 incident for the next two and one-half weeks. However, the Union filed an unfair labor practice charge on April 20, 1988 challenging Gary Mitchell's refusal to allow Walter Mitchell to talk with a steward on weekends. Four days after the charge was filed on April 26, 1988, Gary Mitchell recommended discipline against Walter Mitchell. Gary Mitchell explained that the approximate two and one-half lag in recommending discipline occurred because he was busy.

The Mitchell memorandum recommending discipline is inconsistent with his testimony at the hearing with regard not only to Walter Mitchell's alleged use of obscenities, but to other matters as well. At the hearing, Gary Mitchell stated that after he returned from his search for the general foreman he spent five minutes looking for Walter Mitchell before he found him talking with Stevens. However, in his memorandum, Gary Mitchell states that he "found Mr. Mitchell was walking across hanger to find the shop steward." Additionally Gary Mitchell testified that Walter Mitchell left the work area at 11:00 a.m. and did not return until 1:15 p.m., yet in the memorandum he states that Walter Mitchell left at 11:15 a.m. and returned at 1:05 p.m. Other inconsistencies in Respondent's testimony are also present. For example, Gary Mitchell and branch head John Archueleta's versions of Archueleta's involvement at

the April 9, 1988 incident do not mesh. Gary Mitchell claimed that he asked Archueleta to stop by at 11:00 a.m. to witness his direct order while Archueleta stated that he had stopped by because he needed to ask Gary Mitchell a question and that when he did stop by it was about 8:00 a.m. or 9:00 a.m. not 11:00 a.m.

Once Gary Mitchell had written his memorandum, Respondent acted. Employee Relations Specialist Anne Rufino interviewed Gary Mitchell and recommended a two day suspension for Walter Mitchell. Based solely on the facts as described in the April 26, 1988 memorandum, Rufino wrote the "Advance Notice of Proposed Suspension" which Head, A-3 Structural Mechanical/Electrical Rework Section, Ollie Echols signed unchanged. Rufino also wrote the "Decision on Proposed Suspension" which Division Director Robert Blair also signed with no changes.

While Blair, who testified, initially indicated that he had agreed to a two day suspension based on only two allegations of misconduct, refusal to carry out an order and leaving the job without permission, he eventually conceded that the suspension was also based on a third allegation, use of obscene and abusive language. This is consistent with all of the disciplinary documents, all of which state that the discipline is based on the three separate acts of alleged misconduct including the use of abusive and obscene language. At the hearing Blair, without explanation, also changed his view of steward Stevens' comment at Walter Mitchell's oral reply that an unfair labor practice charge may be filed challenging the discipline. In a memorandum to Rufino, Blair characterized the comment as a threat, but at the hearing he denied he viewed it as a threat saying that it "is perfectly within the rights of labor . . . and I don't have any opposition to [a] . . . charge being filed." Blair's inconsistent testimony raises some doubt as to his credibility.

In the meantime, an unfair labor practice concerning the early April incident was filed and Walter Mitchell and Stevens became active participants in the investigation of Case No. 9-CA-80302. Both men met with an FLRA investigator in May 1988 and gave sworn statements about what had happened on April 9, 1988.

Conclusions

These consolidated cases were generated by an employee seeking union assistance while working on a weekend and upon being denied that assistance having an unfair labor practice

charge filed concerning the incident and giving a statement to the FLRA investigator about the incident and having that same supervisor who denied the opportunity for union assistance on the weekend allegedly retaliate for the filing of the above unfair labor practice charge by initiating disciplinary action against the employee.

A. Case No. 9-CA-80302

The first of the consolidated cases deals with Respondent's rule prohibiting contact between employees and the Union on weekends. As is later noted, Respondent apparently does not seriously contest this portion of the matter.

There are a large number of cases dealing with illegal interference through broadly framed prohibitions of contact between employees and unions. Department of Commerce, Bureau of Census, 26 FLRA 719 (1987); Department of Commerce, Bureau of Census, 26 FLRA 311 (1987); Social Security Administration, 13 FLRA 409 (1983); Oklahoma City Air Logistics Center, Tinker Air Force Base, 6 FLRA 159 (1981); Veterans Administration, 2 FLRA 920 (1980). This situation is covered by those cases.

It has also long been settled that employees have a right to exercise section 7102 rights at the worksite so long as there is no interference with work. See, Internal Revenue Service, 7 FLRA 596 (1982). Thus, the Statute clearly prohibits the imposition of rules which unduly restrict employees' exercise of those rights. I credit Walter Mitchell and Stevens account of what occurred herein. I do so because of inconsistencies contained in the accounts of Respondent's witnesses which when considered in their entirety make those accounts improbable. Furthermore, I find no valid justifiable reason in the evidence presented by Respondent to refuse to allow Walter Mitchell to see a union steward until the following Monday. I also agree with the General Counsel that in the context of the events which occurred, the refusal to allow Walter Mitchell to seek assistance on a weekend was coercive.

The main thrust of Gary Mitchell's order conveyed the message that employees working under him had no right to confer with their union representative on Saturdays or Sundays. His broad pronouncement carried with it a ban on exercising section 7102 rights on work time as well as prohibiting the exercise of such rights on nonwork time including breaks and lunch time on those days. This is a

case which aptly demonstrates the effect of such widely drawn prohibitions. Here Walter Mitchell had a legitimate need to see a union steward concerning a work problem on a weekend. The need is readily apparent since he was docked pay during that period for not doing work which it is questionable he could have performed. He was denied that opportunity because of the rule suddenly announced by Gary Mitchell. The prohibition prevented both Walter Mitchell and Stevens from exercising section 7102 rights during both work time and nonwork time although apparently no justifiable reason existed. I agree with the General Counsel that the broad prohibition as stated by Gary Mitchell interfered with, restrained and coerced employees in violation of section 7116(a)(1) of the Statute.

B. 9-CA-80531

This case involves the alleged retaliation by a supervisor for employees having engaged in protected activity i.e. filing an unfair labor practice charge and assisting by giving evidence to the FLRA in support of an unfair labor practice charge filed by the Union. This incident is totally separate from that alleged in Case No. 9-CA-80302.

Respondent ignores the General Counsel's contention that the suspension of Walter Mitchell was related to the Union's filing an unfair labor practice charge and Mitchell's giving statements concerning the charge to the FLRA. Instead Respondent views this case as one where the employee was engaged in self-help and argues that it is a matter which should be resolved through the parties negotiated procedure and not in this forum. Veteran's Administration, West Los Angeles Medical Center, Los Angeles, California, 23 FLRA 278 (1986); Department of the Navy, Naval Weapons Station Concord, Concord, California, 33 FLRA 776 (1988). Actually Respondent seems more interested in the remedy than with the merits of the case when it asserts that this is merely a self-help case to be resolved only through the negotiated procedure. In its defense Respondent maintains that its action was legitimate and that even a union official is not immune from discipline when refusing to comply with a lawful directive having no relationship to representational responsibilities. This argument misses the point since it is not alleged that any action was taken against any union representative. Thus, Walter Mitchell is not a union official who suffered from the alleged retaliation by a supervisor. While it is clear that the Authority will not

condone employee action which violates a lawful agency regulation, such is not the case here. Cf. Portsmouth Naval Shipyard and Portsmouth Federal Employees Metal Trade Council, 7 FLRA 766 (1982); Department of Defense, Army and Air Force Exchange Service, Fort Eustis Exchange, Fort Eustis, Virginia, 16 FLRA 631 (1984).

With respect to the section 7114(a)(1), (2) and (4) violation, the gravamen of the Complaint is that Walter Mitchell was given a two day suspension for the Union's having filed an unfair labor practice charge concerning his supervisor's refusal to allow him to see a Union representative on a weekend and giving information to the FLRA and seeking assistance of the Union representative. Filing unfair labor practice charges and giving information in support of those charges is a basic statutory right. Any interference with that right violates the Statute. See, Department of the Navy Resale System, Field Support Office, Commissary Store Group, Norfolk, Virginia, 16 FLRA 257 (1984). Thus the General Counsel relies both on incidents which occurred before and after the alleged self-help action to establish a violation. Respondent as noted above appears to misunderstand the exact nature of the Complaint. I disagree with Respondent's assessment of what the General Counsel established in this case. A prima facie case alleging the above violation was established through showings of animus, timing, and failure to warn the employee. The delay in discipline until after Walter Mitchell had gone to the FLRA and sought, along with the Union, its assistance in Case No. 9-CA-80302, sticks out like a sore thumb.

The General Counsel sees the case, unlike Respondent as a standard "dual motive" case. Internal Revenue Service, 6 FLRA 96 (1981). Also, in its view the discipline of Walter Mitchell was at best only partially based on the same alleged misconduct relied on by Respondent. U.S. Department of Justice, Bureau of Prisons, 27 FLRA 874 (1987). I agree.

With respect to IRS, supra., a prima facie showing must be established before the burden of proof shifts to a respondent to establish by a preponderance of the evidence that its action was for legitimate reasons. With regard to whether the General Counsel carried its burden, Mitchell's protected activity in seeking union assistance and filing of an unfair labor practice charge were plainly established on the record. Further, the record clearly demonstrated that Walter Mitchell was not warned nor did it appear from the record that any discipline was anticipated until after the unfair labor practice charge alleging involvement with

Gary Mitchell had been filed. Furthermore, Gary Mitchell's disdain for the union is revealed by his actions on April 9, 1988. In all these circumstances, it appears that the proposal of discipline and its being carried out were in retaliation for the filing of an unfair labor practice charge and for assisting in the processing of that charge.

More recently the Authority examined a respondent's obligation to rebut the required prima facie showing in Letterkenney Army Depot, 35 FLRA No. 15 (1990), by establishing by a preponderance of the evidence, the affirmative defense that:

(1) there was a legitimate justification for its action; and the same action would have been taken in the absence of protected Activity.

Respondent asserts that the discipline herein related to the fact that Mitchell refused a valid order of his supervisor and not because he filed an unfair labor practice charge.

Respondent merely reiterates its contention that the matter should have been resolved under the grievance process. This argument concerning the alleged violation of section 7116(a)(1), (2) and (4) is wide of the mark. Respondent's defense that Walter Mitchell was disciplined for legitimate business reasons i.e. refusing a direct order and leaving the job to which he was assigned without proper permission does not fully meet its obligation of showing that even in the absence of Walter Mitchell's protected activity it would have given him a two day suspension. First, a serious question of credibility was raised as to what prompted the discipline. I credited the accounts of Walter Mitchell, Stevens and others who testified in Walter Mitchell's behalf. In crediting Walter Mitchell's account of what occurred, it is found that, at best, only part of the conduct relied upon by Respondent could have justified any discipline at all and at least a part of the discipline was because Mitchell further engaged in protected activity. While some discipline may have been necessary in this matter, such discipline could only be based only on two of the three incidents Walter Mitchell was alleged to have been involved in, those of leaving the work site and refusing to obey a direct order. Even the assertion that Walter Mitchell disobeyed a direct order is questionable since the record evidence casts doubt on whether he could

have performed the work he was ordered to do. In any event, Respondent issued the two day suspension based on three alleged incidents. The third, Walter Mitchell's use of obscene language was not established to have occurred on the record. In that regard, Gary Mitchell's inconsistencies, Blair's initial recollection that only two incidents were subject to discipline and the testimony in support of Walter Mitchell's denial that he would have used obscenities in such a situation makes it problematic that the scenario testified to by Gary Mitchell occurred. Inasmuch as Walter Mitchell engaged in only two of the alleged acts of misconduct, Respondent did not prove that the two-day suspension would have issued even in the absence of protected activity. Furthermore, Respondent did not show what discipline it would have given Walter Mitchell for only two acts of misconduct. Such action has been found by the Authority to constitute a violation of section 7116(a)(2) of the Statute. U.S. Department of Justice, Bureau of Prisons, supra.*

In light of all of the foregoing it is found that Respondent violated section 7116(a)(1) of the Statute both by imposing an overly broad rule prohibiting any union activity on weekends without exception and telling this to an employee. In addition Respondent violated section 7116(a)(1), (2) and (4) of the Statute by giving an employee a two day suspension in retaliation for his having sought union assistance, having the Union file an unfair labor practice charge in Case No. 9-CA-80302 and giving a statement to the FLRA concerning that unfair labor practice charge. Accordingly, it is recommended that the Authority adopt the following:

*/ Having found that Respondent violated section 7116(a)(1), (2) and (4) of the Statute it is recommended that in addition to a cease and desist order and posting of notices that the Authority order that the two-day suspension of Walter Mitchell be rescinded, any reference of the suspension expunged from his personnel records and that Walter Mitchell be reimbursed for any loss of pay suffered as a result of the suspension, and finally that Respondent restore to him any right or privilege he may have lost due to the disciplinary action herein. U.S. Department of Justice, Bureau of Prisons, supra.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the Department of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, California shall:

1. Cease and desist from:

(a) Enforcing overly broad rules prohibiting any protected activity on weekends.

(b) Telling employees that there is no union representation on weekends.

(c) Suspending without pay Walter Mitchell based on his participation in the filing of unfair labor practice charges with the Federal Labor Relations Authority, for his having sought union assistance and for giving a statement concerning the unfair labor practice charge to an agent of the Federal Labor Relations Authority.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmation action in order to effectuate the purposes and policies of the Statute:

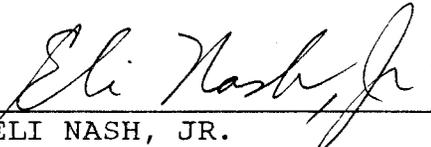
(a) Make whole employee Walter Mitchell for the pay lost during his two day suspension.

(b) Remove any record of the two day suspension from the personnel file of employee Walter Mitchell and restore to him any right or privilege he may have lost as a result of such disciplinary action.

(c) Post at its Department of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, California facility, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, or a designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IX, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., April 4, 1990.



ELI NASH, JR.
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY
AND TO EFFECTUATE THE POLICIES OF THE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT enforce an overly broad rule concerning protected activity on weekends.

WE WILL NOT tell employees that there is no union representation on weekends.

WE WILL NOT suspend without pay Walter Mitchell based on his participation in protected activity and on his filing of unfair labor practice charges with the Federal Labor Relations Authority, obtaining union assistance in filing the unfair labor practice charge and for giving a statement to an agent of the Federal Labor Relations Authority.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured them by the Statute.

WE WILL make employee Walter Mitchell whole for any loss of pay suffered by his two day suspension.

WE WILL remove any record of the two day suspension from the personnel file of employee Walter Mitchell and restore to him any right or privilege he may have lost as a result of such disciplinary action.

(Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region IX, whose address is: 901 Market Street, Suite 220, San Francisco, CA, and whose telephone number is: (415) 995-5000.