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DAVID F. GRAF, M.D.

vs.

DOCKET NO. 30-86-047

WEST VIRGINIA UNIVERSITY

DECISION

Dr. David F. Graf, sometimes referred to as the grievant, has been employed at the West Virginia University School of Medicine since 1979 and presently holds the position of Associate Professor in the Department of Anesthesiology. Dr. Graf is classified as a clinical-faculty member as his academic duties include instruction through lecture and in the treatment of patients at the university hospital (now West Virginia University Hospitals, Inc.). In addition to anesthesiology, Dr. Graf is also board certified in emergency medicine and from the time he assumed his duties as a member of the West Virginia University faculty, he has also been employed during his vacation time, holidays and weekends as an emergency room physician at two hospitals in Pennsylvania. This work was in no way related to his position at the University. In June, 1984

Richard DeVaul, Dean of the School of Medicine, directed Dr. Graf to discontinue this outside employment or "moonlighting".

Dr. Graf subsequently filed a grievance in which he contends that Dean DeVaul's action is in violation of Board of Regents Policy Bulletin No. 36; that the School of Medicine policy is void and unenforceable to the extent it is inconsistent with the Board of Regents policy; and that the Dean's interpretation of Policy Bulletin No. 36 was applied to the grievant in an arbitrary and discriminatory manner. Dr. Graf questions whether his employment with the Board of Regents and the West Virginia University Medical Corporation should be considered part of the same contract or different contracts, and whether the corporation bylaws control his Board of Regents position. He further questions the propriety of the Dean of the School of Medicine enforcing the bylaws of a private corporation.<sup>1</sup>

The West Virginia University School of Medicine policy regarding physician-faculty members engaging in outside

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<sup>1</sup>This grievance was originally styled David F. Graf, M.D. vs. Richard A. DeVaul, M.D.. The Hearing Examiner has replaced Dean DeVaul with the institution which has the ultimate authority and responsibility for effectuating the holdings of this decision.

activities, or moonlighting, was promulgated in written form by Dean DeVaul through a memorandum dated October 24, 1985 and directed to all full-time physician-faculty members. Dean DeVaul, former Dean John E. Jones and Associate Dean David G. Morgan all testified that although the policy had previously been unwritten, it had been longstanding in effect. Dean DeVaul's restatement of the policy is that faculty members may engage in outside professional activities only after receiving the approval of the Dean. Any employee who wishes to engage in outside activities must submit a written request for approval to his department chairman. The chairman must then forward the request, with his recommendation, to the Dean. Both the request and the recommendation must contain specified information. The Dean will then issue a decision based on whether the requested activity will interfere with the adequate performance of the academic duties of the requesting employee or other employees of the department or school. Dean DeVaul asserts that Policy Bulletin No. 36 places on him the responsibility of establishing a program to review the outside activities of his faculty which he is authorized to restrict if found to interfere with the employee's academic duties.

The respondent also cites the 1983 West Virginia Faculty Handbook which states the general institutional

policy that one working day per week may normally be used by faculty members for consulting organizations other than the University. This activity is to be reported to the departmental chairman who in turn reports to the Dean as to the extent of consulting carried on by the departmental faculty members. Counsel for the University states that in applying this general policy throughout the institution, the practice has been to permit and encourage the individual schools and colleges to develop their own policies within the framework of the University policy which merely establishes a norm for outside activities and a reporting requirement. Dean DeVaul further states that the policy of the School of Medicine was established pursuant to the authority delegated by Policy Bulletin No. 36 and the Faculty Handbook and reflects the unique needs and circumstances of the medical school.<sup>2</sup>

Board of Regents Policy Bulletin No. 36 states in pertinent part:

The appointment of a person to a full-time position at an institution is made subject to the following conditions:

- a. The appointee shall render full-time service to the institution to which appointed. Outside activities shall not be restricted unless such activities or employment interfere with the adequate performance of academic duties. The administration of each institution shall establish a program of periodic review of outside services

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<sup>2</sup>The grievant questions the relevancy of this citation from the Faculty Handbook as it refers to outside activities engaged in during the working day. Dr. Graf's activities took place only when he was off duty.

of appointees to guide faculty members.

- b. If outside employment or service interferes with the performance of the regular institutional duties of the appointee, the institution has a right to make such adjustments in the compensation paid to such appointee as are warranted by the appointee's services lost to the institution, and by the appointee's use of institutional equipment and materials.

The Faculty Handbook provides:

One working day per week may normally be used for consulting for organizations other than the University. Such consulting work must be reported to the departmental chairperson, who reports to the dean regarding the extent of consulting by various faculty members of the department.

The University policy is clear that the Deans of the individual schools must be aware of any outside activities engaged in by members of their faculty during the work day. Policy Bulletin No. 36 places responsibility on the administration to review the employee's performance to insure that he is adequately fulfilling his academic duties and to take appropriate action if he is not.

However, the Board of Regents exerts ultimate control, supervision and management over all state colleges and universities and neither the School of Medicine nor West Virginia University may establish policies contrary to

those of that agency.

The requirement that a faculty member must secure a two level approval prior to engaging in outside activities clearly contravenes the Board of Regents directive that outside activities shall not be restricted. Therefore, the respondent's contention that the grievant has no right to moonlight is incorrect as he was specifically granted that right by his employer, the Board of Regents.<sup>3</sup>

To the extent that the policy of the School of Medicine is inconsistent with Board of Regents Policy Bulletin No. 36, it is void and unenforceable.

Dr. Graf also executes an annual employment contract with the West Virginia University Medical Corporation, also known as the Physicians Fee Office and hereinafter referred to as the "PFO" or the "Corporation". The bylaws of the PFO strictly prohibit its members, or employees, from engaging in outside professional services, with limited exceptions. The respondent contends that the

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<sup>3</sup>The Board of Regent's policy of allowing employees to engage in unrestricted outside activities is undoubtedly based on that agency's inability to offer salaries competitive with those of the private sector. By allowing its faculty members to secure additional employment the employee can reduce his "lost opportunity cost" and the Board of Regents can secure competent professionals to fill faculty positions.

grievant's relationship with the PFO is not a part of his Board of Regents contract and that the PFO is a private, non-profit corporation not subject to Board of Regents or University policies and is beyond the jurisdiction of the Education Employees Grievance Board.<sup>4</sup>

The grievant contends that although the PFO is in name a private, non-profit corporation, it is in fact an arm of the West Virginia University School of Medicine. In support of this allegation, the grievant relies upon the following facts:

(1) The PFO was incorporated by the Vice-President, deans and department heads of the School of Medicine.

(2) The PFO does not solicit, interview or hire its physician employees, nor does it determine their salary or define their job duties. All of these are responsibilities of the Dean of the School of Medicine .

(3) A substantial part of the faculty-physicians' salary is contributed by the PFO which collects fees from the patients treated by the faculty member as part of his regularly assigned duties.

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<sup>4</sup>Some question exists regarding whether the faculty physicians are members or employees of the corporation. While these individuals are primarily referred to as "members" it is not clear whether the reference is to members of the faculty of the School of Medicine or members of the PFO. The physicians are referred to as "employees" in Section II, Paragraph E and Section VII, Paragraph D of the PFO bylaws. Counsel for the respondent asserts that the Corporation does not employ physician-faculty of the School of Medicine. However, they do sign a contract of employment with the PFO indicating employee status.

(4) The medical school underwrites the entire cost of liability and malpractice insurance for Corporation employees.

(5) All administrative policies of the Corporation must be approved by the President of West Virginia University.

(6) The Corporation's Board of Directors is composed of full-time physician-faculty members. The Vice-President for Health Services and the Dean of the School of Medicine are ex-officio, non-voting members.

Throughout the record information provided by both parties establishes a relationship between the Corporation and the medical school so interwoven as to create an interdependence resulting in a joint participation in the execution of the State's business. It appears highly questionable how individuals in their capacity as employees of a state institution could establish a private corporation which exists and functions solely for the purposes of the medical school at a state university. Indeed, it would be intolerable to allow a public institution, and it's employees, to be placed under the control of a private organization. Therefore, the PFO must be found to be an entity created and endowed with authority by individuals who were powerless to do so, or a public corporation functioning cooperatively with the West Virginia School of Medicine. As it is not the purpose of this decision to determine the



legitimacy of the PFO, this examiner adopts the interpretation that to the extent the corporation is a joint participant with the School of Medicine and affects Board of Regents employees, it is public in nature and subject to the jurisdiction of the Education Employees Grievance Board.

The grievant raises the question of whether his employment by the Board of Regents and the PFO is to be considered part of an employment package or whether they are separate contracts of employment.

The respondent asserts "[t]here is absolutely no requirement that clinical science faculty join the PFO". Of course, if a faculty member chooses not to become a member, he would not be subject to that organization's bylaws. Despite the strenuous declarations of the respondent as to the voluntary nature of PFO membership, the facts indicate otherwise.

The PFO bylaws state that they shall apply to all clinical faculty members who provide patient services. Language throughout the bylaws indicates their applicability to clinical faculty members. No where is it indicated that membership is voluntary.

Dean DeVaul, Assistant Dean Morgan and former Dean, now Vice-President for Health Services, John E. Jones testified that even though PFO membership is voluntary, all current physician-faculty members at West Virginia University are

members and none of the witnesses could recall any past exceptions.

Eight physician-faculty members appeared at the level four hearing pursuant to subpoena.<sup>5</sup> When asked their understanding of whether PFO membership is mandatory or voluntary, their responses were that it was mandatory, or that it went hand-in-hand with the faculty appointment.

Dr. Graf's testimony was that he first became aware of the PFO several days after he had assumed his duties at West Virginia University.<sup>6</sup> His department chairman directed him to Robert Graff, Executive Director of the PFO, to sign papers for patient billing. Mr. Graff read the PFO bylaws to the grievant and provided him with a contract. David Graf stated that under the circumstances, he felt he had no option but to sign the contract.

This testimony is entirely consistent with Robert Graff's

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<sup>5</sup>Prior to the hearing, the grievant agreed to assume the cost attendant to the issuance of the subpoenas. He is now directed to compensate those individuals who requested witness fees in the amount of \$10.00 each.

<sup>6</sup>By letter dated June 22, 1979, Richard Knapp, then Chairman of the Department of Anesthesiology, offered the grievant the position of Assistant Professor at a salary of \$62,000 per year, plus benefits, initially. There was no mention of the PFO or that any part of the salary would be contributed by the PFO. On July 7, 1979, the grievant signed a Board of Regents contract which stated his salary to be \$26,004.00. Typed below was: "(Professional Service Plan will add \$36,000.00)". Again there was no reference to employment or a separate contract through the PFO.

statement that he generally does not talk with prospective employees. According to Robert Graff, he meets with the new employees, reads the Corporation bylaws, discusses fringe benefits and provides them with a contract. Robert Graff states that he does not discuss whether membership is voluntary because when the new employees reach his office they are ready to sign the contract.

Although the school policy memorandum twice states that physician-faculty members may choose not to become a member of the PFO, it also states that as a general rule, most professional activities take place through the Corporation. Those employees who do not elect to become affiliated with the PFO retain the right to engage in outside activities so long as the activity is within the parameters of Policy Bulletin No. 36 and the Faculty Handbook and is with the prior approval of the Dean.

When the Dean approves a request for approval of outside activities, the requesting faculty member must agree that all income from such activities shall be paid to the West Virginia University Medical Corporation, to be disbursed under the rules of that organization, regardless of whether the requesting faculty member is an employee of the West Virginia University Medical Corporation. (The bylaws of the West Virginia University Medical Corporation permit the adjustment of a physician-faculty member's salary from the Corporation to take into account such additional approved activities--where the faculty member is an employee of the Corporation.) Exceptions may be granted to this rule when the income from such outside activities is insubstantial or where government regulations will not permit payment

to the West Virginia Medical Corporation.<sup>7</sup>

Employees may not belong to the PFO and engage in outside professional activities as the corporation contracts for all of it's members available services.<sup>8</sup>

It appears then, that a faculty member may choose to join the PFO and may request the Dean's approval to engage in outside activities from which he may be reimbursed directly (if the activity falls within one of the four exceptions); or he may choose not to become a member of the PFO and request the approval of the Dean to engage in outside activities with the agreement that all income is to be paid to the PFO, unless direct payment is also approved by the Dean. Of course, if the employee is not a member of the PFO, he may not receive compensation from it. It is obvious from this and other documents that an employee must become a member of the PFO or forego compensation for a large percentage of his services.

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<sup>7</sup>The memorandum later states that individual billing may be permitted with the prior approval of the Dean.

<sup>8</sup>In addition to their University and Corporation salaries PFO members may also retain income earned from: (1) royalties from publications; (2) honoraria; (3) expert witness fees in legal actions and (4) approved and authorized professional services performed for federal and state agencies or other approved and authorized extramural functions of the School of Medicine.

The contention of voluntary membership was perhaps most effectively refuted by an action of the grievant himself. Through his legal counsel, Dr. Graf inquired as to whether he could maintain his faculty appointment and whether he could bill hospital patients directly if he chose not to renew his contract with the PFO.

Dean DeVaul responded that Dr. Graf could not directly bill patients treated in the course of his clinical duties as that function was performed by the PFO. "Full-time members of the faculty of the School of Medicine are not allowed to practice independent medicine, and their salaries from the West Virginia University Medical Corporation are not related to their productivity in terms of fees generated."

Dean DeVaul stated that Dr. Graf could maintain his faculty appointment

[h]owever, if the patients served by Dr. Graf in his clinical role cannot be billed (since Dr. Graf cannot bill them himself and the West Virginia University Medical Corporation can bill only for its employees) we would be placed in the awkward position of having medical services performed for which no bill could be rendered. This, of course, would be an intolerable situation

for Dr. Graf to cease seeing patients in a clinical capacity. This being the case, we would need to review very carefully the question of whether Dr. Graf can perform his teaching responsibilities if he is unable to perform clinical duties. So... while he could TECHNICALLY retain his faculty appointment even though no longer employed by the West Virginia Medical Corporation, there is some question whether he could do so and remain an effective member of the faculty. This, of course, is a matter we will have to review if and when the situation develops.

As the grievant may spend from seventy to ninety percent of his work day engaged in clinical duties, it is immediately apparent that he could not function as an effective member of the faculty, thereby leaving him no alternative but to "voluntarily" become a member of the PFO.<sup>9</sup>

Counsel for the respondent states: "it is not relevant whether or not physician-faculty must join the PFO - they choose to do so for the salary augmentation." What is relevant is that if the medical school offered only the salary stated on the Board of Regent contracts, it would be unable to secure a faculty of competent physicians. A more lucrative salary is offered, but cannot be received unless the employee agrees to sign a contract with the PFO.

As it was previously determined that the PFO is in

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<sup>9</sup> Dr. Richard Eller, the present Chairman of the Department of Anesthesiology, testified that, in his opinion, Dr. Graf could function as an effective member of his staff on a part-time basis as an instructor if he was no longer involved in clinical activities.

fact a joint participant in the administration of the medical school and is functioning as a public corporation and as the grievant has established that membership is mandatory rather than voluntary, the result is a two contract employment package. As such, the regulations and/or bylaws of the PFO may not contravene or restrict any rights granted by the Board of Regents. To the extent the PFO bylaws are inconsistent with Board of Regents Policy Bulletin No. 36, they are unenforceable.

In addition to the foregoing, the grievant alleges that he has been subjected to arbitrary and discriminatory treatment as the criteria used to determine whether his outside activity would be approved was not that stated by the Dean nor was it the same as was applied to other faculty members; the procedure required of him for gaining approval of the activity differed from that followed by other members of the faculty; and other faculty members were not required to submit the income earned from outside activities to the PFO.

In Dean DeVaul's policy memorandum he states that approval of outside activities will be granted if he determines the activity will not interfere with that employee's duties or the duties of others in the school. The Dean indicated at the level four hearing that he would also consider whether

the activity would interfere with or promote the educational mission of the school. Dean DeVaul testified that he had not inquired as to whether the grievant's outside activities were interfering with his academic duties or the educational mission of the school as that was not at issue. The issue at that point, according to the Dean, was possibly insubordination, as Dr. Graf had been told to stop moonlighting and had not done so. Thus, the criteria for approval appears not to have been applied at all.

Relative to the issue of direct compensation for outside activities, the respondent claims that those members of the faculty who engage in outside activities and receive direct compensation have all received the proper authorization and approval to do so. As the Dean has not made a decision as to whether Dr. Graf would be permitted to engage in the outside activity, there was no need to consider whether he could receive direct compensation.<sup>10</sup>

Dean DeVaul stated that if Dr. Graf wanted to work as an emergency room physician and keep the income it would be necessary for him to secure approval of the activity and separate approval to retain the income. The proper procedure to gain this approval was to submit a written request to his department chairman.

The faculty and administrative physicans who testified

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<sup>10</sup>At one point Dean DeVaul did suggest to Dr. Graf that the emergency medicine activity could be made a part of his assigned duties if Dr. Graf would agree to submit the income to the PFO. The grievant found this suggestion to be unacceptable.



at the level four hearing are engaged in a wide variety of activities unrelated to their academic duties. None indicated they had submitted a written request for approval. On the contrary, virtually all indicated their request and approval had been verbal. Most directly received the income from these activities and in some instances payment was "passed through" the PFO.

Despite this evidence indicating a practice of granting verbal approval of outside activities, the respondent disregards the grievant's uncontroverted testimony that he had discussed his outside activities with Dr. Knapp on two occasions prior to accepting the position and that on both occasions he had been assured there would be no problem.<sup>11</sup>

Not only is this testimony that the grievant received verbal authorization to engage in outside activities ignored, but the respondent insists that Dr. Graf still has never formally requested approval.

By letter dated March 22, 1985, Dr. Graf requested that Dean DeVaul "reconsider your position of June, 1984 and allow me to work and retain the income that I generate from the practice of Emergency Medicine at Waynesburg and Uniontown during weekends, holidays, and vacation time." Dean DeVaul stated that he did not consider this a written request for approval of the outside activities, but rather, a request

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<sup>11</sup>Dr. Knapp was Chairman of the Department of Anesthesiology in 1979 and had recruited Dr. Graf for the faculty position.

to reconsider his directive to stop the moonlighting.

In summary, the grievant informed Dr. Knapp at the time of his interview that he was only interested in the position of Assistant Professor if he would be permitted to continue his outside work in emergency medicine. Dr. Knapp assured him that it would be permissible. This procedure appears to be the same as that followed by other members of the faculty and the PFO. The requirement that Dr. Graf fulfill criteria which are more strict and more formal than that required of other faculty members establishes a difference in treatment of employees amounting to discrimination as defined in W. Va. Code, 18-29-2 (m).<sup>12</sup>

In addition to the foregoing it is appropriate to make the following findings of fact and conclusions of law.

#### Findings of Fact

1. The grievant accepted the position of Assistant Professor in the Department of Anesthesiology in reliance on the assurance of the department chairman that it was permissible for him to engage in medical practice outside of his academic duties.

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<sup>12</sup> Arguments relating to constitutional and contractual rights of the grievant, addressed by counsel in both the grievant's and respondent's briefs, will not be addressed in this decision as the issue to be resolved involves the interpretation and application of policy.

2. Following the advice of his department chairman, the grievant transferred his outside activities to hospitals in Pennsylvania to avoid any possible conflict with his employment at West Virginia University.

3. Dr. Graf engaged in this outside practice on holidays, weekends and vacation time for approximately five years with the knowledge of the medical school administration.

4. There has been no allegation that the grievant's outside work has in any way adversely affected or interfered with his academic duties at West Virginia University. On the contrary, Dr. Graf has been promoted to Associate Professor and granted tenure. Dr. Eller, the present Chairman of the Department of Anesthesiology and the grievant's immediate supervisor, testified that the outside activity has not detracted from the grievant's academic performance.

5. The grievant was directed to cease his outside activities in June, 1984 or possibly be charged with insubordination as he had been told previously to stop his moonlighting activities. The grievant recalls having previously discussed his outside activities with administrators but had not interpreted any of the conversations as an order to stop his outside activities. No written documentation has been submitted indicating that he had been directed to stop moonlighting prior to June, 1984.

6. The respondent has stated that the grievant's outside activities were disallowed because: a) he had not secured proper approval as per the School of Medicine policy to engage in outside professional activities; b) lack of approval created problems with the grievant's malpractice insurance coverage; c) the PFO bylaws forbid outside professional activities, with limited exceptions; d) to permit faculty members to engage in outside activities and retain the income from those activities would undermine the financial security of the medical school and e) the grievant is motivated to engage in the outside practice by personal, rather than professional reasons.

7. Dean DeVaul further stated that, in his opinion, the position of a clinical faculty member is a twenty-four hour a day, seven day a week job. If the grievant has free time the Dean would prefer that he engage in research and publication activities.

8. Dean DeVaul did discuss with the grievant the possibility of making the emergency medicine work part of his assigned duties - if the grievant would agree to submit the earned income to the PFO.

9. The grievant had secured his own malpractice insurance

to cover his outside activities.

10. In May, 1985 Dean DeVaul issued a memorandum to the physician-faculty advising of a need for additional emergency room staff for a period of six months to a year. The Dean approved this as a moonlighting activity with direct payment to the physician. The grievant applied for, but did not receive this position despite his certification and experience.

11. Dean DeVaul testified there are no other instances of a faculty member being forced to discontinue a moonlighting activity.

#### Conclusions of Law

1. The West Virginia University Medical Cooperation, in name a private corporation, exists and operates interdependently with the school of medicine and therefore functions as a public or quasi-public corporation.

2. Board of Regents Policy Bulletin No. 36 states that an employee may engage in outside activities in an unrestricted manner so long as these activities do not interfere with the adequate performance of his academic duties.

3. If the outside activities of a Board of Regents employee does interfere with his academic duties, the institution may

adjust the compensation of the employee to adequately reflect the services lost to the institution. Policy Bulletin No. 36.

4. It is the responsibility of the institution's administration to review the outside activities of its employees for the purpose of guiding the faculty members.

5. Neither an institution nor an individual school may promulgate policies contradictory to those of the Board of Regents.

6. Subjecting an employee to standards which are more restrictive than those required of other employees amounts to discrimination as defined by W. Va. Code, 18-29-2 (m).

7. An employee may not privately bill for the treatment of patients which is a part of his regularly scheduled duties in his capacity as a physician faculty member.

In consideration of the foregoing and the record as a whole, the grievant's request that he be allowed to engage in outside activities in conformity with Board of Regents Policy Bulletin No. 36 and that he be compensated for wages lost pursuant to the Dean's order to terminate these activities is granted. An award of costs, including reasonable attorney fees may not be awarded at this level.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County and such appeal must be filed within thirty (30) days of receipt of this decision. (Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

DATED September 26, 1986

Sue Keller

SUE KELLER

Hearing Examiner