DAVID F. GRAF, M.D.

v. DOCKET NO. 93-BOT-155

WEST VIRGINIA BOARD OF TRUSTEES/

WEST VIRGINIA UNIVERSITY

DECISION

Grievant, David F. Graf, is employed by the West Virginia Board of Trustees as a full-time, tenured Associate Professor in the Department of Anesthesiology at the West Virginia University School of Medicine. From 1979 through June of 1984 Grievant was also employed by two health care facilities in western Pennsylvania on a part-time basis as an emergency room physician. This outside work or "moonlighting" was conducted entirely on Grievant's own time: evenings, weekends, and vacation or annual leave. WVU Hospital administrators ordered Grievant to cease the moonlighting in 1984. A grievance ensued, culminating in a decision by the West Virginia Supreme Court of Appeals in December 1992, (See footnote 1) holding that Respondent had violated West Virginia Board of Regents Policy Bulletin No. 36 when itprohibited Grievant from engaging in the outside activity. (See footnote 2)

On May 4, 1992, the Board of Trustees amended Policy Bulletin No. 36. (See footnote 3) Previously, the policy provided that "[o]utside activities shall not be restricted unless such activities or employment interfere with the adequate performance of academic duties." If the outside activities were found to be an interference with the employee's regular institutional duties the institution had a right "to make such adjustments in the compensation paid to such appointee as are warranted by the appointee's service lost to the institution . . . ."

The revised Policy No. 36 states in pertinent part: Faculty - Types and Conditions of Appointment

4.3.1. The appointee shall render full-time service to the institution to which appointed. Outside activities, except the practice of medicine and dentistry which is restricted below in subsection 4.3.2, 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 of appointees to guide faculty members.

4.3.2. Full-time faculty appointments assigned to respective dental or medical schools will render dental and medical patient services only at facilities affiliated with their assigned institution, or at such other locations orfacilities as may be authorized in their annual notice of appointment, or as otherwise approved in writing by the dean or by the president.

4.3.2.1. Fees for professional patient related services rendered by full-time medical and dental faculty appointees shall be billed, collected and expended in accordance with the bylaws of the faculty practice plan for their respective institution, or through such other billing and collection mechanism as may be provided for in the faculty member's annual notice of appointment, or as otherwise approved in writing by the dean or by the president.

4.3.2.2. Fees for professional services not directly related to patient services including, but not limited to, royalties, honoraria, legal actions where no patient services have been rendered, or such other similar sources as may be approved in writing by the dean or by the president are permitted as individual income to the individual faculty member.

By letter dated May 6, 1992, Grievant requested that he be permitted to "moonlight" which he defined as "to work as a physician treating patients on my own time, not using University malpractice insurance nor competing with the University and to retain the income from such outside professional services." Dr. Robert D'Alessandri, Dean of the School of Medicine, denied the request on June 15, 1992. Dr. Graf initiated grievance proceedings on July 13, 1992. Following denials at levels one and two the grievance was advanced to level four on June 23, 1993. An evidentiary hearing was conducted on October 6, 1993, and briefing was concluded on December 27, 1993.

Grievant argues that the denial of his request to engage in professional medical activities outside of WVUfollowing revision of Policy Bulletin No. 36 is invalid because it violates his equal protection and substantive due process rights under the W.Va. Constitution, Article III, Section 10, and his right to immunity from unconstitutional impairment of contract under W. Va. Constitution, Article III, Section 4. Grievant further asserts that the denial constitutes discrimination, favoritism, reprisal and harassment as defined by W.Va. Code §18-29-2, and that the denial was arbitrary, capricious, and irrational on a nonconstitutional plane.

Grievant continues to complain that the amendment to Policy Bulletin No. 36 was improper

because the Board of Trustees failed to follow statutory and regulatory mandates required for policy amendments. He additionally asserts that the amendments constitute impermissible special laws since they are exclusively or primarily directed to Grievant rather than to a general class of persons and the amendments infringe upon Grievant's right to engage in protected scientific endeavors as a faculty member of WVU and otherwise.

Grievant argues that the amendment violates the separation of powers mandate since the statutes and rules governing Grievant's relationship with Respondent do not contemplate or permit such amendments, particularly since the Legislature has not approved such executive actions. Additionally, Grievant claims that the amendment incorporates certain regulations or policies of the MedicalCorporation, an illegitimate encroachment upon his rights to engage in outside professional activities as a purely public and tenured employee of WVU.

Grievant next asserts that Respondent's action is an unlawful exercise of a standardless delegation of administrative public power by the WVU Board of Trustees to the Dean of the WVU Medical School and the President of WVU. The procedure established by amended Policy No. 36 is arbitrary and deprives him of due process, Grievant claims, since no criteria or standards are enumerated in the amendment to guide or define in any respect the limitless discretion of the Dean or President to permit or deny a medical faculty member's request to engage in professional activities at an entity other than WVU.

Grievant claims that due to the improper denial of his request to moonlight he has incurred lost earnings and other harms, including extensive loss of experience in the practice of emergency medicine and his highly lucrative Board certification in emergency medicine. Grievant requests compensation for lost wages plus pre-judgment and post-judgment interest.

Respondent asserts that the revised Policy No. 36, which it amended under authorization of W.Va. Code §18B-1-6, eliminated the conflict between the previous version of the Policy and the WVU Medical Corporation by-laws which had allowed Grievant to prevail in Graf I, and that subsequent to May 4, 1992, Grievant no longer had a legal right to workoutside the Faculty Practice Plan without written permission from the Dean. Because Dr. D'Alessandri denied Grievant's request to moonlight, Respondent requests that the grievance be dismissed.

It is accepted that the Board of Directors amended Policy No. 36 in an effort to achieve consistency between that policy and Respondent's practice. It is also accepted that the basis for

Respondent's restriction of outside medical practice by its employees does not lack merit. Dr. D'Alessandri testified at level four that he has consistently denied all request to moonlight. He explained that the reason for the across-the-board restriction is to capture the income generated by those services at the WVU Hospitals and other clinics and locations for the support of the School of Medicine. The Dean stated that less than half of the school's total budget now comes from the State's annual tax appropriations; thus, the restriction on outside work was based upon this compelling financial reason. (See footnote 4)

Dr. D'Alessandri indicated that he also considered the mission of the institution and the tradition that clinics would provide the practice arm of the school. (See footnote 5) The Dean denied that he acted with any intent to discriminate, harassor retaliate, but rather insists that he acted in a fair and equitable manner when denying Grievant's request to moonlight. Respondent concludes that Policy No. 36 is valid and serves a clearly stated purpose necessary to the mission of the WVU School of Medicine, and that all full-time faculty members, including Grievant, are prohibited from outside employment.

Notwithstanding Respondent's motivation to restrict outside activity, or the fact that the Dean has applied the revised version of Policy No. 36 consistently, Grievant must again prevail on the moonlighting issue. Although Respondent characterizes Section 4.3.2. as a prohibition on moonlighting, it is not. Closer review of the wording in this paragraph establishes that dental and medical faculty may still engage in outside practice; however, it does impose a contingency, that being the approval of the dean or president.

While Dr. D'Alessandri's reasons for across-the-board denial of all requests to moonlight is generally valid in theory, it is flawed in application because he does not consider individual circumstances. This conclusion is perfectly illustrated by the unique factual situation of the present matter. Grievant was employed by Respondent to provide services in the WVU Department of Anesthesiology. Respondent does not assert that Grievant does not fully perform the duties for which he is employed or that it does not "capture the income generated" by Grievant for theanesthesia services which he renders at WVU. Further, Grievant does not contest that Respondent is fully entitled to these services. (See footnote 6)

Grievant is also Board certified in emergency medicine and it is in this specialty he desires to moonlight. Respondent has made no showing that Grievant's outside practice in an area secondary

to that for which he is employed at WVU will result in any loss of finances to which it is entitled by virtue of its contract of employment with Grievant. Controlling factors considered herein are that Respondent does not employ Grievant for any work other than anesthesia and that no clinical opportunities are offered by Respondent in emergency medicine. From an educational viewpoint, it would appear that having a faculty member on staff with two certifications would be an enhancement to the school and the hospital; however, Respondent has acted in such a manner as to cause Grievant to lose the second certification. (See footnote 7) Finally, Respondent could presumably have reaped an additional financial benefit by offering Grievant supplemental employment at its facilities in the area of emergency medicine and did not do so. Thus, it appears thatRespondent has no valid basis for denial of Grievant's request that he be allowed to engage in outside medical practice. (See footnote 8)

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

FINDINGS OF FACT

1. Grievant is employed as an Associate Professor in the Department of Anesthesiology at the West Virginia University School of Medicine.

2. Grievant additionally possessed certification in the area of emergency medicine and was permitted to moonlight in this area from 1979 until June 1984.

3. In December 1992 the West Virginia Supreme Court of Appeals held that Respondent's restriction of Grievant's moonlighting was improper because it was contrary to Board of Regents Policy No. 36.

4. In May 1992 Respondent amended Policy No. 36 to require that dental and medical school faculty members receive permission from the dean or president prior to engaging in practice outside the institution. 5. In May 1992 Grievant requested that he be allowed to moonlight and the request was denied by the dean of the school.

CONCLUSION OF LAW

Because Grievant fully provides the services for which he is employed at WVU, the denial of his request to moonlight in a second area of certification for which he was not employed by Respondent, and for which Respondent offered no clinical opportunities, was an arbitrary and capricious

application of Policy No. 36.

Accordingly, the grievance is Granted and Respondent is Ordered to permit the moonlighting, effective immediately, and to compensate Grievant for lost wages consistent with the formula applied in Graf v. Bd. of Trustees/West Virginia University, Docket No. 93-BOT-155 (June 22, 1994).

DATED July 14, 1994 SUE KELLER

ADMINISTRATIVE LAW JUDGE

Footnote: 1

Graf v. West Virginia University and West Virginia University Medical Corporation, 429 S.E. 2d 496 (W.Va. 1992), hereinafter referred to as Graf I.

Footnote: 2

The West Virginia Board of Regents was dissolved in 1989 by legislative action and replaced with the University of West Virginia Board of Trustees and the Board of Directors of the State College System. See W.Va. Code, Chapter 18B, Articles 2 and 3.

Footnote: 3

That policy was codified as a procedural rule and can be found at 128 C.S.R. 36 (1992).

Footnote: 4

Apparently Respondent employes several physicians on a part- time basis with no restrictions placed on their private practices.

Footnote: 5

Grievant submitted a seventeen page listing of approved clinical programs which WVU sponsored in August 1992. It is noted that none of these clinics were affiliated with emergency room practice.

Footnote: 6

Grievant's moonlighting during 1979-84 did not impair his performance at WVU as evidenced by the fact that he was promoted and granted tenure during that time.

Footnote: 7

Due to Respondent's prohibition on his outside activities Grievant was unable to retain his certification in emergency medicine. Grievant Exhibit No. 22 indicates that his certification in emergency medicine expired in 1990 and that after 1993 he will be required to take both oral and written examinations to regain certification.

Footnote: 8

Because Grievant has established that Policy No. 36 was applied in an arbitrary and capricious manner, it is unnecessary to address the remaining myriad issues.

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