

BRADLEY C. SWIGER,

Grievant,

v.

DOCKET NO. 95-DEP-569

**WEST VIRGINIA DIVISION OF
ENVIRONMENTAL PROTECTION,**

Respondent.

D E C I S I O N

Grievant, Bradley C. Swiger, filed this grievance on August 14, 1995, alleging:

Denial to conduct forest management consultation is arbitrary, capricious & discriminatory. . . .

Grievant seeks as relief reversal of Respondent's denial of his request for self-employment. Following adverse decisions at Levels I and II, Grievant appealed to Level III where hearing was held on October 6, 1995. Despite repeated requests from Grievant, no response was or has been issued by the Level III hearing examiner at this date. Grievant exercised his statutory right under the Grievance procedure for state employees, W. Va. Code §§ 29-6A-1, et seq., and appealed to Level IV on December 20, 1995. This matter was scheduled for hearing, and following several continuances for good cause, was submitted on the record by agreement of the parties. [\(See footnote 1\)](#) The Level III transcript has been incorporated into the record at Level IV. This matter became mature on February 16, 1995, the deadline for submission of proposed findings of fact and conclusions of law. [\(See footnote 2\)](#)

Background

Grievant has been employed by the West Virginia Division of Environmental Protection ("Respondent"), and its predecessor, the West Virginia Division of Natural Resources, since 1982. He is an Environmental Inspector Supervisor with the Environmental Enforcement Office. Grievant's duties include oversight of regulatory inspection/enforcement functions related to solid waste

management and water pollution control programs.

By memorandum dated June 12, 1995, to Mike Zeto, Chief Environmental Enforcement and Grievant's supervisor, Grievant requested approval for self-employment to perform forestry resources management activities. Grievant had already requested an exemption from the West Virginia Ethics Commission, pursuant to W. Va. Code §§ 6B-1-1, et seq., for purposes of obtaining employment by regulated persons. Grievant was granted an exemption by the Ethics Commission on January 11, 1995, which also directed Grievant to "insure that your plans are consistent with the rules and regulations of your employing agency." Based upon this exemption, as well as reliance upon an Advisory Opinion from that body regarding private gain by a state public employee through "moonlighting", Grievant incorporated Land Sakes Consulting Services on April 18, 1995, for the purposes of performing forestry management consulting. By memorandum dated August 4, 1995, from Mike Zeto, Grievant was informed that "[b]ased on . . . discussions and recent agency decisions regarding such employment, . . .", his request for self-employment was denied. Grievant then filed this grievance protesting the denial and requesting that Respondent's decision be reversed.

Issues

Grievant alleges that Respondent's denial of his request is arbitrary and capricious as well as discriminatory in that other employees have been granted approval for self-employment. Grievant alleges that the forestry management services he wishes to provide in no way relate to his position with Respondent, and Respondent has not articulated any legitimate reason for its denial.

1.

Whether Respondent's denial of Grievant's request for self-employment was arbitrary and capricious?

The purpose of the West Virginia Ethics Act, W. Va. Code §§ 6B-1-1, et seq., is to define and establish minimum ethical standards for public employees and to eliminate actual conflicts of interest which might arise in connection with public employment. W. Va. Code § 6B-1-2(b). Code § 6B-2-5(h)(1) prohibits employment of public employees by persons who would be regulated under that employee's agency. The West Virginia Ethics Commission issued an Advisory Opinion on this subject, wherein it stated:

It would be a violation of the Act's prohibition against working for regulated persons for the employee to moonlight for any person regulated by the State Division - regardless of where the person is located or the type of work to be performed. The Ethics Commission can grant an exemption from this prohibition.

. . .

Even with an employment exemption, it would be a private gain violation for the State Division employee to contract with landowners, located within the geographic area for which he is responsible, to provide land management plans for a fee.

. . .

It would not be a private gain violation for the employee who had obtained an exemption to:

- (1) receive private pay to provide land management plans to persons located outside the geographic area for which he is responsible, or
- (2) provide forestry services not provided by the Division to those located within his area of responsibility.

Ethics Review, No. 92-5 (Nov./Dec. 1992).

As noted earlier, Grievant received an exemption from the West Virginia Ethics Commission to perform forestry management services, which he plans to provide to those landowners within his geographic area of responsibility. Grievant argues that his job in Environmental Enforcement does not include forestry management services and further, that he is not employed by the Division of Forestry.

As also noted earlier, Grievant was directed by the Ethics Commission to insure that his plans were consistent with the rules and regulations of his employing agency. Respondent states that its position ensures safeguards to prohibit employees from using their positions in ways that constitute an appearance of personal or organizational conflict of interest, and that it may refer and consider further criteria (other than the Ethics Act) in deciding to grant or deny self-employment. Respondent does not have a policy relating to "moonlighting", but rather relies on the Code Sections referred to above, and the West Virginia Division of Personnel's Administrative Rules and Regulations (1995),

specifically § 18.01. That section, entitled "Employment Conflicts", provides:

Other Employment: No employee shall hold other public office or have conflicting employment while in the classified service. Determination of the conflict shall be made by the appointing authority and the Board who shall consider whether the other employment:

- (1) will be in conflict with the interests of the agency;
- (2) will interfere with the performance of the employee's official duties;
- (3) will use or appear to use information obtained in connection with official duties which is not generally available to the public; or,
- (4) may reasonably be regarded as official action.

Respondent asserts that the potential for conflict exists because Grievant's employment would be within his geographic area of responsibility; Grievant would be employed by a landowner, whose logging operations might come under investigation for water pollution violations, which Grievant would have an ethical duty to report and maybe investigate; and Grievant's participation in the Stewardship Incentive Program makes him an employee of the Division of Forestry, thus creating a direct conflict as illustrated by the Ethics Commission Advisory Opinion's example.

Grievant presented evidence that, although the Environmental Enforcement Office has authority to act under the Water Pollution Control Act, the Division of Forestry has taken the lead in handling complaints and investigations of violations under that Act. Indeed, Grievant presented evidence, which Respondent did not refute, that virtually no forestry related water pollution violation complaints have been handled by his Office, and are the sole responsibility of the Division of Forestry.

Grievant maintains that he would be employed by the landowner to select the type and volume of trees to achieve the landowner's objectives based on site conditions in harvesting situations. The harvesting operations would be performed by a third party, the logger, hired by the landowner. Grievant admitted that he would be participating in the Stewardship Incentive Program, a federally-funded program administered by the Division of Forestry to provide financial cost-sharing assistance to landowners for practices to improve the forest environment. Grievant, as a forester, would contract

with the Division of Forestry. Therefore, he would, in effect, be an employee of the Division of Forestry. This calls into question whether this arrangement would create a private gain violation under the Ethics Commission Advisory Opinion's example. The undersigned finds that, given the above problem, as well as other concerns of Respondent summarized above, it was not arbitrary or capricious for Respondent to deny Grievant's request for self-employment.

2.

Whether Respondent discriminated against Grievant in denying his request for self-employment?

Grievant alleges that Respondent has discriminated against him in denying his request for self-employment because other employees, some with the same classification, have been granted approval to participate in the Stewardship Incentive Program.

Respondent does not deny this allegation. Indeed, in the Level II decision, the hearing examiner states "[p]erformance of such self-employment by the past DEP employee and one of the current DEP employees has been confirmed." The hearing examiner goes on to state the general rule against discrimination of employees, but never addresses the issue further. Level II Decision, August 30, 1995.

Mike Zeto testified at Level III that at least one other DEP employee performs similar activities as those requested by Grievant, and that participation in Stewardship Incentive Programs went on under past-Director, David Callaghan. Level III Tr., p. 31. Mr. Zeto then went on to say:

I don't believe Director Callaghan, and obviously others, are aware of employees in the agency doing such work. The one instance that I am personally aware of, that decision was made, if I recall, is when we were still in DNR under Director Hamrick. So, you know, that decision was made long ago.

Level III Tr., p. 33.

Mr. Zeto testified that Director Callaghan took a rigid stance against outside employment and that he wanted no indication that an employee was even remotely tied through outside employment to regulatory activities. Level III Tr., p. 32.

W. Va. Code § 29-6A-2(d) describes "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or

agreed to in writing by the employees." [\(See footnote 3\)](#) In order to establish a claim of discrimination under the Grievance statute, Grievant must establish a prima facie showing:

(a) that he is similarly situated, in a pertinent way, to one or more other employees;

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/had not, in a significant particular, and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Div. Of Highways, Docket No. 91-DOH-246 (May 20, 1992).

Once a prima facie case has been made, the employer may offer a legitimate, non- discriminatory reason for its actions. If the employer is able to establish such reason, the grievant must then show the employer's stated reason is pretextual. Id.

Grievant has alleged that at least one other DEP employee has been given approval to perform in similar moonlighting activities, specifically, participating in the Stewardship Incentive Programs. Respondent has admitted that this employee performs moonlighting activities similar to the ones Grievant has requested. Respondent does not offer any evidence that this employee is not similarly situated to Grievant, or any explanation that the circumstances surrounding that employee's request are in some way different than Grievant's. Rather, Respondent merely states that the decision to grant that employee permission to moonlight was made under a previous Director. Further, Respondent avers that it has not discriminated against Grievant because it has temporarily granted him approval to participate in the 1995 Stewardship Incentive Program. This defense does nothing but strengthen the evidence that other employees are being allowed to engage in self-employment.

While it certainly would be within one Director's purview to decide whether to let his employees moonlight, in contradiction to the practices of a former Director, that decision must be applied uniformly absent some "grandfather" clause. Respondent does not have a "moonlighting" policy, and neither the Ethics Act nor the Division of Personnel Administrative Rules and Regulations provide "grandfather" clause exemptions. Therefore, if indeed, Respondent has taken a "rigid stance" against moonlighting, then that stance must be applied to all employees, even those who have previously

been permitted to moonlight. Otherwise, to treat employees differently with respect to moonlighting requests under similar circumstances constitutes a discriminatory practice and is prohibited under the grievance statute.

Because Respondent does not deny the other employee is similarly situated to Grievant, and in fact confirms that he or she has been granted permission to participate in the Stewardship Incentive Program, Grievant has successfully established a prima facie case of discrimination which Respondent has failed to rebut.

The foregoing discussion is supplemented with the following findings of fact and conclusions of law.

Findings of Fact

1. Grievant has been employed by the Division of Environmental Protection since 1982. Grievant is currently an Environmental Inspector Supervisor with the Environmental Enforcement Office.
2. Grievant obtained an exemption from the West Virginia Ethics Commission to engage in forestry management services outside of his employment with Respondent.
3. Grievant requested of his employer, by memorandum dated June 12, 1995, permission to participate in moonlighting forestry management activities and to participate in the Stewardship Incentive Program offered by the Federal government.
4. Respondent denied Grievant's request on August 4, 1995.
5. Respondent later granted Grievant temporary approval to participate in the 1995 Stewardship Incentive Program lottery which was to be held in August or September 1995, pending resolution of this grievance.
6. At least one other DEP employee has been granted permission in the past to participate in the Stewardship Incentive Program in a moonlighting capacity.

Conclusions of Law

1. The burden is on the Grievant in a nondisciplinary matter to establish the charges by a preponderance of the evidence.
2. Grievant has failed to prove that Respondent's denial of his request for self-employment was arbitrary and capricious.

3. Discrimination is defined as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(d).

4. Grievant has established a prima facie case of discrimination as at least one other DEP employee has been granted permission to moonlight and participate in the Stewardship Incentive Programs.

5. Respondent has failed to offer a legitimate reason for its different treatment of Grievant and the other employee.

Accordingly, this grievance is **GRANTED** and Respondent is hereby **ORDERED** to grant Grievant approval to participate in the Stewardship Incentive Program on the same basis as the other employee who has been granted approval to participate in the program, or until such time as a "non-moonlighting" policy is implemented and enforced uniformly by Respondent.

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

MARY JO SWARTZ
Administrative Law Judge

Dated: March 12, 1996

[Footnote: 1](#)

This matter was reassigned for administrative purposes to the undersigned Administrative Law Judge.

[Footnote: 2](#)

An unsigned, five-page memorandum was received in the Board's Elkins office on February 16, 1996. A review of the memorandum indicates that it is a memorandum in support of Grievant's position and will be accepted as such and

incorporated into the record.

[Footnote: 3](#)

Reference was made to a U.S. Environmental Protection Agency Region III Grants and Audit Management Branch, Grant Application Kit for State and Local Governments for Fiscal Year 1996, which provides funding to various state and local governments, including Respondent, as authority prohibiting discrimination of employees. Paragraph 6 of the Grant Application certifies that the applicant (DEP) will comply with all Federal statutes relating to nondiscrimination. However, review of that document reveals that provision only applies to the various protected classes under the Federal nondiscrimination statutes. Grievant has not shown he is a member of a protected class. Nonetheless, that does not end the inquiry into discrimination as the Grievance Procedure's definition of discrimination is broader than the protected class statutes, and it is not disputed that Grievant falls within the protections of the Grievance Procedure's nondiscrimination statute.