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LARRY VANGOSEN

v.

DOCKET NO. 91-DPS/RJA/-087

**WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY/
WEST VIRGINIA REGIONAL CORRECTIONAL and
JAIL FACILITY AUTHORITY**

DECISION

Grievant, Larry VanGosen, has been employed by the West Virginia Regional Jail and Correctional Facility Authority (RJA) at the Eastern Regional Jail (ERJ) in Martinsburg, West Virginia, since September 1989. On March 7, 1991, Mr. VanGosen filed a grievance at level four in which he alleged that he was improperly denied the opportunity to retain a part-time position with the Harpers Ferry/Bolivar Police Department. By letter dated April 19, 1991, Grievant's representative advised the undersigned that the matter had been prematurely filed at level four and moved that the grievance be remanded to level three for hearing. The motion was granted and a level three hearing was held on June 21, 1991. Following denial at that level Grievant advanced his claim to level four on August 9, 1991. An evidentiary hearing was conducted at level four on December

17, 1991, and the submission of proposed findings of fact and conclusions of law completed the record for decision.

The facts of this matter are not in dispute and may be set forth as follows:

1. Grievant has been employed as a full-time correctional officer by the RJA at the ERJ since September 1989.

2. Grievant has been employed as a part-time police officer with the Harpers Ferry/Bolivar Police Department since 1984. Grievant's jurisdiction as a law enforcement officer for the local police department extends only to the city limits of the municipalities of Harpers Ferry and Bolivar.

3 Any person or persons arrested within the city limits of Harpers Ferry or Bolivar requiring incarceration are held at the ERJ.

4. W.Va. Code §31-20-5 grants the RJA broad powers to promulgate rules and regulations to govern the effective operation and management of the regional jail facilities.

5. RJA Policy and Procedure Statement No. 3035, effective November 14, 1989, sets forth certain guidelines and restrictions concerning secondary employment which its employees may accept. Paragraph E, relevant herein, provides, "No employee shall hold a secondary employment that may be an actual or perceived conflict of interest with employment by the Authority."

6. Billy B. Burke, Executive Director of the RJA, advised Grievant by letter dated November 2, 1990, that his

secondary employment as a police officer for a local municipality was a conflict of interest with his duties as a Correctional Officer at the ERJ and, therefore, Grievant would be required to terminate the secondary employment in compliance with Policy 3035.

7. Grievant exercised an in-house appeal which was denied by Executive Director Burke on November 16, 1990.

8. Although several employees at the ERJ were formerly employed as law enforcement officers, none currently hold secondary employment with a local law enforcement agency.

In his letter of November 16, 1990, Executive Director Burke offered the following explanation to Grievant as to why his secondary employment constituted a conflict of interest with his assignment at the ERJ.

Officer VanGosen, I don't think you entirely understand the rationale for this decision. By way of example, let's say you arrested an individual who physically resisted and assaulted you and some time during his incarceration you are required to use force on this individual for some reason. If this inmate were to bring charges against you, either in court or administrative, your justification could be weakened, especially in the eyes of a jury, if he were to claim you used excessive force against him in retaliation for the hard time he gave you during the arrest.

A second example might be where you were the arresting officer for a particularly heinous crime and again at some point during subject's incarceration, you were required to use force, this time the subject could weaken your justification by alleging that you were retaliating against him because you became so emotionally distraught upon discovery and investigation of his crime.

Respondent asserts that it is quite likely that Grievant, in his capacity as an officer with a local police

department, could arrest an individual whom he would subsequently supervise at the ERJ. Considering that the floorplan of the facility consists of two pods and that correctional officers are assigned rotating shifts which require them to work in each area of the facility, it is probable that any correctional officer would be required to supervise any and all inmates at the jail. Although it was suggested that Grievant could be assigned to a station separate from any inmate he had arrested, Respondent asserted that such an accommodation may not be possible since it experiences a constant problem in retaining a full staff of correctional officers.

Grievant asserts that in his two years of employment with the RJA there has been no instance similar to that suggested as a possibility by Mr. Burke and that allegations of excessive force can be raised by an inmate in any event. Grievant asserts that rather than being in conflict with his assignment at the ERJ, his work as a police officer provides him with additional training and sharpens his skills as a law enforcement officer, thereby making him a better correctional officer. Grievant argues that the RJA has failed to show any actual or perceived conflict of interest exists and none will exist unless he changes his secondary employment as a police officer to that of criminal.

The testimony offered at level four by Howard Painter, Chief of Operations, establishes that Respondent's reasoning behind the decision to deny Grievant permission to continue

in his secondary employment as a police officer was to alleviate potential inmate allegations and liability for both staff and the agency. Although Grievant's secondary employment was very similar to his work for the RJA, it was the similarity in assignments which could have created the conflict of interest described by Mr. Burke. In general, when an employee holds any secondary employment which might reasonably create a liability for the state agency which provides his primary employment, a conflict of interest results. Because an agency has a legitimate interest in controlling liability which might be incurred during its day-to-day operations the restriction of secondary employment which could reasonably create a conflict of interest is a reasonable and proper exercise of its authority.

In addition to the foregoing it is appropriate to make the following specific conclusions of law.

Conclusions of Law

1. It is incumbent upon a grievant to prove all the allegations constituting the grievance by a preponderance of the evidence. Payne v. W.Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. Grievant has failed to prove by a preponderance of the evidence that Respondent's restriction of his work as a local law enforcement officer was contrary to its Policy 3035 prohibition against any employee holding secondary

employment which may be a conflict of interest with employment by the Authority. Grievant also failed to prove that the Respondent's promulgation and application of the policy was unreasonable, improper, or exceeded its authority.

Accordingly, the grievance is DENIED.

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.

DATED

July 1, 1992

Sue Keller

SUE KELLER
SENIOR ADMINISTRATIVE
LAW JUDGE