#855

Case No. 34-23(030402)0017-01-09
The Karl Spires Matter

In The Matter of the Arbitration

-between-

The State of Ohio
Bureau of Workers Compensation

-and-

Ohio Civil Service Employees
Association, AFSCME Local 11

ARBITRATOR: John J. Murphy
Cincinnati, Ohio

APPEARANCES:

FOR THE STATE:

Rhonda Bell
Labor Relations Officer
Bureau of Workers Compensation
30 West Spring Street
Columbus, Ohio 43215

Marvin Phillips
Office of Collective Bargaining
2nd Chair

Also Present:

Gene Tyree
Manager, Division of Safety & Hygiene

Dave Spencer
Superintendent, Division of Safety & Hygiene

Jason Calhoun
Manager, Bureau of Workers Compensation

FOR THE UNION:

Lori Collins
Staff Representative
OCSEA/AFSCME Local 11
390 Worthington Road
Westerville, Ohio 43082-8331

Victor Dandridge
Staff Representative
OCSEA/AFSCME Local 11
2nd Chair

Also present:

Don Hodkinson
Employee, Bureau of Workers Compensation

Frank Modra
Safety Consultation, Division of Safety & Hygiene

Karl Spires
Safety Consultant, Division of Safety & Hygiene
Grievant

FACTUAL BACKGROUND:

The Grievant's supervisor since 1996 is the manager of the Division of Safety & Hygiene. He manages a multi-disciplinary team, including industrial safety consultants, such as the Grievant. He assigns members of the team to give safety training to Ohio employers who request it as services that are paid for by premiums paid by Ohio employers.

In November of 2002, an audit was conducted of the payroll of an Ohio employer, Cravat Coal Co. It revealed the Grievant's name and social security number as appearing as a contractor providing Mine Safety and Health Administration compliance training. An investigation began in November of 2000, leading to a report on January 29, 2003 by the Department of Internal Affairs of the Bureau of Workers Compensation.

In February 2003, the Bureau conducted investigatory interviews of the Grievant during which the Grievant freely acknowledged that he had provided Mine Safety and Health Administration (MSHA) compliance training during the last three years, outside of his normal safety duties for the Bureau of Workers Compensation (BWC). The Grievant also agreed to produce a list of these companies to his supervisor. The Grievant took the position that he had provided this MSHA compliance training to Ohio and other employers since the late 1980s as an independent contractor for compensation, and he did not believe there was anything "wrong with it."

On March 6, 2003, the Grievant's supervisor issued a written direct order to the Grievant. The order stated:

> This is a Written Direct Order. You have presented safety training to Ohio employers from 1999 to 2002 for monetary compensation. Effective immediately, you are directed to discontinue providing any safety services including training as outside employment to employers. You are to follow all BWC Work Rules including the following (there then followed a copy of the BWC Code of Ethics and the BWC rule on Outside Employment).

Thereafter, after the requisite notice, a pre-disciplinary hearing was held on March 15, 2003 leading to a report recommending discipline for violation of two BWC work rules. On March 27, 2003, the administrator of BWC issued a written suspension without pay for ten days for: "Violation of BWC Code of Ethics . . . and Failure to Follow Written Policy or Practice of the Employer."

On the next day, March 28, 2003, the Grievant gave notice in writing to his supervisor of his outside employment. It stated:

> I will be conducting Mine Safety and Health mandatory compliance training. The Division of Safety & Hygiene does not offer this type of compliance training. I will use my days off, weekends, and holidays for this compliance training. I will not solicit, use State resources, facilities or times as stated in Division D of Section 102.30 of the Ohio Ethics Commission Ruling. I have no contact with these companies as a Division of Safety & Hygiene employee.

The Grievant's supervisor responded by a memorandum dated May 2, 2003 reminding the Grievant that he was "under a Direct Order, issued on March 6, 2003 . . . to discontinue any safety services including training as outside employment to employers." The memorandum concluded that

> Providing mine safety training in your current position is viewed by the Bureau of Workers Compensation as a Conflict of Interest.

STIPULATED ISSUE:

Was the Grievant, Karl Spires, suspended for just cause? If not, what shall the remedy be?

RELEVANT PROVISIONS OF THE OHIO ADMINISTRATIVE CODE FOR BWC EMPLOYEES AND RELEVANT BWC WORK RULES

OAC § 4123-15-01 **Code of Ethics, Title and Rules Covering**

This rule . . . shall be titled "Code of Ethics" for employees of the Bureau of Workers Compensation . . .

OAC § 4123-15-03 **Standards of Conduct**

(C) Conflict of Interest

No employee . . . shall engage in outside employment that results in conflict or apparent conflict with the employee's official duties and responsibilities.

. . .

(2) Outside employment with an . . . entity that involves work . . . which is in any way related to workers compensation matters is prohibited.

Relevant Work Rules

Memo 4.11

OUTSIDE EMPLOYMENT

A BWC employee may work outside BWC as long as this employment does not conflict with or interfere with their work for BWC. In order to prevent any appearance of, or actual, conflict of interest with BWC's public mission, BWC employees cannot be employed by any person or company who is doing or seeking to do business of any kind with the Bureau. Likewise, BWC employees may not contract or volunteer to provide services for any person or company for whom BWC is providing or has provided services. Employees who are working outside BWC must notify their immediate supervisor in writing of the outside employment and the specific nature and scope of the duties performed for the outside employer.

There are a few specific exceptions to the above-stated policy. Any employee seeking a clarification regarding a potential conflict of interest should contact BWC's Chief Legal Officer for specific guidance and/or restrictions.

Violation of this policy can lead to discipline, up to and including termination from BWC.

Disciplinary Grid

INSUBORDINATION

Violation	*1st*	*2nd*	*3rd*	*4th*	*5th*
a. . . .					
b. Failure to follow a written policy or practice of the employer	Written/ suspension	Suspension	Removal		
c. . . .					

FAILURE OF GOOD BEHAVIOR

Violation	*1st*	*2nd*	*3rd*	*4th*	*5th*
a. . . .					
k. Violation of BWC/IC Code of Ethics	Determination based upon severity of incident				
l. . . .					

SUMMARY OF POSITIONS OF PARTIES

A.) State Position

The Bureau became aware that the Grievant was receiving compensation from Ohio employers for providing mine safety training. Many of these Ohio employers did business with the Bureau of Workers Compensation.

The Grievant is an employee within the Division of Safety & Hygiene, which provides safety consultative services including training to Ohio employers. If the Grievant saw an Ohio employer's training need in mine safety, he had a professional duty to put the Bureau on notice that such training was needed for safety purposes. Instead, the Grievant conducted training for a fee and received personal gain from Ohio employers.

It is true that MSHA training is not, at this time, provided by the Bureau. However, the Bureau could have developed such

training and provided the training service at no additional cost to an Ohio employer.

The Grievant never provided notice to his immediate supervisor of this outside employment, and the outside employment constituted a conflict of interest under the Bureau's Code of Ethics.

B.) Union Position

The Grievant had no knowledge that his outside employment was a violation of either the Code of Ethics or the Employer's rule dealing with outside employment until he was given a direct order on March 6, 2003. He complied with this direct order. Therefore, the discipline is for conduct of the Grievant that occurred prior to the issuance of the direct order. "The Grievant is being disciplined before the harm occurred."

There is no conflict in the Grievant's providing MSHA compliance training. This training has never been provided by the Bureau in the past and is not now being provided. Moreover, this was requested of the Bureau in the past but the Bureau decided that it did not have the resources to provide this training.

Lastly, the Grievant gave notice to his supervisors in the Division of Safety & Hygiene in the late 1980s and received permission to provide this training. In addition, his supervisor in the Bureau in 1995 knew of his outside employment in providing this training and encouraged the Grievant to do so. Consequently, this permission to provide MSHA compliance training was not revoked until the direct order was issued on March 6,

2003. The Grievant's prior activity in providing this training was in compliance with his notices to his supervisors in 1995 and in the late 1980s.

The suspension should be overturned, the Grievant should be made whole, and the direct order should be declared null and void because there is no conflict in the Grievant's providing MSHA training.

OPINION:

This opinion considers the central conflicts between the parties. First, did the Grievant violate the rules charged against him—a question on which the Employer has the burden of proof. Second, did the Grievant give notice and receive permission from his supervisors of this outside employment. This is an affirmative defense on which the Union has the burden of proof. Lastly, we consider the question of the sanction--consideration bound up in the concept of just cause to discipline.

A.) A Basis for Discipline

We begin with an analysis of the rules upon which the State disciplined the Grievant. This analysis is for the purpose of identifying the key elements of these disciplinary rules charged against the Grievant. The analysis also includes an evaluation of the evidence to determine whether the State has sustained its burden of proof that the key elements of the disciplinary rules are found in this record.

The Grievant was charged with a "failure of good behavior," but the Bureau's disciplinary grid contains specifications of this general phrase. In this case, the State charged the Grievant with

a violation of the BWC Code of Ethics as the particular way by which the Grievant failed to maintain good behavior. The Grievant was also charged with "Failure to follow a written policy of the employer." Specifically, the Grievant was charged with failing to comply with the Employer's written policy on outside employment.

The BWC Code of Ethics prohibits employees from engaging in outside employment that results in "conflict or apparent conflict with the employee's official duties and responsibilities." The Code then proceeds to define types of outside employment that do constitute an actual or apparent conflict. One such definition is a "relationship" definition. An actual or apparent conflict occurs when the outside employment work "is in any way related to worker's compensation matters."

The relationship between the outside employment and Workers Compensation matters need not be direct. The relationship is established if the outside employment relates "in any way" to worker's compensation matters.

According to the record, the Division of Safety & Hygiene of the Bureau has not in the past and does not now (at the time of the arbitration hearing) provide outside MSHA compliance training. The record, however, is clear that such training could be provided by the Bureau, should it choose to do so. Consequently, MSHA compliance training is related "in any way" to workers' compensation matters.

The record does show that the Bureau did consider providing such training in 1995; it researched the matter and chose not to provide the training because of the lack of resources. This

consideration by the Bureau clearly establishes that such training is a Bureau of Workers Compensation matter. Moreover, there is nothing in the record to indicate the decision not to provide this training in 1995 inhibits the Bureau in any way to provide the training in the future.

The job description of the Grievant as Industrial Safety Consultant includes providing "specialized safety services to companies . . . and developing accident prevention and safety educational programs." It also includes advising companies on ways and means to eliminate the causes of accidents and health hazards. MSHA training would fall within the purview of the Grievant's job description, and there is no exception stated in the job description relating to safety training for Ohio mining companies. The conclusion is, therefore, that the Grievant did engage in a prohibited conflict of interest under the BWC Code of Ethics.

We turn now to the Bureau's rule concerning outside employment. Similar to the Code of Ethics definition of a conflict of interest, this rule seeks to "prevent any appearance of, or actual, conflict of interest with BWC's public mission." Also, the rule--similar to the Code of Ethics--defines an actual or apparent conflict of interest. An employee cannot provide services to any company "for whom BWC is providing or has provided services."

The Grievant's position is that he did not provide any services in his capacity as a BWC employee to the Ohio employers for whom he provided MSHA training services. The Grievant listed the Ohio employers to whom he had provided MSHA training since 1999. Of these employers, nine had Ohio Worker Compensation policy numbers. The parties stipulated, however, that the Grievant's

supervisor had not assigned the Grievant to any of these nine employers who had Ohio Worker Compensation policy numbers.

The theory of the Grievant is that he did not violate the rule against outside employment because his MSHA training had in the past and in the present not been provided by the Bureau. The prohibition in the rule deals with employees who provide services for a company for whom BWC is providing or has provided services. This prohibition cannot be sensibly interpreted as a prohibition against an employee from competing directly with BWC in providing the same service. It prohibits employees from providing services to a company to which BWC is or has provided services.

It is not necessary in this case to provide a definition of the scope of the prohibited services; it is sufficient only to note that the prohibited services would include MSHA training--training within the purview of the Bureau's mission and the Grievant's job description.

The record shows the sensitivity of both the supervisor and the Grievant in the Grievant's providing MSHA training to Ohio employers that have Worker Compensation premium numbers. The Grievant insisted that he had never contacted any Ohio employers for whom he had acted at a BWC employee in order to provide his MSHA training. The Grievant also insisted--and the parties stipulated--that the Grievant did not provide safety training as a BWC employee to any of the nine Ohio employers for whom the Grievant provided MSHA training. The problem with this insistence is that the Grievant could have been assigned by his supervisor to provide safety consultations to the nine Ohio employers. There is

nothing in this record to show that such an assignment could not have occurred prior to or after he had visited these Ohio employers as a self-employed MSHA safety consultant. Indeed, the record shows that his supervisor since 1996 was unaware of his providing MSHA training, which raises the probability of such an assignment of the Grievant to these nine Ohio employers.

A similar measure of sensitivity about the conflict arising from the provision of MSHA training to Ohio employers was exhibited by the Grievant's supervisor. The supervisor discovered the Grievant's outside employment as a MSHA safety consultant in November 2002. The supervisor testified that he would not now assign the Grievant to the nine Ohio employers with Workers Compensation numbers "because it would give an appearance of conflict to these companies." This analysis leads to the conclusion that the Grievant did engage in outside employment prohibited under the Employer's work rule.

The argument was made that the Grievant was guiltless under the Code of Ethics or the rule concerning outside employment until he received a direct order to cease providing MSHA safety training on March 6, 2003. This argument was supported by two assertions, one of which is now discussed; the other, in the next section of this opinion.

There is nothing in the code or the rule that sets forth a direct order by the Employer as a necessary prerequisite for discipline under either the code or the rule. There is in the rule an opportunity to seek a clarification of a potential conflict of interest by contacting BWC's Chief Legal Officer for guidance. The Grievant did not use this opportunity. The code and the rule were

included in the BWC Employee Handbook. The Grievant testified that he received a copy of the handbook, and the record includes an acknowledgment by the Grievant signed on May 1, 2001 that he received the handbook with a specification of receipt of the Code of Ethics.

In addition, a fellow industrial safety consultant testified on behalf of the Grievant. He acknowledged that both the Code of Ethics and the rule concerning outside employment are in the handbook, and that both the Grievant and he were under a duty to comply with both.

B.) The Union's Affirmative Defense

The Union made a second assertion to support its claim that the Grievant was guiltless under the code or the work rule with respect to his conduct prior to March 6, 2003--the date of the direct order to cease safety training by his supervisor. This assertion is that the Grievant, on two occasions, made his supervisors aware of his MSHA training activities for outside employment, and was given permission to engage in such.

This assertion was supported by evidence by the Grievant and a co-employee of a meeting that occurred in the late 1980s at the Industrial Commission. At this meeting, the Industrial Commission determined to stop providing MSHA training by its industrial safety consultant in its Division of Safety & Hygiene. The Grievant asked if he could provide such training since the Industrial Commission would no longer be making this training available to Ohio employers. Jason Calhoun, then legal counsel to the Division of Safety & Hygiene of the Industrial Commission approved MSHA

training by the Grievant as outside employment because the Industrial Commission was withdrawing from this field.

The obvious difficulty with this analysis arises from the stipulation by the parties that the Division of Safety & Hygiene was transferred from the Industrial Commission to the Bureau of Workers Compensation on or about August 3, 1989. The Grievant acknowledged that when he was transferred to the Bureau of Workers Compensation, he was under the Bureau's rules, and he further acknowledged that some of these rules were different from the Industrial Commission rules. This record does not contain the Industrial Commission's code of ethics or rule on outside employment in existence in 1988 at the time of this claimed permission to engage in MSHA training. The record, however, does contain the Bureau's code and work rule regarding outside employment. As the above analysis concluded, MSHA safety training by the Grievant violated both the Bureau's code and the Bureau's work rule regarding outside employment.

There is a second claim of supervisory approval of the Grievant's MSHA safety training. The Grievant's supervisor for one year covering months in 1995 to 1996 testified at the arbitration hearing.[1/] This witness testified that he, as the Grievant's

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[1/] His testimony was over the objection by the Bureau. The objection was based on the Bureau's view that the Grievant was disciplined for his action from 1999 to 2002; therefore, this testimony is irrelevant. The testimony was permitted because the record shows that the Grievant had claimed in the grievance process a permission to engage in this MSHA training both in 1988 and in 1995.

Supervisor, knew of the Grievant's MSHA training because the Grievant had told him about such outside employment. The supervisor claimed that there was no conflict because the Bureau did not provide this training. So long as no State resources were used, the witness testified that he encouraged this activity by the Grievant.

This claimed permission also falls before another stipulation in this record. The parties stipulated that the Bureau's Code of Ethics and rule on outside employment were both in existence continuously since February 5, 2000. This stipulation also stated that there is "no information in this record on either the code or the policy on outside employment prior to February of 2000. Therefore, there is no way to evaluate this claimed permission in 1995. There is nothing in this record to indicate that the Bureau regulated outside employment and the manner of such regulation in 1995-1996. Therefore, the Union did not sustain its burden of proof with respect to this affirmative defense.

C.) The Question of the Sanction

The Employer has the contract duty to adopt a sanction, which is consistent with its disciplinary grid both for the violation of the Code of Ethics and the violation of written policy on outside employment. The 10-day suspension falls within the allowable sanctions under the disciplinary grid.

In addition, violation of both the Code of Ethics and the rule concerning outside compensation constitute a direct assault upon the interests of the Bureau. For example, the policy behind the

Code of Ethics states that "it is essential that the public has confidence in the administration of the . . . Bureau." The policy continues by pointing out that this public confidence depends largely on whether the public trusts the employees of the Bureau. It is important that the public understand that the employees of the Bureau "act only in the interest of the people uninfluenced by any consideration of self-interest, except those inherent in the proper performance of their duties. (Emphasis added). Clearly, the 10-day suspension is within the range of sanctions that the Employer could choose to apply in the violation of the Code of Ethics and the rule concerning outside employment.

There is, however, in this record undisputed evidence that the Employer, acting through the Grievant's supervisor in 1995, contributed to the Grievant's conduct found in this opinion to be a violation of the code and the Bureau's work rule. While the evidence of this supervisor's approval and encouragement of the Grievant's conduct in 1995 was not found to constitute the affirmative defense of permission, it certainly is sufficient to show some responsibility by the Bureau for the conduct now punished by the Bureau.

When this responsibility by the Bureau for this conduct is weighed against the seriousness of the transgression found in this case, a 10-day suspension is clearly too extreme. Consequently, the sanction is reduced to a 3-day suspension.

AWARD:

The 10-day suspension is reduced to a 3-day suspension without pay. The Grievant is to be made whole. In light of the analysis in this opinion, the Bureau's direct order to the Grievant dated March 6, 2003 is not declared to be null and void.

Date: February 28, 2004

John J. Murphy
Arbitrator