OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN

OHIO ENVIRONMENTAL PROTECTION AGENCY
-AND-
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME LOCAL 11

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Right to Conduct Outside Employment

Decision
Grievance Denied

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I. The Facts

A. Introduction

The parties to this contractual dispute are the Ohio Environmental Protection Agency ("Agency" or "EPA") and the Ohio Civil Service Employees' Association, Local 11 ("Union"), representing Mr. Donald Vanterpool ("Grievant"),[1] a Staff Attorney 3 in EPA's Division of Air Pollution Control. The Grievant had approximately twenty-five years of service when the instant dispute arose.

EPA hired the Grievant in 1988. From then until 2005, he also had a private legal practice, involving legal drafting, family law, personal injury, and probate. In 2005, the Grievant accepted a position as Court-Appointed Counsel for indigent minors in the Domestic Relations and Juvenile Branch of the Franklin County Court of Common Pleas. His duties involved representation in cases of criminal juvenile delinquency, custody, and child support. From 2005-2011, the Grievant's annual caseload as Court-Appointed Counsel was no more than three non-juvenile cases, involving no more than eight hours per month.

As Court-Appointed Attorney, the Grievant received his assignments from the Court Appointment Officer ("Appointment Officer"), who left new assignments as either voicemails or emails on the Grievant's personal mobile phone. The Grievant had forty-eight hours to respond to the Appointment Officer lest other attorneys received the assignments. Sometimes the Appointment Officer would see the Grievant in court and offer him assignments.[2] The Grievant is never compelled to accept any given court appointment.

Despite the pressures of private practice, the Grievant consistently met his EPA obligations. Flexibility in the EPA and court schedules afforded him considerable control over work assignments in both entities. When confronted with conflicts between his EPA duties and his private practice, the Grievant would petition the court either to reschedule his hearings or to grant continuances. The

[1] Hereinafter referenced as, "The Parties."

[2] Joint Exhibit 6; Email from Don Vanterpool to Karen Haight, describing appointment process.

Grievant used his EPA vacation time to cover absences related to his private practice during his EPA working hours. The Agency consistently approved such vacation requests.

There were times, however, when judicial assignments required the Grievant to leave the Agency for an hour or less. The Grievant once took a leave to address matters in his private practice and consequently missed an EPA meeting. Generally, however, the Grievant's flexible EPA work schedule allowed him to make up lost time by reporting to work early, remaining late, or working through his lunch break. Mr. Bryan Zima, the Grievant's Supervisor, knew about such adjustments.

The Instant dispute arose because one of the Grievant's clients[3] became irate about his legal fees, fired him, and notified the Ohio Office of the Inspector General ("OIG") that the Grievant was practicing law on the Agency's time.[4] The OIG investigated the matter and on August 19, 2010 issued a report (Report"),[5] finding that the Grievant consulted "during normal work hours" by using flex time with Mr. Zima's approval. Such leave arguably offended EPA's flextime policy, however. In addition, the report, recommended that the Agency regulate its employees' outside employment.[6] The OIG report set forth the following specifics:

1. The OIG investigated Vanterpool's activities for the period January 1, 2008, to November 24, 2009.[7] Vanterpool made no calls unrelated to his EPA duties on his state-issued desk phone during the period investigated.[8]
2. Vanterpool did not attend court proceedings while on state time.[9]
3. Bryan Zima, Vanterpool's immediate supervisor, knew Vanterpool had a private law practice.[10]
4. ***Zima admitted his supervision of Vanterpool, particularly his time records, was poor***.[11]

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[3] Ohio Office of the Inspector General, *Report of Investigation* (August 19, 2010), File ID No. 2009391 at Joint Exhibit 9).
[4] *Id*.
[5] Joint Exhibit 9.
[6] *Id., at 8*.
[7] *Id*. at 1.
[8] *Id*. at 4.
[9] *Id*.
[10] *Id*. at 5.
[11] Joint Exhibit 9, at 5.

5. Despite his poor supervision, Supervisor Zima ***does not believe Vanterpool conducted private work while on state time***.[12]

6. Zima allowed Vanterpool to flex his time so he could perform his non-EPA legal work during EPA work hours.[13]

7. EPA permitted its employees to conduct personal business during normal work hours (8:00 AM to 5:00 PM), provided they utilized flex time to ensure they were not on paid state time when they did so.[14]

8. EPA did not require its employees to follow strictly the agency's flex time policy.[15]

Effective June 2011, the Agency promulgated an Outside Employment Policy ("Policy"), requiring employees to obtain managerial approval before conducting outside employment that conflicted with the Agency's "core business hours." Specifically, the Policy favored pre-arranged, reasonably static outside employment that did not compete with employees' EPA duties.[16]

Between June and August 2011, approximately fifty-nine EPA employees, including the Grievant, petitioned the Office of Employee Services with requests to pursue outside employment. The Agency approved fifty-eight of those requests but rejected the Grievant's. The HEM Administrator, Ms. Karen Haight initially screened them.[17] In addition, EPA Chief Legal Counsel and Ethics Officer, Mr. Brian Cook, reviewed requests implicating ethical issues, and EPA Director, Scott J. Nally, ultimately approved or denied the requests.

On June 8, 2011, the Grievant requested permission to continue his private practice as Court-Appointed Counsel. [18] The Grievant's request contained the following: (1) Outside work would require

[12] *Id.*
[13] *Email from Bryan Zima to Don Vanterpool* (June 8, 2009, 1:20 PM) (included with Joint Exhibit 9). "If you have an appointment outside work and outside the time frame of 10:30 to 2:30, rather than take lunch time please take vacation, personal, comp. etc. for that appointment *or schedule a flex schedule to accommodate it*." (emphasis added). *See also Email from Bryan Zima to Don Vanterpool* (July 17, 2009, 3:37 PM) (included with Joint Exhibit 9) ("When you do those weird flex days, can you tell me when you are going to flex? Even if you say 9 and then it happens [to] be at 9:15, I'd like to have some idea as to when.")
[14] Joint Exhibit 10, at 2.
[15] Joint Exhibit 9, at 8.
[16] Joint Exhibit 4.
[17] Joint Exhibit 13. Ms. Height's Title is unclear. In its Post-hearing Brief, EPA referenced her as "Human Resource Administrator." However, at the arbitral hearing, Ms. Height signed in as a "HEM Administrator."
[18] Joint Exhibit 6, at 1.

no more than eight hours leave per month; (2) Because he had substantial control of his schedule, the risk of scheduling conflicts were practically impossible should scheduling conflicts arise. The Grievant would use vacation, personal comp time, or flex time to cover them; (3) No outside work would conflict with his duties within the Agency. Nor did the outside work involve any environmental components.[19]

The Grievant's request worked its way through EPA's screening. The Grievant received a memorandum issued by EPA Director Scott J. Nally, written by EPA Chief Legal Counsel Brian Cook, and dated June 17, 2011. In the memorandum Director Nally denied the Grievant's request with the following rationale:[20]

1. Vanterpool's work **"*may* create an *appearance* of impropriety or *appearance* of conflict of interest"** because he would be working "as an attorney… in the state court system (which operates during the same general work hours as the Ohio EPA)."
2. The demands of his juvenile criminal defense work **"*may*** jeopardize the operational needs of the Ohio EPA."
3. The OIG report found he made non-EPA related calls during EPA work hours.
4. The OIG report found Vanterpool violated EPA's flex policy by occasionally starting work after 9:00 AM and ending after 6:30 PM.
5. The OIG report found Vanterpool violated EPA's flex policy by working through lunch, or not claiming a lunch period.
6. The OIG report concluded Vanterpool worked in private practice while on state time.
7. Additional state resources would be required to properly monitor Vanterpool's activity.
8. In addition, EPA linked its image to the Grievant's off-duty conduct. On August 19 and 20, 2010, the *Columbus Dispatch* published articles, stating that two state attorneys, the Grievant and another state attorney were "moonlighting."[21] The August 19 article claimed Vanterpool "improperly worked on cases for his private law practice while on the clock for the state."[22]

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[19] *Email from Don Vanterpool to Karen Haight* (June 13, 2011, 10:49 AM) (Joint Exhibit 6, at 2).

[20] Joint Exhibit 7.

[21] Union Exhibits 4, 5. James Nash, "Two attorneys did private work on State's time, report finds," *Columbus Dispatch*, August 19, 2010; James Nash, "Report: State lawyers were moonlighting," *Columbus Dispatch*, August 20, 2010.

[22] Union Exhibit 5. The Union claims the Article was false because the OIG found the Grievant performed outside legal work during EPA work hours, but never accused the Grievant of performing outside legal work while on the clock. Nevertheless, Mr. Cook found the Grievant's conduct to be "embarrassing" for the agency.

On July 2, 2011, the Union filed Grievance No. EPA 12-00-20110702-0190-01-14 ("Grievance"),[23] challenging EPA's denial of the Grievant's request. The Grievance alleged that the Policy violated "the Contract by abusing Management Rights, initiating midterm contractual change and past practices."[24] EPA denied the Grievance in a Step 3 Grievance Response,[25] and on October 7, 2011, the Union announced its intent to arbitrate EPA's denial of the Grievant's request.[26] The Parties elected to arbitrate the dispute before the Undersigned on September 25, 2012. At the outset of that hearing, the Parties agreed that the instant dispute was properly before the Undersigned. During the arbitral hearing, the Parties' advocates made opening statements and introduced documentary and testimonial evidence to support their positions in this dispute. All documentary evidence was available for proper and relevant challenges; all witnesses were duly sworn and subjected to both direct and cross-examination. The Grievant was present throughout the proceedings. At the close of the hearing, the Parties agreed to submit post-hearing Briefs. Upon receipt of those Briefs, the Undersigned closed the record.

II. The Issue

Did the Environmental Protection Agency violate Article 5 or Article 44 of the Collective-bargaining Agreement by denying the Grievant's June 8, 2011 request for outside employment under the agency's outside employment policy?

III. Relevant Contractual and Regulatory Provisions

Article 5-Management's Rights

Additionally, the Employer retains the rights to: . . . 5) make ***any and all*** rules and regulations.[27]

[23] Joint Exhibit 2. The Union also filed Union Grievance No. EPA 12-00-20110702-0191-01-09-13-14 (challenging the Policy as violating "the Contract by abusing Management Rights, initiating Midterm Contractual change and past practices.") (Joint Exhibit 3).
[24] *Id.*
[25] Joint Exhibit 2, at 2.
[26] *Id*, at 5.
[27] Joint Exhibit 1, at 12 (emphasis added).

Article 44-Miscellaneous

44.04-Work Rules

After the effective date of this Agreement, Agency work rules or institutional rules and directives must ***not be in violation*** of this Agreement. Such rules shall be ***reasonable***. . . ."[28]

Outside Employment

Ohio EPA recognizes that employees may desire secondary employment outside of the Ohio EPA. Outside employment is generally permissible if it does not ***adversely impact*** the employee's ***work or attendance***, is in accord with any ***applicable ethical requirements***, does not ***create a conflict of interest*** with the business of the Ohio EPA, and occurs ***completely outside*** of the agency's ***core business hours*** of 8:00 a.m. to 5:00 p.m. Monday through Friday except paid holidays.[29]

* * *

General Prohibitions

Outside employment that ***adversely impacts*** an employee's ***work or attendance*** is prohibited.[30]

Outside employment that ***creates a conflict of interest*** with the business of Ohio EPA or violates any other provision of the Ohio Ethics Law is prohibited.[31]

* * *

Criteria for Approval/Disapproval of Request for Outside Employment During Core Business Hours

* * *

2. Outside employment with dates of performance that is ***pre-arranged months in advance*** and ***reasonably static*** is favored.[32]

* * *

4. Outside employment that ***may create an appearance of impropriety*** or ***appearance of a conflict of interest*** is disfavored.[33]

Standards for all Outside Employment

When employees are participating in any type of outside employment, they are to strictly adhere to the following requirements:

1. Employees are prohibited from engaging in activities in the pursuit of personal profit while on ***state time or state property***.
4. Outside employment shall not involve such time demands as would render performance of the employee's Ohio EPA duties ***less efficient*** or ***take precedence in any way*** over those duties.

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[28] *Id.*, at 158 (emphasis added).
[29] Joint Exhibit 4 (emphasis added).
[30] *Id.* (emphasis added).
[31] *Id.* (emphasis added).
[32] *Id.*, at 2 (emphasis added).
[33] *Id.*

IV. Summaries of the Parties' Arguments

A. Summary of the Union's Arguments

1. Issues about the *appearance of impropriety* fall without the Policy's scope, especially where the most one can say is that such issues *may* arise. Even if the Policy considered such issues, only conduct that actually "creates a conflict of interest" would be subject to the Policy.

2. Also, the Policy does not contemplate conduct that *may* jeopardize the Agency's operational needs. Instead, the Policy sanctions only conduct that *actually* impacts the Agency's operations. The OIG report clearly concluded that the Grievant performed no outside work while he was on the EPA's clock.

3. The Agency has not established that the Grievant used his cell phone to make telephone calls related to his outside employment *while on the EPA's clock*. Clearly, the Grievant telephoned individuals during the EPA's schedule work hours, but not while he was actually on the EPA's clock.

4. It is unclear whether the Grievant actually violated the EPA's flextime policy. But if he did, he had supervisory approval for any changes in his work schedule. Before the Agency implemented the Policy, its supervisors inadequately supervised employees, including the Grievant. Therefore, if the Grievant is permitted to perform outside work, his supervisor needs only to adequately observe him. There is no indication that extra supervision would be needed.

5. There is no reason to suppose that the Grievant would require extra supervision should the Agency grant his request to perform outside legal work.

6. Finally, Mr. Cook's concern about the Grievant's "embarrassing" the Agency during his private practice is irrelevant, since the Policy neither sanctions nor addresses such anticipatory concerns.

7. The evidence is inconclusive regarding the recipients of the Grievant's phone calls made during the Agency's business hours.

8. Arguably, the Grievant did not violate the Flexible Work Schedule Policy because his Supervisor approved the Grievant's schedules.[34]

B. Summary of EPA's Arguments

1. The Policy requires Agency approval for outside employment that conflicts with the Agency's core business hours. The Policy favors moonlighting that is pre-arranged months in advance and reasonably static. Supplemental employment must not create an appearance of impropriety. Time demands of supplemental employment must not in any way undermine job performance.[35]

2. When reviewing the Grievant's request, the Agency considered the Policy's standards, the Grievant's information, the juvenile court's rules, and the Report. The Agency then exercised its discretion to deny the Grievant's request and adduced substantial evidence to support that decision.

3. The Grievant's role as Court Appointed Counsel would adversely affect his work or attendance, interfere with the performance of his primary duties and could create an appearance of

[34] Joint Exhibit 10, at 1, 2 ("Flexible schedules are permitted with management approval." "Supervisors will determine if the requested work and flex schedules… can be approved").
[35] Joint Exhibit 4.

impropriety. In short, the Grievant's supplemental employment as a Court Appointed Counsel is inherently offensive to the Policy.

4. In reviewing any employee's request, Ms. Haight considers the completeness of the request, the Policy's criteria and standards, the employee's schedule, position description, and any relevant additional information.

5. The Grievant may not serve in a position that could lead the public to question why an attorney could simultaneously serve the state and private clients.

6. The Grievant's supplemental employment conflicted with the Agency's core business hours.

7. The Grievant's supplemental employment was not pre-arranged months in advance and was not reasonably static and could generate conflicts between his work schedule and attendance at the Agency and his court related duties. Regarding pre-arrangements, there is no typical amount of time as to how far in advance an assignment request is made.

8. The unpredictability and lack of control in the Grievant's private practice offends the Policy's criteria. Once the Grievant accepts a judicial assignment, he must appear before the court at judicially determined times, which are wholly beyond his control. Nor does the Grievant have any control over judicial decisions to grant requests for continuances. Furthermore, the Grievant's private practice could be so demanding as to compromise his EPA job performance.

9. Core hours involved in the Grievant's supplemental employment often overlap those of the Agency.

10. The Grievant admitted to scheduling his EPA meetings and duties around his private practice.[36]

11. The Inspector General's Report, among other considerations, factored into the Agency's review of the Grievant's request.

12. Use of leave does not necessarily eliminate conflicts between consulting and EPA duties. Before the agency promulgated its policy, the Grievant violated EPA's flextime policy and practiced law on "paid state time." Furthermore, the Grievant admittedly scheduled leave to attend issues in his private practice and, consequently, missed a scheduled EPA meeting. Thus, where EPA interests arise simultaneously with consulting interests, one may schedule leave to benefit the latter at the expense of the former. Furthermore, positive leave banks do not ensure that the Agency will grant leave requests for substitute employment.

13. Assuming, arguendo, that ninety percent of the Grievant's 208 phone calls made during his EPA "work hours" were to his daughter, he admitted that the remainder involved his private practice. This admission reveals not only his need to contact public agencies with core business hours that substantially overlap the EPA's, but also the "inherent conflicts" between EPA duties and private law practice.[37] Finally, these observations evidence the reasonableness of the Agency's conclusion that the need to make such phone calls would remain undiminished if the Grievant continued his private law practice while working for the EPA. Proper assurance of compliance would require access to the Grievant's phone records, which the Agency lacks, thereby creating a continual, "fluctuating," and "unpredictable" conflict.[38]

[36] Agency's Post-hearing Brief, at 6, citing Joint Exhibit 7.
[37] *Id.*, at 7.
[38] *Id.*, at 8.

14. Two reasons suggest that the Grievant may not be able to properly serve the EPA while engaging in private practice, despite the fact that he has previously done so. First, the Inspector General found that the Grievant violated the Agency's flextime policy. Second, the Policy has modified the rules governing secondary employment.

15. Members of the public may perceive the Grievant's engaging in private practice during the Agency's core business hours as a conflict of interest and, hence, improper. This appearance of impropriety actually surfaced because of two newspaper articles.

16. Regarding the claim of disparate treatment, the Union has not identified an employee similarly situated to the Grievant whose request for supplemental employment was granted.

V. Evidentiary Preliminaries

Because this is a contractual dispute, the Union has the burden of proof. More important, the Union has the burden of persuasion and, hence, must establish its allegations by preponderant evidence in the arbitral record as a whole, doubts about those allegations will be resolved against the Union. Similarly, EPA has the burden of persuasion regarding its allegations and affirmative defenses, doubts about which will be resolved against the Agency.

VI. Analysis and Discussion

A. Nature and Scope of Employers' Rights to Protect Legitimate Interests

Before assessing the propriety of the EPA's action in the instant dispute, a brief discussion of employer's "Common law of the shop" rights with respect to its legitimate interests is indicated. Generally, employers may protect their legitimate business interests against employees' ***unreasonable*** conduct that either ***actually*** or ***unreasonably threaten*** to undermine employers' legitimate interests.[39] Regarding threats, employers need not wait for their rights to be diminished before taking protective steps. They may shield their legitimate interests from conduct that poses an ***unreasonable risk*** to those interests.

Although the EPA has the foregoing fundamental rights, it may wholly or partially forgo those rights[40] either in its unilaterally promulgated rules or in the negotiated provisions of the Collective-

[39] "Legitimate interests" encompasses three areas: (1) productivity or productive efficiency, (2) workmanship or quality, and (3) reputation.

[40] Although employers may unilaterally restrict the enumerated rights, they may never unilaterally expand them.

bargaining Agreement. With these principles as a backdrop, the Undersigned now turns to an assessment of the Policy itself before assessing the propriety of EPA's Application of that Policy.

1. Nature of Policy's Provisions

The Policy comprises essentially two types of provisions: (1) provisions that prohibit only outside employment that ***actually*** adversely impacts EPA's operational interests ("Impact Provisions"); and (2) provisions that prohibit outside employment that threatens to adversely impact EPA's operational interest ("Risk Provisions").

a. Impact Provisions

The following are impact provisions: "Outside employment is generally permissible if it ***does not adversely impact*** the employees ***work or attendance*** . . . ***does not create a conflict of interest***. . . ."[41] Outside employment shall not involve such time demands ***as would render*** performance of the employee's Ohio EPA duties less efficient or take precedence in any way over those duties." Henceforth, the Arbitrator will reference the foregoing provisions as "Impact Provisions." These provisions contemplate only situations in which an employee's conduct actually undermines his/her "work" or "attendance," both of which represent EPA's legitimate interests.

b. Risk Provisions

In contrast, the following passages contemplate conduct that ***merely poses a risk*** to EPA's legitimate interests: "Outside employment that ***may*** create an appearance of impropriety or appearance of a conflict of interest." By including ***may,*** EPA expressly intends to prohibit conduct that merely threatens (poses a risk to) its legitimate interests and implicitly intends to condemn conduct that has actually undermined its legitimate interests.[42] The other risk provision in this dispute states that: "Outside employment with dates of performance that is ***pre-arranged months in advance*** and ***reasonably static*** is

[41] Joint Exhibit 4 (emphasis added).

[42] Rules that ***expressly*** prohibit unreasonable ***threats*** to legitimate interests presumptively prohibit ***actual*** adverse impacts to legitimate interests. The reverse of this proposition, however, is not necessarily true. That is, a rule that protects only against actual impact does not necessarily address mere threats to legitimate interest.

favored.[43] Although the element of risk aversion does not appear on the face of this provision, it inheres there, nevertheless. The provision seeks to render employees' outside employment stable and predictable apparently to reduce the ***risk*** that outside employment ***will conflict*** with EPA's core business hours and other legitimate interests.

B. Grievant's Private Legal Practice Before Policy

Before EPA promulgated the Policy, the Grievant conducted his private legal practice without ***substantial*** adverse impact on either his "work" or his "attendance." Specifically, he missed an EPA meeting because he took leave from his EPA duties to address matters in his private practice. Here, the private practice clearly encroached upon the Grievant's "attendance" if not his "work"[44] and would have violated the Policy's impact provisions had they been extant. However, since this event predated the Policy, there is no violation. More important, under the impact provisions, the EPA may not prohibit the Grievant from engaging in private legal practice unless that practice again undermines either the Grievant's "work" or "attendance." In other words, should the Grievant ever allow his private practice to adversely impact either his "work" or "attendance," EPA would then have grounds, under the impact provisions, to prohibit the Grievant engaging in a private legal practice.

Prior to the Policy, the Grievant also admitted scheduling his EPA duties around his private practice, rather than the reverse. Evidence in the arbitral record does not establish whether these events ***actually impacted*** either the Grievant's "work" or "attendance." Therefore, these events would not have violated the impact provisions, though, as discussed below, they likely would have run afoul of the risk provisions.

[43] *Id.*, at 2 (emphasis added).
[44] The issue is whether attending that meeting was part of the job description of a Staff Attorney 3.

C. Application of the Impact Provisions to Grievant's Current Legal Practice

Preponderant evidence in the arbitral record ***does not*** establish that the EPA may rely on the impact provisions to prohibit the Grievant from engaging in a private legal practice. Although the foregoing events betray a tension between the Grievant's private practice and his responsibilities to EPA, prudent planning on his part could conceivably ***lessen*** that tension. That tension, however, would hardly vanish because EPA's core business hours overlap those of the Grievant's private practice. Ultimately, then, unless the private practice actually impaired the Grievant's "work" or "attendance," the impact provisions would not prohibit his private practice, unless EPA demonstrated deleterious nexus between the private practice and either the Grievant's "work" or his "attendance." Absent such a ***demonstrated*** link, however, the impact provisions are impotent regarding the Grievant's, private practice. Imposition of such a prohibition under the impact provisions without the demonstrated nexus constitutes an ***unreasonable application*** of those provisions, ***in violation of Article 44*** of the Collective-bargaining Agreement.

D. Application of Risk Provisions to Grievant's Current Legal Practice

The Policy's risk provision states: "Outside employment that ***may create*** an appearance of impropriety or appearance of a conflict of interest is disfavored.[45] The issue is whether the foregoing provision prohibits the Grievant from conducting a private legal practice that may "create an appearance of impropriety."[46] As set forth below, application of the risk provision is the pivotal or dispositive issue in the instant dispute.

Here, EPA argues that the Grievant's private practice will likely violate the risk provision because members of the public may view as improper the Grievant's practicing law during EPA's core business hours, irrespective of any actual or potential impact on the Grievant's "work" or "attendance." EPA argues further that the Grievant's private practice could, thereby, embarrass the Agency, or sully its

[45] Joint Exhibit 4, at 2.
[46] *Id.*

reputation. In stark contrast, the Union insists that EPA's concerns about such prospective embarrassment or reputational assassination are irrelevant because the Policy neither sanctions nor addresses such anticipatory events. In other words, according to the Union, the Policy does not contemplate outside employment that threatens an *appearance of impropriety*. In the Union's view, the Policy condemns outside employment if and only if it actually undermines the Grievant's "work" or "attendance."

EPA prevails on this pivotal issue for at least three reasons. First, the Arbitrator has already held that any employer, including EPA, has the right to protect its legitimate interests from unreasonable risks/threats. Second, the Management Rights Clause provides in relevant part: "[T]he Employer retains the rights to . . . 5) make any and all rules and regulations."[47] Although this language does authorize EPA to promulgate any and all rules and regulations, Article 44, limits this authority with the rule of ***reasonableness,*** which undoubtedly includes rules to protect EPA's legitimate interests. In the instant case, the risk provision is facially reasonable and, as discussed below, reasonably applied to protect EPA's legitimate interests. Nor could one seriously argue that EPA's reputation is not a legitimate interest.

Third, because the Grievant must conduct most, if not all, of his private practice during EPA's core business hours, there is a continual risk/threat that members of the public will identify him as an EPA attorney who practices law during EPA's core business hours. Indeed, the likelihood of such an event is indisputable, since the instant dispute arose because one of the Grievant's clients complained about his allegedly practicing law on EPA's time, and the news media predictably disseminated this image of EPA. Such unflattering publicity either will or might tarnish EPA's reputation, thereby "embarrassing" the Agency. Based on the foregoing discussion, the Arbitrator holds that EPA ***violated neither Articles 5 nor 44*** of the Collective-bargaining Agreement by ***prohibiting*** the Grievant's private practice under this risk provision.

[47] Joint Exhibit 1, at 12.

E. Pre-Arrangement/Reasonably Static Standard

The Policy states in relevant part: "Outside employment with dates of performance that is ***pre-arranged months in advance*** and ***reasonably static*** is favored."[48] The issue is whether EPA ***reasonably*** applied this risk provision in the instant case. EPA contends that the Grievant's private practice is not properly prearranged or reasonably static. The Union does not specifically address the application of this particular provision to the Grievant's private practice.

The Arbitrator holds that EPA did not reasonably apply this risk provision in the instant case. Essentially, EPA has not established a link between the prearranged/reasonable standard and its legitimate interest. Instead, EPA simply observes that the Grievant's private practice is neither prearranged for the required length of time nor reasonably static during that period. EPA offers neither useful discussion nor elucidating explanation as to exactly how this risk provision might shield the Grievant's "work" or "attendance" from erosion that could result from his private practice.

Absent preponderant evidence in the arbitral record as a whole establishing a nexus between this risk provision and EPA's legitimate interests, the Undersigned is not persuaded that this risk provision was reasonably applied in the instant case. Restated, the ambiguity surrounding the existence of the foregoing nexus is resolved against EPA, which has the burden of persuasion regarding this issue. Consequently, the Arbitrator holds that EPA's attempt to apply this risk provision to the Grievant's private practice is, therefore, unreasonable and, hence, violative of Article 44 of the Collective-bargaining Agreement.

VII. The Award

For all the foregoing reasons, the Grievant is hereby **denied** in its entirety.

Robert Brookins

Robert Brookins, Professor of Law, Labor Arbitrator, J.D. Ph.D.

[48] Joint Exhibit 4, at 2 (emphasis added).