**OCB AWARD NUMBER: 2191**

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| **SUBJECT:** | **ARB SUMMARY # 2191** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **DAVID LONG** |
| **OCB GRIEVANCE NUMBER:** | **12-00-20110702-0190-01-14; and, 12-00-20110702-0191-01-13** |
| **DEPARTMENT:** | **EPA** |
| **UNION:** | **OCSEA** |
| **ARBITRATOR:** | **Robert Brookins** |
| **GRIEVANT NAME:** | **Donald Vanterpool** |
| **MANAGEMENT ADVOCATE:** | **Brian Cook** |
| **UNION ADVOCATE:** | **Thomas Cochrane** |
| **ARBITRATION DATE:** | **09/25/2012** |
| **DECISION DATE:** | **01/06/2013** |
| **DECISION:** | **Denied** |
| **CONTRACT SECTIONS:** | **Article 5 – Management Rights; Article 44 – Miscellaneous** |
| **OCB RESEARCH CODES:** | **2.01 – Management Rights; 115.2011 Flextime; 118.6561 – Work Rules-In****General; 115.251 – Work Schedule Changes; 124.45 – Outside Employment** |

**HOLDING: Grievance denied. The Arbitrator denied the grievance disputing an outside employment request because the Grievant’s private law practice could potentially jeopardize the agency’s reputation. In order to manage his private case load, the Grievant had to regularly work on his private cases during the agency’s core business hours. Although the Grievant typically used approved leave or flexed his schedule to do so, the Grievant’s practice presented a “continuous risk/threat” that the public would presume that the Grievant was using state time for personal profit, consequently injuring the agency’s reputation.**

Donald Vanterpool, Grievant, is a Staff Attorney 3 at the Ohio Environmental Protection Agency (“EPA” or “the Agency”) with twenty-five years of service at the time of the dispute. Since his 1988 hire date, the Grievant also maintained a private legal practice representing clients in family, personal injury, and probate matters.

Despite the pressures of private practice, the Grievant consistently met his EPA obligations. The Grievant’s EPA schedule was extremely flexible, and the Grievant could adjust his lunch breaks and/or his start and end time to accommodate his private practice appointments. When confronted with conflicts between his EPA duties and his private practice, the Grievant would petition the court to reschedule his hearings or to grant a continuance. The Grievant also used approved leave to cover absences related to his private practice.

This dispute arose when one of the Grievant’s private clients complained to the Ohio Office of the Inspector General (“OIG”) that the Grievant practiced law on the Agency’s time. In sum, the OIG investigated the matter and reported that the Grievant had his supervisor’s approval to flex his time or to take other leave in order to advise his private clients. In their report, the OIG criticized the EPA’s lenient flex time practices. Additionally, the *Columbus Dispatch* published two articles alleging that the Grievant “improperly worked on cases for his private law practice wile on the clock for the state.” Thereafter, the EPA issued a new Outside Employment Policy requiring employees to obtain managerial approval before conducting outside employment that conflicted with the Agency’s “core business hours.” In part, the policy read, “Outside employment with dates of performance that is pre-arranged months in advance and reasonably static is favored” (the “Reasonably Static Standard”). The Grievant subsequently requested permission to continue his private law practice, and pursuant to the new policy, the agency denied his request based on the potential appearance of impropriety.

The arbitrator determined that the Agency did not violate Articles 5 or 44 of the contract when it denied the Grievant’s request for outside employment. The arbitrator explained that employers have a right to make reasonable rules and regulations to protect their legitimate interests, such as reputation, from unreasonable risks/threats. The arbitrator concluded that the Grievant’s private practice may jeopardize the Agency’s reputation. In light of the OIG investigation and the *Dispatch* articles, the arbitrator reasoned that the Grievant’s practice presented a “continual risk/threat” that the public would presume that the Grievant was abusing state time and resources for personal profit. However, the Arbitrator noted that the Agency’s application of the “Reasonably Static Standard” violated Article 44 because the Agency did not establish a nexus between the standard and its legitimate interests. Nevertheless, the arbitrator denied the grievance in its entirety.