



In the Matter of:

ORVILLE LEWIS, JR.,

ARB CASE NO. 10-008

COMPLAINANT,

ALJ CASE NO. 2009-STA-039

v.

DATE: June 16, 2011

**VIRGINIA COMMONWEALTH
UNIVERSITY POLICE DEPARTMENT,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Orville Lewis, Jr., *pro se*, Petersburg, Virginia

For the Respondent:

**Martha Parrish, *Virginia Commonwealth University Office of the General Counsel*,
Richmond, Virginia**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado,
Administrative Appeals Judge; and Joanne Royce, *Administrative Appeals Judge***

FINAL DECISION AND ORDER

Orville Lewis, Jr. filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, the Virginia Commonwealth University Police Department (VCU), violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-

codified, when it terminated his employment. 49 U.S.C.A. § 31105 (Thomson/West 2007 & Supp. 2010).

We review Lewis's case pursuant to Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge." 29 C.F.R. § 1978.109(c)(2010).

In reviewing VCU's motion for summary decision, the ALJ focused solely on the issue of coverage, given that the STAA excludes state employees from coverage. *See* 49 U.S.C.A. § 31105(j)(2). Whether Lewis was a state employee necessarily involves a mixed question of fact and law. The ALJ found that Lewis was a VCU employee based on an uncontested affidavit that said Lewis was employed by VCU. This fact is undisputed. The legal issue is whether VCU is the "state." VCU argues that members of its staff are employees of the Commonwealth of Virginia. Resp. Br. at 4. Lewis does not deny that VCU is "a state" under the STAA or that he was employed by the Commonwealth of Virginia. Consequently, Lewis has essentially conceded that he is excepted from coverage under STAA because he is a state employee. Nevertheless, whether VCU is "a state" under the STAA is not an issue that can be decided by the admission or stipulation of the parties; it must be decided by law. The STAA does not define the term "state." However, we believe that Virginia statutes and prior case law sufficiently answer the legal issue.

We note that Virginia federal courts have repeatedly used eight factors to determine whether a university or other entity is the "state."¹ Those are: (1) whether and to what extent any judgment will be payable from the state treasury; (2) the extent of funding provided to the institution by the state; (3) the extent of the state's control in appointing the governing body of the institution; (4) the degree of the institution's autonomy over its operations; (5) whether the institution is separately incorporated; (6) whether it has the power to sue and be sued and to enter into contracts; (7) whether its property is immune from state taxation; and (8) whether the institution's function is governmental or proprietary.² We see no reason to deviate from the *Jacobs* factors to decide this case.

Most of the *Jacobs* factors can be determined in this case by looking to the Virginia Code. Pursuant to that Code, the Commonwealth of Virginia established VCU as "a corporation consisting of the board of visitors of [VCU]" which is under the control of Virginia's General Assembly. Va. Code § 23-50.4. All of VCU's "real estate and personal property [is] the property of the Commonwealth." Va. Code § 23-50.5. The Governor of Virginia appoints VCU's board of visitors subject to confirmation by the General Assembly. Va. Code § 23-50.6. VCU was formed for the purpose of establishing and maintaining programs of education. Va.

¹ *See, e.g., Jacobs v. College of William & Mary*, 495 F. Supp. 183, 189 (E.D. Va. 1980) (identifying the eight factors we note in our decision). *Cf. York v. Jones*, 717 F. Supp. 421, 428 (E.D. Va. 1989) (citing the same eight factors but noting the importance of local law as an additional factor).

² *See Jacobs*, 495 F. Supp. at 189.

Code § 23-50.7. The Commonwealth of Virginia appropriates funds to VCU for VCU to perform its functions. Va. Code § 23-50.8. The board of visitors must first obtain approval from the Governor of Virginia to convey any real estate. Va. Code § 23-50.13.

Applying the *Jacobs* factors, we note that VCU essentially parallels the College of William and Mary, which was found to be an arm of the state in *Jacobs*. Consequently, we agree that the state is the real party in interest in this case, and that VCU is the “state” as intended by the STAA.

After reviewing the record and the ALJ’s recommended decision and order, we agree with the ALJ’s conclusion that (1) there is no genuine issue of material fact that Lewis was a VCU employee, (2) VCU is the “state” for purposes of the STAA, and (3) VCU is entitled to judgment in its favor, as a matter of law, because Lewis, as an employee of a “state,” is not a covered “employee” under the STAA. Therefore, we affirm the ALJ’s recommended decision to dismiss this case.

CONCLUSION

Accordingly, we affirm the ALJ’s order and **DENY** Lewis’s complaint.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge