

No. 35712-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

Court of Appeals Division II Case No. 32664-7-II  
Thurston Superior Court Case No. 04-2-02084-8  
(PAB No. RULE-03-0008)

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BENJAPON SAKKARAPOPE, Appellant.

v.

WASHINGTON STATE UNIVERSITY, Respondent.

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BRIEF FOR APPELLANT

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Benjapon Sakkarapope,  
714 South Jefferson Street  
Moscow, ID 83843-3030  
Phone: (208) 882-2138

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPARTMENT OF JUSTICE

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## **A. ASSIGNMENTS OF ERROR**

### **(a) Assignment of Error**

The trial court erred in denying Sakkarapope's request for expenses, costs and fees, and for sanction; the Order entered December 22, 2006:

It is further ORDERED that Petitioner is granted his filing fee to the superior court but that the remainder of Petitioner's request for fees, costs, and sanction are hereby denied.

### **(b) Issues Pertaining to Assignments of Error**

**No.1:** Whether Sakkarapope is a prevailing party and entitled to recover costs, expenses and fees incurred in the judicial review from the date the petition filed in the trial court, October 11, 2004, to the date the final order was entered, December 22, 2006, including such costs, expenses and fees incurred in all appeals of interlocutory decisions, pursuant to Civil Rule 54(d); RCW 4.84.

**No. 2:** Whether Sakkarapope is entitled to award attorney fees under a remedial action statute pursuant to RCW 49.48.030.

**No. 3:** Whether Counsel Donna Stambaugh filed the pleadings and/or documents in the courts that did not comply with the Civil Rule 11, and violated the Rule of Professional Conduct, RPC 3.1, 3.4 and 8.4; thus, it is subject to sanction under the rules.

**No.4:** Whether WSU and its counsel, Donna Stambaugh, committed fraud

and misrepresentation, and Respondent's defense is frivolous and made in bad faith; thus, Sakkarapope is entitled to award triple expenses, costs and fees upon sanction for fraud and misrepresentation, and frivolous defenses pursuant to RCW 4.84; Civil Rule 11.

## **B. STATEMENT OF THE CASE<sup>1</sup>**

(1) RCW 41.06.070(1) provides that student employees exempt from the provision, but what constitutes "a student" for employment purpose is defined by the Washington Personnel Resources Board (PRB). The PRB defines the exemption positions in WAC 251-04-040 and a procedure for monitoring and controlling in **WAC 251-19-120(7)**:

Each institution shall develop for director approval a procedure which indicates its system for controlling and monitoring exempt positions as identified in chapter 41.06 RCW.

On **July 23, 1990**, Washington State University (WSU) submitted its procedures for controlling and monitoring temporary employees in

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<sup>1</sup> The Clerk's Papers previously filed in this court in the appeal of interlocutory decision, case No. 32664-7-II is cited as "CP-I," and the supplemental Clerk's Paper filed in this case at hand is cited as "CP-II." The agency Certified Records was previously filed in this court in the appeal of interlocutory decision, case No. 32664-7-II is cited as "CR." Exhibits of the Findings, Conclusions, and Determination of the Director ("FCDD") entered dated July 8, 2003 will be cited as it is designated, i.e., Exhibit E-1 thru E-16, (see the PAB's Certified Records ("CR") 159-320 or CP-I 260-413). Exhibits of Appellant's Document submitted to the PAB at the hearing of July 13, 2004 will be cited as Exhibit 1 thru 4, (see CP-I 515-595). Exhibits of the Errors in the Findings, Conclusions, and Determination of the Director ("Errors/DOP"), dated October 10, 2003 will be cited as it is designated, i.e., Exhibit A thru H, (CP-I 439-514; CR 1-158)

accordance with **WAC 251-19-120(7)** for approval by the Director of Higher Education Personnel Board, and designated **Karen Kruse** as a contact person in that regard. WSU by Lynda L. Brown was notified of the Director's approval in Director John A. Spitz's letter dated **August 30, 1990**. (CP-II 174-188) The approved Washington State University Procedures for Insuring Compliance with HEPB Rules Controlling Student and Non-Student Temporary Employment defines the term, "students" as:

Student employees are enrolled at Washington State University (WSU) for a minimum of **seven credits during the fall or spring semesters and four credits during the summer session**. They work 516 hours or less in any six consecutive months, exclusive of hours worked in a temporary position (s) during the summer and other breaks in the academic years, provided such employment does not take the place of a classified employee laid off due to lack of funds or lack of work or fill a position currently or formally occupied by a classified employee during the current or prior calendar or fiscal year, whichever is longer. WAC 251-04-040(2) [Emphasis added] (CP-II 179)

Further, WAC 251-19-120(1) provides that "Temporary appointment may be made only to meet employment conditions set forth in the definition of "temporary appointment" in WAC 251-01-415." WAC 251-01-415(2): "Performance of work which does not exceed one thousand fifty hours in any twelve consecutive month period from the original date of hire or October 1, 1989, whichever is later, in accordance with WAC 251-04-040(6)." The Director of the Department of Personnel

(DOP) also set precedents as follow:

(i) The DOP determined that the WSU's monitoring practice of using the beginning of pay period (the 1st and the 16th day of the month) to start tracking hours was not proper. *Bill Williams v. WSU*, HEU 3968 (1994, by Kari Lade).

(ii) The DOP repeatedly ruled in the other cases on the same basis that "Since an employee was not properly informed of the conditions of these appointments, he did not take part in any willful failure to comply with the HEPB rules." *McCrary v. Univ. of Wash.*, HEU 4255 (2000, by Kari Lade); *Hayward v. Bellevue Community College*, HEU 4251(1999, by Kris Brophy); *Kelsey v. Western Wash. Univ.*, HEU 4279; *Schmidt v. Western Washington Univ.*, HEU 4269(2000, by Kari Lade).

(iii) "Remedial Action is intended to afford non-classified persons access to the classified service through appeal to the Director of the Higher Education Personnel Board when certain appointment criteria have not been met by an institution" set forth in WAC 251-12-600(1). *Tony Jongkol v. University of Washington*, HEU No. 3534 (by Kari Lade); *Harborview Medical Interpreters et. al. v. University of Washington (HMC)*, HEU No. 4283 (2000, by Kris Brophy).

(2) Sakkarapope had been continuously employed by the Department of Crop and Soil Sciences, Washington State University

("WSU") since the initial hiring date of March 21, 1995, through its temporary employment program, Position title: Service Worker I. (Exhibit ("Exh.") E-4, E-5; CR at 268, 261-3). While the last reappointment was made from May 16, 2002 thru May 15, 2003, Sakkarapope's employment was terminated due to the work hour of 1,165.25 non-student hours exceeded the 1050 hours limit effective February 21, 2003. (Exh. E-7, E-1F; CR 201, 216). At the time of termination, the total non-student/non-exempt work hours was determined by using the *Business Policies and Procedures Manual*, "Personnel Rule 60.26," which the term, "students," is defined as:

For purposes of temporary employment, a student is one who is enrolled at WSU for six or more credit hours during fall or spring semesters. During summer session a student is one who is enrolled for three or more credit hours<sup>2</sup>. (CP-I at 298)

Ms. Laurie Stemmene, WSU's witness, testified before the PAB at the July 13, 2004, hearing that:

SAKKARAPOPE: How many, how long have you used the same criteria to monitor temp employee's hours that's on this exhibit?

STEMMENE: The 1050 hour limitation came in, I believe, 1989. (CR at 383)

Further, the Personnel Rule 60.26 indicates that "Employees

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<sup>2</sup> The number of credit enrollment was reduced by one credit (to six and three, respectively) where the DOP and WSU still conceal the full records in this regard of the change. It is believed that it was changed prior to November, 2000. However, the change will not affect the determination of the total non-student/non-exempt work hours and the outcome in this case.

appointed to duties included in a classified staff job description for 20 or more hours per week for six months or longer are classified staff regardless of the source of funds or a specific termination date.” The undisputed fact is that Sakkarapope was assigned to perform a research technician’s job description<sup>3</sup> after Mr. John Pritchett, a research technician<sup>4</sup>, retired in March 2000. Sakkarapope did not perform a duty as a service worker, but as a research technician job which is a classified staff job description subject to civil service laws. Nonetheless, WSU misclassified Sakkarapope’s employment in violation of RCW 49.44.160 by retaining the temporary employment appointments as Service Worker I. It is constituted an unfair practice as defined in RCW 49.44.170.

(3) After Sakkarapope’s request for remedial action pursuant to WAC 251-12-600 was filed with the DOP on February 23, 2003. The **same Karen Kruse**, a designated contact person having the full knowledge of the approved procedures for controlling and monitoring temporary employees in accordance with WAC 251-19-120(7), intentionally committed fraud and misrepresentation of the approved

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<sup>3</sup> There is undisputed fact that the Department of Crop and Soil Sciences made the appointments to a Service Worker I position, but the actual work performed was research technician’s duty--a classified staff job description of “Agricultural Research Technologist I,” Class code: 4504, and these positions are subject to civil service laws. (Exhibit E-5, C and E; CP-I at 352-60, 491, 496-9)

<sup>4</sup> Exhibit F and G show an example of types of duties Sakkarapope had performed, which was obviously not a type of work or duty a job description of a Service Worker I and not a low rate of pay \$7.50 – 10.50 an hour. (CP-I 501-6)

procedure by issuing the letter dated April 24, 2003, deceptively introducing an unpublished definition of a "student" to reconstruct the Exhibit 3 with Exhibit 4 and Revised Exhibit 4 (*see* Exh. E-4, E-8; CR at 259-60, 202-4):

For monitoring purposes WSU uses 6 credit hours to determine student status which exempts the employee from the 1050 hour limit. Hours worked under this definition are reflected in Exhibit 3. Previous decisions from the Higher Education Personnel Board have determined that a student is "enrolled for credit" with no set number of credit hours. Exhibit 4 reflects a total of 811.75 hours as a non-student if we follow this precedent because he for 3 credits fall 2002.

At the PAB's July 13, 2004, hearing, Laurie Stemmene, testified that:

MORGAN: Was the official document computerized payroll document?

STEMMENE: Yes.

.....

MORGAN: Okay. Now was this the document that generated the letter from your office identified in E-1F? Indicates, "Due to notification from WSU Campus Student and Hourly Employment Office, on February 19, that you have exceeded the 1050 hourly limit." Would that have been generated off this document?

STEMMENE: Yes. The information is the same.

MORGAN: So, on February 19, your office notified Mr. Sakkarapope's department that he had exceeded 1050 hours based on E-7?

STEMMENE: Correct.

.....

MORGAN: As E-7, and yet the numbers have changed.

STEMMENE: Correct.

MORGAN: How's that?

STEMMENE: Based on communications from Carey (unintelligible) [Kari Lade] of the Department of Personnel, and email from Mr. Sakkarapope, there was consideration for the, some enrollment and so the summary was adjusted but we did not, we did not adjust the official body of that document.

MORGAN: That was some several months later.

STEMMENE: Correct.

MORGAN: After E-7, after E-1F, when you got to Department of Personnel which was probably close to a year later, then these changes started to be made.

STEMMENE: Correct.

MORGAN: And then we move to E-8, page 2, earning types all stay the same and we've now done a different configuration with the numbers based on disenrollment.

STEMMENE: Correct.

MORGAN: And then page 3 of E-8, now it appears that all of the earning types have been changed in the third section.

STEMMENE: Correct.

MORGAN: Why?

STEMMENE: Based on communications with Mr. Sakkarapope and Carey (unintelligible) [Kari Lade], it was asked for better clarification as to the hours to make earning types also fit.

MORGAN: Prior to February 19, 2003, had the University used the 6 hours?

STEMMENE: Yes. (CR at 393-4)

(4) The DOP entered the Findings, Conclusions, and Determination of the Director dated July 8, 2003 denying a remedial action by adopting the unpublished definition of a "student" as suggested in the Kruse's letter of April 24, 2003, and excluded the Personnel Rule 60.26, 60.27 and 60.05 from its consideration. In the original proceeding, the Director determined whether Sakkarapope's request for remedial action met the four criteria set forth in WAC 251-12-600(1) solely based on WSU's records and without a hearing, either a teleconference or in person, and then concluded that WSU did not comply with the temporary employment appointment.

While there is no dispute that the three of the four criteria for granting a remedial action, WAC 251-12-600(1), are met, the Director denied a remedial action based on the fourth criteria for granting a remedial action--whether non-student work hours exceeded the 1050 limit in any twelve consecutive months since the initial date of hire, by arbitrarily and manipulatively using June 16, 1993, as the initial date of hire, adopting an unpublished definition of a student as who enrolls for "some credits," and retroactively applying WAC 251-04-035, as suggested by WSU. (CP-I 260-413)

The DOP's proceeding was conducted in bad faith, fraud and misrepresentation of facts of laws. The Investigator, Kari Lade, asked some follow-up questions as indicated in her May 6, 2003, email. Despite Sakkarapope's request and objection to their private conversation, WSU did not provide written answer to the questions. Ms. Lade had a private conversation with WSU and conveyed the phone conversation to Sakkarapope on their behalf via email. Ms. Lade was no longer interested in WSU's written responses. (Exh. E-13, E-14, E-15 and H; CP-I 507-14).

Further, on May 6, 2003, Sakkarapope questioned the application of WAC 251-04-035. There was NO exemption provision in effect from September 1 to November 13, 2002, because the WAC 251-04-035 did not exist prior to November 14, 2002: (i) the WAC 251-04-040 (former

exemption provision) was repealed in the July 11, 2002, Personnel Resources Board meeting effective September 1, 2002; and (ii) on an emergency basis, WAC 251-04-035 was reinstated and made effective permanently June 12, 2003. (CP-I 569, 575).

(5) Sakkarapope took the Exceptions to the Director's Determination pursuant to WAC 251-12-600(4)--the Exceptions to the Findings, Conclusions, and Determination of the Director ("Exception") and the Errors in the Findings, Conclusions, and Determination of the Director, ("Errors/DOP") were filed on August 1, and October 10, 2003, respectively. (CP-I 414-514) The PAB did not conduct a full administrative review on the specific items set forth in the exception based on the entire records of the original DOP proceeding, WAC 251-12-600(4), but a partial review as suggested by Counsel Stambaugh.

The fundamental issue before the PAB is central to whether Sakkarapope's non-student work hours exceeded the 1050 hour limit in any twelve consecutive month periods since the initial date of hire of March 21, 1995, WAC 251-12-600, in which it is depended on the questions of law: (i) the definition of a student for WSU's temporary employment purpose (DOP's Exhibit E-1D), (ii) the retroactive application of WAC 251-04-035 and (iii) the beginning date of the twelve consecutive month periods—the initial date of hire.

The PAB entered its Findings of Fact, Conclusions of Law and Order of the Board on October 5, 2004, denying Sakkarapope's request for remedial action. (CP-I 9-14). As suggested by Counsel Stambaugh, the PAB did not consider the Business Policies and Procedures Manual, Personnel Rule 60.26, as part of the state merit system, and erroneously and arbitrarily concluded that Sakkarapope worked only 827.75 hours from March 16, 2002 through February 24, 2003, and the 403.25 hours worked by Sakkarapope from August 26, 2002 through December 20, 2002 was not considered non-student hours. (CR at 5-6)

(6) WSU did not challenge the fact that Sakkarapope's non-student work hours from March 21, 1995 thru March 20, 1996 is total of 1,090 hours regardless of a definition of a student being used. (Exh. B-1; CR at 75). Ms. Laurie Stemmene, testified before the PAB at the July 13, 2004, hearing that based on the published definition of a student as in Personnel Rule 60.26, Sakkarapope's total non-student work hours is 1,231; and by including the work hours during the breaks, the total is 1,297.5 hours, and that "It does exceed 1050," (CR at 379-82; 406-8; Exhibit R-10), in the last 12-month consecutive period of March 16th, 2002, through February 24th, 2003, and is 1,244.5 non-student hours in the last 12-month consecutive period of March 21st, 2002, through February 24th, 2003. (Exhibit B-8; CR at 84)

(7) The PAB's July 13, 2004, hearing (*see* Transcript, CR 321-421) was arbitrary and capricious:

(i) A hearing to review the exception under WAC 251-12-600(4) is on the records of the DOP, not a *de novo* basis. The witness testimony was obviously outside of the scope of the DOP's records and the specific items set forth in the Exception. (Exhibit 3; CP-I 541-6) Despite Sakkarapope's oral objection, the PAB's proceedings were conducted in bad faith and without WSU's pleading, answer to Exception and its amendment (Exhibit 2; CP-I 535-45), Counsel Donna Stambaugh asked the PAB to allow the witness testimonies without subpoena. (CR 323).

(ii) Sakkarapope moved to request for his own witness to testify at the hearing. The PAB ruled that it would sign a subpoena, but would not grant a continuance. (CR 324-7). It was impossible for anyone could proceed under such condition.

(iii) Prior to the hearing, the PAB did not notify the parties whether it would conduct a *de novo* hearing and its reason, but surprised the party at the hearing.

(iv) The Board tossed out the entire Directors' Determination and its records, and the Exceptions and its amendment, and ruled that:

(A) The PAB would render its decision based on only the hearing of July 13, 2003, NOT based on the entire records of Director's

Determination and Sakkarapope's Exceptions and its amendment.

(B) The issue at the hearing was limited to the last twelve consecutive month period beginning March 16, 2002.

(C) The PAB refused to admit Sakkarapope's Memorandum of Authority submitted at the hearing, but allowed Sakkarapope to read some portions to the records of the proceeding. (CR 322-27, 411-2).

(v) Respondent admitted ten exhibits at the hearing. (CP 548-62). The Exhibit R10 was not part of the DOP's exhibits, but was created by the Respondent's witness suggesting 403.25 be student work hours which should be considered exempt from the provision.

(vi) Despite Sakkarapope's objection, the PAB allowed Respondent to introduce the subject matter of immigration status which was outside of the Director's Determination, the Exceptions, and the PAB's jurisdiction. (CR 326-9, 394-505)

(vii) In knowing that the Personnel Rule 60.26 dictates a procedure for employing a non-citizen and that a discrimination in employment based on national origin is prohibited., Counsel Stambaugh misled the PAB of Sakkarapope's employment eligibility and further suggested at the hearing if the PAB granted such remedial action, WSU would terminate Sakkarapope's employment afterward. (CR 352, 417)

(8) A Notice of Appeal was filed with the trial court on October

11, 2004, along with the original motion for summary judgment set forth a hearing dated November 19, 2004. (CP-I 3-53). The trial court then denied summary judgment motions twice. In the trial court proceedings, Counsel Stambaugh did not comply with the judicial standard and professional conducts. The PAB received the Notice of Appeal on October 14, 2004, and has statutory duty to certify the agency's records within 30 days which was due November 15, 2004. RCW 41.64.130(3). Nonetheless, on October 28, 2004, Counsel Stambaugh moved the trial court for a Motion and Objection to Summary Judgment Hearing Date through an ex parte proceeding. (CP-I 60-63). On October 30, 2004, Sakkarapope moved the trial court with Objection to Continuance and Motion to Strike Affidavit of Counsel. (CP-I 65-110). Then, on November 2, 2004, Respondent requested a hearing set forth November 12, 2004. (CP-I 114-5).

On November 6, 2004, Sakkarapope moved the trial court with Status Conference, Renewed Objection to the PAB's Proceeding of Witness Testimony and Motion for Interrogation of Counsel and Determination of Admissibility of Evidence on Appeal. (CP-I 122-43). On November 3, 2004, Respondent served its Response to Motion for Summary Judgment without a supporting affidavit and any other evidence as required by Civil Rule 56(e). (CP-I 117-21). On November 9, 2004, Sakkarapope submitted a Rebuttal and Motion to Strike. (CP-I 146-213).

At the hearing, November 12, 2004, Respondent was default. Counsel Stambaugh did not appear before the trial court at the hearing date requested/set by it, but sent a substitute who did not properly enter a notice of appearance before the court. CR 70.1 Counsel Stambaugh did not notify the court and the adverse party of any substitution. Nonetheless, the trial court granted Respondent a continuance and authorized a new motion for summary judgment. (CP-I 214-5).

Sakkarapope submitted a second Motion for Summary Judgment set forth a hearing, December 17, 2004. Responding and Reply Briefs were filed without affidavit as required by CR 56(e). (CP-I 216-597, 598-606, 633-4). Where the PAB certified the agency's records and the transcript of the July 13, 2004 hearing to the trial court on December 8, 2004,(CR 1-421), Sakkarapope submitted a Motion for a Revisit the First Motion for Summary Judgment and Early Status Conference, (CP-I 643-53), a Request for Disclosure on December 14, and December 13, 2004, respectively. No response by Counsel Stambaugh.(CP-I 654-7).

Despite the fact that the issue before the court is purely a question of law, narrowly the application of the established procedure under WAC 251-19-120(7) which is the so-called Personnel Rule 60.26, the trial court chose to enter an Order Denying Sakkarapope's Motion for Summary Judgment, "...being of the opinion that the Personnel Appeals Board did

not exceed its authority in its review of Rule 03-0008,” (CP-I 659-660), and stating its oral opinion that the PAB generally has authority to conduct such hearing of July 13, 2004. (RP II at 18-20).

(9) On December 17, 2004, a Notice of Appeal to the Court of Appeals was filed. (CP-I 661-63). The appellate courts denied to review the trial court’s decision denying a summary judgment. The matter returned to the trial court for trial on the records. Counsel Stambaugh not only did not file any statement of issue for the status conference, but also failed to appear at the status conference hearing. The trial date was finally set October 6, 2006. Counsel Stambaugh provided nothing new in its responding brief. Its brief was not substantially different from its reply briefs to the two summary judgment motions in 2004.

Counsel Stambaugh not only concealed the fact of law regarding the DOP’s approved procedure for monitoring and controlling the exempt positions in accordance with WAC 251-19-120(7), but also misled and lied to the court of the fact at the trial, dated October 6, 2006:

**MS. STAMBAUGH: I don't believe I've ever seen a policy from WSU that was developed pursuant to that rule. They may have one.** I don't believe the policy in question is it. It is not a WAC. It is not a published policy. It was not made pursuant to any rule-making authority. It is an internal policy and procedure as to how they track student hours. And as you have seen from the record, there are certain reasons why they have chosen six hours for financial aid purposes, for benefit purposes of the Department of Retirement Systems, for IRS purposes, and so

forth. And, normally, the six-hour provision works fine. In this particular instance, it didn't work so fine, because there was a period of time when Mr. Sakkarapope was only enrolled for three hours. What the PAB determined and what eventually the DOP determined, through their back and forth -- and again, I wasn't involved in that proceeding. It was between The Department of Personnel, the director's designee, Mr. Sakkarapope, and somebody from WSU -- was that the rule is the rule. That is the published rule, that -- the Civil Service Rule 251, published by The Department of Personnel. That's the rule they have to follow when they look at remedial actions. If the situation were reversed and the rule said anybody less than six hours we're going to discount for remedial action, but you have to be enrolled for six hours or less -- or more, excuse me, and WSU said, no, we are going to count all student hours, well, they would be bound by the rule. They can't just make a policy that's contrary to the rule. And that's what Mr. Morgan found when he issued his order, that the rule in question that Mr. Sakkarapope has appealed -- he didn't appeal the policy. He can't. PAB has no jurisdiction to hear violations of an agency's policy. The rule in question said student hours are exempted. So, again, that's not a published rule. It's an internal policy and procedure. And as a caveat, I believe they put some procedure in place so that this kind of problem doesn't happen again.

**THE COURT:** Well, it says here "each institution," that would be WSU, "shall develop for director approval a procedure which indicates its system for controlling and monitoring exempt positions as identified in Chapter 41.06."

MS. STAMBAUGH: They may have that.

THE COURT: 41.06 is the chapter we're talking about.

**MS. STAMBAUGH:** That may have that in rule somewhere and that was approved by the director somewhere, but I don't believe that one is it.

THE COURT: If it is --

**MS. STAMBAUGH:** I mean, this wasn't in evidence before the Board, but I asked them later, and they said, that rule was never approved by the Department of Personnel. And again, that's not in evidence before this Board -- or before this court. It wasn't in evidence before the PAB. They looked at the rule. The PAB looked at the rule, the DOP looked at the rule, and said any student hours when you're enrolled as a student does not count. Does Your Honor have any other questions that I might answer on

that issue?

THE COURT: No.

MS. STAMBAUGH: I don't know if that helps. **But that's what I was advised, that that rule wasn't one that was approved by the Department of Personnel. And I'm not saying they may not have gotten one approved like they were supposed to, but I don't know what it is.**

THE COURT: Okay. [Emphasis added] (*See*, Tr. 12-06-2006 at 21-22)

The trial court was having opinion that the relationship between the Business Policies and Procedures Manual, 60.26, a published temporary employee regulation by Washington State University, and WAC 251-12-600 is the most troubling issue. WAC 251-12-600 provides that student hours are not counted as temporary employment hours for the 1,050-hour limit. In that regulation and in no other regulation promulgated by the Department of Personnel is the concept of "student" defined. Nevertheless, an accompanying regulation in the same chapter as the Section 600 regulation (WAC 251-12-600), **specifically WAC 251-19-120(7) requires that an agency in the position of the university was required to make such procedures for tracking employment hours.** The evidence in this case indicates that the Business Policies and Procedures Manual, Personnel Rule 60.26, for purposes of monitoring Sakkarapope's temporary employment hours, was that the rule of six credit hours or more to establish Sakkarapope's status as a student was

used since 1989 or prior to February 19, 2003. The PAB ignored that rule and declared that it was not bound by the informal policies of the university.

**Under those circumstances, the trial court concludes that the Personnel Appeals Board committed error of law in declining to consider that rule. The legislative intent in the chapter from which these regulations spring, Chapter 41.06 RCW, has as its legislative intent or expression of purpose that the rights of workers should be protected, and the Personnel Appeals Board should have considered that rule.**

Further, the evidence in this case shows that Sakkarapope met his burden to bring the issue to the Personnel Appeals Board and argue it before them. The issue was raised but not proved to their satisfaction. After the issue was raised before the Board, and in the absence of evidence forthcoming from the employee, the Board should have requested information about that rule from WSU or the Department of Personnel to determine if the rule was part of the procedure required by WAC 251-19-120(7). (Tr. Oral Decision 10-06-2006 at 8-11)

Counsel Stambaugh continued to mislead and lie to the court at the presentment hearing of December 1, 2006:

THE COURT: Let's stop there. Ms. Stambaugh, if this

information is correct, and I have no reason to doubt that it's not correct, then the first issue that I remanded back seems to have been clearly already decided back in 1990, and that the rule that was relied upon by Mr. Sakkarapope in his presentation was, in fact, approved pursuant to the WACs and have been part of the case.

**MS. STAMBAUGH: I guess my first inquiry is, is this newly admitted evidence?**

**THE COURT: No. But it's information that is of concern to me at this point.**

MS. STAMBAUGH: Well, I can respond after he's finished if you like or --

THE COURT: All right. I want to hear from you about this now.

MS. STAMBAUGH: Okay.

THE COURT: I understand the petitioner's position here.

MS. STAMBAUGH: Okay.

THE COURT: May I hear your response.

MS. STAMBAUGH: When we were here before, you asked about the Business Policies and Procedures Manual 60.26. **And if we go back to the PAB proceeding, this issue came up. And to be honest with you, I didn't give it much thought,** because I knew that the PAB would do what they normally do. They always say, we do not have jurisdiction to determine a violation of an agency's internal policies. In fact, that's what they said. **I didn't really give it much thought.** After the proceedings were over, I asked Ms. Kruse, who was then employed at WSU -- she's no longer there, she's retired -- did you get your Business Policies and Procedures Manual approved by the Department of Personnel, and she said no. I didn't ask her to check further whether there was an earlier -- because this doesn't say "BPP" on it anywhere. **It doesn't say "60.26" -- whether there was an earlier monitoring policy. And if you recall, the rule says --**

**THE COURT: Now, wait a minute.**

MS. STAMBAUGH: -- the policy for monitoring exempt -

**THE COURT: Let me stop you right there. Be more specific when you make statements like this doesn't --**

MS. STAMBAUGH: This policy that he's now presenting to you that he got a couple weeks ago doesn't say "60.26." It doesn't say "BPPM." It's not the same policy as 60.26.

THE COURT: Okay.

MS. STAMBAUGH: And, again, before the PAB, and what I knew four weeks ago -- eight weeks ago when we were here was that, my vague recollection was somebody had told me, no, the Business Policies and Procedures Manual was not approved by DOP. And, in fact, the DOP's letter says as much. **We don't have anything that says "60.26" on the top. After our last hearing, I went back to Ms. Kruse's successor who looked in the file and found that there was something from 1989, a policy to monitor exempt employment, which is what the statute requires -- or, excuse me, what the WAC requires, that was sent to DOP. And I just presented that to you, because that was the evidence that I discovered after our last time here. So I wanted to make that clear to you, that I went back and checked, and --**

THE COURT: When you say you presented that to me, you mean you're telling me that now, or have you submitted it to me on --

MS. STAMBAUGH: **When we were here October 4th.**

THE COURT: Okay.

MS. STAMBAUGH: You asked about it, and I said to my recollection, **way back in 2004**, this issue came up. And again, policies -- they don't normally rule on violations of agency policy. That's what they did in this case. They said we don't have jurisdiction to rule on an agency policy. They can't turn a policy into a WAC, nor can DOP. And that's my recollection. That's as good as I could recall it two years earlier, that somewhere it wasn't a big deal, again, **because I didn't think it was a big deal**, because they don't usually determine violations of policy. **So I just said, by the way, was your BPPM ever approved by DOP, and she said no. After it came up in October, I went back and asked them. Had Mr. Sakkarapope signed my order with no presentment, I would have sent that to you in a letter. But since we're here today, I'm submitting it to you, truthfulness to the tribunal. I went back and followed up, and she went and found -- again, Ms. Kruse's successor found something that showed they went back to 1989. They submitted a policy for monitoring exempt employment.**

THE COURT: Okay. All right.

MS. STAMBAUGH: I'd also note that Mr. Sakkarapope's documents indicate a letter from Ms. Kruse that says the HEP Board president normally refers to just a student with no hours

attached. So that's what they were going on, as well.

MR. SAKKARAPOPE: Your Honor --

THE COURT: Yes.

MR. SAKKARAPOPE: -- I would like to direct you to Page No. 3 of the fax number -- the fax document.

THE COURT: All right.

MR. SAKKARAPOPE: Page No. 3, the letter from WSU Director of Human Resource Services to Mr. John Spitz.

THE COURT: Yes.

MR. SAKKARAPOPE: And the letter is July 23rd. At the bottom -- at the last sentence of the letter from WSU, it says, "Please refer any questions you have regarding these procedures to Karen Kruse."

THE COURT: I see --

MR. SAKKARAPOPE: **This Karen Kruse is the same person that she was talking about.**

THE COURT: **I see that it says, "Please refer any questions you have regarding these procedures to Karen Kruse." All right.**

MR. SAKKARAPOPE: **That is -- they know the facts in the beginning. They are lying in the beginning, Your Honor.** [Emphasis added] (Tr. 12-01-2006 at 8-11)

(10) By the clear existing procedure established in 1990, the only "monitoring and controlling temporary exempt positions" procedure approved by the DOP pursuant to WAC 251-19-120(7) defines a student for temporary employment purpose is one who enrolled at WSU for "a minimum of seven credits during the fall or spring semesters and four credits during the summer session." Also, the languages in the BPPM, Section 60.26, and on the temporary Employment Appointment Forms clearly are consistent with the original procedure approved by the DOP.

The PAB Board committed error of law by excluding the work

hour of 403.25 hours during fall 2002 semester, where Sakkarapope enrolled for 3 credits. In fact, the 403.25 hours, in combination of 827.75 hours, shall constitute hours in excess of the 1,050 hour limit.

The appellate courts denied review of the trial court's decision denying the summary judgments. The Commissioner of this court was having the opinion<sup>5</sup> that:

...Likewise, the court did not err in limiting the issues to be considered at the summary judgment hearing. Even where the evidentiary facts are undisputed, if reasonable minds could draw different conclusions from those facts, then summary judgment is not proper. *Sheriffs' Assoc. v. Chelam County*, 109 Wn.2d 282, 295 (1987)...

The rulings were not supported by the facts and existing authorities, but based on Counsel Stambaugh's fraud and misrepresentation of facts and laws as presented therein. Counsel Stambaugh concealed and misrepresented the approved procedure from day one and continued to this date; never made any statement of apology.

## **C. ARGUMENTS**

### **(a) Standard Review**

Costs shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute. Civil Rule 54(d).

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<sup>5</sup> The Commissioner's Ruling Denying Review dated September 21, 2005, Case No. 32664-7-II.

RAP 18.9(a) permits the imposition of sanctions for pursuit of a frivolous appeal. For purposes of a statute under which attorney fees may be awarded to the prevailing party in an action, the prevailing party generally is the party against whom an affirmative judgment has not been rendered. In deciding how to apply an attorney fee statute, a court considers the statute's underlying purpose and the overall purpose of the statutory scheme of which the attorney fee statute is a part. A statute's mandate of a liberal construction applies as well to an attorney fee provision in the statute. A trial court's discretionary award of attorney fees will not be disturbed on appeal absent an abuse of discretion. Discretion is not abused if the award has a tenable basis in the record. An award of attorney fees will not be affirmed on review if the record does not contain findings of fact and conclusions of law adequately supporting the award. An appellate court will vacate the attorney fee award and remand the case for entry of findings and conclusions explaining how the award was calculated. *CONDO OWNERS v. COY*, 102 Wn. App. 697 (2000)

**(b) Sakkarapope Is The Prevailing Party And Entitled To Recover Reasonable Expenses Incurred In The Action.**

The fundamental issue before the PAB and the trial court is central to whether Sakkarapope's non-student work hours exceeded the 1050 hour

limit in any twelve consecutive month periods since the initial date of hire of March 21, 1995, WAC 251-12-600, in which it is depended on the application of the Washington State University Procedures for Insuring Compliance with HEPB Rules Controlling Student and Non-Student Temporary Employment approved by the Director John A. Spitz in **August, 1990**, (CP-II 174-188), published in the WSU's *Business Policies and Procedures Manual*, (BPPM), under the so-called section "Personnel Rule 60.26." *See also*, Part B Section (2) above.

Respondent and its counsel chose to conceal and misleadingly manipulate the fact of the DOP's approved procedure in compliance with WAC 251-19-120(7); and repeatedly refused to abide by its rule and procedure from day one. The PAB arbitrarily and capriciously discarded a definition of "a student" established by WAC 251-19-120(7) and entered its October 5, 2004, finding and conclusion of law that:

2.10 The University's policy contains a definition of a "student" for purposes of temporary employment. However, WAC 251-04-035 does not indicate the number of credit hours necessary to be considered a student. Rather, WAC 251-04-035 indicates that the provisions of the chapter and of RCW 41.06.070 do not apply to "Student employed by the institution at which they are enrolled..."

3.3...we conclude that...Petitioner raises issues regarding the University's failure to abide by its policy regarding temporary employment. However, RCW 41.06.170(2) provides for employees to appeal violations of the civil service laws and rules to this board. It does not provide for this board to adjudicate alleged violations of internal agency policies. (CP-I at 13-14)

The trial court finally concluded that the PAB committed error of law in declining to consider that rule, (*see also*, Part B above at 18-9), and determined that Sakkarapope is a prevailing party in the action:

MR. SAKKARAPOPE: ... by the statute RCW 64.30.130(2) which said already clear that if you remand, remand, reverse, and I am the prevailing party.

THE COURT: I agree. You are entitled to recover costs – (Tr. 12-01-2006 at 19)

The trial court order of December 22, 2006, is indeed, the only affirmative judgment against Respondent. The prevailing party upon the judgment is entitled to costs, including, filing fees and reasonable expenses, exclusive of attorneys' fees, incurred in the action. RCW 4.84.010, .030 However, the trial court granted only filling fee to the superior court, which is \$110:

THE COURT: -- that the law provides for you. But in addition to the filing fee that you filed here, you're asking for costs that are certainly not encompassed by the statute or court rule, including your cost of filing an appeal for interlocutory relief with the Court of Appeals which was denied. So you certainly weren't the prevailing party there. But if you were, the appropriate place to obtain recovery for costs in that event would have been at the Court of Appeals. Merely by reason of the fact that you ultimately prevailed on part of the remedy that you were requesting here does not make you the prevailing party in an appeal to the Court of Appeals that you lost. So I'm not going to grant those, because I don't have authority to do that. You've also asked for travel time and additional costs, and those are not costs that are contemplated by the cost recovery statute. So I can't do that. I can grant you recovery of your filing fee.

MR. SAKKARAPOPE: I would like you to add in the same -- your decision in the same order. You don't have to -- have to have a separate order.

THE COURT: All right. Would you please do that, Ms. Stambaugh? As part of the recovery of costs to the prevailing party, I'm awarding recovery of the filing fee here in Superior Court.

Appellant respectfully submits that the trial court erred in denying the request for recovering the expenses. The award of \$110 is unfair and deprived Sakkarapope's right to recover the entire costs, expenses and attorney fees. The requested expenses of \$2,724.58, as of December 1, 2006, (*see*, receipts, Bill of Cost at CP-II 117-164), are actually incurred:

Item	Description	Amount (\$)
1	Filing fees (\$110+\$250)	360.00
2	Verbatim Reports of Proceedings [November 12 and December 17, 2004 = \$275; October 6, 2006 = \$228.75]	503.75
3	Clerk's Papers (CP-I)	347.75
4	Transcript of PAB's July 13, 2004 proceeding	35.00
5	Traveling expenses (Room and gasoline) [Trips to Olympia/Tacoma: October 11-12, November 16-17 and December 16-18, 2004; September 13-14, 2005; May 17-19, October 5-6, and December 1, 2006]	618.17
6	Mailing expenses	445.93
7	Copying costs	413.98
	<b>Total Expenses</b>	<b>2,724.58</b>

The appeal of the interlocutory decision is the party due process right within the original action to have appellate review preventing any useless, unnecessary further proceedings. The denials of review by the

appellate courts did not render any affirmative judgment on merit in the case against Sakkarapope; WSU is not a prevailing party in the action. RAP 18.9. The matter returned to the trial court for further proceeding.

Counsel Stambaugh opposed to the two summary judgment motions and requested for a full trial, which was leading to the interlocutory appeals. It is obvious that the issue before the trial court was purely a matter of law. The full trial proceeding on October 6, 2006, had nothing more than what was already presented in the two summary judgment proceeding. The denial of review was simply no different from giving Counsel Stambaugh for more time to continue its fraud and misrepresentation, unnecessary cost and delay in the litigation. Counsel Stambaugh presented no genuine issue of material fact for trial, but fraud, misrepresentation and lies.

Where any reasonable persons should reach to the ONLY conclusion that the WSU's Procedures was approved in **August, 1990**, and that the four conditions for granting a remedial action are met, a summary judgment is proper. *Sheriffs' Assoc. v. Chelam County*, 109 Wn.2d 282, 295 (1987). The Supreme Court provides that "[t]he motion should be granted only if reasonable persons could reach but one conclusion from all the evidence. *KLINKE v. FAMOUS RECIPE FRIED CHICKEN, INC.*, 94 Wn.2d 255, 256-57, 616 P.2d 644 (1980).

The trial court committed a probable error in denying the summary judgments, preventing the finality of the action in Sakkarapope's favor in the first place, and creating unnecessary costs in litigation to both the courts and the parties. This unnecessary cost would not occur if Counsel Stambaugh had been faithful to the truth, not conceal such approved procedure all along. The appellate courts simply ignored the appealability and denied review as a matter of law. The summary judgment motion should have been granted in the first place in November/December, 2004. The delay of the proceeding does not change the fact of law. It was the courts' and Respondent's choice to allow unnecessary litigations and costs.

Therefore, where the ultimate affirmative judgment against Respondent, under such circumstance, Sakkarapope had been a prevailing party on merit and he is entitled to recover the entire expenses and attorney fees, allowed by applicable statutes, including incurred in the interlocutory decision appeals. The trial court erred in denying the other expenses; it is unfair and deprived of Sakkarapope's interest.

**(c) Attorney Fee Is Allowed Under Remedial Action Statute.**

In *COMMUNITY COLLEGE v. PERSONNEL BOARD*, 107 Wn.2d 427, 730 P.2d 653 (1986), the Supreme Court articulated the test whether

it is appropriate to authorize awards of attorney fees:

"[A]n allowance [of attorney fees] is not automatic, but should be reserved for cases in which a defense to the unfair labor practice charge can be characterized as frivolous or meritless. The term "meritless" has been defined as meaning groundless or without foundation. *STATE EX REL. WASH. FED'N OF STATE EMPLOYEES v. BOARD OF TRUSTEES*, 93 Wn.2d 60, 69, 605 P.2d 1252 (1980).

The Supreme Court also emphasized two factors in making this determination: (1) the entire course of dealing between the parties, and (2) the good faith and honest belief of the college's administration in the advice of the college's assigned Attorney General, and the college's reasonable reliance on that advice. *BOARD OF TRUSTEES*, *Id.*

In *Robert L. Fraser, V. Edmonds Community College*, \_\_\_ Wn. App. \_\_\_ (11/27/2006), "Washington follows the American rule that a prevailing party normally does not recover its attorney fees." *Dempere v. Nelson*, 76 Wn. App. 403, 406, 886 P.2d 219 (1994). Attorney fees are properly awarded only if specifically authorized by a contract, statute, or recognized equitable ground. *Bowles v. Dep't of Retirement Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993).

RCW 49.48.030 authorizes attorney fees in certain employment-related cases:

In any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney's

fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

This is a remedial statute that should be construed liberally to effect its purpose. *McIntyre v. State*, \_\_\_ Wn. App. \_\_\_, 141 P.3d 75, 77 (2006); *Naches Valley Sch. Dist. JT3 v. Cruzen*, 54 Wn. App. 388, 399, 775 P.2d 960 (1989). It has been interpreted to apply to many forms of compensation due to an employee, including back pay, front pay, reimbursement for sick leave, and commissions. *See, e.g., Gaglidari v. Denny's Rests., Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991) (back pay); *Hayes v. Trulock*, 51 Wn. App. 795, 755 P.2d 830 (1988) (front pay); *Naches*, 54 Wn. App. at 390 (reimbursement for sick leave); *Dautel v. Heritage Home Ctr., Inc.*, 89 Wn. App. 148, 948 P.2d 397 (1997). .....the statute awards fees in "any action," not only actions for breach of contract. Washington courts have applied RCW 49.48.030 to cases involving a variety of theories of recovery. *See, e.g., Hayes*, 51 Wn. App. at 806 -- 07 (employer's tortious wrongful termination of employee); *Hanson v. Tacoma*, 105 Wn.2d 864, 872 -- 73, 719 P.2d 104 (1986) (employer suspended employee in violation of local ordinance).

Where a situation is analogous to a wrongful termination, and the court thus concludes that RCW 49.48.030 applies -- particularly in light of

the fact that this is a remedial statute to be construed liberally. The damages constitute "wages or salary owed" for purposes of RCW 49.48.030, and thus, the party should be awarded attorney fees. *STATE EX REL. WASH. FED'N OF STATE EMPLOYEES v. BOARD OF TRUSTEES*, 93 Wn.2d 60, 69, 605 P.2d 1252 (1980); *Robert L. Fraser, V. Edmonds Community College*, \_\_\_\_ Wn. App. \_\_\_\_ (11/27/2006).

Under the case at hand, it is solely the matter of remedial action of the temporary employment positions. A remedial action is granted where the four criteria set forth in WAC 251-12-600 are fulfilled. Then, an employee became a permanent classified employee on the date he exceeded the 1050 hour temporary employment limitation<sup>6</sup>. *Robinson v. WSU*, HEU 4377; *Williams v. WSU*, HEU 3968; *Schmidt v. Western Wash. Univ.*, HEU 4269. This is a well-established criteria for granting remedial action. It is required that decisions of administrative agencies must be consistent in their construction of statutory terms, but did not address the issue of agency remedial action. *SOLTMAN v. CENTRAL WASH. STATE COLLEGE*, HEPB 311 (1976); *EARWOOD v. CENTRAL WASH. UNI v.*, HEPB 1147 (1980); *VERGEYLE v. DEPARTMENT OF EMPL. SEC.*, 28 Wn. App. 399, 623 P.2d 736 (1981). Thus, Sakkarapope

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<sup>6</sup> See also, *Earl McCrary v. Univ. of Wash.*, HEU 4255; *Phillip Hayward v. Bellevue Community College*, HEU No. 4251; *Tyler Scott Kelsey v. Western Wash. Univ.*, HEU 4279; *Morgan Goldbloom v. Bellevue Community College*, HEU 4417.

is subject to the same standard.

In the instant case, the PAB and the DOP denied Sakkarapope's remedial action based on the **only basis whether the fourth condition of granting a remedial action is met**: "the employee has worked in one or more positions for more than one thousand fifty hours in any twelve consecutive month periods since the original hire date." WAC 251-12-600(1)(b). Where the trial court reversed the PAB's decision, the DOP has no other ground for denying the remedial action. The undisputed fact is that the four conditions were met in the first twelve consecutive month period of March 21, 1995 thru March 20, 1996, Sakkarapope's remedial action should be granted in consistent with the precedents as of the non-student temporary employment first crossed the 1050 hours limit on January 12, 1996.<sup>7</sup> *Robinson v. WSU*, HEU 4377; *Williams v. WSU*, HEU 3968. See details of the four criteria in Petitioner's Trial Brief, CP-II 2-32.

WSU has a substantially recurring pattern of failure to comply. Prior to *Sakkarapope* (March, 1993 through September, 2002), there are, at least, five remedial actions filed against WSU. The remedial actions were granted in two cases: (i) *Williams* where his total employment was

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<sup>7</sup> A remedial action was granted where an employee's employment exceeded the 1,050 hour limitation in the other cases, e.g., *Morgan Goldbloom v Bellevue Community College*, HEU 4417 (1,060 hrs), *Phillip Hayward v. Bellevue Community College*, HEU 4251 (1,682.75 hrs), *Earl McCrary v. Univ. of Washington*, HEU 4255 (1,517.75 hrs), and *Tyler Scott Kelsey v. Western Washington Univ.*, HEU 4279 (1,066 hrs).

1,181.85 hours, and (ii) *Robinson* where his total employment was 1,087 hours. Nonetheless, WSU had been repeatedly directed by the Director to inform temporary employees of changes to the conditions of their temporary employment in accordance with WAC 251-19-122, and to review its hourly monitoring procedures to ensure timely and effective communications with departments to help maintain temporary employees within the required limit. *Williams v. WSU*, HEU 3968; *Robinson v. WSU*, HEU 4377; *Braden v. WSU*, HEU 4364; *Watkins v. WSU*, HEU 3989.

The legislature intends that public employers be prohibited from misclassifying employees, or “taking other action” to avoid providing or continuing to provide employment-based benefits to which employees are entitled under state law or “employer policies” or collective bargaining agreements applicable to the employee's correct classification. RCW 49.44.160. It is an unfair practice for any public employer to: (a) misclassify<sup>8</sup> any employee to avoid providing or continuing to provide employment-based benefits; or (b) include any other language in a contract with an employee that requires the employee to forgo employment-based benefits. RCW 49.44.170(1). An employee deeming

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<sup>8</sup> "Misclassify" and "misclassification" means to incorrectly classify or label a long-term public employee as "temporary," "leased," "contract," "seasonal," "intermittent," or "part-time," or to use a similar label that does not objectively describe the employee's actual work circumstances. RCW 49.44.170(1)(d).

himself or herself harmed in violation of RCW 49.44.170(1) may bring a civil action in a court of competent jurisdiction. RCW 49.44.170(3)

The evidence in the instant case shows that WSU misclassified Sakkarapope's employment and took "actions to avoid providing or continuing to provide employment-based benefits" to which Sakkarapope is entitled under state law or WSU's policies. The term, "internal policies," suggested by Counsel Stambaugh is frivolous. The DOP and the PAB denied a remedial action based on a single cause that is the refusal to abide by the approved rule and procedure in compliance with WAC 251-19-120(7). With the 1990 approved procedure, there is no basis to deny Sakkarapope's remedial action request; it is prohibited to avoid the employment-based benefits provided by the state law. Sakkarapope has defended such unfair labor practice, misclassification, fraud and misrepresentation by the University's and the DOP's officials, abuse of process and discretion by the DOP and the PAB. The concealing and refusing to abide by the approved procedure is frivolous or meritless in the meaning set by the Supreme Court. *BOARD OF TRUSTEES*, Id.. It is inconsistent with the legislative intent.

Therefore, the two factor test is met. Sakkarapope has standing to bring civil action in this matter and he is entitled to award attorney fees under a remedial statute, RCW 49.48.030. A separate civil action should

not be required, which it would create unnecessary cost in litigations.

**(d) Counsel Misconduct; Attorney Fee Is Allowed under Sanction for Frivolous Defense and Failure to Comply with Civil Rule 11.**

To the extent that a party is entitled to award attorney fees where the two-factor test is met pursuant to the authorities presented in the previous sections above, RCW 4.84.185 allow a prevailing party to receive expenses for opposing frivolous action or defense:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or **defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense.** This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order. [Emphasis added]

Also, Civil Rule 11(a) also provides that:

... The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum; that to the best of the party's or attorney's knowledge, information, and belief, formed **after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it**

**is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. .... If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee. [Emphasis added]**

The languages in WAC 251-19-120(7) and other applicable provisions are explicit. The term, “each institution shall develop for director approval a procedure...,” should be understood by any licensed lawyer. Counsel Stambuagh has practiced law and made a living from being a professional in this area, it has duty to the court to conduct a reasonable inquiry the relevant existing laws and authorities. In addition to his Trial Brief (CP-II 2-32), Sakkarapope has repeatedly brought up the term, “WAC 251-19-120(7),” in his pleadings:

- (i) In “Errors in the Findings, Conclusions, and Determination of the Director, filed with the PAB October 10, 2003, (CR 34-54; CP-I 414-514), it was repeatedly cited on pages 4, 6, 8, and 12.
- (ii) In Memorandum of Authority filed with the PAB on July 13, 2004, (CR 159-320), it was repeatedly cited on pages 4 and 12.
- (iii) In Memorandum of Authority in Support of Appellant’s Motion for Summary Judgment, filed with the trial court on

October 11, 2004, (CP-I 20-53), it was repeatedly cited on pages 14-16, 21, and 24.

- (iv) In Memorandum of Authority in Support of Appellant's Motion for Summary Judgment, filed with the trial court on December 10, 2004, (CP-I 607-32), it was repeatedly cited on pages 14-16, 21, and 24.

Counsel Stambaugh was fully informed and aware of "WAC 251-19-120(7)," but intentionally chose to ignore it and continuously deceive the existing DOP's approved procedure. The so-called "BPPM" is the University's business/administrative manual, which contains a collection of rules and procedures from various departments/units. Not all rules and procedures published in the BPPM are subject to the DOP's approval. The so-called "60.26" is a reference number of the manual that contains the rules and procedures for WSU's temporary employment, in which it must be approved by the DOP. The languages in the so-called Personnel Rule "60.26" are explicit of the rules and procedures under RCW 41.06 and WAC 251. This is mundane. Any lawyer who does not, or is not able to, apprehend this type mundane should not be allowed to practice law in this state. It is dangerous to the public and the interest of the state employees.

The statement to the trial court, such as ...."doesn't say "60.26." It doesn't say "BPPM." It's not the same policy as 60.26," is extremely

frivolous; it should not come from any person who is considered him/herself a professional lawyer. No need for further justification.

The misconduct of the counsel has a recurring pattern. The trial court granted Respondent's motion striking Sakkarapope's first motion for summary judgment while Respondent was default at the November 12, 2004 hearing, based on a speculation and a defective and fraud of the affidavit, not the fact, and before the last day of the 30-day period.

Counsel Stambaugh submitted an inadmissible and fraud affidavit to obtain the order Continuing Summary Judgment Motion Hearing Date (November 12, 1004), by stating that:

“Our office has been advised by staff from the PAB that the transcript of the PAB hearing held on July 13, 2004, will not be ready before the November 19, 2004, hearing date and may not be ready until January 2005. Petitioner's appeal refers to the related records of the Department of Personnel, the PAB and Washington State University and sites these records as a basis for his motion. To properly consider and/or respond to this appeal, the court and the parties need to have the complete record, including the transcript, before them.” (CP-I at 61)

Such statements are hearsay, speculative, prejudicial, irrational and inconsistent with the facts. The PAB actually transmitted the certified records on December 8, 2004, which was prior to the date set for the hearing on summary judgment motion—December 17, 2004, not in January 2005 as stated in the counsel's affidavit. The affidavit was not

made by the transcriber and/or the PAB's authorized person who had the first-hand knowledge. Such movement was premeditated by the counsel Stambaugh in bad faith to prevent the certification of the records within 30 days. Such action constitutes an obstruction of justice and misconduct.

The facts also show that: (i) while the agency certified records were due November 15, 2004, Respondent, on October 28, 2004, moved the trial court with a motion through an ex parte proceeding and later requested for a hearing of November 12, 2004 responsive to Sakkarapope's objection to an ex parte proceeding; (ii) Counsel Stambaugh wrote a defective, fraud affidavit to support Respondent's motion preventing the PAB to file the certify records within 30 days as statutory requirement and used it as a basis supporting its motion; (iii) Counsel Stambaugh failed to appear before the court to present its motion and avoided an interrogation of counsel at the hearing; and (iv) Counsel Stambaugh did not file a notice of substitution with the trial court and notify the adverse party and the trial court that the counsel would not be able to appear before the court in person. RCW 2.44.040, 050; CR 70.1. (CP-I 60-143) A teleconference was not requested.

The counsel not only failed to meet the requirement of CR 56 by submitting a response to both motion for summary judgment without affidavit, but also manipulated the issues and proceedings and did not

answer to the Exceptions. Agency's certified records are not required in a summary judgment proceeding, but affidavits. Counsel Stambaugh was able to write a defective and fraud affidavit to support its motion in the November 12, 2004 proceeding, but failed twice to provide an opposing affidavit in the summary judgment proceedings.

Respondent's counsel committed professional misconducts not only in the trial court's proceedings as stated herein, but also in the PAB July 13, 2004 hearing proceeding in introducing witness testimony outside of the Exceptions, and suggesting the guilt of the opposing party, unwarranted by the existing authorities. (See PAB RP, CR at 321-421; CP-I at 117-21, 598-606) CR 11, CR 56(e). Despite Sakkarapope's objections, the counsel not only introduced witness and material evidences of immigration issues which were not part of the specific items set forth in the Exception, and outside of the PAB's jurisdiction, but also suggested the same in the trial court at the hearing of December 17, 2004. The trial court stated that it would not decide the immigration issue. (RP II at 14-19; PAB RP, CR at 394-403)

Respondent already admitted that "there's nothing specific that talks about how they will conduct a remedial action review." (RP II at 33) In its Responding Brief, Respondent also admitted that "[t]he PAB does not have a specific WAC outlining proceedings for the conduct of

remedial action appeals as they simply considered rule violation appeals,” (CP-I 604), which was contradictory to what the PAB ruled at the hearing that “[o]n a rule violation appeal,...that is not applicable in this particular case.....and allocation determinations. The issue before the Board, again, is not an allocation determination. It is a rule violation...” (PAB Transcript, CR 325) Nonetheless, Counsel Stambaugh still misled the trial court by suggesting that “...in any event, ...the allocation WAC, allows the Board to consider additional evidence if they deem fit.” (RP II at 13) as well as in its Responding Brief. (CP-I 604-5; 633-42)

The counsel Stambaugh, moreover, suggested if the PAB at the July 13, 2004 hearing granted a remedial action, WSU would terminate Sakkarapope’s employment afterward anyway. (PAB Transcript, CR 321-421) Such statement was prejudicial and discriminated in nature, showing the intention to violate Sakkarapope’s constitutional right to equal treatment and employment opportunity. 42 U.S.C. §2000d et seq. WSU is prohibited to take action to avoid to provide Sakkarapope’s employment-based benefits. RCW 49.44.160. It is unfair labor practice.

At the July 13, 2004 hearing, Counsel Stambaugh intentionally introduced and assisted the witness to use an unpublished definition of a student which was not warranted by existing authorities to create the Exhibit R-10 to mislead the PAB. The counsel then prejudicially and

frivolously suggested the guilt of Sakkarapope that he would have obligated to terminate his employment prior to the 1050 limit. *Schmidt v. Western Wash. Univ.*, HEU 4269; *Kelsey v. Western Wash. Univ.*, HEU 4279. (PAB Transcript, CR 321-421) While making such accusation, Counsel Stambaugh has full understanding that WSU has a burden as an employer where it failed to comply with the notification provisions:

The contention that an employee was properly notified of the conditions of his employment and was therefore a party to the violation when his hours crossed the 1050-hour limit is without merit. This contention presupposes that given proper notification, **employees share responsibility for terminating their employment** when their hours reach the 1050-hour limit. **This presumption is not valid...**The burden is on respondent to properly notify temporary employees of the conditions of the temporary employment prior to the beginning of each appointment and upon any changes to the conditions of their appointment. When temporary employees are not given proper notification of the conditions of their temporary appointment, the burden should not be upon the employee to terminate their employment when their hours reach the 1050 hour limit. **Respondent carries the burden for monitoring and terminating temporary employees before they reach the 1050 hour limit.**” *Schmidt v. Western Washington Univ.*, HEU 4269; *Kelsey v. Western Washington Univ.*, HEU 4279. [Emphasis added] (CP-I 175-213)

A process of informing employees of changes to temporary appointments is not totally in compliance with WAC 251-19-122 where the employee does not sign the form to verify receipt as required by WAC 251-19-122 (2)(h). *Robinson v. WSU*, HEU 4377. **“Since an employee was not properly informed of the conditions of these appointments, he**

**did not take part in any willful failure to comply with the HEPB rules.”** *McCrary v. Univ. of Wash.*, HEU 4255; *Hayward v. Bellevue Community College*, HEU 4251; *Kelsey v. Western Wash.Univ.*, Id. [Emphasis added]

The conducts of counsel were prejudicial in nature and made in violation of Rules of Professional Conduct, RPC 3.1, 3.4 and 8.4. Such misconducts stripped its professional integrity as obligated under the WSBA’s representation. *Ex parte Young*, 209 U.S. 123 (1908); *Milliken v. Bradley*, 433 U.S. 267, 289-290 (1977); *Idaho v. Coeur D’Alene Tribe of Idaho*, 117 S. Ct. 2028, 138 L.Ed.2d 438 (1997). Such misconduct led to a miscarriage of justice and created unreasonable cost in litigation.

The director's authority to grant remedial action is NOT discretionary, but Sakkarapope’s liberty interest created by WAC 251-12-600 and protected by the constitutions, and he is entitled to a permanent status and benefits as of the date when his hours first exceeded 1050 limit. *Myers v. Univ. of Washington*, HEU 4352. In *Williams and Robinson*, as a standard adopted and applied over a decade, the Director granted a remedial action where an employee’s employment exceeded the 1050 limit, less than in *Sakkarapope*, and under the same rules and procedures. The denial of remedial action where the four criteria are met is prohibited under RCW 49.44.160.

With inclusion of the previous sections herein, including the lying and unreasonably excusing of the concealing of the 1990 approved procedures in compliance with WAC 251-12-170(7), Appellant respectfully submits that Counsel Stambaugh has committed professional misconduct and filed the documents and made statements before the court that were “well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law,” to cause unnecessary delay or needless increase in the cost of litigation. Counsel Stambaugh violates Civil Rule 11(a). An appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred in the litigation, including a reasonable attorney fee, should be awarded to Sakkarapope. The trial court erred.

#### **D. REQUEST FOR EXPENSES AND ATTORNEY FEES**

This court has power to impose attorney fees and costs as a sanction for bringing a frivolous appeal or defense pursuant to RAP 18.9 and under RCW 41.56.140 (as set forth in *BOARD OF TRUSTEES*). The standard for determining whether an appeal warrants imposition of sanctions was set forth in *BOYLES v. DEPARTMENT OF RETIREMENT SYS.*, 105 Wn.2d 499, 509, 716 P.2d 869 (1986).

An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. *STREATER v. WHITE*, 26 Wn. App. 430, 434-35, 613 P.2d. 187 (1980); *SEE ALSO MILLERS CAS. INS. CO. v. BRIGGS*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983). The DOP and WSU have sit on the facts of law in regard to the approved procedures in compliance with WAC 251-12-170(7) since 1989-90, and continued the deception, lying and concealing of the truth throughout the administrative and judicial proceedings. The trial court stated at the December 1, hearing that "...the first issue that I remanded back seems to have been clearly already decided back in 1990, and ...that the rule was, in fact, approved pursuant to the WACs and have been part of the case." (Tr. 12-01-2006 at 8) Thus, the Respondent's defense is totally frivolous, and it is so totally devoid of merit. The trial court erred in denying sanction upon Respondent and its counsel.

Pursuant to RCW 4.84.185, RAP 18.1, 14.2 and 14.3, Appellant respectfully requests for costs, fees and expenses incurred on this appeal. In addition, Appellant respectfully requests the court award reasonable attorney fees as to Respondent's defense is frivolous, and based on fraud and misrepresentation of the facts and laws, and counsel misconducts which has been recurring throughout the proceedings from the DOP, the PAB, to the courts. Without a word of apology, it reflects Counsel Stambaugh's state of mind and intention to continue its fraud and misrepresentation. A sanction is necessary to maintain the integrity of the

judicial proceedings and the highest standard of professionalism of lawyer.

Appellant respectfully requests this court reverse the trial court's decision on costs and award Sakkarapope's reasonable costs, fees, expenses and attorney fees in the amount indicated in Part D below.

#### **D. CONCLUSION**

Based on the facts and authorities presented, the four conditions of granting a remedial action are met and the supporting evidences in the records warrant a remedial action pursuant to WAC 251-12-600. Respondent and its counsel committed fraud, misrepresentation of facts and laws, and brought in a frivolous defense. Counsel Stambaugh violates Civil Rule 11 and Rule of Professional Conduct, RPC 3.1, 3.4 and 8.4.

Therefore, Appellant respectfully asks this court reverse the trial court's decision on costs and award Sakkarapope reasonable costs, fees and expenses and attorney fees on the following:

(1) Reverse the trial court's decision denying costs, fees, expenses and attorney fees, and consider the following:

(i) Award costs, fees and expenses incurred in the entire appeal from the date the action was commenced October 11, 2004, to December 22, 2006, i.e., in the amount of \$2,724.58.

(ii) Impose sanction upon Respondent and its counsel in bringing frivolous defense, fraud and misrepresentation, and counsel misconduct in the judicial proceedings in the triple amount of \$2,724.58.

(ii) Award reasonable attorney fees based on the same standard and rate as of the Declaration Supporting Attorney's Fees filed in the Whitman County Superior Court by Assistant Attorney General Sheryl L. Gordon dated December 7, 2005, which declares that the reasonable attorney fee for the work of preparing two pages of response is \$1,377.50, (i.e., to be determined by the court).

(2) Award costs, fees and expenses incurred on appeal in this court, but not limit to, the following items:

- Appellate filing fee =\$250
- Supplemental Clerk's Paper, (CP-II) = \$119.75
- Additional cost for Report of Proceedings (12-1-2006 & 12-22-2006) =\$100+\$50 =\$150.
- Mailing and copying costs (incurred after December 1, 2006, to be determined)
- Reasonable Attorney fees (i.e., to be determined by the court)

(3) Appellant respectfully believe the reasonable attorney fees when calculated based on AAG Gordon's Declaration will be more than \$10,000.00 Thus, Appellant respectfully asks this court award reasonable attorney fee in the amount of \$10,000.00

Therefore, Appellant respectfully submits that the reasonable costs, fees, expenses, and attorney fees incurred from the trial court to this court should be at least the total amount of \$18,694 (Eighteen thousand-

six-hundred-ninety-four dollars [(\$10,000)+(\$2,724.58x3=\$8,173.74)+  
(\$250+\$119.75+\$150 = \$519.75)]

DATED this 12<sup>th</sup> day of March, 2007.

Respectfully submitted,



Appellant

### CERTIFICATE OF SERVICE

I certify that one copy of BRIEF FOR APPELLANT, and reports  
of proceedings have been served upon Respondent by first class mail, pre-  
postage, on this 12<sup>th</sup> day of March, 2007, to the address:

Richard A. Health,  
Associate Vice President  
for Administration and Human Resources,  
Washington State University,  
139 French Adm. Bldg., Room 432  
P.O. Box 641045  
Pullman, WA 99164-1045

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
07 MAR 13 AM 9:17  
BY \_\_\_\_\_  
DEP. CLERK



Benjapon Sakkarapope