

FILED  
COURT OF APPEALS  
DIVISION II

07 APR -9 11:04:50

NO. 35712-7-II

STATE OF WASHINGTON  
BY DM  
CLERK

---

**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

---

BENJAPON SAKKARAPOPE,

Appellant,

v.

WASHINGTON STATE UNIVERSITY,

Respondent.

---

**BRIEF OF RESPONDENT**

---

ROBERT M. MCKENNA  
Attorney General

DONNA J. STAMBAUGH  
Assistant Attorney General  
WSBA No. 18318  
1116 W. Riverside  
Spokane, WA 99201-1194  
(509) 456-3123

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE CASE .....2

III. STATEMENT OF THE ISSUE .....7

    A. Did the trial court properly exercise its discretion in denying Mr. Sakkarapope’s request for fees, costs and sanctions?.....7

IV. ARGUMENT .....7

    A. The trial court did not abuse its discretion when it denied costs, fees and sanctions to Mr. Sakkarapope.....7

        1. RAP 18.9 (a) does not provide a basis for costs or sanctions for Mr. Sakkarapope.....7

        2. Mr. Sakkarapope is not entitled to costs for his numerous appeals. ....8

        3. RCW 49.48.030 is not available to award Mr. Sakkarapope attorney fees.....11

        4. Mr. Sakkarapope is not entitled to costs or sanctions pursuant to RCW 4.84.185 or CR 11. ....14

    B. Mr. Sakkarapope is not entitled to attorney fees.....19

V. CONCLUSION .....20

## TABLE OF AUTHORITIES

### Cases

<i>Biggs v. Vail</i> , 124 Wn.2d 193, 202, 876 P.2d 448 (1994) .....	16
<i>Boehm v. City of Vancouver</i> , 111 Wn. App. 711, 722, 47 P.3d 137 (2002).....	11
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn. 2d 210, 219, 829 P.2d 1099 (1992).....	15
<i>McIntrye v. State</i> , 135 Wn. App. 594, 141 P.3d 75 (2006).....	12
<i>Skimming v. Boxer</i> , 119 Wn. App. 478, 755, 82 P.3d 707 (2004).....	16
<i>Tiger Oil v. Department of Licensing</i> , 88 Wn. App. 925, 938, 946 P.2d 1235 (1997).....	14, 15

### Statutes

RCW 4.84.185 .....	5, 14, 15
RCW 41.06 .....	1
RCW 41.64 .....	1
RCW 49.44.160 .....	13
RCW 49.48.030 .....	11, 12
WAC 251-12-600.....	12
WAC 251-19-120 (7).....	5

### Rules

CR 11 .....	passim
-------------	--------

**RAP 18.9** ..... 7, 8

## I. INTRODUCTION

This case arises out of a matter decided by the former Personnel Appeals Board (PAB), the legislatively created administrative agency that previously heard appeals from state civil service employees regarding disciplines, separations, reduction in force and rule violations. The PAB was abolished effective July 1, 2006. RCW 41.06 and RCW 41.64.

Appellant, Mr. Benjapon Sakkarapope, was previously enrolled as a graduate student at WSU and worked in a part-time capacity. Mr. Sakkarapope's temporary employment was terminated in early 2003 and this led to his appeal before the Department of Personnel (DOP) and ultimately to the PAB. Mr. Sakkarapope asserted that he was entitled to a permanent appointment at WSU based on the civil service rules.

In this case the Court is being asked to grant costs, fees and sanctions based on an appeal to Thurston County Superior Court that reviewed a decision of the PAB. The Court should decline to impose such costs, fees, and sanctions and affirm the superior court's refusal to do so.

## II. COUNTERSTATEMENT OF THE CASE

This matter is before this Court on Mr. Sakkarapope's appeal of the December 22, 2006, order of the Thurston County Superior Court denying his request for costs, fees and sanctions in his judicial review hearing from an order of the Personnel Appeals Board.

Mr. Sakkarapope's temporary employment at WSU was terminated on February 21, 2003. Brief of Petitioner, at page 6, CP II 7.<sup>1</sup> He then filed a request for remedial action with the Department of Personnel (DOP) on March 7, 2003, contending that he had worked beyond the requisite number of hours as a temporary worker at WSU and was entitled to a permanent position. RP 182, 257. The DOP denied Mr. Sakkarapope's request on July 8, 2003, whereupon he appealed to the PAB. RP 159-181.

---

<sup>1</sup> For ease of reference, I have used the same reference to the first set of Clerk's Papers, CP I, and the second set, CP II, that Mr. Sakkarapope utilized. Given the numerous references to Civil Rule 11, the record of the PAB is referenced as RP, Record of Proceedings rather than CR.

The PAB heard Mr. Sakkarapope's appeal on July 13, 2004, and issued Findings of Fact, Conclusions of Law and Order of the Board on October 5, 2004, denying Mr. Sakkarapope's request for a permanent position. RP 1-7.

On or around October 11, 2004, Mr. Sakkarapope filed a Notice of Appeal of the PAB decision, along with a motion for summary judgment with the Thurston County Superior Court. That motion was stricken by the court. Mr. Sakkarapope filed a second motion for summary judgment on or around November 15, 2004. Mr. Sakkarapope's second summary judgment motion was denied by the court, after oral argument, on December 17, 2004. Mr. Sakkarapope filed a Notice of Appeal to the Court of Appeals on December 17, 2004. CP I 661.

Commissioner Schmidt issued a ruling denying Mr. Sakkarapope a right to appeal the order denying summary judgment as a matter of right on January 21, 2005. Mr. Sakkarapope filed a Motion to Modify Commissioner's

Ruling on February 2, 2005. On March 23, 2005, the Court of Appeals denied Mr. Sakkarapope's motion. Mr. Sakkarapope filed his Motion for Discretionary Review of the March 23, 2005, Court of Appeals order, with the Supreme Court on April 6, 2005. Commissioner Crooks denied his motion on May 12, 2005. Mr. Sakkarapope filed a Motion to Modify Commissioner's Ruling on May 19, 2005. On July 12, 2005, a 5-member panel of the Supreme Court denied Mr. Sakkarapope's motion.

Mr. Sakkarapope then filed a Motion for Discretionary Review of the Thurston County order with the Court of Appeals on July 18, 2005, and after oral argument on September 14, 2005, Commissioner Skerlec denied this latest motion. Mr. Sakkarapope thereupon filed a Motion to Modify the Commissioner's Ruling to the Court of Appeals, which was denied on December 21, 2005. After again asking the Supreme Court to review this matter and being denied, Mr. Sakkarapope's judicial review petition was eventually

heard on the merits in Thurston County Superior Court on October 6, 2006.

After oral argument, the trial court denied most of Mr. Sakkarapope's claims but remanded the matter back to the DOP for consideration of one remaining issue.<sup>2</sup> CP II 218-219.<sup>3</sup> Prior to the October 2006 hearing Mr. Sakkarapope submitted, with his reply brief, an objection and motion asking for costs, expenses and CR 11 sanctions. CP II 104-114. On November 21, 2006, prior to the presentment hearing with the trial court which occurred on December 1, 2006, Mr. Sakkarapope submitted a motion, presentment and bill of cost pursuant to RCW 4.84.185 contending that WSU's defense

---

<sup>2</sup> The trial court denied a number of Mr. Sakkarapope's claims including his assertions that 1) the PAB erred by taking additional evidence and conducting a new hearing; 2) the 12-month monitoring period used by the PAB in determining total hours worked was incorrect; and 3) the Washington Administrative Code section exempting students from civil service was repealed for several months during a time period pertinent to these proceedings. The trial court remanded, to DOP, one remaining issue for further consideration: whether or not WSU's internal policy for defining a student is part of compliance with WAC 251-19-120 (7) and, if so, whether Mr. Sakkarapope should be considered for remedial action.

<sup>3</sup> The judge's oral opinion issued on October 6, 2006, was incorporated by reference in the trial court order, but apparently did not get attached as it is not contained in the Clerk's Papers. Since Mr. Sakkarapope attached only the oral argument to his briefing, the oral opinion is attached herewith as Appendix I for the Court's convenience.

was frivolous and requesting an award of double his costs of \$2,724.

On November 28, 2006, Mr. Sakkarapope filed an amended motion, presentment and bill of cost wherein he provided additional documents not contained in the PAB record, CP II 173-180, to the court, asking to have them considered, and renewing his request for expenses, fees and costs. CP II 165-172. The trial court declined to admit the documents as evidence, but remanded the matter back to the DOP for further consideration on the issue of WSU's temporary employment policy. The court also awarded Mr. Sakkarapope his filing fees in superior court but declined to award him any further costs or to levy sanctions against WSU's counsel. CP II 218-219. The remanded matter is currently pending before the DOP.

Mr. Sakkarapope now appeals the portion of the trial court order that declined to award him costs, fees and sanctions.

The trial court's rulings on the merits of the case have not been appealed and are not now before this Court.

### III. STATEMENT OF THE ISSUE

- A. **Did the trial court properly exercise its discretion in denying Mr. Sakkarapope's request for fees, costs and sanctions?**

### IV. ARGUMENT

- A. **The trial court did not abuse its discretion when it denied costs, fees and sanctions to Mr. Sakkarapope.**

1. **RAP 18.9 (a) does not provide a basis for costs or sanctions for Mr. Sakkarapope.**

Mr. Sakkarapope relies, in part, on RAP 18.9 as a basis for awarding him costs associated with his petition for judicial review, and asserts that this rule permits sanctions for a frivolous appeal. That rule states that the court may impose terms or compensatory damages against one who uses the rules (of appellate procedure) for the purpose of delay, files a frivolous appeal, or fails to comply with these rules. There is no proof that WSU or its counsel has engaged in any of these prohibited actions.

Mr. Sakkrapope's assertions are not based in fact, but are merely unfounded speculations on his part.

Further, WSU's defense to Mr. Sakkrapope's petition was not frivolous. Because the trial court ruled in WSU's favor in all but one of the issues presented by Mr. Sakkrapope, the defense was not frivolous and an award of terms pursuant to RAP 18.9 is not appropriate.

**2. Mr. Sakkarapope is not entitled to costs for his numerous appeals.**

Mr. Sakkarapope next asserts that he was the prevailing party before the trial court and should have been granted all of his costs from the initial date of the filing of his petition including various costs associated with his prior appeals to the Court of Appeals. The trial court correctly denied these costs but granted Mr. Sakkrapope recovery of his filing fee to Superior Court.

Again, the earlier record reflects that Mr. Sakkarapope presented his appeal to the Court of Appeals on four different occasions: an appeal of the trial court denial of his summary

judgment which went first to a Court Commissioner and then to the Court of Appeals, and, after a review by the Supreme Court, a motion for discretionary review of the denial of summary judgment which again went to a Court of Appeals Commissioner before being considered by the Court itself. Mr. Sakkarapope did not prevail in any of these proceedings and has absolutely no basis to request his fees from those matters. The trial court correctly denied his full request for costs associated with his appeals.

Mr. Sakkarapope also relies on certain documents reflecting correspondence between WSU and the DOP from 1990 and asserts that these documents prove that certain facts were manipulated and concealed by WSU. These documents, shown at CP II 175-184, were presented to the trial court by Mr. Sakkarapope on or around November 28, 2006, just two days before the presentment hearing. CP II 165. They were never presented to the PAB and the trial court did not admit them into evidence. See page 13 of the transcript of the

December 1, 2006, presentment hearing attached to Mr. Sakkarapope's brief to this Court wherein the trial judge was specifically asked if he was admitting these documents as new evidence and he said no. The documents in question do not represent a basis for an award of costs nor should they be considered by this Court.

In support of his claim, Mr. Sakkarapope also incorrectly asserts that WSU's counsel was in error in opposing his motion for summary judgment in that the briefing submitted on behalf of WSU in the those proceedings was substantially the same as the briefing submitted to the court for the judicial review proceeding on the merits. The first responding brief to Mr. Sakkarapope's summary judgment request was five pages long (CP I 117) and the second was nine pages in length (CP I 598). In contrast, the substantive brief submitted on behalf of WSU in September 2006 was 22 pages in length and contained numerous attachments. CP II 33-103. It is difficult to determine how, even without considering the actual content of

these materials, one could conclude that they were substantially the same. Mr. Sakkarapope's claim in this regard is disingenuous, misplaced and does nothing to support any of his claims associated with costs, fees or sanctions.

**3. RCW 49.48.030 is not available to award Mr. Sakkarapope attorney fees.**

Mr. Sakkarapope asserts that he should be entitled to attorneys fees pursuant to RCW 49.48.030. This statute relates to an action when a person is successful in recovering judgment for wages or salary owed to him. It has no application in the instant case. Mr. Sakkarapope does not possess a judgment for wages owed and this statute cannot be used to award him attorney fees. Further, this argument (relating to a judgment for wages owed) was not raised before the trial court and should not now be considered by this Court. This Court will generally decline to consider issues not raised below. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 722, 47 P.3d 137 (2002).

Mr. Sakkarapope nevertheless asserts that he is entitled to attorney fees pursuant to the “remedial action statute.” He suggests that this statute is RCW 49.48.030 because it was referred to as a remedial statute in a case involving a wrongful termination. *McIntrye v. State*, 135 Wn. App. 594, 141 P.3d 75 (2006). Simply because this case reflects that the statute is remedial in nature does not mean it encompasses a former regulation under the civil service rules, WAC 251-12-600, that referred to what DOP called remedial action relating to temporary employment. It does not and no fees should be awarded to Mr. Sakkarapope based on this statute.

Mr. Sakkarapope also seems to suggest that since he provided certain documents to the trial court at the presentment hearing, these documents should be a basis for his award of attorney fees because he believes they prove that he is qualified for remedial action. The trial court did not grant Mr. Sakkarapope’s request for remedial action, but instead remanded the matter back to the DOP for consideration of a

narrow issue as a prelude to a determination of whether or not DOP should use their discretionary power to grant the requested remedial action. This issue is still undecided and the remanded matter is pending before the DOP. It is disingenuous of Mr. Sakkarapope to argue that because he believes he is entitled to remedial action, a decision that clearly has not been made as of yet, he should be awarded attorney fees.

Mr. Sakkarapope also suggests that he was misclassified by WSU pursuant to RCW 49.44.160 and that somehow this has denied him certain employment benefits that he was entitled to under state law. Mr. Sakkarapope does not specify what those benefits might be nor has he shown that he was deprived of any employment benefits that were due him. This statute has not been referenced or brought to the DOP, the PAB or the trial court for consideration. It does not stand as a reason for an award of fees to Mr. Sakkarapope nor should it be considered by this Court.

**4. Mr. Sakkarapope is not entitled to costs or sanctions pursuant to RCW 4.84.185 or CR 11.**

The trial court's decision regarding costs and fees pursuant to RCW 4.84.185 and CR 11 is reviewed for an abuse of discretion. *Tiger Oil v. Department of Licensing*, 88 Wn. App. 925, 938, 946 P.2d 1235 (1997).

Mr. Sakkrapope asserts that pursuant to RCW 4.84.185, the frivolous litigation statute, he should be awarded costs associated with his petition for judicial review. That statute states, in part, "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 non-prevailing 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."

RCW 4.84.185.

A frivolous lawsuit is one that cannot be supported by any rational argument on the law or facts and the statute requires that the action be frivolous in its entirety. If any one of the claims asserted was not frivolous, the action is not frivolous. *Tiger Oil*, at 938. Because the trial court ruled in WSU's favor in all but one of the issues presented by Mr. Sakkarapope, the defense was not frivolous and an award of fees pursuant to RCW 4.84.185 is not appropriate.

Mr. Sakkarrapope is not entitled to sanctions pursuant to CR 11. Civil Rule 11 provides for the possibility of sanctions if a pleading, motion, or legal memorandum is signed in violation of the rule. The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. It is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. *Bryant v. Joseph Tree, Inc.*, 119 Wn. 2d 210, 219, 829 P.2d 1099 (1992). CR 11 sanctions have a potential chilling effect and the trial court should impose sanctions only when it is patently clear that a claim has

absolutely no chance of success. *Skimming v. Boxer*, 119 Wn. App. 478, 755, 82 P.3d 707 (2004). The burden is on the moving party to justify the request for sanctions. *Biggs v. Vail*, 124 Wn.2d 193, 202, 876 P.2d 448 (1994).

Mr. Sakkarapope asserts that he is entitled to sanctions pursuant to CR 11 for a number of reasons relating to the proceedings before both the PAB and the trial court. He first asserts that counsel's oral statements to the trial court regarding WSU's Business Policies and Procedures Manual were improper. CR 11 sanctions relate to written pleadings and memoranda and not verbal argument. Further, Mr. Sakkarapope can point to no definitive facts that prove the alleged impropriety relating to this allegation.

Mr. Sakkarapope next alleges that counsel's filing of an affidavit with the trial court in relation to his unsuccessful summary judgment motion was fraudulent. This affidavit was filed over two years ago and relates to a proceeding that has already been heard by the trial court as well as this Court, and

should not be re-litigated. In any event, Mr. Sakkarapope has no basis for his assertions of fraud and no proof that the statements made in the affidavit were not factual.

Mr. Sakkarapope also takes issue with the counsel's responding brief before the trial court regarding the authority of the PAB to conduct proceedings and their procedures during the hearing. These pleadings recite various rules relating to PAB proceedings, some of which were presented for analogy, and represent nothing more than zealous advocacy on the part of counsel. They have not been shown to be inaccurate or otherwise improper. They are not the basis for CR 11 sanctions.

Mr. Sakkarapope goes on to assert that counsel's conduct during the PAB proceedings was inappropriate. He asserts that counsel elicited testimony outside of his Exceptions appeal of the DOP proceedings. Mr. Sakkarapope does not provide statutory or other legal citations that would render such testimony inadmissible or otherwise improper. Additionally,

this assertion does not relate to written pleadings or other memoranda but rather to witness statements during a hearing.

Mr. Sakkarapope also asserts that testimony before the PAB regarding his immigration status was improper. He is referring to the testimony of Mr. Robert Casselman, the International Student Advisor in the Office of the International Students and Scholars at WSU. Mr. Casselman provided testimony about Mr. Sakkarapope's F1 immigration status, indicating that when Mr. Sakkarapope was expelled from WSU in early 2003, he lost his F1 status and was no longer legally able to work or remain in the United States without first obtaining another status of some kind. RP 395-400. Mr. Sakkarapope also takes issue with the suggestion which was raised before the PAB that should he be successful in his quest for remedial action he would likely be terminated shortly thereafter because WSU could not legally employ him. Given the un-refuted testimony from Mr. Casselman that Mr. Sakkarapope was not legally able to be employed at WSU,

and Mr. Sakkarapope's appeal requesting permanent employment, the connection was certainly appropriate.

Mr. Sakkarapope has not provided any evidence to dispute or cast doubt on this testimony. Mr. Sakkarapope continues to pursue his quest for permanent employment at WSU, implicitly holding himself out as being ready and available for employment, when the testimony indicates otherwise. These proceedings are not the basis for CR 11 sanctions, but rather are a proper attempt to keep WSU from being subject to an order with which they cannot legally comply. Mr. Sakkarapope has failed to meet his burden to justify his request for CR 11 sanctions.

**B. Mr. Sakkarapope is not entitled to attorney fees.**

Mr. Sakkarapope also requests \$10,000 in attorney fees. However, no attorney has appeared on behalf of Mr. Sakkarapope in any of the various proceedings below or before this Court relating to this matter and he has not shown that he incurred any expenditures relating to payment of

attorney fees. He is not entitled to be reimbursed for attorney fees, notwithstanding the fact that he has not shown that he incurred such fees. Mr. Sakkarapope's request for such fees is misguided. His request for attorney fees should be denied.

#### V. CONCLUSION

Mr. Sakkarapope's repeated attempts to blame others for his failure to attain permanent employment at WSU should not be sanctioned by this Court. For all of the foregoing reasons, WSU respectfully requests that the Court deny Mr. Sakkarapope's request for costs, fees and sanctions and affirm the order of the trial court.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of April, 2007.

ROBERT M. MCKENNA  
Attorney General

*Donna J. Stambaugh*

DONNA J. STAMBAUGH  
WSBA No. 18318  
Attorneys for Respondent

**Oral Opinion**

**Date: October 06, 2006**

**Case:**

**Benjapon Sakkarapope**

**v.**

**Washington State University**

**Thurston County Superior Court  
Cause No. 04-2-02084-8**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON

	)	
BENJAPON SAKKARAPOPE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 04-2-02084-8
	)	
WASHINGTON STATE UNIVERSITY,	)	
	)	
Respondent.	)	
	)	

ORAL OPINION

BE IT REMEMBERED that on the 6th day of October, 2006,  
the above-entitled and numbered cause came on for hearing  
before the Honorable Wm. Thomas McPhee, Judge, Thurston  
County Superior Court, Olympia, Washington.

Kathryn A. Beehler, CCR No. 2448  
Certified Realtime Reporter  
Thurston County Superior Court  
2000 Lakeridge Drive S.W.  
Building 2, Room 109  
Olympia, WA 98502  
(360) 754-4370

A P P E A R A N C E S

For the Petitioner:

Benjapon Sakkarapope  
Appearing Pro Se  
714 South Jefferson Street  
Moscow, ID 83843-3030  
208-882-2138  
dewey\_cola@hotmail.com

For the Respondent:

Donna J. Stambaugh  
Assistant Attorney General  
Labor & Person Division  
W. 1116 Riverside  
Spokane, WA 99201-1194  
509-456-3123

I N D E X

Description	Page Reference
Oral Opinion of the Court	4

1 October 6, 2006 Olympia, Washington

2 AFTERNOON SESSION

3 Department 3 Hon. Wm. Thomas McPhee, Presiding

4 APPEARANCES:

5 The Petitioner, Benjapon Sakkarapope, appearing

Pro Se; Donna J. Stambaugh, Assistant

6 Attorney General, representing

the State of Washington.

7 Kathryn A. Beehler, Official Reporter

8 --o0o--

9 THE COURT: Ladies and gentlemen, there  
10 are a number of issues that are presented in this  
11 appeal, and on some of those the answer seems very  
12 clear to me. First, Mr. Sakkarapope, you have  
13 argued that this court may look to any 12-month  
14 period from the time you began your employment in  
15 the spring of 1995, and if there is discovered, in  
16 12-month period, hours in excess of 1,050, that  
17 you're now entitled to claim permanent employee  
18 status. That's a misinterpretation of the law in  
19 my estimation.

20 I conclude that the intent of the language  
21 that speaks of any 12-month period is to permit  
22 the employee or the employer to count hours worked  
23 through any 12-month period to determine if the  
24 1,050 hour limitation has been exceeded. In other  
25 words, the count can begin in any month. For

1 example, from the first of January to the end of  
2 December, or the first of February to the end of  
3 January.

4 Any 12-month period is the triggering  
5 point. But that does not permit either this court  
6 or the Department of Personnel or the Personnel  
7 Appeals Board to go back to a 12-month period in  
8 1995, for instance, and determine whether, 11  
9 years later, your rights as a temporary employee  
10 were violated in late 1995, and that you are, at  
11 this point in 2006, entitled to permanent employee  
12 status. That's not the meaning of that law.  
13 Instead, the limitation of going back is as  
14 counsel for the respondent here has indicated,  
15 that when the employer commits an act requiring  
16 your employment over 1,050 hours, thereby possibly  
17 entitling you to permanent employee status, you  
18 must file an appeal of that action within 30 days  
19 of it occurring. And it's undisputed that there  
20 has been no appeal of any of those prior years  
21 that was timely.

22 You rely upon the case of Victor Keith  
23 Myers v. The University of Washington. There the  
24 Board went back beyond the year in question to  
25 determine the policies that had been followed.

1 But the key in Myers that distinguishes it from  
2 the situation that we have here is that the Board  
3 did not go beyond the current year to determine if  
4 a violation had occurred. It went back to the  
5 beginning of employment to consider whether  
6 remedial action was appropriate and used that  
7 history as one of the factors that it considered.  
8 That's not what is at issue here.

9           There is a very clear distinction between  
10 the Myers case and the issue that confronts us  
11 here. I do not find that by its decision here the  
12 Personnel Appeals Board has ignored its earlier  
13 decision in Myers or rendered a decision that is  
14 inconsistent with it. So I conclude that you  
15 don't prevail on that issue.

16           The second issue is the repeal of the  
17 regulation that addresses the 1,050 hour  
18 limitation as an exemption. It's WAC 251-04-040  
19 and the earlier version of -035. There is a  
20 period of time where the regulation had been  
21 repealed and before the enactment of an emergency  
22 regulation to reinstate it and bridge across to  
23 reenactment of a permanent regulation.

24           It is appropriate for an agency, under  
25 circumstances recognized in law, to promulgate

1 emergency regulations. The emergency regulation  
2 was enacted here, and it is not published in the  
3 same manner as a permanent regulation in the body  
4 of permanent regulations that appear in hardbound  
5 copies, because it can't be. It is, nonetheless,  
6 an effective regulation by the administrative  
7 agency.

8 For the period of time that there was no  
9 regulation at all, the lack of the exemption  
10 provided you with no basis for relief. The hours  
11 that applied to that period of time did not, in  
12 combination with the other acknowledged hours,  
13 constitute hours in excess of 1,050. I conclude  
14 there is no basis for the relief that you are  
15 requesting.

16 There are a number of other assignments of  
17 error that you've asserted here, including loss or  
18 violation of your constitutional rights. The  
19 arguments that your constitutional rights have  
20 been violated are not well developed. There is no  
21 identification of how they have been violated or  
22 exactly what constitutional provision is alleged  
23 to have been violated.

24 It seems to me that you are arguing that an  
25 error of law has been committed here and that,

1 just as an aside, this violates your rights of due  
2 process. Under the standards of administrative  
3 law, you have the obligation to show beyond a  
4 reasonable doubt that your constitutional rights  
5 have been violated, and your showing must be  
6 specific. You haven't done that here, and I  
7 cannot conclude that you are entitled to any  
8 relief under the argument that your constitutional  
9 rights have been violated.

10 You've also argued in some manner that the  
11 actions of the counsel for the respondent here  
12 has, by her actions, affected your rights. I am  
13 not reversing the decision of the Personnel  
14 Appeals Board on those grounds.

15 I don't know that those arguments assisted  
16 you in any manner, and I reject them as being  
17 appropriate to the contention that the decision of  
18 the Personnel Appeals Board should be reversed. A  
19 person may have, in certain circumstances, a basis  
20 for objecting to the Washington State Bar  
21 Association for the violation of the Rules of  
22 Professional Conduct. But that does not mean that  
23 the decision in the case should be reversed.

24 I'm not suggesting here that the complaints  
25 that you have made to this court about counsel's

1 conduct should rise to a level of complaint to the  
2 bar association. I'm simply saying that the bar  
3 association is, in most instances, where those  
4 types of complaints go, not to the court.  
5 Occasionally there are egregious circumstances  
6 that would cause a court to reverse a decision  
7 made by reason of counsel's misconduct. Nothing  
8 that you have alleged here or complained of here  
9 rises close to that level.

10 That leaves us, then, with the issue that  
11 is for me the most troubling issue here, and that  
12 is the relationship between Rule 60.26, a  
13 published temporary employee regulation by  
14 Washington State University, and the rule that is  
15 in play here, WAC 26-12-600.

16 WAC 26-12-600 provides that student hours  
17 are not counted as temporary employment hours for  
18 the 1,050-hour limit. In that regulation and in  
19 no other regulation promulgated by the Department  
20 of Personnel is the concept of "student" defined.  
21 Under our law, where a word or phrase is not  
22 defined by regulation, one applies the common and  
23 understood definition of that word or phrase. The  
24 commonly understood definition of "student" is a  
25 person enrolled for study at a school or

1 university, as you were when you were enrolled for  
2 three credit hours at WSU.

3           Conversely, the policy of Washington State  
4 University, for purposes of monitoring your  
5 temporary employment hours, was that the rule of  
6 six credit hours to establish your status as a  
7 student was used. The Personnel Appeals Board  
8 ignored that rule and declared that it was not  
9 bound by the informal policies of the university.  
10 Nevertheless, you can point out that an  
11 accompanying regulation in the same chapter as the  
12 Section 600 regulation, specifically Section  
13 120(7) requires that an agency in the position of  
14 the university was required to make such  
15 procedures for tracking employment hours.

16           The evidence in this case seems to be that  
17 Rule 60.26 was the rule that was used by the  
18 university for tracking hours in most instances.  
19 Under those circumstances, I conclude that the  
20 Personnel Appeals Board committed error of law in  
21 declining to consider that rule.

22           A concern I have is that you were the  
23 appellant there, and it was your burden to bring  
24 the issue to the Personnel Appeals Board and argue  
25 it before them. The issue was raised but not

1 proved to their satisfaction.

2 The legislative intent in the chapter from  
3 which these regulations spring, Chapter 41.06 RCW,  
4 has as its legislative intent or expression of  
5 purpose that the rights of workers should be  
6 protected, and it seems to me that, here, the  
7 Personnel Appeals Board should have considered  
8 that rule. After the issue was raised before the  
9 Board, and in the absence of evidence forthcoming  
10 from the employee, the Board should have requested  
11 information about that rule from WSU or the  
12 Department of Personnel to determine if the rule  
13 was part of the procedure required by  
14 251-12-120(7).

15 I am going to remand this case back to the  
16 Department of Personnel, in the first instance, to  
17 determine if Rule 60.26 is part of compliance by  
18 WSU with WAC Section 120, and if so, I believe  
19 that by its terms it would permit the petitioner  
20 here, Mr. Sakkarapope, to qualify as a person  
21 qualified for consideration of remedial action  
22 under Section 600.

23 Mr. Sakkarapope, you win on a narrow issue  
24 here, and that is that the Rule 60.26 should have  
25 been considered. I'm not declaring that 60.26

1 ultimately will cause you to qualify for  
2 consideration of remedial action. That's a  
3 determination to be made by the Department of  
4 Personnel, because I don't have sufficient  
5 information here to determine it myself. But even  
6 if you win on that issue, I want to caution you,  
7 nothing I am ruling here entitles you to remedial  
8 action. That clearly remains a discretionary  
9 action by the employer, and that discretion must  
10 be exercised if you qualify under the four prongs  
11 of Section 600.

12 My ruling today leaves open the possibility  
13 that you will qualify under those four prongs, and  
14 if so, then you have the right to have your  
15 petition considered. But that does not  
16 necessarily entitle you to remedial action. That  
17 still remains a discretionary decision under  
18 Section 600, because the language is "may grant  
19 remedial action" if those four conditions are met.

20 Do you understand that?

21 MR. SAKKARAPOPE: I have one question.  
22 I would like the court to please clarify the  
23 word "may" in the WAC 251-12 --

24 THE COURT: Yes.

25 MR. SAKKARAPOPE: -- -600.

1           THE COURT: You argued that "may" is  
2 synonymous with "shall" and is mandatory. The law  
3 does not support that contention, and I reject it.

4       "May" is a word that connotes a discretionary  
5 action. That's my ruling in that regard.

6           Counsel, I'm going to task you with the  
7 responsibility for preparing the order remanding  
8 this matter back to the Department of Personnel  
9 for consideration as I have outlined here. Do you  
10 understand what my ruling was?

11           MS. STAMBAUGH: I do, but I'm confused  
12 about whether you are remanding back to the  
13 successor of the PAB or further back.

14           THE COURT: I'm remanding it further  
15 back at this point.

16           MS. STAMBAUGH: All right.

17           THE COURT: I think that's the  
18 appropriate way of doing it, because the  
19 responsibility to file the procedures was to the  
20 employer or the Department of Personnel, not --

21           MS. STAMBAUGH: All right.

22           THE COURT: -- the Board or its  
23 successor.

24           MS. STAMBAUGH: Thank you. I'll do  
25 that.

1 THE COURT: All right.

2 MR. SAKKARAPOPE: Your Honor, I have one  
3 question. I wanted to clarify the order here.

4 The 12-consecutive month period, the day  
5 that it used to start the beginning of the period.  
6 Because under the code, WAC code 251-12-600 and  
7 also 01, by definition of 01, 415, talking about  
8 from each period of time. So in this case, my  
9 argument is if you use March 21st as the  
10 beginning, as the starting period, but on this  
11 they use March 16 as starting period, because they  
12 use at the beginning of the pay cycle period. So  
13 I want the court to clarify which date is legal.

14 THE COURT: What is the exhibit number  
15 of the letter of appeal to the -- is it the Board  
16 or the Department of Personnel?

17 MS. STAMBAUGH: I think it's record of  
18 proceeding 182, I believe.

19 THE COURT: I'm not sure I have it  
20 numbered like that.

21 MS. STAMBAUGH: I attached it to my --

22 THE COURT: Where? I've read it. I  
23 just can't find it.

24 MS. STAMBAUGH: It's attached to --  
25 behind the PAB order -- several pages behind the

1 PAB order.

2 THE COURT: Have you got it in front of  
3 you that you could show me?

4 MS. STAMBAUGH: I've got it.

5 THE COURT: Can I see it, because I  
6 can't find it. And I was examining it last night,  
7 so I know it's here.

8 In your appeal, Mr. Sakkarapope, you use  
9 the date March 16, 2002. I believe that is the  
10 appropriate date to use for calculating a 12-month  
11 period from that date forward. That's the subject  
12 of this appeal.

13 MS. STAMBAUGH: Okay. Thank you.

14 THE COURT: Now, an appropriate order  
15 needs to be prepared. Counsel will do that and  
16 submit it to you by mail. You need to review its  
17 terms and then let her know whether you agree that  
18 what is stated there is what I have ordered. If  
19 you do, then it can be submitted informally to me  
20 for my signature. If you disagree, then the  
21 matter will be noted for hearing.

22 The test of whether the order is accurate  
23 is a test of does it accurately reflect what I  
24 ruled here, not what you think I should have  
25 ruled. So if you disagree with my ruling, those

1 are issues that are addressed on appeal, not  
2 addressed in disputing the language of an order  
3 that is intended to reflect what I ruled, not what  
4 you believe I should have ruled.

5 Do you understand that?

6 MR. SAKKARAPOPE: Your Honor, I have two  
7 specific questions. First thing, I want to --  
8 whether the court rewords the DOP ruling precedent  
9 in the Bill William case. Because the DOP already  
10 ruled that you should use monitoring period, like  
11 a March 16 or something, because -- whether it is  
12 the first of the month or 16 of the month, that's  
13 a monitoring period used by you is improper, that  
14 the DOP already set that ruling in the Bill  
15 William case. So right now the court decide that  
16 the beginning period is March 16, that -- my  
17 question is whether the court overrule the DOP  
18 precedent in the Bill William case.

19 THE COURT: I don't believe that I am,  
20 but I'm not sure that I understand your argument.  
21 I think I've made my order clear about the period  
22 that should be considered here. So that's all I  
23 have to say in that regard.

24 So we will conclude, ladies and gentlemen.  
25 Thank you for your attention. We'll stand in

1 recess.

2

3 (Conclusion of the October 6, 2006, Proceedings.)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

COURT OF APPEALS  
DIVISION II

07 APR -9 AM 10:49

COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

BENJAPON SAKKARAPOPE,

Appellant,

v.

WASHINGTON STATE  
UNIVERSITY,

Respondent.

NO. 35712-7-II

CERTIFICATE OF  
SERVICE

I certify that I served, or caused to have served, the Brief of Respondent and this Certificate of Service on all parties or their counsel of record on April 6, 2007, as follows:

- US Mail Postage Prepaid (First Class)
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by:
- FedEx Standard Overnight

To: David Ponzoha, Clerk/Administrator  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4427

/

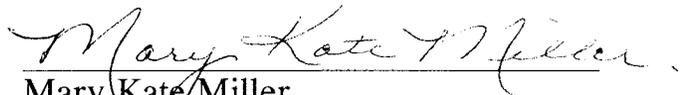
and

- US Mail Postage Prepaid (First Class)
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by:
- FedEx Standard Overnight

To: Benjapon Sakkarapope  
714 S. Jefferson St.  
Moscow, ID 83843

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 6th day of April, 2007, at Spokane, WA.



Mary Kate Miller  
Legal Assistant I  
Office of the Attorney General  
1116 W. Riverside  
Spokane, WA 99201-1194  
(509) 458-3516