

RECEIVED
NOV 12 2009
CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

NO. 39441-3-II

**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. COUNTER STATEMENT OF THE ISSUE2

III. COUNTER STATEMENT OF THE CASE..... 3

 A. Procedural History3

 B. Substantive Issue6

IV. STANDARD OF REVIEW7

 A. Question of Fact..... 10

 B. Error of Law Standard / Unlawful Procedure..... 12

 C. Mixed Question of Fact and Law 13

 D. Arbitrary and Capricious 14

V. ARGUMENT 15

 A. The PRB’s Orders Were Not Contrary to a
 Preponderance of the Evidence. 15

 1. Compliance With the WAC 16

 B. The PRB’s Order Was Not Based on an Error of Law, or
 Affected by Unlawful Procedure 20

 1. WAC v. WSU’s Policy..... 20

 2. Granting of Remedial Action is Discretionary..... 26

 3. The PRB’s Procedure was Proper 27

 C. The PRB’s Decision was Not Arbitrary or Capricious..... 30

D. The PRB's Orders Did Not Violate Constitutional Provisions	30
E. Mr. Sakkarapope's Other Assertions Are Not Properly at Issue Before This Court	33
F. Mr. Sakkarapope is Not Entitled to Costs, Fees or Sanctions.....	34
VI. CONCLUSION.....	35

TABLE OF AUTHORITIES

Cases

<i>Adams v. Dep't of Social & Health Services</i> 38 Wn. App. 13, 683 P.2d 1133 (1984).....	8
<i>Alexander v. Employment Security</i> 38 Wn. App. 609, 688 P.2d 516 (1984).....	13
<i>Assoc. of Capitol Powerhouse Engineers v. State</i> 89 Wn.2d 177, 570 P.2d 1042 (1977).....	11
<i>Ballinger v. Department of Social & Health Services</i> 104 Wn.2d 323, 705 P.2d 349 (1985).....	8, 10, 11
<i>Christensen v. Terrell</i> 51 Wn. App. 621, 754 P.2d 1009 (1988).....	12
<i>Ciskie v. Department of Empl. Sec.</i> 35 Wn. App. 72, 664 P.2d 1318 (1983).....	13
<i>Clarence Hill v. Eastern Washington University</i> HEPB No. 1840 (1984)	23
<i>Daniel Watkins v. Washington State University</i> HEU No. 3989 (1995)	26
<i>Dedman v. Personnel Appeals Board</i> 98 Wn. App. 471, 989 P.2d 1214 (1999).....	8
<i>Dioxin/Organochlorine Ctr. v. Department of Ecology</i> 119 Wn.2d 761, 837 P.2d 1007 (1992).....	12
<i>Dupont-Ft. Lewis School District 7 v. Bruno</i> 79 Wn.2d 736, 489 P.2d 171 (1971).....	15
<i>Franklin Cy. Sheriff's Office v. Sellers</i> 97 Wn.2d 317, 646 P.2d 113 (1982), <i>cert. denied</i> , 459 U.S. 1106 (1983).....	13, 14

<i>Gogerty v. Department of Institutions</i> 71 Wn.2d 1, 426 P.2d 476 (1967).....	10, 11
<i>Haley v. Medical Disciplinary Bd.</i> 117 Wn.2d 720, 818 P.2d 1062 (1991).....	13
<i>J.E. Dunn v. Dept. of Labor and Industries</i> 139 Wn. App. 35, 156 P.3d 250 (2007).....	26
<i>Jefferson County v. Seattle Yacht Club</i> 73 Wn. App. 576, 870 P.2d 987 (1994).....	12
<i>Lawter v. Employment Security Department</i> 73 Wn. App. 327, 869 P.2d 102 (1994).....	11
<i>Louis E. Cobet v. Director, Higher Education Personnel Board</i> HEPB No. 374 (1976)	27
<i>Patrick Tabak v. Eastern Washington University</i> HEPB No. 3726 (1992)	22
<i>Schuh v. Department of Ecology</i> 100 Wn.2d 180, 667 P.2d 64 (1983).....	13
<i>Sherman v. State</i> 128 Wn.2d 164, 905 P.2d 355, (1995).....	32
<i>Sullivan v. Department of Transportation</i> 71 Wn. App. 317, 858 P.2d 283 (1993).....	8, 12, 13, 14
<i>Terhar v. Department of Licensing</i> 54 Wn. App. 28, 771 P.2d 1180, review denied, 113 Wn.2d 1008 (1989).....	14
<i>Trucano v. Dep't of Labor and Industries</i> 36 Wn. App. 758, 677 P.2d 770 (1984).....	8, 12, 15
<i>Tyler Scott Kelsey v. Western Washington University</i> HEU No. 4279 (2000)	26

Statutes

RCW 34.05.010	24
RCW 34.05.010 (16).....	24
RCW 34.50	24
RCW 41.06	1, 9, 15
RCW 41.06.111 (1).....	9
RCW 41.06.111 (4).....	9
RCW 41.06.150	25
RCW 41.06.170	9
RCW 41.06.170 (2).....	9
RCW 41.64	1, 9
RCW 41.64.010	9
RCW 41.64.090	9
RCW 41.64.130	8, 9
RCW 41.64.130(1).....	8
RCW 41.64.130(1)(b).....	10
RCW 41.64.140	8
RCW 49.48.030	34
WAC 251	18
WAC 251-12-600	6, 21, 27, 28
WAC 251-12-600 (4).....	28

WAC 251-19-120 (7).....	passim
WAC 357.....	4
WAC 357-19-430	28
WAC 357-19-440 (2).....	4, 15
WAC 357-19-450	7, 28
WAC 357-49-010	28
WAC 357-52-010	29
WAC 357-52-207	29
Washington Administrative Code Title 504.....	24

Other Authorities

<i>American Heritage Dictionary</i> , Second College Edition	23
Business Policies and Procedures Manual 60.26.....	passim
Personnel System Reform Act of 2002 Laws of 2002 c 354	9

I. INTRODUCTION

This case arises out of an administrative matter most recently decided by the Personnel Resources Board (PRB) the successor to the former Personnel Appeals Board (PAB), the administrative agency that previously heard various appeals from state civil service employees including those regarding disciplines, separations, reductions 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 a part-time temporary employee. Mr. Sakkarapope's temporary employment was terminated in early 2003 upon his expulsion from WSU and this led to his appeal before the Department of Personnel (DOP) and ultimately to the PAB. Even though his foreign student visa was no longer in effect upon his expulsion, Mr. Sakkarapope asserted that he was entitled to permanent employment at WSU based on the civil service rules. The PAB denied his appeal and Mr. Sakkarapope filed a petition for review with Thurston County Superior Court who ultimately

remanded the matter back to DOP for review of one specific issue. DOP denied his appeal once again, and on review to the PRB, that body also denied his appeal. Mr. Sakkarapope again filed a petition for review with the superior court which was denied in June 2009.

In this case the Court is being asked to review the June 26, 2009, decision of the Thurston County Superior Court which heard Mr. Sakkarapope's petition for review of the orders of the PRB denying him remedial action and permanent employment at WSU. The Court should decline to disturb the ruling of the superior court and affirm its decision, and thereby those decisions of the PRB.

II. COUNTER STATEMENT OF THE ISSUE

Whether the decisions of the PRB denying Mr. Sakkarapope remedial action should be affirmed because the PRB's findings are supported by credible evidence, its conclusions are not in error or contrary to law, the decisions are not arbitrary and capricious, materially affected by unlawful procedure or unconstitutional.

III. COUNTER STATEMENT OF THE CASE

A. Procedural History

This matter is before this Court on Mr. Sakkarapope's appeal of the June 26, 2009, order of the Thurston County Superior Court which denied his petition for review of the administrative orders of the PRB dated March 14, 2008, and November 29, 2007.

Mr. Sakkarapope was expelled from WSU's graduate school and his temporary employment at WSU was terminated in early 2003. Brief of Petitioner, at page 5, AR at 177, Ex. R2.¹ Because his student status was terminated he also lost his foreign F-1 Visa or immigration status. AR at 203-205, Ex. R9.

He then filed a request for remedial action with the Department of Personnel (DOP) contending that he had worked beyond the requisite number of hours as a temporary worker at WSU (1,050) and was entitled to a permanent position. The

¹ AR is a reference to the administrative record as shown in the index and record prepared and forwarded to the trial court by the PRB on August 14, 2008.

DOP denied Mr. Sakkarapope's request on July 8, 2003. AR 739-759.

Mr. Sakkarapope appealed to the PAB who denied Mr. Sakkarapope's request for permanent employment. CP at 154-159. Mr. Sakkarapope then appealed to the Thurston County Superior Court. CP at 148. After his repeated attempts to have summary judgment granted in his favor at both the Court of Appeals and the Supreme Court were unsuccessful, Mr. Sakkarapope's appeal was eventually heard on the merits in Thurston County Superior Court on October 6, 2006, and the Court's order was entered on December 22, 2006. CP at 46-47.

After oral argument, the trial court denied most of Mr. Sakkarapope's claims but remanded the matter back to DOP for further consideration of one remaining issue: whether or not WSU's internal policy for defining a student is part of compliance with WAC 251-19-120 (7)² and, if so, whether Mr. Sakkarapope would be qualified for remedial action, and

² Although the WAC referred to in the Superior Court order was repealed effective July 1, 2005, the new civil service rules contained in WAC 357 refer to a similar provision in WAC 357-19-440 (2).

if so, whether he should be granted remedial action.³ The WAC in question required that institutions of higher education submit their procedures for monitoring temporary employment to the DOP for approval.

The remanded matter was reviewed by DOP via the Director's designee, Theresa Parsons, who denied Mr. Sakkarapope's appeal. CP at 39-45. Mr. Sakkarapope then appealed to the PRB. The PRB took written argument and proffered exhibits from the parties and issued its final decision on March 14, 2008, denying Mr. Sakkarapope the right to remedial action and a permanent position at WSU. CP at 24-30. The interim order issued November 29, 2007, by the PRB denied Mr. Sakkarapope's various procedural requests including that of a new full evidentiary hearing, that the Board issue subpoenas on his behalf and that those subpoenas be issued at the subject's place of employment. CP at 31-38.

³ The other claims denied by the trial court included 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.

Following the December 22, 2006, order of the trial court, Mr. Sakkarapope appealed, to this court, only the portion of the trial court order that declined to award him costs, fees and sanctions. Mr. Sakkarapope declined to appeal to this court the trial court's rulings on the remaining merits of the case that were not subject to the remand. The appeal of his costs and sanctions was denied by this Court on July 25, 2007, and the Washington Supreme Court declined review. A mandate was filed in this court on July 3, 2008.

B. Substantive Issue

The only substantive issue properly before this court involves the matter reviewed by the trial court in June 2009, – whether the PRB correctly determined that WSU's internal policy was not a part of the WAC and that Mr. Sakkarapope did not qualify for, and should not be granted, remedial action. Former WAC 251-12-600 allowed temporary employees to request remedial action or permanent employment, under certain circumstances, if their temporary employment exceeded 1,050 hours within a 12-month period.

The WAC stipulated that time worked as a student did not count toward the 1,050 hour limit. Current WAC 357-19-450 contains similar provisions.

Mr. Sakkarapope asserted that since WSU's internal policy defines a student to be any student that is enrolled for six credit hours or more, the hours he worked as a temporary employee during the semester when he was only enrolled for three credit hours should not be counted as student hours; rather, Mr. Sakkarapope contends, these hours should be counted toward the 1,050 hour limit making him eligible for remedial action.

WSU contends that the WAC controls the number of hours for remedial action, that the WAC specifies that student hours (of any amount) are not counted toward the 1,050 hour limit and that Mr. Sakkarapope does not qualify for remedial action.

IV. STANDARD OF REVIEW

The Court of Appeals reviewed decisions of the former PAB de novo on the record made at the Board level, applying the same standard of review as the superior court. *Dedman v.*

Personnel Appeals Board, 98 Wn. App. 471, 989 P.2d 1214 (1999); *Adams v. Dep't of Social & Health Services*, 38 Wn. App. 13, 683 P.2d 1133 (1984); *Trucano v. Dep't of Labor and Industries*, 36 Wn. App. 758, 677 P.2d 770 (1984).

Review of decisions of the former PAB was governed by RCW 41.64.130 and RCW 41.64.140; *Ballinger v. Department of Social & Health Services*, 104 Wn.2d 323, 328, 705 P.2d 349 (1985); *Sullivan v. Department of Transportation*, 71 Wn. App. 317, 320, 858 P.2d 283 (1993). An aggrieved employee previously had the statutory right to appeal the PAB decision on the grounds that the decision is (1) founded on or contained an error of law; (2) contrary to a preponderance of the evidence; (3) materially affected by unlawful procedure; (4) based on violations of any constitutional procedure; and (5) arbitrary and capricious. RCW 41.64.130(1).⁴

⁴ Although there is some question about whether or not Mr. Sakkarapope has a statutory right of review of the PRB decision, for purposes of judicial efficiency, WSU, while not waiving any jurisdictional argument, did not object to a decision on the merits. In the event the Court wishes to consider it, WSU provides the following brief statutory history.

Mr. Sakkarapope asserts that the orders of the PRB were: arbitrary and capricious, founded on and contained an error of law, were materially affected by unlawful procedure, were

Chapter 41.64 RCW was entitled Personnel Appeals Board. RCW 41.64.010 created the PAB, RCW 41.64.090 outlined the jurisdiction of the board to hear employee appeals, and RCW 41.64.130 provided the statutory right of a state civil service employee to appeal certain orders or decisions of the PAB to superior court. RCW 41.64 was repealed in its entirety effective July 1, 2006, under the Personnel System Reform Act of 2002, Laws of 2002 c 354 § 404, which abolished the PAB, effective July 1, 2006, and the powers, duties and functions of the personnel appeals board were transferred to the Washington personnel resources board. RCW 41.06.111 (1). Laws of 2002, c 354 § 233. Further, RCW 41.06.111 (4) now provides that “all rules and all pending business before the personnel appeals board shall be continued and acted upon by the Washington personnel resources board.” When the legislature abolished the PAB and transferred its functions to the PRB they also removed the statutory authority to appeal orders of the PRB. Laws of 2002, c 354 § 213. RCW 41.06.170 was amended to reflect this change and now reads in part as follows:

2) Any employee who is reduced, dismissed, suspended, or demoted, after completing his or her probationary period of service as provided by the rules of the director, or any employee who is adversely affected by a violation of the state civil service law, chapter 41.06 RCW, or rules adopted under it, shall have the right to appeal, either individually or through his or her authorized representative, not later than thirty days after the effective date of such action to the personnel appeals board through June 30, 2005, and to the Washington personnel resources board after June 30, 2005. ... Decisions of the Washington personnel resources board on appeals filed after June 30, 2005, shall be final and not subject to further appeal. (Emphasis added.)

Mr. Sakkarapope filed his appeal on exceptions to the PRB on or around August 7, 2007. All proceedings before the PAB relevant to this matter occurred prior to their statutory demise. The Superior Court heard arguments regarding the PAB order pursuant to former RCW 41.64.130, a statute that was, as indicated earlier, abolished effective July 1, 2006. While the legislature made provisions for the PRB to continue and complete any pending work of the PAB under the earlier existing statutes, the Superior Court essentially overturned the PAB order and the work of the PAB was complete. The work of the DOP and subsequently the PRB then began. While employees could appeal orders of the PAB by right of statute, (former RCW 41.64.130) that right was removed when the statute was abolished. The PRB has taken over the functions and duties of the PAB, but the legislature chose to remove the right to appeal orders of the PRB. RCW 41.06.170 (2).

contrary to a preponderance of the evidence and were a violation of constitutional provisions.

A. Question of Fact

RCW 41.64.130(1)(b) nominally sets forth a preponderance of the evidence test for reviewing challenged findings of fact. However, the Washington Supreme Court has held that the Legislature intended review to be more akin to a substantial evidence test. *Ballinger*, 104 Wn.2d at 328. The Washington Supreme Court has rejected an interpretation of the statute that would confer “de novo reviewing powers” over PAB findings of fact. *Ballinger*, 104 Wn.2d at 328; *Gogerty v. Department of Institutions*, 71 Wn.2d 1, 8-9, 426 P.2d 476 (1967). Instead, the reviewing court accords the PAB decision a “presumption of correctness” and examines if there is “any competent, relevant, and substantive evidence which, if accepted as true, would, within the bounds of reason, directly or circumstantially support the challenged finding or findings,” and “that before the superior court could upset the board’s

findings, it would have to demonstrably appear, from the record as a whole, that the quantum of competent and supportive evidence upon which the personnel board predicated a challenged finding or findings of fact was so meager and lacking in probative worth, and the opposing evidence so overwhelming, as to dictate the conclusion that the pertinent finding or findings did not rest upon any sound or significant evidentiary basis.” *Ballinger*, 104 Wn.2d at 328 (quoting *Gogerty*, 71 Wn.2d at 8-9).

Unchallenged administrative findings are treated as verities on appeal. *Lawter v. Employment Security Department*, 73 Wn. App. 327, 332-33, 869 P.2d 102 (1994), citing *Assoc. of Capitol Powerhouse Engineers v. State*, 89 Wn.2d 177, 183, 570 P.2d 1042 (1977). Additionally, administrative findings of fact are accorded great deference upon judicial review. *Id.* Therefore, the PRB’s facts as outlined in its decision should be regarded as the facts of this case and given great deference by this Court in reviewing Mr. Sakkarapope’s challenge.

In reviewing a prior decision, a reviewing court properly considers only evidence which was admitted in the proceeding below. See *Dioxin/Organochlorine Ctr. v. Department of Ecology*, 119 Wn.2d 761, 771, 837 P.2d 1007 (1992). The review “must be on the record of the administrative hearing, not what came later.” *Christensen v. Terrell*, 51 Wn. App. 621, 634, 754 P.2d 1009 (1988). The court reviews the Board’s decision de novo on the record made at the Board level and it is limited to those issues properly before the Board. *Trucano v. Department of Labor & Industries*, 36 Wn. App. 758, 761, 677 P.2d 770 (1984).

B. Error of Law Standard / Unlawful Procedure

When reviewing a claimed error of law, the court may substitute its judgment for that of the administrative body, but must give substantial weight to the PAB’s judgment. *Sullivan*, 71 Wn. App. at 321; *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 588, 870 P.2d 987 (1994); see also *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 818 P.2d 1062

(1991). In *Sullivan*, the court held that as an adjudicative body exercising its interpretive authority, the PAB's interpretation of the merit system rules was entitled to substantial weight. *Sullivan*, 71 Wn. App. at 322.

Regarding claims of unlawful procedure, "the error of law standard of review applies and allows the reviewing court to essentially substitute its judgment for that of the administrative body, though substantial weight is accorded the agency's view of the law." See *Alexander v. Employment Security*, 38 Wn. App. 609, 613, 688 P.2d 516 (1984), citing *Schuh v. Department of Ecology*, 100 Wn.2d 180, 667 P.2d 64 (1983); *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983); and *Ciskie v. Department of Empl. Sec.*, 35 Wn. App. 72, 664 P.2d 1318 (1983).

C. Mixed Question of Fact and Law

If a court characterizes a case as presenting a mixed question of fact and law, that characterization does not affect the

appropriate standards of review for questions of fact or questions of law. As the Washington Supreme Court held, "It is not the province of the reviewing court to try the facts de novo when presented with questions of law and fact." *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 330, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983). Instead, with mixed questions of fact and law, the reviewing court must determine the correct law independently from the agency's decision and then apply the law to the facts as found by the agency. *Id.*

D. Arbitrary and Capricious

An administrative agency acts in an arbitrary or capricious manner if it takes "willful and unreasonable action, without consideration of facts or circumstances." *Terhar v. Department of Licensing*, 54 Wn. App. 28, 34, 771 P.2d 1180, *review denied*, 113 Wn.2d 1008 (1989); *Sullivan*, 71 Wn. App. at 321. An action is not arbitrary or capricious if it is exercised honestly upon due consideration, even though there may be room for two opinions or even though one may believe that

conclusion to be erroneous. *Dupont-Ft. Lewis School District 7 v. Bruno*, 79 Wn.2d 736, 489 P.2d 171 (1971); *Trucano v. Department of Labor & Industries*, 36 Wn. App. 758, 677 P.2d 770 (1984).

V. ARGUMENT

A. The PRB's Orders Were Not Contrary to a Preponderance of the Evidence.

The only issue properly before the PRB pursuant to the Director's review and the remand from the superior court was whether WSU's Business Policies and Procedures Manual 60.26 was a part of compliance with the civil service rule 251-19-120 (7) and, if so, whether Mr. Sakkarpope was qualified for and should be offered remedial action. That former WAC directed each institution to "develop for director approval a procedure which indicates its system for controlling and monitoring exempt positions identified in RCW 41.06." As noted earlier, current WAC 357-19-440 (2) contains a similar provision.

The PRB made its determination based on credible evidence that supported its conclusion to deny Mr. Sakkarapope's appeal. Although not labeled as such, Section 4.3 in the Board's order contains a finding of fact that WSU's rule 60.26 was not submitted to or approved by the Director and was not part of compliance with WAC 251-19-120 (7). Similarly, sections 4.4, 4.5 and 4.6 contain the Board's conclusions. Based on the written documents before them the PRB's finding of fact regarding WSU's policy clearly supports their conclusions that Mr. Sakkarapope was not qualified for and should not be granted remedial action.

1. Compliance With the WAC

The evidence before the Director and the PRB showed that WSU had previously submitted certain documentation to DOP in 1990 in an effort to follow the rules regarding approval for temporary employment procedures. AR at 186-200, Ex. R7. However, the evidence also showed that WSU's Personnel Rule 60.26 was different in several ways than the documents

submitted those many years ago. WSU's Business and Policies and Procedures Manual (BPPM) part 60.26 entitled, "Temporary Employment Program," describes a student as one who is enrolled for six credit hours or more during fall or spring semester and for three credit hours during the summer. This policy also describes other aspects of WSU's temporary employment program, including the work-study program, non-student employees, compensation, child labor, benefits, non-temporary employment, and so forth. This BPPM policy is shown at AR at 181-185, Ex. R6.

Pursuant to former WAC 251-19-120 (7), WSU, in July 1990, sent in their procedure for monitoring temporary employees to DOP. This procedure, in addition to outlining detailed monitoring processes, and confirming various areas of responsibilities for different departments, defined student employees as those who were enrolled for a minimum of seven credits during the fall and spring semesters and four credits in the summer. This procedure was not numbered nor was it

entitled Business Policies and Procedures Manual. This procedure and the accompanying correspondence between WSU and DOP are shown at AR 186-200, Ex. R7.

The Director and the PRB properly determined that there was no evidence that WSU actually submitted its BPPM policy 60.26 to DOP for approval by the director pursuant to WAC 251-19-120(7). The 1990 procedure included a definition of “student” that was similar to a definition that was contained in the more recent BPPM. That definition related to the number of hours a student needed to be enrolled in order to be considered a student. The 1990 procedure stated that a student was one who was enrolled for seven credits in the spring and fall semesters and four credits in the summer. The BPPM that was in effect in 2000 defined a student as one who was enrolled for six credit hours in the fall and spring and three credits in the summer.⁵ DOP approved those monitoring procedures in 1990 even though they contained a definition of a student that

⁵ WSU’s BPPM was revised in July 2005 to reflect updated references to new WAC numbers after WAC 251 was abolished.

was not reflected in the remedial action rule. The Director properly noted in her decision that the procedures submitted were not consistent with the applicable WAC rule. CP at 42.

Further, there are a number of provisions in the 1990 procedures that are not reflected in the current BPPM, including a detailed rendition of what departments are supposed to do with certain documents, what copies would go where, what would be reflected on earnings statements, where certain reports would be sent, what those reports would contain, which department had responsibility for which role, and so forth. There were also ten attachments provided to DOP with those procedures as samples of how WSU would carry out these functions. These attached samples are not included with the BPPM. In other words, those 1990 procedures reflect the monitoring process that DOP was concerned about. In short, the BPPM in question, although, it contains some definitions that are similar to the 1990 procedures that were approved, is not encompassed in the remedial action WAC. The primary

issue that was presented by the Superior Court for further consideration by DOP, “If the BPPM 60.26 was part of compliance with WAC 251-19-120 (7)” was properly answered in the negative by both the Director and the PRB.

B. The PRB’s Order Was Not Based on an Error of Law, or Affected by Unlawful Procedure

Mr. Sakkarapope lists, as several grounds for his appeal, that the Order was founded on or contained an error of law, and that the Board engaged in unlawful procedure.

1. WAC v. WSU’s Policy

Mr. Sakkarapope continues to assert that WSU’s policy should prevail over the WAC rule. WSU’s policy to count someone as a student if they were enrolled for six credit hours or more was done for a variety of operational reasons, including for benefit purposes, for tax purposes and for financial aid purposes. However, for purposes of excluding student hours in determining if the threshold of 1,050 hours had been met, the six hour limit did not and could not supersede the relevant

WAC. In fact, the policy specifically references the remedial action WAC and its provision that student hours are excluded. AR at 183.

The WAC rule, 251-12-600, indicated that WSU was following the rule in determining if a student's work hours counted toward the 1,050 hour threshold. WSU reasoned that a student enrolled for any amount of credits would have their work time excluded for purposes of applying the remedial action rule. In fact, the rule does not specify that only students enrolled for six or more credits need to have their hours excluded in the count toward the 1,050 hour limit.

DOP has previously determined that an institution's policy regarding how they define students for enrollment purposes does not change the nature of the remedial action rule that excludes all hours worked while a student from the 1,050 hour limit. See *Patrick Tabak v. Eastern Washington*

University, HEPB No. 3726 (1992),⁶ where the director spelled out that “The rule does not stipulate the amount of credits a student must be taking or earning to be considered enrolled as a student, it only specifies that the individual must be enrolled.” In similar fashion, WSU’s policy of defining a student as one who is enrolled for six credits is of no significance when considering possible application of the law – the WAC rule on remedial action.

While WSU was free to monitor student enrollment for a variety of purposes by way of a policy that counted students as those enrolled for six credits or more, they were not free to change the parameters of the rule. In determining if Mr. Sakkarapope was nearing the 1,050 hour limit, they counted all hours when he was enrolled as a student, even if he was enrolled for less than six hours. This was in compliance with the WAC rule regarding student hours and DOP precedent

⁶ Administrative decisions cited as authority are attached for the Court’s reference.

regarding the threshold enrollment required to be considered a student for application of the remedial action rule.

Further, the WAC does not contain a specific definition of “student.” Prior HEPB precedent indicates that when no definitions are contained in the rules relating to temporary appointments, they will look to the dictionary for assistance. See *Clarence Hill v. Eastern Washington University*, HEPB No. 1840 (1984). In keeping with this precedent, we note that the *American Heritage Dictionary*, Second College Edition, defines a student as “One who attends, a school, college, or university.”

Mr. Sakkarapope does not dispute that he attended WSU during the spring and fall of 2002. Therefore, his student hours worked during these two semesters should not be included in determining if he meets the threshold level of hours worked to be considered for remedial action. Mr. Sakkarapope’s contention that he should be granted remedial action because WSU’s policy grants him that right should be rejected. His appeal should be denied.

Further, Mr. Sakkarapope apparently and mistakenly believes that WSU's BPPM is a published document carrying the weight of law. While WSU is a state agency that is required to go through the rule making process for certain rules in accordance with the Administrative Procedures Act (APA) - RCW 34.50 -, those published rules are contained in the Washington Administrative Code Title 504 - "Washington State University." WSU, like most state agencies, has a myriad of internal policies, procedures and guidelines, such as their Business Policies and Procedures Manual, which inform their day-to-day activities. However, those internal policies and guidelines are typically not required to go through the formal rule making process outlined under the APA and they are not published in WAC 504.

In fact, RCW 34.05.010 specifically excludes internal policies of higher education institutions relating to employment relations from rule making. RCW 34.05.010 (16) defines a "Rule" and states in part: "Rule means any agency order,

directive, or regulation... The term includes the amendment or repeal of a prior rule, but does not include, ... (iv) rules of institutions of higher education involving standards of admission, academic advancement, academic credit, graduation and the granting of degrees, employment relationships, or fiscal processes.”

WSU’s BPPM 60.26 is an internal policy that was not promulgated pursuant to rule making requirements of the APA. By contrast, the WAC in question is such a rule and the Director of DOP has the authority and the responsibility to promulgate appropriate WAC rules as outlined in RCW 41.06.150. Those WAC rules go through the formal rule making process pursuant to the APA and carry the force of law. In contrast to agency rules, agency policy statements are not required to go through the formal rule making process and because they are not promulgated pursuant to APA rule making requirements, policy statements do not have the force of law.

See *J.E. Dunn v. Dept. of Labor and Industries*, 139 Wn. App. 35, 51-53, 156 P.3d 250 (2007).

In reviewing the status of Mr. Sakkarapope's claim, DOP and the PRB properly applied the applicable WAC rule in determining whether the student hours should be included. That rule carries the force of law and correctly informed their decisions.

2. Granting of Remedial Action is Discretionary

On its face, the remedial action rule gives discretionary authority to the director to grant remedial action. DOP has also previously indicated that this authority is not mandatory, but rather discretionary. See *Tyler Scott Kelsey v. Western Washington University*, HEU No. 4279 (2000), wherein DOP indicated that "The director may exercise discretion on a case-by-case basis to determine the appropriateness of granting remedial action even when the 1,050 hour limitation has been exceeded." In *Daniel Watkins v. Washington State University*, HEU No. 3989 (1995), DOP stated that, "The director's

authority to grant remedial action is discretionary and is not required by WAC 251-12-600 if a temporary employee works over the 1,050 hour limit.” The Higher Education Personnel Board also ruled in *Louis E. Cobet v. Director, Higher Education Personnel Board*, HEPB No. 374 (1976), that this authority is discretionary in this appeal of the director’s denial of remedial action and said, “The board, or director when delegated, must use its discretion on a case by case basis to determine the appropriateness of granting remedial relief.” Accordingly, it is within the discretion of the director to deny remedial action on a case by case basis depending on the facts and circumstances and the Director properly applied that discretion to Mr. Sakkarapope’s appeal.

3. The PRB’s Procedure was Proper

Mr. Sakkarapope protests the authority of the PRB and the manner in which they conducted their review. He claims that a review on exceptions is not proper and does not adhere to the former WAC. The prior WAC regarding remedial action

appeals was 251-12-600. That rule allowed the director to take remedial action and required the employee to submit such a request within thirty days after the effective date of the alleged violation. WAC 251-12-600 (4) read in part as follows:

The director's order for remedial action shall be final and binding unless exceptions are filed with the personnel appeals board within thirty calendar days of the date of service of the order. Exceptions must state the specific items of the order to which exception is taken. The personnel appeals board will review the exceptions and may hold a hearing prior to modifying or affirming the director's order.

By contrast, current WAC 357-49-010 is entitled **“For what actions may an individual request a director's review?”** and describes how these requests are initiated and reads, in part, as follows:

(5) An individual may request the director review his/her request for remedial action per WAC 357-19-430 or 357-19-450. Requests for remedial action must be received within thirty calendar days of the date the individual could reasonably be expected to have knowledge of the action giving rise to violation of the nonpermanent

appointment or temporary appointment rules.

Current WAC 357-52-010 is entitled, “**What actions may be appealed?**” and states that:

(1) Within WGS, the following actions may be appealed:

(e) An individual or employer may appeal remedial action to the board by filing written exceptions to the director’s review determination.

Current WAC 357-52-207 is entitled ‘**How does the board decide an appeal on exceptions?**’ and states:

The board reviews the record created by the director’s designee or hearing officer. At the board’s discretion, the appeal is decided based upon: (1) The record and the written arguments on the exceptions, or (2) The record and the oral arguments on the exceptions.

The review process outlined in the PRB’s procedural rules is similar to the prior process before the PAB which allowed but did not require the PAB to hold a hearing. The PRB applied the prior WACs regarding Mr. Sakkarapope’s substantive appeal and applied their own procedural WAC rules to the process for considering Mr. Sakkarapope’s appeal. That

process afforded Mr. Sakkarapope the opportunity to present his arguments before the PRB and they considered those arguments. Their process was not affected by an error of law or any unlawful procedure.

C. The PRB's Decision was Not Arbitrary or Capricious

The PRB's decision in this matter clearly takes into account all of the facts and circumstances at issue. Given their review of the Director's determination in this matter and the findings and conclusions rendered by the PRB, it cannot be said that their decision was anything but exercised honestly and with due consideration. This decision is not willful and unreasoning and there has been no showing to the contrary. Even if there is room for two opinions, their decision should not be disturbed.

D. The PRB's Orders Did Not Violate Constitutional Provisions

Mr. Sakkarapope also asserts that the PRB's decision was based on a violation of a constitutional provision. He argues that misconduct on the part of WSU's counsel has deprived him of his due process rights. He also asserts that the PRB's failure

to follow the procedural rules of the former PAB violated his due process and liberty interests. His summary conclusions are without merit and are not supported by relevant facts.

Contrary to these assertions, Mr. Sakkarapope was afforded the appropriate process due under the applicable rules. When he believed a violation of the civil service rules had occurred he filed an appeal with DOP. He provided them exhibits and they conducted a review of the evidence. They rendered a decision and Mr. Sakkarapope was then afforded an opportunity to appeal that decision to the PAB, which he did.

The PAB chose to conduct a full evidentiary hearing and rendered their decision. That decision was properly appealed to Superior Court which conducted its own review before sending the matter back to DOP. The Director's designee again entertained new written arguments and received additional evidence. She also reviewed the prior record before DOP and the PAB before making her decision. Mr. Sakkrapopoe filed exceptions to her decision and the PRB reviewed them,

received written arguments and ultimately ruled against Mr. Sakkarapope.

Fundamental due process requires notice and an opportunity to be heard. *Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355, (1995). Mr. Sakkarapope was heard four separate times by two separate and distinct state agencies with authority to review his situation. There is no indication that those proceedings were flawed or in some way failed to provide the necessary due process protections.

Mr. Sakkarapope also asserts that the denial of equal employment based on his immigration status has deprived him of equal employment opportunity. Contrary to these assertions, the order of the PRB was based on the relevant WAC language and their determination that the WAC took precedent over WSU's policy. Further, Mr. Sakkarapope has not shown, contrary to the evidence presented, that he is in possession of a valid visa that would allow his lawful employment. Mr. Sakkarapope's constitutional claims are unfounded.

E. Mr. Sakkarapope's Other Assertions Are Not Properly at Issue Before This Court

Mr. Sakkarapope raises a number of other issues that have previously been settled and are no longer viable. His protests regarding the correct dates for counting the 12-month monitoring period, the procedures of the PAB in the 2004 hearing, and the expiration of a portion of the relevant WAC for a brief period of time prior to his appeal, were all previously presented to the Superior Court and a final ruling was issued in December 2006. As noted earlier, no appeal of those issues was taken at that time. Curiously Mr. Sakkarapope did avail himself of an appeal to this court at that time but limited his appeal to the superior court's denial of his request for fees and sanctions. He easily could have included portions of the court's decision on the merits if he disagreed with them. He chose not to do so. Since no appeal of that prior ruling was taken, the superior court's determination of those issues is final.

Similarly, Mr. Sakkarapope continues to protest matters relating to the court's denial of his summary judgment requests in November and December of 2004. These issues have also been previously presented to this court and final rulings were issued on several occasions. The only issue before the Superior Court involved the remanded matter considered by the PRB. Mr. Sakkarapope's invitation for the court to reconsider any additional issues should be declined.

F. Mr. Sakkarapope is Not Entitled to Costs, Fees or Sanctions

Mr. Sakkarapope asserts that he should be entitled to 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 fees.

He also asserts that he should be entitled to costs, fees and sanctions because WSU's defenses in response to his

appeals have been frivolous and their counsel has committed misconduct. Since WSU was ultimately the prevailing party, this claim is devoid of merit on its face and should be rejected. He presents no valid or substantive argument that WSU's counsel has committed misconduct.

Additionally, Mr. Sakkarapope has previously had a similar request denied by this Court in his appeal from the Superior Court's December 2006 order. Further, the Office of the Attorney General and its attorney assigned to this case deny his allegations of misconduct.

VI. CONCLUSION

WSU respectfully requests that the Court deny Mr. Sakkarapope's appeal and affirm the order of the trial court. Given all the evidence as presented to the administrative agency, the PRB's decisions were well founded. There is clearly ample evidence to support the findings and those findings clearly support these decisions. The PRB examined that evidence and reasonably concluded that Mr. Sakkarapope

should not be granted remedial action. That decision was not arbitrary or capricious - clearly not willful or unreasoning but, instead, in full consideration of all facts and circumstances. There is no showing that an error of law was committed in rendering their decisions or in the conduct of the proceedings nor were there violations of constitutional provisions. Accordingly, the decisions of the PRB should not be disturbed.

RESPECTFULLY SUBMITTED this 10 day of
November, 2009.

ROBERT M. MCKENNA
Attorney General

Donna J. Stambaugh

DONNA J. STAMBAUGH
WSBA No. 18318
Attorneys for Respondent

BEFORE THE HIGHER EDUCATION PERSONNEL BOARD

STATE OF WASHINGTON

IN THE MATTER OF:)
)
Patrick Tabak) HEPB No. 3726
)
Appellant,)
)
v) FINDINGS, CONCLUSIONS
) AND DETERMINATION OF
) DIRECTOR, HIGHER EDUCATION
Eastern Washington University) PERSONNEL BOARD
)
Respondent.)
_____)

This matter came before the Director, Higher Education Personnel Board, under the provisions of WAC 251-12-600, Remedial Action. The Director's Investigation was conducted by HEPB staff member, Sandra Brownrigg. Discussions of the issues were held with the appellant and Caren Lincoln, Employment Representative for the respondent. Having considered the information provided by Ms. Lincoln and Mr. Tabak and having reviewed the applicable laws and administrative rules, the Director now issues the following Findings, Conclusions and Determination.

FINDINGS

I.

The appellant submitted a request for remedial action dated July 31, 1992, which was received by the Director August 3, 1992 (Exhibit A-1).

II.

The appellant contends that he was assigned work schedules that exceed the limitations set forth in Higher Education Personnel Board rules for temporary employees. Exhibit A-7 is

a summary of hours worked which was submitted by the appellant as documentation to support his contention. The appellant contends that between July 16, 1991 and July 15, 1992, he worked 1162.75 hours which exceeds the 1050 hours stipulated in WAC 251-12-600. According to the appellant's appeal letter, the basis for his request for remedial action is the termination of his student employment due to his failure to complete the credits for which he was enrolled. The appellant requests remedial action as a non-student employee.

III.

The respondent has employed the appellant as a student employee in Insulation Maintenance/Asbestos Abatement since June 19, 1990. On July 30, 1992, the respondent terminated his employment because he failed to obtain enough credits to qualify as a full-time student as defined by the respondent. According to Exhibit R-1, the appellant enrolled as a full-time student. However, he received no credits for classes he failed, and according to the respondent's definition did not qualify as a full-time student. Following the appellant's termination, the respondent reviewed its termination decision and determined that as long as the appellant was registered as a full-time student according to the respondent's Registrar's office (which he was), the respondent would consider him a full-time student. Per a letter dated August 5, 1992, the respondent restored his student employment (Exhibit R-1).

IV.

The respondent provided the appellant with a part-time employment authorization form which served as his letter of appointment indicating his conditions of employment in accordance with 251-04-040(2) (Exhibit R-2).

V.

The respondent submitted Exhibit R-1 as documentation of the hours the appellant worked between June 19, 1990 and July 31, 1992. In accordance with WAC 251-04-040(2)(a), time the appellant worked during academic quarter breaks and summer is not considered student employment. Such hours are considered temporary employment and are included when calculating the 1050 hour exemption for temporary employment per WAC 251-04-040(5). Overtime hours are not included in calculating the 1050 hour exemption.

VI.

Below is a summary of the non-overtime hours the appellant worked for the respondent during quarter breaks and summer that were not exempted under WAC 251-04-040(2). The summary displays hours according to monthly totals and includes the hours the appellant worked from the date he was hired, June 19, 1990, through the date of the appellant's appeal, July 31, 1992.

<u>Month</u>	<u>Year</u>	<u>Hours</u>
June (16-30)	1990	72
July	1990	144
August	1990	183.92
September	1990	80
October	1990	0

November	1990	0
December	1990	47.50
January	1991	20
February	1991	0
March	1991	40
April	1991	0
May	1991	0
June (1-15)	1991	0

The appellant worked a total of 587.42 hours for the respondent between June 16, 1990, and June 15, 1991.

<u>Month</u>	<u>Year</u>	<u>Hours</u>
June (16-30)	1991	94.25
July	1991	137.50
August	1991	170
September	1991	54.25
October	1991	0

November	1991	0
December	1991	50
January	1992	0
February	1992	0
March	1992	53.50
April	1992	0
May	1992	0
June (1-15)	1992	32

The appellant worked a total of 591.50 hours for the respondent between June 16, 1991, and June 15, 1992.

Month	Year	Hours
June (16-30)	1992	40
July	1992	158

The appellant worked a total of 198 hours for the respondent from June 16, 1992, to July 31, 1992.

VII.

The respondent's record of hours the appellant worked (Exhibit R-1) was used as the basis for calculation of the 1050 hour limitation. The respondent's record summarizes the appellant's work hours according to pay periods (1st of the month through the 15th of the month and 16th of the month through the end of the month). According to WAC 251-12-600, the twelve consecutive month period to be considered in this appeal is between June 19 (the original date of hire) and June 18 of the following year. Because the respondent's record of hours the appellant worked is summarized according to pay periods, it is not possible to total the exact number of hours worked between June 19 and June 18 of the following year. For purposes of this appeal, the hours worked between June 16 and June 15 of the following year can be used to calculate the 1050 hour limitation if the number of hours worked between June 16 and June 15 is substantially less than or greater than 1050. In such a situation, using the annual period of June 16 to June 15 of the following year would have little affect on the calculation because of the significant difference between the number of hours worked and the 1050 hour limitation.

VIII.

WAC 251-04-040 states in relevant part:

The following classifications, positions, and employees of higher education institutions/related boards are hereby exempted from coverage of this chapter...

(2) Students employed by the institution at which they are enrolled (or related board) and who either:

(a) Work five hundred sixteen 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 year, provided such employment does not:

- (i) Take the place of a classified employee laid off due to lack of funds or lack of work; or
- (ii) Fill a position currently or formerly occupied by a classified employee during the current or prior calendar or fiscal year, whichever is longer;
- (b) Are employed in a position directly related to their major field of study to provide training opportunity; or
- (c) Are elected or appointed to a student body office or student organization position such as student officers or student news staff members...
- (5) Persons employed to work one thousand fifty hours or less in any twelve consecutive month period from the original date of hire or October 1, 1989, whichever is later. Such an appointment maybe subject to remedial action in accordance with WAC 251-12-600, if the number of hours worked exceeds one thousand fifty hours in any twelve consecutive month period from the original date of hire or October 1, 1989, whichever is later, exclusive of overtime or work time as described in subsection (2) of this section...

IX.

WAC 251-12-600 states in part:

- (1) The director may take remedial action when it is determined that the following conditions exist.
 - (a) The hiring institution has made an appointment that does not comply with higher education personnel board rules.
 - (b) The employee has worked in one or more positions for more than one thousand fifty hours in any twelve consecutive month period since the original date of hire or October 1, 1989, whichever is later. (These hours do not include overtime or work time as described in WAC 251-04-040(2).) *(Emphasis added)*
 - (c) The position or positions are subject to civil service.
 - (d) The employee has not taken part in any willful failure to comply with these rules...

CONCLUSIONS

I.

The Higher Education Personnel Board has jurisdiction over the subject matter and parties to this appeal.

II.

Eastern Washington University's employment of the appellant was properly exempted from the Higher Education Personnel Board rules in accordance with the student employee exemption detailed in WAC 251-04-040(2). The rule does not stipulate the amount of credits a student must be taking or earning to be considered enrolled as a student, it only specifies that the individual must be enrolled. The respondent may have institutional or academic policies which govern student employment and specify how many credits students must take or earn to be considered a full-time student; however, these policies are created and administered at the discretion of the institution and are not at issue in this appeal.

III.

As shown in Finding VI, the hours the appellant worked (exclusive of hours exempt under WAC 251-04-040(2) or worked as overtime) during the time periods of June 16, 1990, to June 15, 1991, June 16, 1991 to June 15, 1992, and June 16, 1992 to July 31, 1992 (date of appeal), are substantially less than 1050 hours for each annual period. Therefore, based on the payroll information the respondent provided, the appellant has not worked as a temporary employee for more than 1050 hours in any twelve consecutive month period starting June 19, 1990 (date of hire), to July 31, 1992 (date of appeal).

IV.

The position the appellant holds in Insulation Maintenance/Asbestos Abatement is potentially subject to civil service.

V.

The appellant did not partake in any willful failure to comply with these rules.

VI.

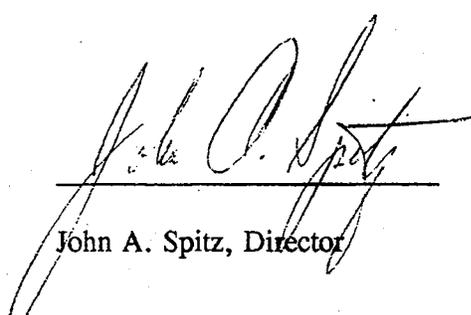
The appellant's request for remedial action does not fulfill the four criteria set forth in WAC 251-12-600 and, therefore, should be denied.

DETERMINATION

The appellant's request for remedial action is denied.

DATED this 5th day of November 1992.

HIGHER EDUCATION PERSONNEL BOARD



John A. Spitz, Director

NOTE: Under provisions of WAC 251-12-075(2), within thirty calendar days of the above date, either party may take exception to these Findings, Conclusions and Determination by filing with the Director, Higher Education Personnel Board written detail of the specific areas to which exception is taken.

LIST OF EXHIBITS

Appellant's Exhibits:

- A-1 Letter of appeal, received at HEPB office August 3, 1992
- A-2 Memo to Dorothy Burgess from Kelley Horsman, dated July 24, 1992
- A-3 Memo to Kelley Horsman from Patrick Tabak, dated July 27, 1992
- A-4 Memo to Patrick Tabak from Kelley Horsman, dated July 28, 1992
- A-5 Letter to Dorothy Burgess from Ron Hess, dated July 31, 1992
- A-6 Trades Helper class specification, class code 5470
- A-7 Wage and Benefit History, received August 3, 1992

Respondent's Exhibits:

- R-1 Letter to HEPB Investigator, Sandra Brownrigg, from Caren Lincoln and attachments (Summary of hours and August 5, 1992, memo to Patrick Tabak from Kelley Horsman), dated September 2, 1992, and received September 8, 1992, at HEPB office
- R-2 Letter to HEPB Investigator, Sandra Brownrigg, from Caren Lincoln with attachment (Patrick Tabak's part-time employment authorization form), dated September 22, 1992, and received September 28, 1992

Director's Exhibits:

- D-1 Assignment of appeal, dated August 14, 1992
- D-2 Letter to parties from HEPB Investigator and List of Exhibits, dated October 2, 1992

Remedial

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

HIGHER EDUCATION PERSONNEL BOARD
STATE OF WASHINGTON

IN THE MATTER OF:)	
)	
CLARENCE HILL,	)	HEPB NO. 1840
Appellant,)	
	)	FINDINGS, CONCLUSIONS AND
v	)	ORDER FOLLOWING EXCEPTIONS
	)	TO THE DETERMINATION OF THE
EASTERN WASHINGTON UNIVERSITY,	)	DIRECTOR, HIGHER EDUCATION
Respondent.	)	PERSONNEL BOARD

THE ABOVE MATTER Came before the Higher Education Personnel Board on the appellant's exceptions to the Findings, Conclusions and Determination of the Director dated February 22, 1984. The Hearing was held on April 25, 1984 in the Board Room of the District Headquarters of the Community Colleges of Spokane, Spokane, Washington. Appellant appeared in person and was represented by Edward Earl Younglove, III of Cordes, Younglove and Wyckoff; respondent was represented by Owen F. Clarke, Jr., Assistant Attorney General. The Board, having heard the arguments of counsel, having considered the files and records herein and being fully advised in the premises now makes the following Findings, Conclusions and Order.

FINDINGS

The Board affirms and adopts the Director's Findings I through XII as follows:

I.

Appellant was employed in the Fabrication Shop at Eastern Washington University on July 11, 1983. Employment of the appellant was initiated by memo from Clif Winkleblack, Maintenance Superintendent to Ken Berg, Personnel Officer, dated July 8, 1983. The memo stated:

"We are in need of a part-time temporary Welder-Fabricator for 60 days to help catch up on the backlog of pro-

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

VI.

In a memo from Robert Graham, Director of Facilities, to Clif Winkleblack, Maintenance Superintendent, dated December 14, 1983 (Exhibit R-4), Mr. Graham stated:

"The Machinery Mechanic position is being deferred at least until February 1984. The temporary position of Welder/Fabricator has now been filled for 5 months in anticipation of filling the Machinery Mechanic position. The temporary position must be terminated as of December 30, 1983.

Until I can determine the effect of additional costs to budgets caused by various items, I will not fill the Mechanic position. I expect that by the middle of January to the first of February I will be able to make a decision."

VII.

On December 15, 1983, Don Rettig, Utility Maintenance Supervisor in a memo to appellant advised him as follows:

"Sorry to say I have to give you two weeks' notice of termination from the Fabrication Shop. Your last working day will be December 30, 1983...."

VIII.

From the time of his initial employment on July 11, 1983 to his termination dated, December 30, 1983, appellant worked the following number of hours and days.

<u>Month</u>	<u>No. of Hours</u>	<u>No. of Consecutive Calendar Days</u>
July 1983	115	21
August 1983	184	31
September 1983	168	30
October 1983	168	31
November 1983	152	30
December 1983	112	30

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

IX.

From July 11, 1983 to December 30, 1983, the appellant worked in excess of 87 hours per month (half time) for six consecutive months for a total of 173 consecutive calendar days.

X.

WAC 251-04-020 Supra provides for hiring temporary employees to "perform extra work required at a workload peak"..."which does not exceed one hundred and seventy-nine consecutive calendar days," and WAC 251-12-600 Remedial Action states in relevant part:

"When it has been determined that an individual has served six consecutive months in an institution in a position subject to the civil service but whose appointment by the institution has not been in accordance with the provision of these rules, and the employee was not a party to the willful disregard of the rules, the director may take such appropriate action as to confer permanent status, set provision for salary maintenance, establish appropriate seniority, determine accrual of benefits, and such other actions as may be determined appropriate pursuant to the best standards of personnel administration...."

XI.

HEPB Rules do not contain definitions related to the temporary appointment process. Therefore, to determine whether the appellant, who was hired to "help catch up on the backlog of projects," was in fact performing extra work required at workload peak, we must look to the dictionary for assistance. Webster's New World Dictionary (2nd Edition) defines the following terms:

Backlog - "An accumulation of unfilled orders, unfinished work."

1 established for the Shop. As a result, respondent's action in
2 appointing appellant to the position was not in accordance with
3 WAC 251-04-020(3).

4
5 IV.

6 WAC 251-12-600 provides the mechanism under which an indi-
7 vidual may be granted relief through remedial action. The rule
8 contains four conditions which must be present in order for the
9 Director to consider remedial action. These conditions are:

- 10 1) The employee must have served six consecutive months.
- 11 2) The position must be subject to the civil service.
- 12 3) The appointment of the employee was not in accordance
13 with the rules.
- 14 4) The employee involved was not a party to the willful
15 disregard of the rules.

16 It is concluded by the Board that conditions 2), 3), and 4)
17 are present in the instant case. Although the appellant was em-
18 ployed in each of six consecutive months, he was employed for 173
19 consecutive days, not six full months.

20 V.

21 In granting remedial action, other related rules of the Board
22 must also be considered. WAC 251-18-340 requires completion of a
23 six month probationary period before permanent status is achieved.
24 Probationary period is defined in WAC 251-04-020 as "The initial
25 six month period of employment in a class following appoint-
26 ment...". The probationary period requires completion of six full
27 months. During the probationary period, the employee may be dis-
28 missed with notice of eight working hours. In this instance, the
29 appellant was provided with two weeks of notice of termination.
30 Had the appellant been appointed in accordance with the rules, he
31 would not have served long enough at the time of his termination
32 to have completed the probationary period. Additionally, the

1 appellant suggested that respondent should have appointed him on a
2 provisional basis as provided in WAC 251-18-300. However, provi-
3 sional appointments may not be credited toward completion of the
4 probationary period. Therefore, appellant would not have achieved
5 permanence via proper application of that rule.

6 VI.

7 Although the respondent inappropriately applied the temporary
8 appointment rules, the appellant was not denied any rights that
9 would have accrued to him under the civil service rules.

10 VII.

11 The appellant is not entitled to remedial action and his
12 appeal should be denied.

13 VIII.

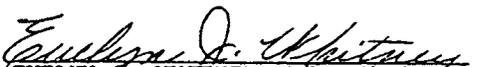
14 The Director's Determination that appellant was not entitled
15 to remedial action should be affirmed but for the reasons set
16 forth herein.

17 ORDER

18 The appeal of Clarence Hill and his request for remedial
19 action are hereby denied.

20 DATED this 26th day of July 1984.

21 HIGHER EDUCATION PERSONNEL BOARD

22
23 
24 EVELYN S. WHITNEY, Vice Chairman

25
26 
27 JANE M. MCCORMMACH, Member

BEFORE THE DEPARTMENT OF PERSONNEL
STATE OF WASHINGTON

IN THE MATTER OF:)	
)	
Tyler Scott Kelsey	)	HEU No. 4279
)	
Appellant,)	
)	
v.	)	FINDINGS, CONCLUSIONS AND
	)	DETERMINATION OF DIRECTOR,
	)	DEPARTMENT OF PERSONNEL
Western Washington University)	
)	
Respondent.)	
<hr/>		

THIS MATTER came before the Director, Department of Personnel, under the provisions of WAC 251-12-600, Remedial Action. The Director's investigation was conducted by Kari Lade of the Higher Education Unit of the Department of Personnel. Information was obtained from Cheri Hayes, Associate Director of Human Resources for Western Washington University (WWU), and from Tyler Kelsey, appellant. Having considered the information provided, having reviewed the applicable laws and administrative rules, the Director now issues the following Findings, Conclusions and Determination.

FINDINGS

I.

Mr. Kelsey originally sent his written request for remedial action to the respondent rather than to the Department of Personnel. In this letter, he stated that he worked for more than twelve consecutive months and was over the 1050 hour limitation since December, 1999. Respondent informed Mr. Kelsey that the Department of Personnel is the proper jurisdiction for filing a remedial action appeal. By letter dated March 16, 2000, Mr. Kelsey submitted his request for

remedial action to the Department of Personnel (exhibit E-1). The request was received by the Director on March 16, 2000.

II.

Respondent originally hired Mr. Kelsey as a temporary employee for the Transport Services Department on August 11, 1997 as shown on the Personnel Action Form (exhibit E-3). As indicated on this form, Mr. Kelsey was performing duties of a Transportation Helper. The end-date of this position was noted as August 10, 1998. Mr. Kelsey's employment ended on March 15, 2000. Mr. Kelsey provided additional information showing he previously worked through the Private Industry Council at Western Washington University as a Warehouse Helper from May 20, 1996 through November 1, 1996.

III.

WAC 251-04-040, Exemptions, states in part:

"The following classifications, positions, and employees of higher education institutions/related boards are hereby exempted from coverage of this chapter...

(6) Persons employed to work one thousand fifty hours or less in any twelve consecutive month period from the original date of hire or October 1, 1989, whichever is later. Such an appointment may be subject to remedial action in accordance with WAC 251-12-600, if the number of hours worked exceeds one thousand fifty hours in any twelve consecutive month period from the original date of hire or October 1, 1989, whichever is later, exclusive of overtime or work time as described in subsection (3) of this section..."

IV.

WAC 251-01-415 defines temporary appointment as:

"(1) Work performed in the absence of an employee on leave for more than six consecutive months in accordance with WAC 251-19-120(2); or

(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(5)[sic]; or

(3) Formal assignment of the duties and responsibilities of a higher level class for a period of less than six consecutive months."

V.

WAC 251-12-600, Remedial Action, states in part:

"(1) The director may take remedial action when it is determined that the following conditions exist.

(a) The hiring institution has made an appointment that does not comply with higher education personnel rules.

(b) The employee has worked in one or more positions for more than one thousand fifty hours in any twelve consecutive month period since the original hire date or October 1, 1989, whichever is later. (These hours do not include overtime or work time as described in WAC 251-04-040 (2)[sic].)

(c) The position or positions are subject to civil service.

(d) The employee has not taken part in any willful failure to comply with these rules.

(2) Remedial action includes the power to confer permanent status, set salary, establish seniority, and determine benefits accrued from the seniority date. Remedial action also includes other actions the director may require to meet the highest personnel standards.

(3) If the institution has complied with WAC 251-19-122, the employee must:

(a) Submit any request for remedial action in writing; and

(b) File the request within thirty calendar days after the effective date of the alleged violation of the conditions of employment which are to be specified in the written notification of temporary appointment..."

VI.

WAC 251-19-122, Written notification of temporary appointment, states:

"(1) All temporary employees shall be notified in writing of the conditions of their employment prior to the commencement of each appointment and/or upon any subsequent change to the conditions of their employment.

(2) The written notification shall contain the following information:

(a) The reason for the temporary appointment (see WAC 251-01-415(1), (2), and (3));

(b) The hours of work and the hourly rate of pay;

(c) The duration of appointment as adjusted by any current or former temporary appointments. The duration shall be expressed as a starting and expected end date;

(d) The name of the employee's supervisor;

(e) A statement regarding the receipt or nonreceipt of benefits. If the employee is to receive

benefits, the statement shall include which benefits are to be received;

(f) The expected status of the employee upon completion of the appointment;

(g) The signature of the personnel officer and/or authorizing hiring official;

(h) The signature of the employee verifying receipt of the written notification;

(i) An identification of any current and/or previously held temporary positions at the institution;

(j) A statement of appeal rights for those positions in which a violation of WAC 251-01-415 may result in permanent status."

VII.

The respondent did not provide Mr. Kelsey with a written notice of temporary appointment as required by WAC 251-19-122. For this appeal investigation, as part of the documentation pertaining to Mr. Kelsey's temporary appointment, Ms. Hayes submitted a copy of a Personnel Action Form which included some information on the temporary appointment. While the form shows various parties for receipt of copies, including the employee, there is no evidence that this was shared with Mr. Kelsey. There are many authorizing signatures on the form, however, Mr. Kelsey did not sign this document. While this document has some of the information required for notification of temporary appointment, it does not include appeal rights and does not appear to be intended as an official notification of temporary appointment. While there was a notation on the form that Steve Baughn, Central Stores Manager, was contacted to ensure completion of the required forms for the temporary appointment packet, no official notice of temporary appointment documentation was submitted by respondent for this appeal investigation.

VIII.

As stated in exhibit E-3, respondent checked the accumulated hours Mr. Kelsey worked after Mr. Kelsey filed his original request for remedial action with respondent's Human Resources office. The amount of hours they had on record was 902 as of January, 2000. However, these hours were in error. By the time Human Resources realized the error, Mr. Kelsey worked from March 1

through March 14, 2000 accumulating an additional 80 hours. Respondent ended Mr. Kelsey's employment when it became aware of this situation. At the end of his employment, respondent had on record that Mr. Kelsey worked 1126 hours as of March 15, 2000, his last day worked.

IX.

Respondent and Mr. Kelsey submitted information pertaining to the hours Mr. Kelsey worked in the temporary appointment. Mr. Kelsey provided an "Earnings History from July 1997 through April 2000" document (exhibit E-1) which included the total hours for which he was compensated on a monthly basis. Ms. Hayes clarified that this information submitted by Mr. Kelsey is reflective of earnings for a month which includes what the employee was paid during that month, not what he worked due to the lagged payroll. She also acknowledged there is a slight discrepancy between the hours from Mr. Kelsey's document and the actual non-overtime hours accumulated.

X.

Below is a summary of the hours Mr. Kelsey worked for respondent as taken from the earnings history document from July, 1997 through July, 1999 and from actual timesheets. The timesheets were signed by Mr. Kelsey, indicating agreement with the hours noted. The summary shows hours worked for the twelve consecutive month periods from Mr. Kelsey's original hire date of August 11, 1997 through March 15, 2000.

<u>YEAR</u>	<u>MONTH</u>	<u>HOURS</u>	<u>TOTAL HOURS</u>
1997 *	August (11-31)	40.00	40.00
	September	146.00	186.00
	October	150.00	336.00
	November	49.00	385.00
	December	0.00	385.00

1998 *	January	0.00	385.00
	February	0.00	385.00
	March	17.00	402.00
	April-August 10th	0.00	402.00

Note: * The monthly hours shown are taken from the "Earnings History from July 1997 through April 2000" document. These hours reflect total hours which may include overtime. Additionally, the hours shown reflect the amount of hours that were paid during the month rather than the hours that were actually worked. The hours shown therefore are not a totally accurate reflection of the monthly hours worked but the primary emphasis is whether 1050 hours were exceeded.

<u>YEAR</u>	<u>MONTH</u>	<u>HOURS</u>	<u>TOTAL HOURS</u>
1998 *	August (11-31)	0.00	0.00
	September-December	0.00	0.00
1999 *	January	0.00	0.00
	February	0.00	0.00
	March	77.50	77.50
	April	92.50	170.00
	May	30.00	200.00
	June	111.00	311.00
	July	136.00	447.00
	August (1-10)	52.00	499.00

Note: * The monthly hours from August 1998 through July 1999 are taken from the "Earnings History from July 1997 through April 2000" document. The hours for August 1-10, 1999 are from actual timesheets.

<u>YEAR</u>	<u>MONTH</u>	<u>HOURS</u>	<u>TOTAL HOURS</u>
1999	August (11-31)	120.00	120.00
	September	164.00	284.00
	October	162.50	446.50
	November	99.50	546.00

	December	160.00	706.00
2000	January	144.00	850.00
	February *	128.00	978.00
	March (1-15) **	88.00	1066.00

Note: * The timesheets double-counted 8 hours from February 15, 2000. Therefore, 8 hours were subtracted from the total (the timesheets show from 2/1/00 through 2/15/00 a total of 72 hours, and from 2/15/00 through 2/29/00 a total of 64 hours for a total of 136 hours).

** 1050 hours as of March 13, 2000.

XI.

Mr. Kelsey worked a total of 402 hours for the respondent from August 11, 1997 through August 10, 1998; 499 hours from August 11, 1998 through August 10, 1999; and 1066 non-overtime hours from August 11, 1999 through March 15, 2000. Mr. Kelsey crossed the 1050 hour threshold on March 13, 2000.

XII.

Mr. Kelsey worked the following percent of full-time hours for the period of August 11, 1999 through March 13, 2000:

<u>MONTH</u>	<u>HOURS WORKED</u>	<u>TOTAL WORK HOURS IN MONTH (hrs X days)</u>	<u>FRACTION OF TOTAL HOURS</u>
August (11-31)	120.00	120 (8 x 15)	120.00/120
September	164.00	176 (8 x 22)	164.00/176
October	162.50	168 (8 x 21)	162.50/168
November	99.50	176 (8 x 22)	99.50/176
December	160.00	184 (8 x 23)	160.00/184
January	144.00	168 (8 x 21)	144.00/168
February	128.00	168 (8 x 21)	128.00/168
March (1-13)	72.00	72.00 (8 x 9)	72.00/72

TOTAL: 1050/1232
Percent of Full Time: .852 = 85%

CONCLUSIONS

I.

The Department of Personnel has jurisdiction over the subject matter and the parties to this appeal.

II.

Mr. Kelsey's employment through the Private Industry Council (PIC) does not count towards the 1050 hour limitation for his temporary employment at WWU. As mentioned in exhibit E-8, PIC employees are paid by PIC. Further, while on-site training and supervision is provided by respondent, this employment is not under the jurisdiction of the Higher Education Personnel rules.

III.

For purposes of this appeal and in accordance with WAC 251-12-600(1)(b), August 11th is construed to be Mr. Kelsey's original date of hire. Therefore, August 11th through August 10th is the twelve consecutive month period where hours are to be totaled to determine if the 1050 hour limit has been exceeded.

IV.

Respondent's employment of Mr. Kelsey exceeded the one thousand fifty hour limitation set forth as a criterion for exemption in WAC 251-04-040(6). For purposes of this appeal, Mr. Kelsey became a permanent classified employee on March 13, 2000, the date he exceeded the one thousand fifty hour temporary employment limitation.

V.

Respondent did not properly notify Mr. Kelsey of the conditions of his temporary appointment as required by WAC 251-19-122. Since Mr. Kelsey was not properly informed of the conditions of the appointment, he did not take part in any willful failure to comply with the Higher Education Personnel (HEP) rules. While Mr. Kelsey filed his original remedial action request with respondent on March 13, 2000, the date he crossed the 1050 hour limitation, he stated in his letter that he thought he was eligible for remedial action since December, 1999. This letter also stated that he had been in contact with Department of Personnel staff who provided information pertaining to employees that work over 1050 hours. While this indicates that at some point and time Mr. Kelsey was aware of the 1050 hour limitation, 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. Respondent acted quickly in ending Mr. Kelsey's employment upon realization that he worked beyond the 1050 hour limit. However, this was as a result of Mr. Kelsey coming forward that his hours worked were questioned.

VI.

The director may exercise discretion on a case-by-case basis to determine the appropriateness of granting remedial action when the 1050 hour limitation has been exceeded. While Mr. Kelsey did not work much beyond the 1050 hour limitation (16 hours total), he may have worked more hours

if he did not file his original request with respondent in a timely manner.

VII.

Mr. Kelsey's request for remedial action fulfills the four criteria set forth in WAC 251-12-600 for granting such a request as follows: 1) Respondent made an appointment which did not comply with HEP rules; 2) Mr. Kelsey worked in one or more positions for more than one thousand fifty hours in the twelve consecutive month period from August 11, 1999; 3) Mr. Kelsey's position is subject to civil service; 4) Mr. Kelsey was not a party to willful failure to comply with HEP rules.

DETERMINATION

Mr. Kelsey shall be granted remedial action as follows:

Seniority Date:	March 13, 2000
Allocation:	To be determined by WWU Personnel
Percent of Time:	85%
Salary Range:	Based on position allocation and seniority date
Status:	Permanent
Vacation/Sick Leave Accrual:	Consistent with seniority date and HEP rules

The respondent is directed to fully inform temporary employees of the conditions of their temporary employment in accordance with WAC 251-19-122. Additionally, respondent should improve its procedures to help ensure accurate tracking of hours worked by temporary employees.

Dated this 27th day of July, 2000.

Dennis Karras
Director

by

Teri Thompson
Teri Thompson
Manager, Higher Education Unit

NOTE: Under the provisions of WAC 251-12-600(4), within thirty calendar days of the above date, either party may take exception to these Findings, Conclusions and Determination by filing with the Personnel Appeals Board, written detail of the specific areas to which exception is taken.

LIST OF EXHIBITS

- E-1: Mr. Kelsey's letter of appeal (dated March 16, 2000), with "Earnings History from July 1997 through April 2000"
- E-2: Letter from Mr. Kelsey to Ms. Hayes (dated March 13, 2000) requesting remedial action
- E-3: Letter from Ms. Hayes to Ms. Lade (dated May 22, 2000) pertaining to Mr. Kelsey temporary appointment and hours worked, Personnel Action form, and forms from temporary employee packet
- E-4: WWU's "Temporary Employee Report of Hours over 800 as of 29-Feb-00" for Mr. Kelsey, timesheets for Mr. Kelsey for February, 2000 through March 15, 2000
- E-5: Timesheets for Mr. Kelsey from August, 1999 through December, 1999
- E-6: Letter from Ms. Lade to Mr. Becker (dated April 3, 2000) requesting information pertaining to Mr. Kelsey's temporary appointment
- E-7: Letter from Ms. Rodriguez to Mr. Kelsey (dated March 20, 2000) acknowledging receipt of fax transmittal on March 16, 2000 requesting remedial action
- E-8: Various e-mail correspondences between Ms. Lade, Mr. Kelsey and Ms. Hayes including status of appeal, verifying hours worked, and employment information

Note: Investigator's file contains duplicate of exhibit E-1.

BEFORE THE DEPARTMENT OF PERSONNEL
STATE OF WASHINGTON

IN THE MATTER OF:)	
)	
Daniel E. Watkins	)	HEU No. 3989
)	
Appellant,)	
)	
v.	)	FINDINGS, CONCLUSIONS AND
	)	DETERMINATION OF DIRECTOR,
	)	DEPARTMENT OF PERSONNEL
Washington State University)	
)	
Respondent.)	
_____)	

THIS MATTER came before the Director, Department of Personnel, under the provisions of WAC 251-12-600, Remedial Action. The Director's investigation was conducted by Kari Lade of the Higher Education Unit of the Department of Personnel. Information was obtained from the respondent's representative, Karen Kruse, Manager of Campus Student and Hourly Employment Office, and Mr. Watkins, the appellant. Having considered the information provided, having reviewed the applicable laws and administrative rules, the Director now issues the following Findings, Conclusions and Determination.

FINDINGS

I.

Mr. Watkins' letter of appeal requesting Remedial Action was received in the Department of Personnel office February 21, 1995 (exhibit E-1). In his appeal letter, Mr. Watkins stated that he worked a total of 1056.75 hours, exceeding the 1050 hour limit in a twelve month period for a temporary employee.

II.

The respondent originally hired Mr. Watkins on May 23, 1994, as a temporary Service Worker I in the Physical Plant Grounds Department.

III.

WAC 251-19-122, Written Notification Of Temporary Appointment, states:

"(1) All temporary employees shall be notified in writing of the conditions of their employment prior to the commencement of each appointment and/or upon any subsequent change to the conditions of their employment.

(2) The written notification shall contain the following information:

- (a) The reason for the temporary appointment (see WAC 251-01-415(1), (2), and (3));
- (b) The hours of work and the hourly rate of pay;
- (c) The duration of appointment as adjusted by any current or former temporary appointments. The duration shall be expressed as a starting and expected end date;
- (d) The name of the employee's supervisor;
- (e) A statement regarding the receipt or nonreceipt of benefits. If the employee is to receive benefits, the statement shall include which benefits are to be received;
- (f) The expected status of the employee within the higher education personnel board system upon completion of the appointment;
- (g) The signature of the personnel officer and/or authorizing hiring official;
- (h) The signature of the employee verifying receipt of the written notification;
- (i) An identification of any current and/or previously held temporary positions at the institution;
- (j) A statement of appeal rights for those positions in which a violation of WAC 251-01-415 may result in permanent status."

IV.

The respondent provided Mr. Watkins with a Conditions For Temporary Employment form (exhibit E-4) which served as his written notification of the temporary appointment. This form was signed by Mr. Watkins, indicating receipt. As shown on the form, the expected duration of the appointment was from May 23, 1994 to August 31, 1994. The end date was subsequently extended to December 31, 1994 then to June 30, 1995 as shown on the Temporary Employment Appointment forms (exhibit E-3). Mr. Watkins' last day of employment was January 30, 1995.

V.

WAC 251-12-600, Remedial Action, states in part:

"(1) The director may take remedial action when it is determined that the following conditions exist (emphasis added).

(a) The hiring institution has made an appointment that does not comply with higher education personnel board rules.

(b) The employee has worked in one or more positions for more than one thousand fifty hours in any twelve consecutive month period since the original hire date or October 1, 1989, whichever is later. (These hours do not include overtime or work time as described in WAC 251-04-040 (2).)

(c) The position or positions are subject to civil service.

(d) The employee has not taken part in any willful failure to comply with these rules.

(2) Remedial action includes the power to confer permanent status, set salary, establish seniority, and determine benefits accrued from the seniority date. Remedial action also includes other actions the director may require to meet the highest personnel standards.

(3) If the institution has complied with WAC 251-19-122, the employee must:

(a) Submit any request for remedial action in writing; and

(b) File the request within thirty calendar days after the effective date of the alleged violation of the conditions of employment which are to be specified in the written notification of temporary appointment..."

VI.

WAC 251-01-415 defines temporary appointment as:

"(1) Work performed in the absence of an employee on leave for more than six consecutive months in accordance with WAC 251-19-120(2); or

(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(5); or

(3) Formal assignment of the duties and responsibilities of a higher level class for a period of less than six consecutive months."

VII.

The Department maintained daily records of hours Mr. Watkins worked (exhibit E-6). These records were signed by Mr. Watkins, indicating agreement. As noted by Ms. Kruse in exhibit E-2, record

sheets for July 6, 1994 and December 12, 1994 were not located, however Mr. Watkins was paid for eight hours for each of those days. Mr. Watkins worked the following total non-overtime hours for the respondent from the date he was hired, May 23, 1994, through January 30, 1995:

<u>YEAR</u>	<u>MONTH</u>	<u>HOURS</u>	<u>TOTAL</u>	<u>MONTH</u>	<u>HOURS</u>	<u>TOTAL</u>
1994	May	48	48.0	September	48	604.5
	June	176	224.0	October	0	"
	July	152	376.0	November	152	756.5
	August	180.5	556.5	December	152	908.5
1995	January	148.25	1056.75			

VIII.

For purposes of this appeal and in accordance with WAC 251-12-600(1)(b), May 23, 1994 is Mr. Watkins' original date of hire. Thus, May 23, 1994 through May 22, 1995 is the twelve consecutive month period where hours are to be totaled to determine if the 1050 hour limit has been exceeded. Mr. Watkins worked a total of 1056.75 hours for the respondent from May 23, 1994 through January 30, 1995. Both the respondent and Mr. Watkins agree to the total hours Mr. Watkins worked as shown in exhibits E-1 and E-2.

IX.

The Student Employment Office notified the Physical Plant Department of hours Mr. Watkins had worked shortly after he worked 908.5 hours and again after he worked 980.5 hours. As stated in exhibit E-9, there was a discrepancy between the Physical Plant Department and the Student Employment Office in regards to the amount of hours tracked for Mr. Watkins.

X.

Mr. Watkins' employment was ended on January 30, 1995, as soon as the discrepancy in hours was resolved.

CONCLUSIONS

I.

The Department of Personnel has jurisdiction over the subject matter and the parties to this appeal.

II.

Respondent properly informed Mr. Watkins of his conditions of temporary employment as required by WAC 251-19-122.

III.

The Student Employment Office notified the Physical Plant Department on two occasions regarding the status of hours Mr. Watkins had worked. However, the second notification sent by Profs on January 27, 1995 (exhibit E-9) occurred after Mr. Watkins had already worked over 1050 hours.

IV.

For the period of May 23, 1994 through January 30, 1995 (his last day worked), Mr. Watkins worked a total of 1056.75 non-overtime hours.

V.

The Student Employment Office practiced good faith efforts in notifying the Physical Plant Department of hours Mr. Watkins worked when he reached 908.5 hours. Although there was a discrepancy in the amount of hours the Department had on record, upon realization of the discrepancy, the Department ended Mr. Watkins' employment. This indicates good faith efforts on behalf of the Department in trying to maintain temporary employees within the 1050 hour limit.

VI.

The director's authority to grant remedial action is discretionary and is not required by WAC 251-12-600 if a temporary employee works over 1050 hours.

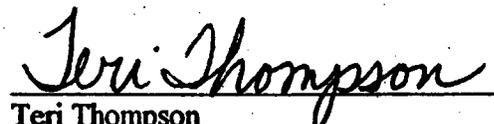
DETERMINATION

Mr. Watkins' appeal for remedial action is denied. Washington State University's Campus Student and Hourly Employment Office should review their hourly tracking procedures and ensure continual, timely communication with departments to help avoid discrepancies in tracking hours worked by temporary employees.

Dated this 8th day of June, 1995.

Dennis Karras
Director

by


Teri Thompson
Teri Thompson
Manager, Higher Education Unit

NOTE: Under the provisions of WAC 251-12-075(2), within thirty calendar days of the above date, either party may take exception to these Findings, Conclusions and Determination by filing with the Personnel Appeals Board, written detail of the specific areas to which exception is taken.

LIST OF EXHIBITS

- E-1: Letter of appeal dated February 15, 1995, received in the Department of Personnel office February 21, 1995
- E-2: Letter (dated March 24, 1995) from Ms. Kruse to Ms. Lade accompanying materials regarding appeal
- E-3: Temporary Employment Appointment forms for Mr. Watkins' Service Worker I position
- E-4: Conditions For Temporary Employment form
- E-5: Payroll Expense Detail report showing total hours for which Mr. Watkins was paid
- E-6: Department's daily records of hours Mr. Watkins worked
- E-7: Letter (dated February 24, 1995) from Ms. Lade to Mr. Waldrop requesting information relevant to Mr. Watkins' temporary appointment
- E-8: Letter (dated February 22, 1995) from Ms. Rodriguez to Mr. Watkins regarding receipt of letter requesting remedial action
- E-9: Letter (dated May 15, 1995) from Ms. Kruse to Ms. Lade accompanying memo to Ms. Kruse (dated April 28, 1995) from Ms. Earhart; back page of Temporary Employment Appointment form; note (dated 1/27/95) from Laurie Musick to Monica Collins regarding hours worked as of 1/15/95; and copies of WSU Payroll/Personnel System - Employee Records Non-Student Temporary Employment Roster - Warnings (dated 1/4/95 and 1/19/95)

STATE OF WASHINGTON

4	In the Matter of)	
5	LOUIS E. COBET,	)	HEPB NO. 374
6	Appellant,	)	FINDINGS, CONCLUSIONS,
7	v.	)	AND ORDER
8	DIRECTOR, HIGHER EDUCATION)	
9	PERSONNEL BOARD,)	
10	Respondent.)	

THIS MATTER came on for hearing before all three members of the Higher Education Personnel Board, John B. Troup, Chairman, Evelyn Jaeger, Vice-chairman, and Mendel B. Miller, Member, on the appeal of Louis E. Cobet from the determination of the director of the Higher Education Personnel Board denying remedial action. The appellant appeared in person and was represented by Tom Bartlett, Area Representative of the Washington Federation of State Employees and the respondent appeared in person, accompanied by Diann Youngquist, Personnel Specialist. The hearing was held on Thursday, July 15, 1976, in Room 142, Administration Building, University of Washington, Seattle, Washington. The board having heard the arguments of the parties, having considered the files and records herein, and being fully advised in the premises now enters the following findings, conclusions, and order.

FINDINGS

I.

In April of 1975, the Oceanography Department at the University of Washington experienced an increase in work load in the Ocean Technical Service Unit, requiring the addition of an Instrument Maker position. Since it was anticipated at that time that the work load peak would last from three to six months, it was decided

1 to add a temporary rather than a permanent position.

2 II.

3 The Oceanography Department requested the assistance of the
4 staff personnel office in recruiting for the position. The
5 vacancy was listed on the Employment Opportunities Bulletin,
6 indicating that it was a temporary position with a duration of
7 three to six months. From among those who applied for the
8 position, the appellant was appointed on May 28, 1975, and was
9 fully aware of the temporary nature of the appointment.

10 III.

11 The Oceanography Department later determined that the work
12 load would not diminish. They requested and were granted per-
13 mission to establish a permanent position. The staff personnel
14 office recruited for the class, conducted examinations, and
15 established a register. The appellant and two other eligibles
16 were certified to the Oceanography Department on November 25, 1975
17 and the appellant was given a probationary appointment effective
18 December 1, 1975.

19 IV.

20 By letter dated December 5, 1975, received in the HEPB
21 office on December 8, 1975, Tom Bartlett, an Area Representative
22 of the Washington Federation of State Employees, filed on behalf
23 of the appellant a request for remedial action pursuant to the
24 provisions of WAC 251-16-030.

25 V.

26 WAC 251-16-030 provides:

27 "(1) When it has been determined that an indivi-
28 dual has served six consecutive months in an
29 institution in a position subject to the civil
30 service but whose appointment by the institution
31 has not been in accordance with the provisions
32 of these rules, and the employee was not a party
to the willful disregard of the rules, the board
may take such appropriate action as to confer
permanent status, set provision for salary main-
tenance, establish appropriate seniority, deter-
mine accrual of benefits, and such other actions

1 as may be determined appropriate pursuant to
2 the best standards of personnel administration.

3 "(2) The board may delegate administration of
4 the provisions of WAC 251-16-030 (1) to the
5 director, subject to the taking of exceptions
6 to the director's order in the same manner as
7 set forth in RCW 28B.16.170."

8 VI.

9 The director, pursuant to delegation by the board as pro-
10 vided in WAC 251-16-030(2), conducted an investigation and found
11 that the establishment of the temporary position and the appoint-
12 ment of the appellant to that position was in accordance with
13 HEPB rules. By letter dated April 6, 1976, he denied the appel-
14 lant's request for remedial action. The appellant filed excep-
15 tions to the director's decision on April 16, 1976.

16 CONCLUSIONS

17 I.

18 The Higher Education Personnel Board has jurisdiction over
19 the parties hereto and over the subject matter herein.

20 II.

21 The board concurs with the director's finding that the
22 establishment of the temporary position and the appointment of the
23 appellant to that position was in compliance with HEPB rules.

24 III.

25 The granting of remedial action is discretionary, not
26 mandatory.

27 IV.

28 The appellant contends that since the temporary appointment
29 exceeded by three days the one-hundred-eighty day limit specified
30 in WAC 251-04-020 (29) (b), he was automatically entitled to
31 remedial action. The reference in WAC 251-16-030 to six consecu-
32 tive months of service is intended to establish a minimum time
period that must be served before the employee can request remedial
action. The board, or director when delegated, must use its

1 discretion on a case by case basis to determine the appropriateness
2 of granting remedial relief.

3 V.

4 The decision of the director to deny remedial action to
5 the appellant should be affirmed and the appeal should be denied.

6 ORDER

7 NOW, THEREFORE, IT IS HEREBY ORDERED That the determination
8 of the director of the Higher Education Personnel Board to deny
9 remedial relief to the appellant is affirmed and the appeal is
10 denied.

11 DATED This 19th day of August 1976.

12 HIGHER EDUCATION PERSONNEL BOARD
13

14 
15 JOHN B. TROUP, Chairman

16 
17 EVELYN JAEGER, Vice Chairman

18 
19 MENDAL B. MILLER, Member
20
21
22
23
24
25
26
27
28
29
30
31
32

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

BENJAPON SAKKARAPOPE,

Appellant,

v.

WASHINGTON STATE
UNIVERSITY,

Respondent.

NO. 39441-3-II

CERTIFICATE OF
SERVICE

RECEIVED

NOV 12 2009

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

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 November 10, 2009, as follows:

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

To: David Ponzoha, Clerk/Administrator
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454,

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 10th day of November, 2009, at Spokane, WA.


Karin Skalstad, Legal Assistant II
Office of the Attorney General
1116 W. Riverside
Spokane, WA 99201-1194
(509) 458-3536