

July 26, 2007

RE: Benjapon Sakkarapope v. Washington State University (WSU)
Remand from Thurston County Superior Court No. 04-2-02084-8
PAB No. RULE-03-0008

Dear Mr. Sakkarapope:

On December 22, 2006, the Thurston County Superior Court reversed the former Personnel Appeals Board's October 5, 2004 decision, which denied your appeal regarding remedial action. The Court then remanded this matter back to the Department of Personnel to determine the following issues:

- 1) Whether WSU's Business Policies and Procedures Manual, Personnel Rule 60.26, is part of compliance by WSU with WAC 251-19-120(7);
- 2) If so, consider whether a remedial action should be offered to you under WAC 251-12-600.

Background

You had previously been a student and part-time hourly employee for WSU since March 1995. As a student employee, you were considered to be in immigration status as assigned by the U.S. Immigration and Naturalization Service (INS) and coded as F-1 status by WSU (Exhibits R-8 and R-9). As a student employee in F-1 immigration status, WSU's Policy 60.05, Employing Non-U.S. Citizens, indicated you must take a minimum of 12 undergraduate or 10 graduate credits (Exhibit R-8). In the fall semester of 2002, which ran from August 26, 2002 – December 20, 2002 (Exhibit R-4), you were enrolled as a student at WSU. However, you only enrolled for three credits during that semester. In spring semester 2003, beginning January 13, 2003, you initially enrolled for six credits, but you were later dropped from enrollment with a withdrawal date of January 10, 2003 (Exhibits R-1 and R-2). The temporary employment hours you worked in early 2003 were ultimately considered "non-student" hours by WSU.

On March 7, 2003, you filed a request for remedial action with the Department of Personnel (DOP), stating that as of February 24, 2003, you had worked more than 1,050 hours in 12 consecutive months. On July 8, 2003, DOP denied your request for remedial action. On August 4, 2003, you filed an appeal with the former Personnel Appeals Board (PAB), alleging WSU violated WAC 251-12-600 by not granting you permanent employment status. The major issue before the PAB centered on your work hours during the fall semester of 2002, when you were enrolled as a student taking three credits.

You claimed that under WSU's Policy 60.26, you did not meet the definition of a student because you were not enrolled in at least six credits (Exhibit R-6). As a result, you argued the 403.25 hours you worked from August 26, 2002 to December 20, 2002 should be considered non-student, temporary employment hours. WSU, however, did consider you a student and argued the 403.25 hours should be considered student employment hours under WAC 251-04-035, which exempted students employed at the institution where they were enrolled from the provisions of Chapter 251 WAC, including remedial action.

It is important to note that the earlier version of WAC 251-04-035, WAC 251-04-040 concerning exemptions, was repealed and later replaced by WAC 251-04-035. In his oral opinion, Judge McPhee determined "[i]t is appropriate for an agency, under circumstances recognized in law, to promulgate emergency regulations." As such, Judge McPhee determined it "an effective regulation by the administrative agency" (Exhibit C, pages 6-7). The PAB ruled that according to WAC 251-04-035, the provisions of the chapter (251 WAC) did not apply to positions listed in RCW 41.06.070 and did not apply to you specifically because you were a student employed at the institution where you were also enrolled. As a result, the PAB concluded the 403.25 hours were considered student employment hours and that you only worked 827.75 non-student hours from August 26, 2006 through February 24, 2003. Additionally, the PAB noted it did not have jurisdiction to adjudicate alleged violations of internal university policies.

The Court remanded your appeal on two very specific issues. First, the Court concluded the PAB erred by not considering whether WSU's Business Policies and Procedures Manual, Personnel Rule 60.26 was part of WSU's compliance with WAC 251-19-120(7). WAC 251-19-120(7) provides that institutions shall develop a procedure for Director approval that indicates its system for controlling and monitoring exempt positions. Once that question has been answered, the Court ordered the Director of DOP to determine whether you should be offered remedial action under WAC 251-12-600.

In response to the Court's order, we asked both parties to submit written briefs addressing the two issues outlined in the Court's remand order. The following summarizes each party's response:

Summary of Mr. Sakkarapope's Argument

You submitted a Brief on Remand For Appellant, received on April 13, 2007, and a Reply Brief on Remand for Appellant, received on May 9, 2007. You also submitted a follow-up letter dated July 19, 2007 with attached email correspondence between you and Kimberly Maupin, Human Resource Assistant at WSU, in November 2000. In your briefs you continue to assert that you did not meet the definition of a student as stated in the Business Policies and Procedures Manual, 60.26. Further, you assert the former Higher Education Personnel Board (HEPB) Director, John Spitz, approved WSU's "Procedures for Insuring Compliance with HEPB Rules Controlling Student and Non-Student Temporary Employment" in 1990 (Exhibit R-7). Consequently, you contend at that time, student employees were enrolled "for a minimum of seven credits during the fall or spring semesters and four credits during the summer session." Similarly, you contend that at the time of your termination, the Business Policies and Procedures Manual, 60.26 defined a student employee as "one who is enrolled at WSU for six or more credit hours during fall or spring semesters." You further claim that for monitoring purposes, WSU uses the six credit hours to determine student status in exempting the employee from the 1,050 hour limit. As such, you assert the number of non-student, temporary employment hours you worked exceeded 1,050 hours from March 16, 2002 to February 24, 2003. Therefore, you argue all four criteria have been met under WAC 251-12-600 and assert you should be granted remedial action.

In addition, you argue your immigration status is irrelevant and not an issue under the remedial action rule, WAC 251-12-600.

Summary of WSU's Argument

First, WSU contends its Business Policies and Procedures Manual (BPPM) was not a part of compliance with WAC 251-19-120(7) because WSU asserts there is no evidence the policy was submitted to DOP or approved by the Director pursuant to the WAC. WSU does, however, acknowledge that a similar definition of a student had previously been approved by the Higher Education Personnel Board (HEPB) back in 1990 but asserts the definition was not consistent with the remedial action rule. WSU further contends a number of provisions in the 1990 procedure were not reflected in BPPM 60.26 and maintains that the BPPM in question has not been approved in accordance with WAC 251-19-120(7) .

Second, WSU argues you were not a person qualified for remedial action pursuant to WAC 251-12-600 because the WAC excludes all hours worked as a student and does not limit those hours based on a level of credit enrollment. Therefore, WSU asserts the 403.25 hours you worked during the fall semester of 2002 were student employment hours. Consequently, WSU argues your non-student, temporary work hours did not exceed 1,050 hours in a 12-month period and contends you should not be granted remedial action. Additionally, WSU points out that granting remedial action is discretionary and argues that even if qualified, your request for remedial action should be denied due to your inability to be employed at WSU as a result of your immigration status. Therefore, WSU further argues the remedy you are seeking is unavailable to you.

Director's Review and Determination

In reviewing the Court's first item, I conclude WSU did not fully comply with WAC 251-19-120(7). While I acknowledge the BPPM 60.26 is the university's policy and procedure manual on temporary employment, there is no evidence WSU specifically submitted this policy to DOP for approval. In fact, WSU's policy for monitoring student employment hours is inconsistent with WAC 251-04-035, which does not apply enrollment credits to a student's status. At the same time, I recognize a previous procedure existed that was similar in nature and had previously been approved by the former HEPB Director (Exhibit R-7). Further, the documentation suggests WSU had previously applied the six or seven credit standard when considering a student's status, though WSU notes the standard had been used for many reasons such as financial aid reporting. Like the former PAB, I am inclined to rely on the WACs and RCWs rather than adjudicate an internal policy, which had been the customary practice of the Board. However, in light of the Court's remand and because a similar procedure had been approved predating BPPM 60.26, I did consider WAC 251-12-600. WAC 251-12-600 provides, in part, that "[t]he director may take remedial action" when it has been determined that certain conditions exist, including the relevant condition here that addresses an employee's work hours exceeding 1,050 hours in any 12-month consecutive period.

In his oral ruling, Judge McPhee emphasized the discretionary nature of the Director's decision, noting that while your petition may be considered by the Director, it "does not necessarily entitle you to remedial action." Judge McPhee further emphasized the language, which reads "may grant remedial action" (Exhibit C, page 12, lines 12-19). In reviewing your request, I considered the packet of information included with the remand from Thurston County Superior Court, No. 04-2-02084-8, which included documentation from the PAB record, Case No. RULE-03-0008 and Director's Determination No. HEU No. 4478. I also considered all of the information in the Director's Review file created after the Court remanded the case back to the Director of DOP, including all written briefs and correspondence submitted by you and WSU.

It is undisputed you worked a total of 1,682.25 hours from March 16, 2002 to February 24, 2003 (Exhibit R-5). However, I conclude you do not meet the requirements for remedial action as envisioned in WAC 251-04-035, which describes exempt positions, including "[s]tudents employed by the institution at which they are enrolled . . ." and those exempted in RCW 41.06.070. Furthermore, your immigration status is relevant because it had been directly connected to your student enrollment at WSU. As indicated by the testimony of Robert Cassleman, International Student Advisor in the Office of International Students and Scholars at WSU, maintaining your immigration status as an international student required "maintaining full enrollment in school" (Transcript of PAB Hearing, page 397 of record filed to Court – Exhibit R-9). Since your immigration status was dependent on your enrollment at WSU, it was in fact your student enrollment during fall semester 2002 that enabled you to be temporarily employed by the university. Therefore, as the Director's designee, I am exercising discretion on behalf of the Director, as permitted under WAC 251-12-600, and I conclude the broader concept of the word

“student” applies in your case, despite WSU’s BPPM 60.26. As a result, I am denying your request for remedial action.

Appeal Rights

WAC 357-49-018 provides that either party may appeal the results of the Director’s review to the Personnel Resources Board (board) by filing written exceptions to the Director’s determination in accordance with Chapter 357-52 WAC.

WAC 357-52-015 states that an appeal must be received in writing at the office of the board within thirty (30) calendar days after service of the Director’s determination. The address for the Personnel Resources Board is 2828 Capitol Blvd., P.O. Box 40911, Olympia, Washington, 98504-0911.

If no further action is taken, the Director’s determination becomes final.

Sincerely,

Teresa Parsons
Director’s Review Supervisor
Legal Affairs Division

c: Donna Stambaugh, AAG

Enclosure: List of Exhibits