

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

In Re:

CIC No. 2017-02

**CHERYLE M. HALL,
Former Clerk, Court of Claims,

Respondent.**

FINAL DECISION AND ORDER

This matter came for consideration before the West Virginia Ethics Commission during its regularly scheduled meeting on February 1, 2018, following a public hearing conducted before the Commission's duly appointed hearing examiner on October 10, 2017.

This proceeding arises under the West Virginia Governmental Ethics Act, W. Va. Code §§ 6B-2-1 through 6B-3-11 ("Ethics Act"). The Ethics Commission initiated a Complaint against Respondent Cheryle M. Hall ("Respondent" or "Hall") on January 13, 2017, and issued an Amended Complaint on May 26, 2017, alleging that she had violated the Ethics Act. The Ethics Commission is the duly authorized state agency to enforce the Ethics Act and conduct hearings pursuant to the provisions of W. Va. Code § 6B-2-4.

The Ethics Commission's Probable Cause Review Board, following an investigation, entered an Order on July 6, 2017, finding probable cause to believe that Respondent Hall violated W. Va. Code § 6B-2-5(b)(1) and ordering that a Statement of Charges be prepared and that a public hearing be scheduled.

A Statement of Charges and Notice of Hearing was issued on July 6, 2017. The hearing on the Complaint was held in Charleston, West Virginia, on October 10, 2017, with Jeffrey G. Blaydes presiding as the independent Hearing Examiner. At the hearing, the Commission was represented by its General Counsel, Kimberly B. Weber, and by Staff Attorney Derek A. Knopp. Respondent appeared at the hearing and was represented by counsel James M. Cagle. The Commission presented as witnesses Aaron Allred, Denny Rhodes, Melissa Bishop, Cynthia Pritchard, Brittany Cullen, Crystal Estep and Anne Ellison and introduced 11 exhibits into the record. Respondent Hall testified and also presented Becky Ofiesh as a witness and introduced four exhibits into the record. A certified court reporter created a stenographic record of the hearing and a transcript of the proceedings.

The Commission, with seven of the Commission members present and voting, considered the record and the Hearing Examiner's Findings of Fact and Conclusions of

Law (hereinafter "Hearing Examiner's Recommendation"); the Ethics Commission's Proposed Findings of Fact and Conclusions of Law; Respondent's Proposed Findings of Fact and Conclusions of Law and Brief; Ethics Commission's Brief in Support of Hearing Examiner's Proposed Findings of Fact and Conclusions of Law; Respondent's Brief in Opposition to Proposed Findings of Fact and Conclusions of Law, and the hearing transcript with exhibits.

The Hearing Examiner's Findings of Fact and Conclusions of Law is attached hereto and is incorporated herein by reference.

INTRODUCTORY PARAGRAPH

The Hearing Examiner's Recommendation's introductory paragraph is modified to reflect that the Ethics Commission was represented at the hearing by its General Counsel, Kimberly B. Weber and by Staff Attorney Derek A. Knopp.

FINDINGS OF FACT

The Commission adopts each of the 32 "Findings of Fact" set forth in the Hearing Examiner's Recommendation with the following modifications:

1. Findings of Fact No. 26 is modified to state that "Ms. Estep testified that she overheard Krebs tell Respondent Hall that she was reminded that she needed to check leave balances before approving leave."
2. In Findings of Fact No. 29, "no evidence" is modified to "no direct evidence."

The Commission hereby adopts those proposed Findings of Fact, Conclusions of Law and arguments advanced by the parties that were expressly adopted in the Hearing Examiner's Recommendation. To the extent that the following Findings or Conclusions are consistent with those advanced by the parties and adopted in the Hearing Examiner's Recommendation, the same are adopted. Conversely, to the extent that the same are inconsistent with these Findings and Conclusions, they are rejected. To the extent that these Findings or Conclusions are inconsistent with any other proposed Findings and Conclusions submitted by the parties, the same are hereby adopted and, conversely, to the extent that the same are inconsistent with these Findings and Conclusions, they are rejected. To the extent that the testimony of any witness is not in accord with these Findings and Conclusions, the testimony is not credited. Any proposed Finding of Fact, Conclusion of Law or argument proposed and submitted by a party but omitted herein is deemed irrelevant or unnecessary to the determination of the material issues in this matter.

ANALYSIS

The Commission adopts the "Analysis" section of the Hearing Examiner's Findings of Fact and Conclusions of Law with the following modifications:

1. In the third paragraph of the Analysis, the references at the end of the paragraph are modified to read: "(See Findings of Fact 8, 12, 15, 17, 18 and 20)".
2. In the last paragraph on page 11 of the Analysis, the case citation is modified to read: "State Ethics Comm'n v. Antonetti, 365 Md. 428 (2001)."
3. On page 13 of the Analysis, in footnote 13, "W. Va. Code § 6B-2-4(w)" is modified to "W. Va. Code § 6B-2-4(x)."

CONCLUSIONS OF LAW

The Commission adopts each of the Hearing Examiner's six "Conclusions of Law" with the following modification: In Conclusions of Law No. 2, "Committee" is modified to "Commission" and "6B-2B-6" is modified to "6B-3-11."

PROPOSED SANCTIONS

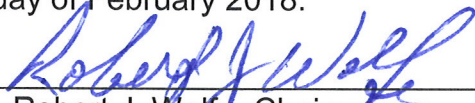
The Commission adopts the Hearing Examiner's "Proposed Sanctions" section.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the West Virginia Ethics Commission finds that the evidence beyond a reasonable doubt establishes that Cheryle M. Hall materially violated W. Va. Code § 6B-2-5(b)(1) and ORDERS the following sanctions against her:

1. A public reprimand shall be issued against Respondent Cheryle M. Hall;
2. Respondent Cheryle M. Hall shall pay a fine of \$1,500 to the West Virginia Ethics Commission on or before April 1, 2018;
3. Respondent Cheryle M. Hall shall reimburse the West Virginia Ethics Commission the amount of \$4,668 for the actual costs of prosecuting her violation of the Ethics Act on or before April 1, 2018.

This Order was entered on the 1st day of February 2018.



Robert J. Wolfe, Chairperson
West Virginia Ethics Commission

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

WEST VIRGINIA ETHICS COMMISSION,

Received
DEC 11 2017
WV Ethics Commission

Complaint,

v.

CIC No. 2017-02

CHERYLE M. HALL,

Former Clerk, Court of Claims,
Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was heard on October 10, 2017, by the West Virginia Ethics Commission ("Commission") through its designated hearing examiner, Jeffrey G. Blaydes, Esquire. The hearing convened at the Commission's office, 210 Brooks Street, Charleston, Kanawha County, West Virginia, pursuant to the Notice of Hearing issued by the Commission. The Commission was represented by Assistant Attorney General Kimberly B. Weber. Cheryle M. Hall was represented by James M. Cagle, Esquire. Having thoroughly considered the evidence and argument presented at the hearing and the written submissions of the parties, the hearing examiner now issues the following Findings of Fact, Analysis, Conclusions of Law, and Recommended Order.

FINDINGS OF FACT

1. At all times relevant, Respondent Cheryle M. Hall ("Respondent Hall") was employed by the West Virginia Court of Claims as its Clerk.¹ (Complainant's Ex. 4 at 1 (hereinafter "C. Ex. 1 at g"))

2. At all times relevant, Respondent Hall was a "public employee" as defined in West

¹Amendments to West Virginia Code § 14-2-5, which went into effect July 9, 2017, changed the title of the Court of Claims and made other changes not relevant to this proceeding.

Virginia Code § 6B-2-5(b)(1).

3. The Court of Claims adjudicated claims against the State for money damages, investigated and ruled upon claims made by victims of criminally injurious conduct, and awarded compensation from the Crime Victims Compensation Fund. (C. Ex. 4 at 4)

4. Pursuant to West Virginia Code § 14-2-5 (1998), the Court was authorized to appoint a clerk, chief deputy clerk, and deputy clerks. The Joint Committee on Government and Finance (“Joint Committee”)² was authorized to hire other employees whose services were necessary for the orderly transaction of business of the Court of Claims. The Clerk of the Court of Claims had administrative responsibility for the Court of Claims staff and the Crime Victims Compensation Fund staff. (C. Ex. 4 at 5)

5. The Clerk of the Court of Claims was responsible for ensuring that Court of Claims’ employee attendance records were accurately and consistently maintained and that employees were properly compensated. (C. Ex. 4 at 7)

6. When an employee had sick or annual leave available and requested to use it, the employee’s timely completion of a form triggered the necessary deduction from his or her total accrued sick or annual leave time. The employee then received paid leave time. When an employee had exhausted all annual and sick leave, his or her timely completion of a form triggered a change of status to “leave without pay.” He or she then received no pay or benefits for the days he or she did not work. (C. Ex. 4 at 8)

7. No employee is permitted to be paid a salary before his or her “services have been

²The Joint Committee has authority over the personnel and services of joint legislative agencies, including the former Court of Claims, which was established by West Virginia Code § 14-2-4, and the Crime Victims Compensation Fund, which was established by West Virginia Code § 14-2A-4. (C. Ex. 4 at 6)

rendered.” W. Va. Code § 12-3-13. (C. Ex. 4 at 9) Thus, an employee must work a full 35 hour workweek or use paid leave to be paid his or her full wages.

8. A Court of Claims employee, Brittany Cullen (“Cullen”), missed work on multiple occasions during her employment with the Court of Claims. As will be described more fully below, her absences were observed by others and caused her to seek leave without pay after she had been paid for time she did not work and for which she had no paid leave. (C. Ex. 4 at 10)

9. Aaron Allred is the Legislative Manager for the Joint Committee and has served in that position for twenty-four years. (Tr. 29-30) On July 19, 2016, Mr. Allred received a Request for Leave Without Pay form for Cullen. Cullen requested leave without pay for dates not worked, but for which she had *already* been paid. Respondent Hall had approved Cullen’s request. (Tr. 42, 82-83; C. Ex. 6)

10. Mr. Allred thereafter instructed the Director of the Post-Audit Division, Denny Rhodes, to conduct an audit of Cullen’s attendance, pay, and leave to ensure that Cullen had not been paid for time on additional dates that she had neither worked nor took leave.³ (Tr. 42-43, 46, 82-83; C. Ex. 6)

11. The audit revealed that there were several employees that either did not work the appropriate hours, did not submit leave without pay forms, or did not submit annual leave or sick leave on days that they did not come in to work. Cullen and employee Therese St. Germain were found to have been paid for the most time for which they did not work.⁴ (Tr. 87)

³After initiating an investigation of Cullen and based upon the suggestion of Mr. Rhodes, the audit was expanded to include all employees, including some former employees, of the Court of Claims. (Tr. 47, 83)

⁴Five of the nine employees within the Court of Claims had significant time and leave issues resulting in a total of \$15,778 in wages and benefits paid to employees that were not earned. (Tr. 87, 110; C. Ex. 7 at 1)

12. Cullen was paid for a total of 32 days, or 224 hours, that she did not work or take leave between December 16, 2014, and June 30, 2016. Cullen was paid \$2,707 in wages and approximately \$812 in benefits for the 224 hours. She, therefore, received approximately \$3,520 for hours that she did not work. (Tr. 105; C. 4 at 4; C. Ex. 4 at 3; C. 7 at 5; C. Ex. 8)

13. Cullen's leave issues began in April 2015 and became more significant after an August 2015 automobile accident. (Tr. 106-107, 146-147; Comp't's Ex. 8) Cullen was "immediately in the hole" as it pertained to available leave at the time of her accident.⁵ (Tr. 86)

14. After the August 2015 accident, Cullen had discussions with Respondent Hall regarding missing work due to the accident and related medical appointments. (Tr. 147)

15. Once Cullen had exhausted her leave, Respondent Hall discussed with her whether she would need leave without pay. Rather than requiring Cullen to request leave without pay for the days already missed, Respondent Hall entered into an informal arrangement with Cullen to allow her to "try to make up" for the time she had not worked by working extra hours during the workweek and on Sundays.⁶ (Tr. 85-86, 147-149; C. Ex. 4 at 15)

16. From January 1, 2016, through June 30, 2016 – for every week except one – Cullen was paid for work not performed. (Tr. 107; C. Ex. 8)

⁵Cullen's absences occurred with such frequency that other employees observed it and complained. Shortly after Cullen's accident, Cindy Pritchard, a Court of Claims employee, complained to Respondent Hall that Cullen was absent or late and that her absences were affecting Ms. Pritchard's workload. (Tr. 128-129) Respondent Hall told Ms. Pritchard to "stay out of it" and not say anything regarding Respondent Hall's treatment of Cullen because of how little money Cullen earned. (Tr. 130, 140) After Cullen was absent for an extended period, Respondent Hall told Ms. Pritchard that Cullen would never be able to make up all the time. (Tr. 130-131) At some point later, Ms. Pritchard called Respondent Hall to inform her that she would need to take leave without pay when her husband was hospitalized. Respondent Hall told Ms. Pritchard that instead of taking leave without pay, she could make up the time later. (Tr. 132)

⁶The informal arrangement did not include a schedule of days Cullen was to work or a deadline by which the hours had to be made up. Cullen simply informed Respondent Hall when she made time up and took additional absences. (Tr. 148-149)

17. Respondent Hall made a second arrangement with Cullen in which she agreed to take three days' leave without pay during each of the next three two-week pay periods to "make up" for a total of nine days of missed work. The agreement purportedly was intended to "make up" for the days on which she had not worked, had not taken leave but was paid, Respondent Hall entered into this agreement with Cullen knowing that Cullen "owed" the State more than nine days.⁷ (Tr. 85-86, 223; C. Ex. 4 at 16)

18. On July 18, 2016, Respondent Hall approved the necessary form to deduct three days' pay from Cullen's next pay period and submitted the form to Allred. The three days were days that she had already failed to work during May and June of 2016. (Tr. 42; C. Ex. 4 at 17; C. Ex. 6)

19. Respondent Hall testified that Cullen injured her back in a car accident in August of 2015 and required six weeks of physical therapy. She indicated that Cullen faced dire financial difficulties as a single mother with a three-year-old child. (Tr. 219-220; See also Tr. 152-153) During the Post-Audit Division Audit, Respondent Hall told Denny Rhodes that she knew Cullen owed time and was paid for services not rendered, but that she was not going to take Cullen's time away because of, *inter alia*, the automobile accident and how little money she made. (Tr. 42; 84-90)

20. The record establishes beyond a reasonable doubt that Respondent Hall knowingly and intentionally failed to require Cullen to either work a full workweek consisting of 35 hours, to properly take accrued annual leave or sick leave, or to request leave without pay if annual or sick leave had been exhausted. (C. Ex. 4 at 13) The record further establishes beyond a reasonable doubt that Respondent Hall was aware that Cullen's paid leave was exhausted inasmuch as Respondent

⁷When Respondent Hall indicated that she would be docked three days for pay over a three week period, Cullen pleaded with Respondent Hall to only dock her two days per pay period.

Hall established a “make-up” plan and made various statements indicating that she knew that Cullen had exhausted her paid leave. Finally, the record establishes beyond a reasonable doubt that Respondent Hall allowed Cullen to receive salary and benefits for those days and did not require her to take time off without pay. (C. Ex. 4 at 14)

21. Therese St. Germain (“St. Germain”), another Court of Claims employee, held the position of Administrative Assistant and, later, Business Manager at the Court of Claims. She worked there from March 25, 2013, to August 20, 2015. (Tr.234-235; C. Ex. 7)

22. Jean Ann Krebs (“Krebs”), a Fiscal Officer employed by the Joint Committee, worked with St. Germain and noticed St. Germain was absent from work for a significant period.⁸ (C. Ex. 5 at 8-9, 14-15)

23. At some point in either 2014 or 2015, Krebs had a telephone conversation with Respondent Hall regarding St. Germain’s absences. She asked Respondent Hall if there were any leave without pay forms submitted for St. Germain given the extent of the absences. (Tr. 269-272; C. Ex. 5 at 15-17)

24. Respondent Hall told Krebs that according to the computerized leave records, St. Germain had “plenty of leave.” Krebs confirmed this by reviewing the computerized leave record and observing that St. Germain “had leave.” As a result, Krebs believed that there were no issues with St. Germain’s leave time.

25. The record does not establish, beyond a reasonable doubt, when this conversation occurred. Krebs recalled that it “probably” occurred in the spring of 2015. (Krebs Depo., pp. 16-17) Krebs acknowledged that other employees, including Crystal Estep, a Joint Committee employee,

⁸Krebs’ deposition was submitted as part of the record herein. St. Germain did not testify.

were present for the telephone conversation between Respondent Hall and Krebs. Ms. Estep testified that she was “pretty sure” this conversation occurred in or around the summer of 2014 because it was well before St. Germain left employment in the summer of 2015.⁹ (Tr. 285-287) According to Ms. Estep, Respondent Hall told her in a separate conversation that St. Germain was a single mother and that Respondent Hall was just trying to help St. Germain. (Tr. 285)

26. Ms. Estep testified that she overheard Respondent Hall tell Krebs that she was reminded that she needed to check leave balances before approving leave. (Tr. 286)

27. After discovering that Respondent Hall permitted a “make-up policy” within the Court of Claims, Krebs called Mr. Allred because she felt “deceived” by Respondent Hall given their discussion regarding St. Germain’s leave status. (C. Ex. 5 at 49-50)

28. Upon further investigation, it was revealed that St. Germain’s attendance sheets differed from the computerized leave records. St. Germain was paid for a total of 24.89 days, or 174.25 hours, that she neither worked nor took leave between March 25, 2013, and August 20, 2015. (Tr. 109; C. Ex. 7 at 6-7; C. Ex. 9) Neither Krebs nor Respondent Hall had checked St. Germain’s attendance sheets to ensure leave was properly being taken. (C. Ex. 5 at 16, 49; Tr. 270)

29. There is no evidence of record that Respondent Hall knew St. Germain had exhausted her leave or that she had entered into a “make-up” agreement with St. Germain. (Tr. 241) Krebs, a Commission witness, corroborated that the electronic leave record showed that St. Germain had leave available.

30. It appears that Respondent Hall failed to enforce the requirement that St. Germain

⁹Ms. Estep worked with St. Germain and recognized that St. Germain was frequently absent from work including out-of-state work-related travel during which she took some personal time. (Tr. 283-84)

maintain accurate and timely records of her work hours. However, the Commission failed to establish, beyond a reasonable doubt, that Respondent Hall knowingly and intentionally allowed this to occur. (Tr. 269-272, 285-286; C. Ex. 5 at 15-16, 49-50)

31. Although Respondent Hall failed to require St. Germain to work a full workweek consisting of 35 hours, properly take accrued annual leave or sick leave, or request leave without pay if annual or sick leave had been exhausted, the record failed to establish, beyond a reasonable doubt, that Respondent Hall knowingly and intentionally allowed this to occur. (Tr. 269-272, 285-286; C. 5 at 15-16, 49-50) According to the computerized leave record that was reviewed by Krebs and Respondent Hall in either the summer of 2014 or the first half of 2015, St. Germain had sufficient leave.

32. At no time did the Joint Committee have a policy that would permit an employee to receive wages prior to performing the work associated with earning those wages. The Joint Committee and its divisions also did not permit the practice of paying an employee for work not performed and allowing the employee to make up the time for which he or she was paid at a later date.¹⁰ (Tr. 295-297, 310-312; C. Ex. 5 at 45-47)

ANALYSIS

The purpose and intent of the West Virginia Governmental Ethics Act ("Act") is set forth in West Virginia Code § 6B-1-2(a), as follows:

¹⁰Becky O'Fiesh, Chief Deputy Clerk for the Court of Claims, testified that employees were paid for work not performed and were permitted to make the time up. (Tr. 198-203) Other witnesses denied that it was the practice of the Joint Committee and its divisions to allow employees to get paid for work not performed under a "make-up policy." Ms. O'Fiesh testified that it was impermissible for employees to receive pay for work not performed. Finally, an individual Ms. O'Fiesh identified as permitting the practice, Jean Ann Krebs, expressly denied the same. (Tr. 203, 295-297, 310-12; C. 5 at 11-13, 45-57) The Joint Committee did permit flexibility for employees to meet the standard 35-hour work week.

The Legislature hereby finds that the holding of a public office or public employment is a *public trust*. Independence and impartiality of public officials and public employees are essential for the maintenance of the confidence of our citizens in the operation of democratic government. The decisions and actions of public officials and public employees must be made free from undue influence, favoritism or threat, at every level of government. *Public officials and public employees who exercise the powers of their office or employment for personal gain beyond the lawful emoluments of their position or who see to benefit narrow economic or political interests at the expense of the public at large undermine public confidence in the integrity of democratic government.*

(Emphasis added)

A central tenet of the Act is that the State fisc must be protected and used only for the benefit of the public. To this end, the Legislature has prohibited the use of a public office for private gain.

West Virginia Code § 6B-2-5(b) states:

A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.

Given the facts relating to employee Brittany Cullen, it is clear that Respondent Hall violated the Act. The salient facts of this case as it relates to Cullen are largely undisputed and, in fact, were stipulated by the parties. (See Findings of Fact, 9, 14, 17, 21, 25, 26, 27).

A review of the entire record and the stipulations referred to above clearly and unequivocally establish that Respondent Hall, in her official capacity, knowingly and intentionally permitted Cullen to be paid for work that she did not perform. In other words, Respondent Hall knew that Cullen's had exhausted all paid leave, missed work without taking personal or sick leave, but was paid. Nonetheless, Respondent Hall entered into an informal agreement to permit Cullen to "pay back" the missed time by working weekends and lunches from time to time – after Cullen had been paid for the work she had missed. Respondent Hall knew that Cullen had exhausted all her paid leave

and continued to take leave. Nevertheless, Respondent Hall authorized payment of wages for time Cullen did not work.

It is beyond cavil that State employees cannot be paid for time that they do not work. West Virginia Code § 12-3-13, known as the “ghost employee” statute, states:

No money shall be drawn from the treasury to pay the salary of any officer or employee before his services have rendered.

Cullen was paid for services not rendered. Respondent Hall, Cullen’s supervisor, with knowledge that Cullen had exhausted her leave, knowingly and intentionally permitted this to occur, in violation of West Virginia Code § 6B-2-5(b) which, as noted, prohibits the use of public office for the private gain of another.

According to Respondent Hall, Cullen, who received relatively low pay in her position, was a single mother who had recently been injured in a car accident, had exhausted all available leave, was in financial peril, and required assistance. Respondent Hall asserts that she did not intend to “cheat” the State, but, rather, intended to allow Cullen to repay the State by making up her missed time after the fact. Respondent Hall asserts that her attempt to allow Cullen to make up her missed time was “foiled” when Cullen was terminated. Respondent Hall argues that she lacked the requisite intent to violate West Virginia Code § 6B-2-5(b) and that no one gained from the arrangement that she had made with Cullen.

Notwithstanding Respondent Hall’s argument to the contrary, Respondent Hall had the requisite intent to violate West Virginia Code § 6B-2-5(b). The record establishes, beyond a reasonable doubt, that Respondent Hall knowingly permitted Cullen to be paid for time that she did not work. Indeed, Respondent Hall admitted that she knew Cullen was out of time and went so far

as to *twice* set up a plan for re-payment of the time missed. Respondent Hall, in her official capacity, knowingly and intentionally allowed Cullen to be paid for time not worked.

The Act is designed to insure that public resources are not used for private benefit or gain. Cullen clearly experienced private gain from the actions of Respondent Hall: She was paid for work she did not perform. This clear violation of the Act is not excused by the fact that Respondent Hall had set up a “make-up” plan. The “ghost employee” statute prohibits “make-up” plans and Respondent Hall certainly is not authorized to offer a loan of public funds and repayment plan in this regard.

As for Respondent Hall, while she did not gain financially, it is clear that she used her position of authority to permit Cullen to be paid in an unlawful manner. The statute at issue prohibits public officials and employees from using public office for the personal gain of another. It does not require that Respondent Hall personally receive a financial benefit; to find otherwise would undermine a fundamental purpose of the Act, which is to protect the public fisc and prevent the use of public resources for private purposes.¹¹

The record in this case also raises the question of whether other state agencies have permitted similar “make-up” agreements and, whether Cullen’s agreement was consistent with such agreements. The undersigned rejects the contention that if similar “make-up” plans have occurred that it would excuse or justify the actions of Respondent Hall. Respondent Hall was not authorized to act in a manner contrary to law even where she sought to help an employee. See e.g. State Ethic Comm’n v. Antonetti, 365 Md. 428 (2000).

¹¹Taken to its logical extreme, Respondent Hall appears to assert that a public official could utilize public money for the private interests of a subordinate so long as the public official did not receive a financial benefit. This narrow reading of the statute is clearly inconsistent with the plain language of the statute and the purpose of the Act.

Respondent Hall also asserts that the non enforcement of West Virginia Code § 6B-2-5(b)(1) constitutes desuetude which may be imposed when a statute that has been in existence for some time but has not been enforced. According to Respondent Hall, West Virginia Code § 6B-2-5(b) has not been applied since its inception in 1989. This argument is unpersuasive. As a threshold matter, the Commission has routinely applied the statute in a general manner routinely. In fact, the Commission applied this statute in nearly the same manner as in the instant case in a Final Decision and Order issued October 1, 2015, in In re Paula Boggs, where a public official authorized the use of public funds for an individual's private legal defense. The public official was sanctioned for this action under West Virginia Code § 6B-2-5(b)(1) (imposing a penalty consisting of a public reprimand, a \$1,000 fine and costs). Finally, it must be noted that the doctrine of desuetude is designed to address instances where a law has been promulgated for years but never or rarely enforced. The test is whether the application of such a law is fundamentally unfair. Here, it cannot be found that applying the statute at issue to the facts herein is fundamentally unfair. Committee on Legal Ethics v. Printz, 416 S.E.2d 720 (W. Va. 1992) Rather, for the reasons already stated, it is consistent with the plain language of the statute and appropriate based upon the evidence relating to employee Cullen.

In contrast to the evidence regarding the violation of the Act related to Cullen and, in particular, Respondent Hall's knowing and intentional involvement in permitting Cullen to be paid for work not performed, the evidence relating to Therese St. Germain fails to establish, beyond a reasonable doubt, that Respondent Hall knowingly and intentionally permitted St. Germain to be paid for work not performed.

The uncontraverted evidence of record establishes that a discussion of St. Germain's leave

time occurred at some undetermined date – either in the summer of 2014 or in 2015, before St. Germain left state employment. The parties to that discussion – Krebs and Respondent Hall – both determined that St. Germain had sufficient leave at that time.¹² There is no evidence of record that Respondent Hall was aware that St. Germain had exhausted her leave.¹³ Indeed, Respondent Hall’s denial of knowledge of this is undisputed and finds support from Krebs.

Finally, the salient facts of this case indicate that Respondent Hall sought to aid an employee in a difficult time. Although her compassion is laudable, the method by which she aided Cullen in this instance was misplaced, and, ultimately, contrary to law, and violated the Act. That Respondent Hall violated West Virginia Code § 6B-2-5(b) with regard to employee Brittany Cullen (Count One) is supported by the record, beyond a reasonable doubt, as required by West Virginia Code § 6B-2-4(s)(1).

Based upon the foregoing the undersigned now makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. Respondent Hall, during her tenure as Clerk of the Court of Claims, was a public employee within the meaning of the West Virginia Governmental Ethics Act. W. Va. Code § 6B-1-3(j).

¹²Joint Committee employee Crystal Estep further indicated that she discussed the fact that St. Germain was combining personal leave with out-of-state, work-related travel. Though Ms. Estep recalled that Respondent Hall remarked that St. Germain was a single mother who needed assistance, there was no evidence that Respondent Hall knew that St. Germain had exhausted her leave. It was only after the underlying audit in this case was completed that it was determined that St. Germain had, in fact, been paid for time she did not work.

¹³Although the absence of proof beyond a reasonable doubt as it relates to St. Germain is dispositive on Count 2, the undersigned notes that the date upon which Respondent Hall commented that St. Germain was a single mother who needed assistance occurred in the summer of 2104, according to Ms. Estep. As such, the two-year statute of limitations in place at the time would not have been met as the Complaint herein was not filed until January of 2017. W. Va. Code § 6B-2-4 (w). Therefore, the record does not establish beyond a reasonable doubt that the statute of limitation was satisfied.

2. The Ethics Committee has jurisdiction over alleged violations of the Ethics Act committed by West Virginia public employees, including Respondent Hall. W. Va. Code §§ 6B-1-1 through 6B-2B-6.

3. Public officials are prohibited from knowingly and intentionally using their public office for the private gain of another. W. Va. Code § 6B-2-5(b).

4. Private gain of another includes being paid for work not performed even if the Respondent had an expectation of her subordinates to perform the work at a later time. Permitting the immediate and uninterrupted payment to an employee for work not performed is, at its core, an unlawful use of public funds and clearly violates West Virginia Code § 6B-2-5(b).

Count One

5. The evidence of record establishes beyond a reasonable doubt that, during the period from December 16, 2014, through June 30, 2016, Respondent Hall knowingly and intentionally used her public employment position for the private gain of another in violation of West Virginia Code § 6B-2-5(b)(1) by knowingly and intentionally failing to require Brittany Cullen to utilize her sick or annual leave time or to take time off without pay for multiple days on which she did not work but was paid a salary and accrued associated employment benefits.

Count Two

6. The evidence of record fails to establish beyond a reasonable doubt that Respondent Hall knowingly and intentionally used her public employment position for the private gain of another (Therese St. Germain) in violation of West Virginia Code § 6B-2-5(b)(1).

PROPOSED SANCTIONS

1. A public reprimand shall be issued against the Respondent Cheryle M. Hall.

2. The Respondent Cheryle M. Hall shall pay a fine of \$1,500 to the West Virginia Ethics Commission for her violation of the Ethics Act in Count One.

3. The Respondent Cheryle M. Hall shall reimburse the West Virginia Ethics Commission for the actual costs of investigating and prosecuting this violation.

Entered this 11th day of December, 2017.


JERFREY G. BLAYDES
HEARING EXAMINER

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

In Re:

CIC No. 2017-02

CHERYLE M. HALL,
Former Clerk, Court of Claims,

Respondent.

CERTIFICATE OF SERVICE

I, Rebecca L. Stepto, Executive Director of the West Virginia Ethics Commission,
certify that I mailed true and complete copies of the foregoing **FINAL DECISION AND**
ORDER on February 1, 2018, to the following

Via U.S. Mail and Certified Mail, Return Receipt Requested:

Cheryle M. Hall
2008 Parkwood Road
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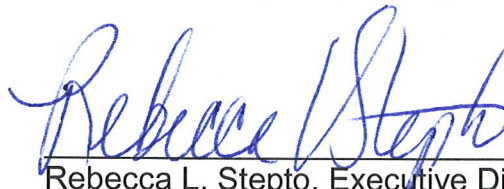
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