

NO. 3540~~4~~7

COURT OF APPEALS, DIVISION II, THE STATE OF WASHINGTON

ARNOLD MELNIKOFF,

Appellant,

vs.

THE WASHINGTON STATE PATROL

Respondent.

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STATE of WASHINGTON
BY *[Signature]*
REPLY

COURT OF APPEALS

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This is an appeal of the Findings of Fact, Conclusions of Law, and Order of the Personnel Appeals Board (PAB), dated July 26, 2005, and the Thurston County Superior Court Order Affirming Personal Appeals Board Decision, dated September 8, 2006.

This case presents several unique legal issues and a complex set of facts regarding opinion testimony about human hair comparisons issued 17 years ago by the Appellant, Arnold Melnikoff, in the state of Montana. Mr. Melnikoff was a long-time employee (15 years) of the Washington State Patrol (WSP), with a sterling employment history, who was terminated from his position based upon a recent dispute over his opinion testimony in 1990. As set forth herein, Mr. Melnikoff asks the Court to reverse the PAB's and the Superior Court's Order because the State terminated Mr. Melnikoff from his employment without adhering to its own policies and procedures, and without any factual basis. Any attempt by the State to discipline Mr. Melnikoff now for his testimony in 1990 is contrary to both the Washington and United States Constitutions, and the concepts of due process and fairness.

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II. ASSIGNMENTS OF ERROR

1. The PAB erred by entering Findings of Fact 5.1, 5.2, 5.3 and 5.4.
2. The PAB erred by entering Conclusions of Law 6.1, 6.7, and 6.9.
(CP 6; PAB pp. 13-15).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the PAB have jurisdiction over the WSP's allegation of incompetence and gross misconduct when the WSP determined Mr. Melnikoff was not working for the WSP when he testified 14 years before it fired him?
2. Is it lawful to terminate a public employee for gross misconduct or incompetence 14 years after the single alleged wrongful act (opinion testimony in a public trial)?
3. Did the WSP violate Mr. Melnikoff's due process rights under the United States and Washington constitutions by waiting 12 years to initiate an investigation into public testimony it knew he had given at the time, and then conduct a biased investigation during which it violated several of its own most fundamental rules?
4. Did the WSP's violation of its own policies, rules and regulations prevent the WSP from imparting discipline in this case?

5. Does the WSP's refusal to investigate similar cases involving its forensic scientists' expert opinion testimony bar it from disciplining Mr. Melnikoff in this case?
6. Are the PAB's findings of fact supported by the record?
7. Is termination of employment an appropriate sanction under the facts and circumstances of this case?

III. FACTS

References to the Certified Record of the PAB are "PAB ____".

Arnold Melnikoff was a permanent employee for the Respondent, Washington State Patrol (WSP). He began his employment as a Forensic Scientist 3 with the WSP in September 1989. (CP 6; PAB p. 4).

The duties of a Forensic Scientist 3 include performing complex analyses on physical evidence in criminal cases; interpreting analytical results; preparing written opinion reports; and testifying as an expert in courts of law. (CP 6; PAB p. 4).

Mr. Melnikoff has a bachelor's degree in biology, with a minor in mathematics, and a master's degree in organic chemistry. Mr. Melnikoff also took a course in hair analysis from the Federal Bureau of Investigations (FBI) laboratory in 1975. (CP 6; PAB p. 4).

While employed with the WSP, Mr. Melnikoff worked at the Spokane Crime Lab, performing tests on drugs, including

methamphetamine laboratory evidence. (CP 6; PAB p. 4). Mr. Melnikoff never testified on behalf of the WSP with respect to any hair analysis.

Mr. Melnikoff has no previous employment discipline of any type. (CP 6; PAB p. 4). He has never had a negative employee performance evaluation. He has had an exemplary work record for the WSP. (CP 6; PAB pp. 180-233).

Dr. Barry Logan, Director of the WSP Forensics Laboratory Bureau, informed the Washington Association of Prosecuting Attorneys on November 4, 2002:

Mr. Melnikoff has been employed as a scientist in the chemistry section of the WSP Crime Laboratory Division since 1989. His only assignment has been to test drugs and methamphetamine laboratory evidence. All of his work for the WSP has been subject to 100% peer review, and he, like all our staff, has been subject to repeated proficiency testing. Mr. Melnikoff's expert testimony is also periodically monitored by his supervisor. While employed in Washington, Mr. Melnikoff has not performed analysis, or provided testimony, on any cases involving hair identification or analysis.

We are not currently aware of any concerns raised by the courts, the defense bar, or prosecuting attorneys about Mr. Melnikoff's work while employed by Washington State.

[Emphasis added]. (CP 6; PAB pp. 78-79).

Prior to his employment with the WSP, Mr. Melnikoff was a Forensic Scientist and Bureau Chief of the Montana Crime lab for the State of Montana beginning in 1970. While working in Montana, Mr.

Melnikoff performed hair analyses for criminal cases, and he provided testimony in court. (CP 6; PAB p. 4). Although Mr. Melnikoff never testified on hair comparison or hair identification for the WSP, he was subpoenaed to the State of Montana in 1990, while employed by the WSP, for a case, State of Montana v. Paul D. Kordonowy, he had handled for the Montana Crime Lab before he began work for the WSP. (CP 6; PAB p. 995).

In October 2002, Dr. Logan received a copy of a letter to the Washington State Attorney General, dated September 30, 2002, from Peter Neufeld, Director of the “Innocence Project.” Mr. Neufeld complained about Mr. Melnikoff’s scientific practices while Mr. Melnikoff was employed by the State of Montana in the 1980’s. He alleged that Mr. Melnikoff offered “false testimony” during a criminal trial, and that as a result a defendant, Jimmy Bromgard, was convicted of a crime. Mr. Neufeld’s letter alleged that subsequent DNA analysis “exonerated” Mr. Bromgard. Mr. Neufeld submitted a review from a panel of experts he personally selected on hair examination, who asserted, based upon portions of trial transcript testimony supplied to them by Mr. Neufeld, that Mr. Melnikoff’s testimony in 1990 was contrary to generally accepted scientific principles. (CP 6; PAB pp. 4-5).

The Internal Affairs Section (IA) of the WSP notified Mr. Melnikoff on October 30, 2002, that it had initiated an investigation into Mr. Neufeld's allegation that he had engaged in misconduct related to "court room testimony and/or case analysis." None of these complaints related to Mr. Melnikoff's employment with the WSP. The Complaint was amended on January 14, 2003, to include the following allegations:

1. On or about January 16 through 18, 1990, you provided statistical comparisons based on analysis of hair samples during courtroom testimony for the State of Montana while you were an employee of the Washington State Patrol. The statistical comparisons you provided were not consistent with scientific principles or training you received.
2. On or about January 16 through 18, 1990, you provided testimony for the State of Montana while employed by the Washington State Patrol in which you stated you had conducted hair analysis in 500 to 700 cases. It is alleged that you conducted substantially fewer hair analysis than you testified to in court.

[Emphasis added]. (CP 6; PAB p. 5).

The above-referenced "new" 13-year-old allegations related to testimony Mr. Melnikoff provided in the State of Montana regarding forensic testing he performed while still employed with the Montana Crime Lab on head and pubic hairs of Paul D. Kordonowy. They did not relate to his work for the WSP. He was subpoenaed by the State of Montana. (CP 6; PAB p. 995). The WSP does not consider Mr.

Melnikoff to be working for the WSP when subpoenaed by another agency.

Mr. Melnikoff testified in the trial of State of Montana v. Paul D. Kordonowy, 251 Mont. 44, 823 P.2d 854 (1990). (CP 6; PAB pp. 248-251). He testified about the microscopic comparisons he did of various hairs, both head and pubic hair, found both at the crime scene and as having been extracted from Mr. Kordonowy for comparison purposes. Mr. Melnikoff testified that, based upon his examination, he was able to match the head hair from the crime scene with that of Mr. Kordonowy's, and the same with the pubic hair. (CP 6; PAB pp. 249-250). Mr. Melnikoff testified that he could not state with certainty that any one hair came from a specific person. He was asked about the probability that the hair found at the crime scene did not belong to Mr. Kordonowy. Mr. Melnikoff testified that he had worked on "somewhere between 500 and 700 hair cases" in Montana. (CP 6; PAB p. 139). Mr. Melnikoff was referring to hair comparisons, not file or case jackets. (CP 6; PAB p. 978). Mr. Melnikoff testified that, based upon his training and his experience in the 500-700 comparisons, "1 in 100" was a "good, conservative estimate of the probability of two people's hair matching, either head or pubic hair" of Mr. Kordonowy. He further testified that since there were matches on both head and pubic hair, that there was "approximately one in 10,000

chance” that both the pubic and head hair found at the crime scene did not belong to Mr. Kordonowy. (CP 6; PAB p. 140).

Prior to his testimony in the Kordonowy case, Mr. Melnikoff had approximately 15 years of experience in conducting microscopic hair comparisons, and had read the published scientific journal articles about hair comparisons and statistical probability before he testified in the Kordonowy case. Mr. Melnikoff’s testimony was consistent with his training, experience, and understanding. (PAB pp. 994-996).

Mr. Melnikoff testified that you can multiply the probabilities of two head hairs together only when they match two dissimilar head standards from an individual. Head and pubic hairs are very dissimilar. This is not true for all head hair obtained from the same individual. Therefore, based upon studies published by Barry Gaudette, you can multiply the probabilities of head and pubic hair together. (CP 6; PAB pp. 1025-1026).

Witnesses for the WSP and Mr. Melnikoff told the PAB that other forensic scientists around the country had testified to similar statistical probabilities. See summary of PAB testimony and exhibits in Section V. G., *infra*, pages 30-36.

At the PAB hearing, the WSP presented testimony from three experts, Dr. Dedman, Mr. Bisbing, and Mr. Houck. However, none had

read the transcript of the State of Montana v. Kordonowy testimony. According to the PAB findings, their opinion was that Mr. Melnikoff testified improperly in 1990 when he indicated that the chance that the hairs found at the crime scene was 1 in 10,000 that they were not Mr. Kordonowy's. (CP 6; PAB p. 5). However, Mr. Melnikoff testified that the 1 in 10,000 figure was approximate, which is allowed, even according to the State's witnesses. (CP 6; PAB 140). Further, the exhibits presented at the hearing (textbook excerpts and scientific journal articles) contradict the testimony of the State's experts regarding the use of statistics. The texts and scientific journal articles support Mr. Melnikoff's testimony. See Section V. G., pages 30-36, *infra*.

Mr. Melnikoff's testimony, in every criminal case which he has testified, was screened prior to trial by a prosecutor, was subject to cross-examination by defense counsel, was often subject to rebuttal by a defense expert, and was always deemed admissible by the trial judge. He never used hair testimony to absolutely identify the defendant as having been at the crime scene. He consistently testified that hair comparison testimony is not a form of positive identification. (CP 6; PAB 994).

The WSP fired Mr. Melnikoff because it determined that his testimony regarding the approximate number of 500 to 700 cases he examined were inaccurate, and that his use of the statistic of

“approximately 1 in 10,000” in the Kordonowy case was inappropriate. The PAB determined that his testimony did not constitute willful violation of published rules of the WSP or the PAB, and that it was not a neglect of duty. However, it affirmed the WSP’s finding that his testimony constitutes gross misconduct and incompetence. See Conclusion of Law 6.7. (CP 6; PAB p. 14).

In addition to the investigation of the Neufeld complaint, the IA investigators, despite the fact that there was not a single complaint about his work as a chemist, improperly placed an “audit” of 100 of Mr. Melnikoff’s recent files as a chemist into the IA file just before it closed its investigation of his testimony in Montana. The hypercritical “audit”, which the State admits was improperly done and inaccurate, was presented to the “Appointing Authority”, who testified at the PAB hearing that the “audit” was ultimately not a basis for any disciplinary action, even though he and the WSP originally had relied on it when it decided to fire Mr. Melnikoff. (CP 6; PAB p. 876). Mr. Melnikoff was afforded a “Loudermill” hearing (pre-disciplinary hearing) at which he rebutted (a) all of the adverse findings of the improperly conducted “audit”, and (b) the concerns about his testimony in the Kordonowy case. However, the WSP had already released the audit to newspaper outlets, including the Associated Press. There was massive negative publicity about the audit

and Mr. Melnikoff's alleged incompetence before Mr. Melnikoff was first interviewed by Internal Affairs, which took place at the Loudermill hearing. (CP 6; PAB pp. 1001-1002). Mr. Melnikoff identified several witnesses at the Loudermill hearing that had factual and expert opinion about the matters investigated by IA. The WSP did not contact any of the witnesses identified by Mr. Melnikoff. It made its decision to fire him solely on the information and opinion provided by Mr. Neufeld's personally selected panel. (CP 6; PAB p. 882, line 16 to p. 897, line 20).

Mr. Melnikoff appealed his termination to the Washington State Personnel Appeals Board. On July 26, 2005, the Personnel Appeals Board entered Findings of Fact, Conclusions of Law, and an Order upholding the termination. Mr. Melnikoff then appealed the decision of the Personnel Appeals Board to the Thurston County Superior Court. On September 8, 2006, the Thurston County Superior Court entered an Order affirming the decision of the Personnel Appeals Board. (CP 137-138).

V. ARGUMENT

A. Standards of Review.

RCW 41.64.130 provides that a public employee may seek judicial review of the decision of the Personnel Appeals Board on one or more of the grounds that the PAB Order was:

- A. Founded on or contained an error of law, which shall specifically include error in construction or application of any pertinent rules or regulations;
- B. Contrary to a preponderance of the evidence as disclosed by the entire record with respect to any specified finding or findings of fact;
- C. Materially affected by unlawful procedure;
- D. Based on violation of any constitutional provision;
or
- E. Arbitrary or capricious.

Superior Courts and Courts of Appeal apply a “substantial evidence” test in reviewing decisions of the PAB under this statute. Ballinger v. DSHS, 104 Wn.2d 323, 705 P.2d 249 (1985). The test is whether there exists in the record 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. Gogerty v. The Department of Institutions, 71 Wn.2d 1, 8-9, 426 P.2d 476 (1967). With respect to errors of law, the reviewing court may substitute its judgment for that of the PAB, though substantial weight is accorded the Board’s view of the law. Dedman v. Personnel Appeals Board, 98 Wn.App. 471, 477, 989 P.2d 1214 (1999).

In the instant case, the record contains no substantive or relevant evidence which supports the PAB’s upholding of the WSP’s discharge

decision. Moreover, the record clearly establishes that WSP's discharge of Mr. Melnikoff violated his rights to due process of law under both the State and Federal constitutions. Therefore, both the PAB decision and the superior court order upholding the discharge were erroneous as a matter of law, and must be reversed.

B. The WSP and the PAB did not have jurisdiction over the allegations that Mr. Melnikoff's testimony in Montana in 1990 constituted incompetence and gross misconduct.

The uncontested facts are that Mr. Melnikoff was subpoenaed by a prosecutor for the State of Montana to testify in Montana in the Kordonowy case in January 1990. Though newly employed at that time by the WSP, the WSP made it clear to Mr. Melnikoff that it does not consider Mr. Melnikoff to be working for the WSP when he is subpoenaed by another agency. Further, he was a chemist for the WSP, and his testimony in Kordonowy involved hair comparison analysis, not chemistry.

The WSP did not have jurisdiction over Mr. Melnikoff for the allegations of "incompetence" and "gross misconduct."

Incompetence presumes a lack of ability, capacity, means, or qualifications to perform a given duty. Plaisance v. Department of Social

& Health Services, PAB No. D86-75 (Kent Hearing Exam), affirmed by Board, (1987). Gross misconduct is flagrant misbehavior which adversely affects the Agency's ability to carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

Since the WSP did not consider Mr. Melnikoff to be working for the WSP when he testified under subpoena in Montana in Kordonowy, and since he was not assigned to hair analysis by the WSP, (he was a chemist), the WSP and the PAB have no legitimate personal or subject matter jurisdiction over Mr. Melnikoff or his testimony for the alleged offenses.

Personal jurisdiction for incompetence or misbehavior would require Mr. Melnikoff to have been working for the State at the time. For example, if Mr. Melnikoff were a plumber for WSP, and he did plumbing work on the side – not for the WSP – and one of his customers sued him for improper plumbing work, the WSP would not have personal jurisdiction over Mr. Melnikoff in that matter because it was outside the scope of his work for the WSP. It does not matter if it was the same or similar to the work he normally performs for the WSP. If he was not working for the WSP at the time, the WSP has no jurisdiction over him to decide whether he was a good or bad plumber. It only has jurisdiction over him for work he does for the WSP.

Subject matter jurisdiction works the same way. First and foremost, Mr. Melnikoff was a chemist for the WSP. Whether he was a competent hair examiner is not a subject over which the WSP and the PAB had jurisdiction. Using the plumber analogy, if Mr. Melnikoff were a plumber for the WSP and someone filed a complaint against the WSP saying Mr. Melnikoff messed up an electrical job he did 15 years ago, the WSP cannot discipline him now for incompetence or misbehavior as a plumber. Mr. Melnikoff has never worked as a forensic hair examiner for the WSP. The WSP has no basis to judge his competence 15 years ago as a hair examiner; it has no jurisdiction to discipline him for alleged incompetence or misbehavior as a hair examiner when he has never performed that function for the WSP.

C. **The WSP is time-barred from terminating Mr. Melnikoff's employment 14 years after a single incident of alleged misconduct.**

The complaint on which the WSP disciplined Mr. Melnikoff was 13 years old when the WSP notified him of it. Mr. Melnikoff worked as a forensic scientist for the State of Montana from 1970 through September 1989, when he was hired by the WSP. Mr. Melnikoff was a probationary employee for the WSP for one (1) year. During that probationary period, Mr. Melnikoff was subpoenaed by the Montana prosecutor handling the State of Montana v. Kordonowy case. He received permission from his

manager to return to Montana to testify. He testified in a public trial. The State of Washington had every opportunity to monitor his testimony and actions during that period of time. Nothing about his testimony and opinions during that trial was hidden from the WSP. Indeed, he was on probation and was evaluated in 1990 after his testimony, and the WSP deemed his work acceptable. The Montana trial court deemed it acceptable. The Montana Supreme Court did not exclude it. See State v. Kordonowy, 251 Mont. 44, 47, 823 P.2d 854 (1991). (CP 6; PAB pp. 248-251).

Twelve years later, the WSP received the Complaint from Peter Neufeld, a biased advocate for an inmate, who is suing the State of Montana and Mr. Melnikoff. Mr. Neufeld had a financial stake in attacking Mr. Melnikoff's reputation. The original basis for attacking the conviction of Mr. Kordonowy was based upon DNA testing, which was unavailable to Mr. Melnikoff and most other forensic scientists in the 1980's. The Complainant, Mr. Neufeld, personally selected a peer panel that was generally critical of hair comparison analysis and testimony. Had Mr. Melnikoff selected a peer panel, using the WSP's methods, he could have put together experts with contrary opinions. If a panel was needed, an unbiased employer would have put together a more balanced panel. In

essence, the Neufeld panel reached back almost 14 years in time and criticized Mr. Melnikoff based on selective portions of testimony.

The attempt to reach so far back in time was deemed so remote in time that it was considered to be outside the realm of relevance under the Rules of Evidence. See CP 6; PAB pp. 628-629, "Courtroom Testimony." United States District Court Judge William Fremming Nielsen refused to allow testimony about the WSP's IA matter in his court in 2003 when the defense attempted to challenge Mr. Melnikoff's credibility as a scientist. Prosecutors in Washington felony cases subpoenaed Mr. Melnikoff even while he was on administrative leave. Counsel for Mr. Melnikoff has been unable to locate any similar case nationwide in which a public officer was charged with misconduct, neglect of duty, incompetence, or willful violation of an agency's policy 13 years after the single, alleged wrongful act. The reasons why no such cases exist are obvious. It is grossly unfair to the employee to attempt to reconstruct a defense to the allegations, and it is probably just as difficult for employers to gather credible evidence reaching so far back in time. How can anyone remember everything that one used as a basis for one's opinion testimony from 13 years before if they no longer work for the same agency, and have not conducted hair comparison cases during that period of time? For example, Mr. Melnikoff

testified as follows about having to renew his understanding about hair comparisons since 1990:

Q. . . . Arnie – you haven’t testified as an expert in hair analysis in a court of law since 1990 – true?

A. This is the last . . . case I actually testified in as a hair expert.

Q. . . . And during . . . the next 14 years, from 1990 to, to your termination in 2004, did you keep up on hair analysis articles?

A. . . . No, . . . I had – after about 199 – 1990 or 1991, I did some, helped with some training for the WSP, but then after that, I wasn’t involved in hair examination at all, so probably, uh, 1991 to the present, I haven’t really paid any attention to what’s going on in hair examination.

The WSP’s own rules and regulations require fairness. As previously stated, Mr. Melnikoff had already passed his probation and evaluations of his work after he testified. The opinions of the hand-selected panel by Mr. Neufeld are just that - opinions. It is grossly unfair to allege misconduct 13 years later.

Further, the IA investigators never contacted the experts or any other witness identified by Mr. Melnikoff that refuted the Neufeld panel’s opinions. Additionally, Mr. Melnikoff submitted the scientific journals and textbooks that he consulted prior to testifying in 1990, which supported his testimony. Not only had Mr. Melnikoff consulted the

scientific literature, but he had consulted other forensic scientists around the country that were doing hair comparison cases and determined that they were providing statistical testimony as well. All was ignored by the WSP. Now, at Mr. Neufeld's biased urging, more than a decade later, the WSP attempts to pick apart Mr. Melnikoff's efforts.

This case is unique in both its scope to classify opinion testimony as "misconduct" and its extraordinary effort to reach back in time to discipline an employee with an exemplary record. Mr. Melnikoff was not accused of a crime by the WSP. Even IF the WSP would have, he would have had the benefit of a statute of limitations that would prevent the State from prosecuting.¹ By comparison, the WSP has ignored the fairness and laches concepts, and has invoked a death sentence on Mr. Melnikoff's career, despite his exemplary record, without considering the extraordinary lapse of time.

While some scientists today may want to debate Mr. Melnikoff's testimony 17 years ago about probability, the WSP has to acknowledge that: (1) there were no standards in place at the time that could have been violated by Mr. Melnikoff; (2) the FBI did not train on statistics, but told

¹ For example, if Mr. Melnikoff were charged with perjury under RCW 9A.72.020 or .030 (both felonies) for intentionally lying about a material fact in court, the statute of limitations would be three years, RCW 9A.04.080(h), unless he were deemed to be a "public officer" for purposes of RCW 9A.04.080(b)(i), whose crime was in connection with his duties or oath of office, in which case it would be 10 years.

its students that they would have to base any conclusions they made on their own experience; (3) the “Daubert”² standards for presenting opinion testimony in court today were not established until 1993, and were not in place in 1990; (4) articles in scientific journals discuss the method by which experienced hair examiners, such as Mr. Melnikoff in 1990, could testify about probability; and (5) the experts from Neufeld’s panel who testified at the PAB hearing made mistakes in their statistical analysis. The WSP’s demand of Mr. Melnikoff to attempt to voluntarily recreate all he knew 13 years previously without access to notes, work product, etc., is not something he, or any other employee, should ever be asked to do, especially when the employee is the target of politically motivated complaints.

D. The WSP’s discipline violates due process.

“No State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV, §1.

It is undisputed that the WSP has a legitimate interest in monitoring its crime labs and the work of its employees. However, it is inappropriate and contrary to law for the WSP to reach back so far in time and seek to impose discipline against an employee, and to do so by

² Daubert v. Merrell Dow Pharm., Inc., 509 US 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

violating many of its own critical rules and regulations regarding IA investigations and audits of crime lab work.

One of the fundamental concepts of public employment law is that employees are entitled to due process when faced with allegations of misconduct. Basic due process refers to substantive fairness as well as the specific procedural protections to which an employee may be entitled by contract or law. Fundamental rights include hearing rights such as notice and opportunity to respond, evidentiary issues, an impartial decision maker, and pre- and post-disciplinary hearings. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed2d 494 (1985); United States Constitution Amendments 5, 14; Payne v. Mount, 41 Wn.App. 627, 705 P.2d 297, review denied, 104 Wn.2d 1022 (1985); Washington Constitution, Article 1, Sec. 3. In discussing the significance of retaining one's employment, the Loudermill court stated:

First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. (Citations omitted). While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job. (Citation omitted).

Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. (Citation omitted). Even where

the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases the only meaningful opportunity to invoke the discretion of the decision-maker is likely to be before the termination takes effect. (Citations omitted). [Emphasis added].

470 U.S. at 543, 105 S.Ct. at 1494.

The requirement to have an impartial decision-maker is critical. When the outcome of a government worker's pre-termination hearing has been predetermined regardless of the proof presented, the concerns and goals of the pre-termination hearing as set forth in Loudermill, supra, have not been met. Wagner v. City of Memphis, 971 F.Supp. 308 (W.D. Tenn. 1997). "In such cases, there is no meaningful opportunity to invoke the decision-maker's discretion, and there is no possibility that a mistaken decision can be avoided. In sum, such a hearing does not fulfill its function as enunciated in Loudermill and Duchesne [v. Williams], 849 F.2d 1004 (6th Cir. 1988) (en banc)], and is, in fact, nothing more than a sham proceeding." Id., 971 F.Supp. at 319 (footnote omitted). As stated in Bettis v. Village of Northfield, 775 F.Supp. 1545, 1564 (N.D. Ohio 1991), "... in the case at bar, the Complaint indicates that the bias was so harmful as to totally defeat the concerns and goals of the hearing."

Indeed, the Loudermill hearing in Mr. Melnikoff's case was nothing more than a sham proceeding. The hearing officer, Mr. Knorr, as the "appointing authority," refused to contact the expert witnesses

identified by Mr. Melnikoff, who would counter the Neufeld's personal panel personally selected by Mr. Neufeld. Mr. Knorr refused to consider the numerous scientific articles submitted by Mr. Melnikoff that said you could testify to statistical probability. Why? He was already biased against Mr. Melnikoff and had determined that he had to be fired because Mr. Kordonowy had spent 13 years in prison. Knorr's summary in the *Administrative Insight*, which he wrote before he heard from Mr. Melnikoff for the very first time at the Loudermill hearing, stated, "In summary, Mr. Melnikoff's inaccurate, incorrect, misleading and confused statements in any one of the trials taken individually or all three combined, have resulted in a complete lack of confidence in you as a forensic scientist and expert witness." (CP 6; PAB p. 292). [Emphasis added]. After he expressed that opinion, and after the WSP distributed that conclusion to the news media, Mr. Knorr met with Mr. Melnikoff to hear his side of the story for the first time.

As argued, supra, fairness to Mr. Melnikoff was not a concept embraced by the WSP or the PAB. The allegations are so far remote in time as to vitiate Mr. Melnikoff's ability to counter the specific factual allegations. Further, the WSP's violation of its own rules and regulations were identified with specificity in the Loudermill hearings, but were completely ignored by the Appointing Authority, Mr. Knorr, and the PAB.

To further bias the already bolixed investigation, the WSP conducted an “audit” of 100 of Mr. Melnikoff’s chemistry files over the preceding three years, and did so by violating its own standard operating procedures (SOP’s) in significant ways, and then improperly placed the audit, which had absolutely nothing to do with the allegations regarding hair comparison testimony, into the IA file, which then biased the Appointing Authority to the point that he believed Mr. Melnikoff to be an incompetent chemist. See CP 6; PAB pp. 619-633. Then, in the most bizarre twist, the WSP published the findings of the so-called audit to the news media and humiliated Mr. Melnikoff before the WSP ever contacted Mr. Melnikoff about the audit, as it absolutely should have under its own SOP’s, which require full consultation with the originating scientist whenever questions arise. See CP 6; PAB p. 632. Mr. Melnikoff countered each and every question and criticism raised by the audit at the Loudermill hearing, and was so effective in rebutting the criticisms that the audit was finally withdrawn from consideration by the Appointing Authority before he rendered his discipline. However, the massive harm caused by the unlawful, hypercritical audit and the unlawful, harmful publication of the audit was already done, and the WSP improperly took disciplinary action against Mr. Melnikoff to save face. The Appointing Authority was already horribly biased by the audit and the intense public

scrutiny placed on the agency. That pressure caused Mr. Knorr to impose discipline, and to make that discipline termination of employment. These actions, both individually and collectively, constitute a violation of due process under both Washington and Federal law.

E. The WSP's discipline violates the WSP's own rules and regulations.

As previously argued, the WSP's violation of its own IA rules and regulations, and the Crime Lab's Standard Operating Procedures (SOP) constitute a violation of due process. However, even if the court were to determine it was not a violation of due process, the WSP's and the PAB's failure to adhere to the rules and regulations and adopted SOP's constitutes an independent basis for reversal of the PAB's decision.

The WSP sets forth eleven (11) criteria that must be followed before it can discipline an employee:

1. Have the allegations against the employee been factually proven?
2. Is the discipline appropriate to the offense?
3. Was the investigation conducted fairly?
4. Is the discipline contemplated non-discriminatory or similar to what another employee in a comparable situation would receive?

5. Is it the employee who is at fault?
6. Have mitigating circumstances been considered?
7. Has the employee's work record been considered?
8. Is this discipline progressive?
9. Is the discipline free from anti-union sentiment?
10. Can the employee be rehabilitated?
11. Was the accused employee afforded due process?

These criteria were discussed in detail at the Loudermill hearing, and Mr. Melnikoff established that many of those criteria were not met. (CP 6; PAB pp. 632-633). Both Captain Jones and Mr. Knorr testified at the PAB hearing that all 11 were met, but their superficial, self-serving assertions fly in the face of the enormous amount of evidence that proves otherwise. See CP 6; PAB pp. 619-633.

Accordingly, the failure of the WSP to adhere to its own rules and regulations precludes the WSP from disciplining Mr. Melnikoff.

F. The WSP's discipline of Mr. Melnikoff is inconsistent with virtually identical cases involving WSP forensic scientists.

As previously noted, one of the criteria for the WSP and PAB to consider is whether the discipline imparted in this case is consistent with how comparable cases were handled by the agency. The PAB should consider evidence of disparate treatment. McGraw v. Department of

Licensing, PAB No. DISM-01-0084 (2002). The WSP has singled Mr. Melnikoff out for discipline and ridicule when, in two other highly publicized matters involving forensic scientists (Mr. Grubb and Mr. Vaughn), the WSP did nothing to criticize or discipline its employees. Indeed, in one, the head of the agency even wrote a public editorial explaining why it would be improper to investigate the employee at this late date. In both cases, forensic scientists for the WSP provided allegedly improper testimony in court that led to convictions, which were later overturned.

The first case, State v. Kunze, 97 Wn.App. 832, 988 P.2d 977 (1999), occurred before Mr. Melnikoff was terminated. The Kunze matter was brought to the attention of the WSP during the Loudermill hearing and was completely ignored. In Kunze, a WSP Crime Lab criminologist, Michael Grubb, testified in a murder case that the defendant was the likely or probable maker of an earprint at the crime scene. Grubb testified about his extensive qualifications as a criminalist. Though he had not seen any data or studies on earprints, he testified, “. . . that latent earprint identification is generally accepted in the scientific community, reasoning that ‘the earprint is just another form of impression evidence’, and that other ‘impression evidence is generally accepted in the scientific community.’” 97 Wn.App. at 837-8. The court then analyzed whether

Grubb's testimony was correct. 97 Wn.App. at 849-857. It determined that Mr. Grubb, as a forensic scientist, did not base his opinion on "tenable grounds." 97 Wn.App. at 854. The Court criticized both his science and his conclusion. A parade of experts testified that latent earprint identification was either (a) not generally accepted, or (b) that the experts were not aware of its acceptance, or (c) that surely the FBI would use it if it were generally accepted, but the FBI did not. 97 Wn.App. at 854. The court declared:

We reject his premise that latent earprints automatically have the same degree of acceptance and reliability as fingerprints, toolmarks, ballistics, handwriting, and other diverse forms of impression.

97 Wn.App. at 855.

However, the WSP did not investigate Mr. Grubb's testimony as being improper in any way, despite the fact that his testimony was (a) rebuffed by a parade of experts, and (b) wholly rejected by the court as "not generally accepted in the forensic science community." *Id.*

Here, to the contrary, the WSP reached back 14 years, and ignored the fact that both the Montana trial court and Supreme Court accepted the testimony provided by Mr. Melnikoff, and ignored the fact that Mr. Melnikoff's testimony was not unique and was supported by scientific journals and textbooks since the 1970's.

The second case involves a situation very similar to Mr. Melnikoff's and occurred a few months after Mr. Melnikoff was disciplined. A WSP forensic scientist, Charles Vaughan, testified in a murder case in Oregon in the 1980's on behalf of the prosecution, when he worked for the Oregon State Patrol Crime Lab, and the defendants were convicted. In 1994, the Oregon courts reversed the murder convictions that were due in part to Vaughan's erroneous testimony, and the defendants were released from prison. Vaughan was then hired by the WSP in 1995. Editorials were published by several regional newspapers in January 2005 that called for an investigation and discipline of the "offending" WSP forensic scientist. (CP 6; PAB p. 257, in Appendix).³ Though the allegations were strikingly similar to those of Mr. Neufeld's in this case, Dr. Logan steadfastly took the opposite tact and defended the scientist without an investigation and publicly stated in a letter to the newspaper that he refused to investigate. (See CP 6; PAB pp. 257-259, in Appendix).

The WSP engaged in a witch hunt in Mr. Melnikoff's case, but steadfastly refused to even attempt to investigate the other two matters.

³ The editorial notes that the WSP performed a review of Mr. Melnikoff's drug analysis cases, and fired him because of his questionable handling of drug evidence. However, as previously noted, Mr. Melnikoff successfully rebutted the botched, biased "audit" of his drug cases, and the WSP quietly ignored the fact that it had to acknowledge that Mr. Melnikoff's drug work was fine, and that the bogus "audit" was withdrawn from consideration by IA.

As such, Mr. Melnikoff's termination constitutes disparate treatment, which violates IA Standard No. 4 and PAB rules.

G. The PAB's Findings of Fact are not supported by the record.

The PAB issued four Findings of Fact. (CP 6; PAB pp. 12-13). Each is unsupported by the record once the exhibits are analyzed, which the PAB apparently failed to do.

1. Opinion v. Fact.

The first critical point is that the WSP presented a body of opinion, not fact, from Mr. Neufeld's panel. As previously argued, there were differing opinions in 1990 than those relied upon by the WSP and the PAB, which failed to acknowledge the differing opinions and research and experience relied upon by Mr. Melnikoff and others.

A wide range of opinion as to the value of hair evidence has appeared in the literature. Some authors take a disparaging view of hair evidence. The following quotation is typical: 'There is nothing about hair comparable to the specificity of fingerprints, and at best the probability of establishing identification from hair is perhaps no greater than the probability of determining identification using the ABO blood group system in blood smears.' (Camps 1968). On the other hand, the following quotation is typical of those authors who consider hair comparison evidence to have a high value: 'From research studies, it has been shown that hairs from two individuals are distinguishable and that no accidental or coincidental matches occurred, and would, therefore in actual casework be a relatively rare event.' (Strauss 1983). The generally prevailing view of the value of hair comparison evidence

lies between these extremes. These two quotations are representative:

Through hair comparison it is presently only rarely possible to determine that a questioned hair did or did not originate from a particular person. In the vast majority of cases it can only be stated that a questioned hair is or is not consistent with having originated from a particular person. Accordingly, hair comparison evidence is generally only of value when used in conjunction with other evidence. (Gaudette 1985).

1. So far, a hair or hairs have not been shown to have any features exclusively confined to an individual; 2) Any indication of identity based on an examination of hair can therefore only be established in terms of probability; 3) The probability is increased, under certain circumstances, if all the characteristic elements are considered and is increased to an even greater extent when unusual features such as uncommon colours, disease, etc. are present. (Martin 1957). (CP 6, PAB 589-90).

While it may be appropriate to be swayed by any single expert's opinion on hair testimony, it is arbitrary and capricious to completely discount a different opinion when there is factual and scientific support for that different opinion as well. Mr. Neufeld's panel does not control the opinion that all others must accept; it is per se erroneous for the PAB to use Neufeld's opinion to the exclusion of all others.

2. The PAB Record.

The exhibits submitted by both the WSP and Mr. Melnikoff demonstrate that Mr. Melnikoff testified in the Kordonowy case consistent

with the available literature at the time, consistent with his training from the FBI in 1975, and consistent with Mr. Gaudette's own publications and statistical estimates.

A. Barry Gaudette.

In 2000, Mr. Gaudette wrote the following in a textbook, Encyclopedia of Forensic Science, in the chapter entitled "*Comparison: Significance of Hair Evidence.*"

Report Writing and Court Testimony

On the basis of the results of an examination, the hair examiner must draw a conclusion which he or she then interprets in giving an expert opinion as to evidential value. Conclusions and expert opinions are given in report writing and court testimony. Exact wording of conclusions will depend on an examiner's preferences and a laboratory's policy . . . The normal positive and normal negative conclusions cover a wide range of evidential value. Accordingly, it is important that they be further interpreted in reports and court testimony. The examiner should first mention that hair comparison is not usually a positive means of personal identification. An estimate of the average value of forensic hair comparison evidence should then be given. This can be either based on personal experience or some of the previously described published studies. [Emphasis added].

(CP 6, PAB 592).

Mr. Gaudette's work was discussed or otherwise noted in the following portions of the PAB record.

See:

- PAB 76-77 (material fact from the Oregon State Police Crime Laboratory Division from 1970's regarding authorization to use statistics in hair comparison testimony);
- PAB 252-256 (article summarizing three of Gaudette's articles on hair comparison in the 1970's, and established Gaudette's statistical probability of 1 in 4,500 for head hair and 1 in 800 for pubic hair);
- PAB 90-92 (letter from Larry B. Howard, Ph.D., who performed hair evaluations for 45 years, in which Dr. Howard discusses Gaudette's studies and states, "The fact is Mr. Melnikoff quoted a scientific article. This is scientifically acceptable. Furthermore, it is my opinion that the 1/100 statement is too conservative and not prejudicial.");
- PAB 586-615 (scientific journal articles and textbook excerpt written by Gaudette); and
- PAB 662-667 (article entitled "*Some Further Thoughts on Probabilities and Human Hair Comparisons*" in which

Gaudette offers elaboration on his initial statistical work.

He wrote:

In the author's experience, the characteristics delineated in the studies [1, 2] have been worthwhile in comparing hairs. The results have been well accepted in courts and have been used as general estimates for the probabilities involved and as experimental verification of the proposition that hair evidence is good evidence.

When referring to the studies in court, I emphasize that the probability figures are only estimates for an average case. Depending on circumstances, I may then add qualifying statements such as, "In this case, because scalp hairs of Mongoloid racial origin were involved, I would expect the probability of similarity to be somewhat greater than the 1 in 4500 figure" or "Because of the number of hairs involved and the unusual characteristics they possess, the possibility that these hairs could have originated from some person other than the source of the standard sample is extremely remote." [PAB 664. Emphasis added].

Similarly, the testimony of the various witnesses demonstrates support for Mr. Melnikoff's testimony.

B. Dr. Larry Howard.

Dr. Larry Howard testified regarding the appropriateness of the use of the "1 in 100" statistic in both court testimony and scientific literature, which he personally used, (CP 6; PAB 919, 925); multiplication of the odds of head and pubic hair as independent variables, (he observed that Gaudette multiplied head and pubic hair probabilities as independent variables in Gaudette's research) (CP 6; PAB 920); discussion of a

textbook (*Encyclopedia of Forensic Sciences*, published in 2000), (CP 6; PAB pp. 587-593), that describes the procedure scientists should use to testify about hair comparisons and statistics, (CP 6; PAB pp. 922-924); and how he used statistics when he testified about hair, (CP 6; PAB p. 924, line 26 to p. 925, line 15).

C. Dr. Hal Dedman.

Dr. Dedman testified on behalf of the Washington State Patrol. Nevertheless, his testimony supported Mr. Melnikoff. For example, he testified that: He taught about the statistical significance of hair comparisons at the FBI class on hair examinations, by referring to discussion about probabilities in the scientific literature, (CP 6; PAB pp. 820-821); scientists in the 1980's and 1990's used statistics when testifying about hair comparisons, (CP 6; PAB p. 824); the estimate of "1 in 100" is a valid estimate (CP 6; PAB p. 341); other scientists have testified to a "1 in 4,500" probability because it was published in scientific journals (though Dr. Dedman does not personally believe it is appropriate), (CP 6; PAB p. 831); testifying to statistical probability was accepted in the courts and by scientists before 1987, (CP 6; PAB p. 829); and scientists have differing opinions, and it is up to the judge whether statistical probability testimony is admissible, (CP 6; PAB pp. 833-834).

D. Richard Bisbing.

Mr. Bisbing testified for the WSP. He initially indicated it is inappropriate to testify about statistics and probability in hair comparisons, then admitted that he knew Barry Gaudette provided such testimony and wrote articles about it, and further admitted he, himself, cited statistical information from Gaudette's articles when pressed by trial counsel. See CP 6; PAB pp. 325-326, 801-807.

H. **Termination of employment is not an appropriate sanction under the facts and circumstances.**

Even one of the WSP's witnesses, Richard Bisbing, alluded to the fact that hair comparison analysis and testimony is somewhat unique in the field of forensic science, and is difficult and, in some ways, controversial. As he explained to the WSP during the IA investigation, just because you have had trouble with hair analysis and testimony does not mean you cannot be a good forensic scientist in other areas. (CP 6; PAB p. 327, line 24; p. 329, line 16).

Q. Okay. Is there any additional information that should be considered in this case that we have not asked you about or that you would like to be considered by the reviewer of this case?

A. I, I think – yeah. I – uh, one thing I think is important is – that I thought about when you – when you called me before, um – particularly because I know from the newspaper article that you no longer

– at least from the article, it said he no longer does hair comparison. He works for a different agency and so forth. Um, that, that I don't think there's necessarily anything – any reason to be re- -- to suggest that this test- -- testimony would reflect upon his abilities or his expertise or his testimony in other types of evidence. Hair evidence is, is very different. And the pressures and the nature of the testimony is very different from virtually every other type of evidence.

Um, for example, when, when somebody testifies about a drug identification, they don't have to deal with this probability business. They don't have to deal with this – the, the issues of the hair comparison and so forth. It's – so I don't – I think – I don't want to suggest that, that what we've read here has anything to do with what he might be doing in other types of evidence and so forth or that laboratory is doing in other types of evidence testimony.

Hair evidence is a very difficult – to testify about. It's very different. Um, and this may be the only type of testimony that, um, would be a – would – one would take issue with, um, ab- -- about this examiner. And, uh, um, doesn't reflect on the – on the laboratory. It doesn't reflect on forensic science. It doesn't reflect, I don't think, on the individual necessarily because of – because of the problems with comparison testimony and the pressures and so forth.

(PAB pp. 327-328).

That, in a nutshell, is what the WSP's case is all about, especially when it seeks to punish an employee with an exemplary record 14 years

after he allegedly provided inappropriate opinion testimony on a subject for which he has never had to testify for the WSP.

Even though Dr. Logan worked with Mr. Neufeld and the Innocence Project in an effort to uncover any other alleged wrongdoing by Mr. Melnikoff during his career with the WSP since 1989, they came up with nothing but compliments. They sought information from the Washington State criminal defense bar and prosecutors. Yet, not a single complaint was registered about Mr. Melnikoff's work or testimony, despite the solicitation. To the contrary, many letters of commendation were submitted in support of Mr. Melnikoff. (CP 6; PAB pp. 185-196).

“In determining whether a sanction imposed is appropriate, consideration must be given to the facts and circumstances, including the seriousness and circumstances of the offenses. The penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent recurrence to deter others from similar misconduct, and to maintain the integrity of the program.” Holladay v. Department of Veterans Affairs, PAB No. D91-084 (1992); Conclusion of Law 6.8, (CP 6; PAB pp. 14-15). In Mr. Melnikoff's case, there has been no recurrence of the alleged misconduct during his exemplary service with the WSP, and reoccurrence is impossible since he does not perform hair examinations for the WSP. The integrity of the program is maintained through its

SOP's and peer reviews, which the WSP acknowledges Mr. Melnikoff passed.

At best, the WSP's and the PAB's sanction of termination was an overreaction to opinion testimony 17 years ago. At its worst, their decision to terminate is based on either an erroneous understanding of a complex record, or perhaps, in the case of the WSP, a biased witch hunt designed to provide a scapegoat to Mr. Neufeld. Either way, the penalty of termination is not consistent with the totality of the facts and circumstances presented. Their decision may satisfy a visceral reaction "to do something," but it is an overreaction of monumental proportions that fails to acknowledge any of the many mitigating factors presented by Mr. Melnikoff.

The decision to terminate should be vacated, and all of Mr. Melnikoff's benefits should be restored. WAC 358-30-180.

VI. CONCLUSION

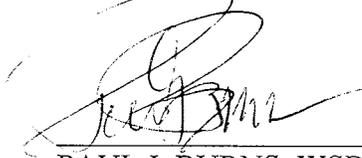
At the hearing before the PAB, the WSP had the burden to establish that Mr. Melnikoff violated the rules and/or regulations of the WSP, and that the WSP adhered to its own rules and regulations in the disciplinary process, and that the sanction was appropriate under the facts and circumstances. However, the only thing the WSP established is that: (1) Mr. Melnikoff had an exemplary and unblemished employment record

during his entire WSP career; (2) experts can disagree 17 years later about hair comparison opinion testimony; and (3) the WSP utterly failed to comply with its own rules and regulations, which failure had a significant impact on the improper decision to terminate Mr. Melnikoff.

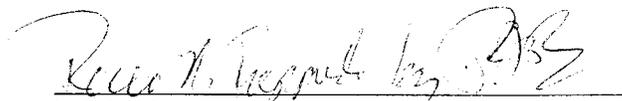
Accordingly, the Findings of Fact, Conclusions of Law, and Order of the Personnel Appeals Board, dated July 26, 2005, and the Thurston County Superior Court's Order Affirming Personnel Appeals Board Decision, dated September 8, 2006, should be reversed. Mr. Melnikoff's employment should be reinstated, and all of his employment rights and benefits should be restored.

RESPECTFULLY SUBMITTED this 29th day of March, 2007.

PAUL J. BURNS, P.S.



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APPENDIX

State crime lab scientist has troubled record

THE NEWS TRIBUNE

The Washington State Patrol crime lab in Tacoma has a problem on its hands.

One of its forensic scientists, Charles Vaughan, botched a high-profile case when he worked for the Oregon State Patrol crime lab in the 1980s. His inexcusably sloppy procedure – he used the same instrument to scrape the murder victim and the clothing of both the suspects for blood particles – led to the wrongful convictions of Chris Boots and Eric Proctor for the murder of a Springfield convenience store clerk.

The defendants, who were sentenced to life in prison, were released in 1994. They eventually settled a \$2 million lawsuit against two police officers and the City of Springfield four years later. A judge let Vaughan and the Oregon State Patrol off the hook.

Washington crime-lab officials claim they weren't aware of Vaughan's role in the Oregon controversy when they hired him in 1995. Although his performance in Washington appears to have been relatively uneventful, his conduct in Oregon should raise red flags for his current bosses.

Vaughan's carelessness in the murder case could become a huge liability for Washington county prosecutors relying on his work. Even worse is the possibility that substandard work resulted in the conviction of other innocent defendants.

At a minimum, the crime lab should conduct a thorough review of Vaughan's work in Washington. It's the only way to clear him. The state crime lab can't afford to have questions about the competence and credibility of one of its forensic scientists dangling over its head.

A similar review of former crime lab forensic scientist Arnold Melnikoff resulted in a highly critical report raising doubts about 30 of Melnikoff's drug-analysis cases from 1999 to 2002. State Patrol officials, citing the need to restore public trust, fired him earlier this year. It was the right thing to do. They also notified prosecutors in counties where the audit pointed out Melnikoff's questionable handling of drug evidence.

Crime lab director Barry Logan has sought legal advice about whether to disclose Vaughan's record in the Oregon case to criminal defendants in current and pending cases. That may not be necessary. News reports have already given defense attorneys a sizable opening to impeach Vaughan's credibility on his collection and analysis of forensic evidence.

It is now up to the crime lab to conclusively answer questions about the quality of Vaughan's work in this state – one way or the other.

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Exhibit 14



STATE OF WASHINGTON
WASHINGTON STATE PATROL
FORENSIC LABORATORY SERVICES BUREAU

2203 Airport Way South, Suite 360 • Seattle, Washington 98134-2027 • (206) 262-6000 • FAX (206) 262-6018

January 6, 2005

Tacoma News Tribune
1950 S State St
Tacoma WA 98405

To The Editor:

In an editorial on Tuesday the writer expressed concerns about a Washington State Patrol forensic scientist who, while employed as a scientist in Oregon, worked on a case in 1982 which subsequently ended in the release of two defendants years later.

It is impossible for me to comment on all the reasons for the defendants' release or the scientist's actions in 1982 because many of the reported facts are in dispute, and in any event I can't assess its relevance to our state, since the procedures and safeguards that Oregon's labs had in place at that time are not comparable to our system in Washington. This case is not a basis for a blanket review of any individuals work in Washington State.

In Washington, all of our casework is reviewed by other scientists before any reports are issued. Our analysis is performed according to nationally recognized procedures, and in addition to 100% peer review, is periodically reviewed by supervisors, and scientists in other laboratories. Scientists are proficiency tested every year, and they attend regular training. Each scientist's testimony in court is audited by their supervisor every year. Defense experts are present in our laboratories on a weekly basis reviewing our protocols and data, and observing testing on behalf of defendants. Finally, a criminal trial results in detailed external review of any work performed in a given case by a judge, attorneys, and defense experts.

The WSP Crime Laboratories voluntarily sought national accreditation from the American Society of Crime Lab Directors (ASCLD) in 1984 and have maintained that accreditation ever since. The DNA sections are audited externally every two years. On top of that our evidence is audited four times a year, and the procedures and practices are audited internally each year and externally every five years by ASCLD.

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That's not to say mistakes or errors can never happen, but when they do, our track record shows that we fix them, we document them, we learn from them, and we disclose them. Our policy is and has always been that we investigate any specific allegations of error or misconduct by our staff in any of our cases, and take appropriate action. Since his hire, we have received no such complaints about the work of the scientist referenced in your editorial.

Sincerely,

CHIEF LOWELL M. PORTER



Barry K. Logan, Ph.D.
Bureau Director
Forensic Laboratory Services Bureau

BKL:kj

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