

NO. 35919-7-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS,

Appellant,

v.

CYNDI WALTERS,

Respondent.

FILED  
COURT OF APPEALS  
DIVISION II  
07 JUN 15 PM 12:47  
STATE OF WASHINGTON  
BY DEPT. OF CORRECTIONS

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

Cyndi Walters was terminated from her position counseling employees in crisis as the statewide Director of the Department of Corrections' (DOC) Staff Resource Center. Ms. Walters had disclosed to a coworker, confidential information following the arrest of the DOC Secretary's son. Specifically, Ms. Walters violated policy and neglected her duties by identifying management staff whom she claimed to have counseled and by gossiping about the Secretary's behavior in response to the highly publicized arrest.

Ms. Walters appealed her termination to the Personnel Appeals Board (PAB or Board), and when that appeal was unsuccessful, she sought review in the Thurston County Superior Court (TCSC). After a series of untimely and unusual motions and rulings, the superior court ruled that a Board member's failure to disclose details of the professional relationship between the Board member and a witness required vacation of the PAB order. However, in addition to vacating the PAB order and remanding the matter, the superior court issued an advisory ruling on the merits in Ms. Walters' favor.

DOC asks this Court to reverse the superior court's order vacating the PAB order, and to affirm the PAB order as Ms. Walters was properly terminated for her neglect of duty and violation of policy. To the extent

necessary, the Court should also reverse the superior court's advisory ruling concerning the PAB's Order.

## **II. ASSIGNMENTS OF ERROR**

- 1. The Superior Court Erred As A Matter Of Law In Vacating The PAB Order.**
- 2. The Superior Court Erred As A Matter Of Law By Ruling That The PAB Order Was Erroneous, In Addition To Vacating And Remanding For A New Administrative Hearing.**

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- 1. Did Ms. Walters Waive Her Later Objection To Board Member Nutley's Qualification To Hear Her Administrative Appeal By Failing To Object At The Administrative Hearing?**
- 2. Did Ms. Walters Fail To Provide Specific Evidence To The Superior Court Showing That PAB Member Nutley's Participation In A Committee With Ms. Walters' Witness Violated The Appearance Of Fairness Doctrine?**
- 3. Did The Trial Court Err By Issuing An Advisory Ruling On The Merits To Go To The Administrative Tribunal On Remand?**
- 4. Did Ms. Walters Show That The PAB Ruling Affirming Her Termination Was Based On Any Error Of Law Or That The Findings Were Contrary To The Evidence Under The Standards Of Former RCW 41.64.130?**

#### IV. STATEMENT OF THE CASE

##### A. Statement Of Facts.

##### 1. Ms. Walters' Dismissal.

Ms. Walters was the Statewide Director of the DOC Staff Resource Center (or the Staff Counseling Program). Finding 2.1, CP 16.<sup>1</sup> She was responsible for clinically overseeing, recruiting, hiring, directing, and managing high-level clinical professionals in five regions of the state. RP 374.<sup>2</sup> Ms. Walters served as the State Staff Counselor and was responsible for providing counseling and debriefing services for administrative staff. Findings 2.2, 2.4, CP 16–17; RP 376, 811. This position was integral to the department's overall mission. RP 374.

The Staff Resource Center provides corrections staff with a place to anonymously debrief and consult with counselors about stresses on and off the job that may interfere with work. Finding 2.3, CP 16; RP 806–810. The program's credibility and success rested on DOC's assurance to staff and their labor unions that participation in the program would not be used against them in any way. *Id.* For this reason, the program's policy directive required that confidentiality be maintained regarding staff access to and involvement in the program, including protecting the identities of

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<sup>1</sup> The Board's Findings and Conclusions are attached as Appendix A and can also be found at CP 15–24.

<sup>2</sup> RP as used in this brief denotes the Record of Proceedings before the PAB on September 9, 10, 15, 16, and October 4, 2004.

employees using the program. Finding 2.3, CP 16; RP 160–170, 810, 845, 1024, 1196, 1226, 1228, 1260. Ms. Walters was integral to drafting and developing all policies associated with the program, including the policy that “All communications relating to staff counseling, intervention, and consulting services with the Staff Resource Center shall be confidential unless otherwise specified by law and/or department policy directive(s).” Finding 2.3, CP 16; RP 355, 375, 943–944, 1023, 1037.

Ms. Walters’ credibility, as the program’s director, like the credibility of counselors, was critical to the program. If staff did not believe that they could trust the counselors, they would not use the program. Finding 2.3, CP 16; RP 810–811, 1024, 1195, 1200. Ms. Walters was expected to maintain the highest standards of personal, professional, and ethical conduct. Conclusion of Law 4.4, CP 23; RP 378, 1200. Additionally, she was expected to serve as a role model, through her actions and words. RP 1195.

In October 2003, Ms. Walters was dismissed from her position for violating these expectations after she inappropriately gossiped about her activities as the State Staff Counselor following the publicized arrest of the son of DOC Secretary Joseph Lehman. Finding 2.6, CP 18; RP 292–299. On February 10, 2003, Ms. Walters initiated a discussion with office assistant lead Mary Sutliff, about the Secretary’s son’s arrest, and

explained to her that she had just returned from DOC headquarters after responding to the crisis over the arrest. Ms. Walters then showed Ms. Sutliff a newspaper article about the arrest, discussed how she had been assisting in the crisis, named the managers with whom she had assisted, and how they were reacting, and remarked that the Secretary was “in hiding” to avoid discussing the issue. Findings 2.6, 2.9, 2.10, 2.11, CP 18–20; RP 292–299, 303, 875–876, 903–904.

Ms. Sutliff concluded that Ms. Walters had provided counseling services to the named administrators and the Secretary, and that Ms. Walters had first hand information about the Secretary’s reaction since she knew he was hiding and trying to avoid people. Findings 2.10, 2.11, 2.13, CP 19–20; RP 303, 311, 877, 903–904. Ms. Sutliff was not a confidential member of the Staff Resource Center, providing only technical support to Ms. Walters. Finding 2.9, CP 19; RP 870–872, 906–907, 914, 945–946. Ms. Sutliff knew that the work of the program was confidential, and she believed Ms. Walters’ discussion with her was not appropriate. RP 303, 897, 904. Ms. Sutliff reported the discussion to her supervisor, and DOC initiated an investigation. RP 303, 879–880, 963.

The investigation revealed that Ms. Walters perceived the arrest of the Secretary’s son as an agency crisis, and she responded to DOC

headquarters as the State Staff Counselor.<sup>3</sup> Finding 2.7, CP 18; RP 319, 850, 1038, 1153, 1170. Ms. Walters tried to visit Secretary Lehman during her intervention, but he declined, choosing instead to deal with the matter privately. Findings 2.8, 2.9, CP 19; RP 319, 852–853, 926, 1061. Ms. Walters admitted she did not meet with the Secretary, but told the investigator she had met with secretaries and janitors. Findings 2.9, 2.14, CP 19–20; RP 303, 319, 1156, 1170.

The appointing authority, Assistant Deputy Secretary Anne Fiala, determined that Ms. Walters' statements to Ms. Sutliff were violations of the agency's trust and expectations placed in her as the director of the Staff Resource Center, and the program's policy directive that ensured confidentiality. Findings 2.6, 2.15, CP 18, 21; RP 292–299, 1195–1196. In addition, Ms. Fiala concluded that Ms. Walters' conduct, and the history of corrective action in her personnel file, demonstrated that she had damaged her credibility as a professional who could be trusted to manage a program deemed vital to staff and the agency. RP 297, 1200–1203.

Ms. Fiala's decision was supported by Deputy Secretary Eldon Vail. RP 812–813, 1202–1203. Both Ms. Fiala and Mr. Vail concluded that regardless of whether Ms. Walters was truthful about having provided

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<sup>3</sup> DOC management did not perceive the Secretary's son's arrest to be an agency crisis, but rather a private matter for the Secretary. RP 926–929, 951, 1072–1073.

counseling services to Secretary Lehman and other administrators, she had destroyed her credibility. RP 822–824, 831, 1193–1196. Ms. Walters’ job was to uphold the integrity of the Staff Counseling Program, and her inappropriate statements to Ms. Sutliff, as the director of the Staff Counseling Program, undermined that integrity. RP 831, 1193–1196, 1203.

## **2. The PAB Hearing.**

Ms. Walters appealed her dismissal to the PAB, and a five-day administrative hearing was held. RP 075–076. PAB Member Busse Nutley presided over the hearing. CP 15. Gerald L. Morgen, Vice-Chair, listened to the recorded proceedings, reviewed the file and exhibits and participated in the PAB’s Findings of Fact, Conclusions of Law and Order of the Board. *Id.* After hearing testimony from eighteen witnesses and considering numerous exhibits, the PAB concluded that “under the totality of the proven facts and circumstances, Respondent [DOC] has proven that dismissal is the appropriate disciplinary sanction and the appeal should be denied.” CP 23; RP 035–036, 041–042.

The PAB found that, in response to the publicized arrest of DOC Secretary Lehman’s son, Ms. Walters went to DOC headquarters to act in a counseling capacity and implied to other DOC staff employees that she would be offering counseling services to Secretary Lehman and

administrative staff.<sup>4</sup> Findings 2.8, 2.11, CP 19–20. In its assessment of witness credibility, the PAB found that Mary Sutliff’s testimony regarding Ms. Walters’ disclosures to her, at the hearing and throughout the investigative process, was consistent and credible. Finding 2.13, CP 20. The PAB found no motive for Ms. Sutliff to be untruthful about her discussion with Ms. Walters. *Id.* Additionally, the PAB noted discrepancies in Ms. Walters’ version of events during the disciplinary process, and her theory that her supervisor and others were conspiring against her was not substantiated. Findings 2.14, 2.15, CP 20–21.

In affirming Ms. Walters’ dismissal, the PAB reasoned that Ms. Walters had a key understanding of the agency policy governing confidentiality in the Staff Counseling Program because she was the program director and had a key role in developing the program and writing the policy. Conclusion of Law 4.3, CP 23. Additionally, the PAB acknowledged that the Secretary’s son’s arrest was made public in the media, but it found that Ms. Walters’:

[d]ecision to discuss the matter with Ms. Sutliff was highly inappropriate and unethical. Even though Appellant

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<sup>4</sup> At the hearing, Ms. Walters denied telling or insinuating to anyone that she had met with Secretary Lehman regarding his son’s arrest or to discussing Secretary Lehman’s reaction to the incident. RP 851. Through two DOC rebuttal witnesses, and one of Ms. Walters’ witnesses, testimony established that during her intervention at DOC headquarters, Ms. Walters reported to several staff that she had spent time with Secretary Lehman regarding the issue of his son’s arrest and he was “taking it hard.” RP 1345, 1097–1098, 1297–1299.

[Walters] did not disclose specific information related to a counseling session, the policy clearly states that “all communication relating to staff counseling, intervention, and consulting services shall be confidential.” (emphasis added). Despite the policy, Appellant gave DOC employees the impression she went to headquarters to perform counseling services and then proceeded to discuss the situation and specific names of individuals with Ms. Sutliff, which was contrary to the intent of the policy.

*Id.*

In assessing the level of discipline, the PAB considered the totality of the credible evidence, Ms. Walters’ position of responsibility and authority within the department and her history of corrective action. It concluded that:

An individual in the position of Statewide Director of the Staff Resource Center must be held to a higher standard and must be a credible and trustworthy resource for DOC employees. Appellant’s actions harmed her credibility, damaged her effectiveness as Statewide Director, and undermined the credibility of the Staff Counseling Program.

Conclusion 4.4, CP 23.

**3. Secretary Lehman’s Testimony Concerning Prior Contact With Board Member Nutley.**

DOC Secretary, Joseph Lehman, was called as a witness for Ms. Walters. RP 1058–1067. Mr. Lehman testified that he had served as DOC Secretary since 1997. RP 1059. In January 2003, his son, Joseph Lehman Jr., was arrested for sexually assaulting an infant. RP 144–148. Secretary Lehman testified that the arrest was reported in the media in early

February 2003. RP 1059–1060. Additionally, he testified about Walters’ performance strengths and letters of reference he had signed on her behalf. RP 1062–1064. Further, he explained that he did not learn of Ms. Walters’ dismissal until after the fact, and did not know the specifics of her disciplinary action. RP 1065–1066.

After being sworn in as a witness, the following dialogue took place between Member Nutley and Secretary Lehman:

(Board Member) MS. NUTLEY: Thank you. I’d like to acknowledge for the record that Mr. Lehman and I spent time together in the Governor’s Cabinet.

MR. LEHMAN: Um-hum.

MS. NUTLEY: So, you know me, Busse Nutley. To my left is Teresa Parsons, who is Special Assistant to the Board. You’ve been asked today to testify on behalf of the Respondent and you will be asked questions, oh by the Appellant. I’m sorry. I was in this groove. We’ve been doing the State’s case.<sup>5</sup>

MR. LEHMAN: Right.

MS. NUTLEY: By the Appellant. And Mr. Rose will ask you questions first, followed by questions from Assistant Attorney General Valerie Petrie. I may have questions for you when they’re finished. Mr. Rose, your witness.

MR. ROSE: Yes. Thank you. Good afternoon, Secretary Lehman.

RP 1058.

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<sup>5</sup> Secretary Lehman was called out of order by agreement of the parties because of scheduling issues. RP 1056–1058.

Ms. Walters' counsel, David Rose, raised no objections at the hearing in response to Member Nutley's acknowledgement that she had spent time together with Secretary Lehman in the Governor's Cabinet or that she and Secretary Lehman knew each other. *Id.* Although Member Nutley disclosed a business acquaintance, Mr. Rose did not make any inquiry regarding Secretary Lehman's relationship or contacts with Member Nutley. RP 1058–1067. The PAB's Findings of Fact, Conclusions of Law and Order of the Board do not mention Secretary Lehman's testimony.

**B. Procedural History.**

Ms. Walters' disciplinary appeal to the PAB was filed October 20, 2003. RP 075–076. The PAB hearing was held September 9, 10, 15, 16 and October 4, 2004. CP 15–24. The PAB order upholding Ms. Walters' dismissal and denying her appeal was issued December 23, 2004. *Id.*

On January 21, 2005, Ms. Walters' petitioned for judicial review of the PAB order to Thurston County Superior Court pursuant to RCW 41.64.130. CP 13–24. The case was pre-assigned to superior court Judge Paula Casey. CP 471–472. A judicial review hearing was initially set for September 30, 2005, and all opening briefs were completed by September 15, 2005. *Id.* The judicial review hearing was delayed until April 7, 2006, because of a motion brought by Ms. Walters for a new evidentiary

hearing.<sup>6</sup> In April 2006, it was reset again to June 16, 2006, because of a court scheduling conflict. CP 521–524.

**1. Ms. Walters’ Supplemental Opening Brief Asserting New Assignments Of Error And New Legal Arguments.**

Ms. Walters’ opening brief, filed September 15, 2005, alleged that the confidentiality provision of DOC Policy 870.800 that Walters was charged with violating was unconstitutionally void for vagueness. CP 121–142. Additionally, she assigned error to two PAB Findings of Fact, Findings 2.11 and 2.13, as contrary to the evidence. *Id.* She did not assign error to Findings 2.1–2.10, 2.14 and 2.15. *Id.* Also, Ms. Walters assigned error only to PAB Conclusion of Law 4.3. *Id.*

On May 2, 2006, without leave of the court, Ms. Walters filed a supplemental trial brief asserting new assignments of error to the PAB’s Findings and Conclusions of Law, and espousing legal arguments not previously raised. CP 442–466. On May 26, 2007, the superior court denied DOC’s motion to strike the new briefing, and permitted Ms.

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<sup>6</sup> On September 29, 2005, Ms. Walters filed a motion for an evidentiary hearing based on “newly discovered evidence”. CP 265, 267–271. Over DOC’s objection, the judicial review hearing was continued, Walters’ motion was set for October 28, 2005, and the court directed her to file and serve a complete motion identifying the new evidence. CP 290–291. Ms. Walters submitted documentation of the new evidence to the court, only, for an in camera review. CP 263–272. For this reason, DOC moved to strike. On October 28, 2005, the court denied Ms. Walters’ motion. Subsequently, the court sealed the evidence presented for in camera review without notice to DOC. In December 2007, DOC moved to unseal the records (an Affidavit of John Roberts and a Draft DOC Staff Resource Center Policy) and an order was entered unsealing the records. CP 866–904, 914–915.

Walters to file a twenty-five page consolidated opening brief by June 2, 2006, consolidating her original opening brief and the supplemental opening brief.<sup>7</sup> CP 525.

**2. Ms. Walters' Motion To Vacate The PAB Order Based Upon Biased Tribunal And Failure To Disclose Relationship To Witness.**

On June 23, 2006, just one week prior to the scheduled argument on the merits, Ms. Walters filed a motion to vacate the PAB Order based on a biased tribunal and failure to disclose relationship to party, with over 100 pages of materials from outside the record. CP 608–776. Ms. Walters argued that she was denied a fair hearing and due process because PAB Member Nutley did not disclose the details of a prior, professional relationship with Secretary Joseph Lehman. CP 608–622.

DOC moved to strike Ms. Walters' motion to vacate, arguing that any objection to Member Nutley was waived by Ms. Walters' failure to preserve an objection at the PAB hearing. CP 777–810. Additionally, DOC argued that Ms. Walters failed to provide specific evidence that Member Nutley's past connection to Secretary Lehman implicated the appearance of fairness doctrine. *Id.* DOC also pointed out that Ms. Walters' motion was last minute supplemental briefing that should have been in the consolidated brief, because Mr. Rose had informed Valerie

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<sup>7</sup> Ms. Walters was permitted to file a consolidated opening brief contingent upon payment of terms to DOC by June 2, 2006. CP 525.

Petrie, Assistant Attorney General, in April about his theories that PAB Member Nutley should have been disqualified from hearing Ms. Walters' case. CP 778–779, 809–810.

The superior court heard argument on DOC's motion to strike and Ms. Walters' motion to vacate during the June 30, 2006, 9:00 a.m. motion calendar. CP 608. The superior court found that Member Nutley's failure to disclose the extent of her past professional relationship with Secretary Lehman required vacation of the PAB order. CP 848. However, the superior court stated that:

But before vacating the order of the Personnel Appeals Board and without—well, I'm in an unusual position here because counsel well know that it is seldom that your final arguments to the Court at the time of today's hearing on the substance of the underlying appeal would determine the outcome. I have read the record. I have read the briefing. I pretty much know what I'm going to rule, and it is my intention to overturn the decision of the Personnel Appeals Board.

So I am reluctant to have this matter vacated on the fairness issue, have another entire hearing when I am prepared to determine that there was no basis for the disciplinary action taken by the Personnel Appeals Board or approved by the Personnel Appeals Board.

*Id.*

In response, DOC asked the court to enter an order to vacate, if this was the court's determination, so that it could decide whether to appeal the order. CP 849, 852–853. The superior court went on to explain that, even if DOC appealed the order to vacate:

. . . we will be back to the transcript anyway, and we'll be faced with my analysis of this case anyway because I have already been pre-assigned this case and I've already read the record and nobody else is going to read the record.

CP 854. The superior court then directed the parties to complete alternative dispute resolution within thirty days "because the issues that are presented by this record are really quite ridiculous." CP 856.

After mediation failed, the superior court issued a letter opinion on September 18, 2006, concluding that:

Board Member Nutley had a duty to disclose to the parties her participation with Mr. Lehman in the Partnership for Community Safety. It is not necessary to prove bias or that Ms. Nutley's decision was actually influenced by the relationship with Lehman.

CP 863–865. The superior court's letter opinion went on to explain:

[N]ormally, my decision would end with reversal and remand for a new hearing based on the foregoing analysis. However, because the ethical issue was raised late, I had reviewed the entire administrative record from the Personnel Appeals Board hearing before receiving the challenge to the tribunal. I was prepared to decide the administrative appeal on the merits. A five-day hearing was conducted. Each side had a full opportunity to present evidence. I cannot imagine a new administrative hearing would offer new evidence of significance. The same evidence would be repeated before a new tribunal. Accordingly, I will entertain argument on the merits of the appeal as a next step.

*Id.*

**3. The Superior Court's Dismissal Of Ms. Walters' Appeal Based Upon Procedural Grounds, And Decision To Issue An Advisory Ruling On The Merits.**

On December 7, 2006, the superior court again heard argument on Ms. Walters' pending motion to vacate. CP 932–976. DOC argued that if the superior court was going to vacate the order of the PAB, and dismiss Ms. Walters' judicial review appeal, it would be improper for the superior court to proceed to rule on the merits of the judicial review. CP 933–934. The superior court agreed that she could not rule on the merits after vacating the PAB order.<sup>8</sup> *Id.* However, Ms. Walters argued that the court had inherent authority to rule on the merits, even after vacating the PAB order. The superior court allowed argument on the merits, explaining that it would provide an advisory review, “[s]o that it will be before the tribunal below or whoever wants to review it.” CP 934–936.

The superior court's advisory ruling held that the PAB erred in its Conclusion of Law 4.3 by finding that Ms. Walters violated the confidentiality provision of the DOC's Staff Resource Center policy which stated that “all communication relating to staff counseling, intervention, and consulting services shall be confidential.” CP 973–974.

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<sup>8</sup> The superior court explained its reason for entertaining the merits was, “so the state would understand that at the next hearing you're going to lose on legal grounds, so perhaps that would avoid the next hearing. But apparently you would like to have the next hearing. And so that would mean that the appellant [Ms. Walters] doesn't really have the opportunity to have the merits heard, because you have requested dismissal on procedural grounds, and I have already indicated that you are correct with respect to the procedural issue.” CP 934.

The court reasoned that the DOC policy could not be violated because “without meeting with Secretary Layman [sic] there was no confidential information to disclose and there could be no violation of the policy.” *Id.*

The superior court entered its order on February 5, 2007, granting Ms. Walters’ motion to vacate the PAB order, with an appended advisory ruling on the merits for remand to the Personnel Resources Board.<sup>9</sup> CP 1046, 1051–1103. DOC appealed. CP 1048–1103.

**C. Additional Facts Raised In Ms. Walters’ Motion To Vacate.**

Ms. Walters’ motion to vacate was premised upon her argument that PAB Member Nutley’s failure to disclose her participation as a member of the “Housing for High Risk Offenders: A Partnership for Community Safety” with DOC Secretary Joseph Lehman created an appearance of partiality. CP 608–622. Ms. Walters argued that “the negative publicity of the Lehman arrest had a direct impact upon PAB Member Nutley’s own credentials as well as Secretary Lehman’s.” CP 609. Additionally, Ms. Walters alleged that, “[i]t is inconceivable that Nutley did not have personal knowledge of the firestorm of publicity about the arrest of Lehman’s son since it impacted her own career and

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<sup>9</sup>Effective July 1, 2005, the PAB was abolished and replaced by the Personnel Resources Board (PRB). The PRB assumed jurisdiction for civil services appeals of state employees not represented under a collective bargaining agreement. Laws of 2002, ch. 354, §§ 213(3), 233(1).

former ‘Partner.’” *Id.* However, Ms. Walters provided no evidence to support her speculation about PAB Member Nutley. *Id.*

Instead, Ms. Walters’ motion included copies of the July 2002 Phase I Final Report of the Partnership for Community Safety (“Partnership”), a press release from DOC describing the Partnership, Joseph Lehman Jr.’s presentence statement, news stories relating to Lehman Jr.’s criminal proceedings, and excerpts of DOC managers’ PAB testimony. CP 625–776.

The Partnership Report provided that its purpose was to address the lack of affordable and stable housing for high risk sex and dangerously mentally ill offenders. CP 625–709. The Partnership was a collaboration of twenty-five individuals from state, federal, and local agencies, law enforcement, courts, victims advocates, family advocates, private for profit and nonprofit treatment providers, supporting services providers, and faith-based organizations. CP 626, 631, 637. It also included 8 to 12 individuals who participated as specialized topic experts. CP 631, 637, 690. The Partnership met four times between April 1, 2002, and June 30, 2002. CP 639. The report does not identify who attended those meetings, and it notes that in some circumstances Partnership members sent a representative to the meeting in his/her place. CP 640.

Busse Nutley was the Director of the Office of Community Development, within the Department of Community, Trade and Economic Development (CTED) when she served on the Partnership in 2002. CP 626. Joseph Lehman was the Secretary of DOC when he served on the Partnership. *Id.* Other state agencies, including the Department of Veteran's Affairs and the Department of Social and Health Services had representatives on the Partnership. *Id.* Neither Secretary Lehman nor Ms. Nutley served as chairs of the Partnership. CP 637. In addition, the Partnership used a private contracting agency and its subcontractors to complete a significant amount of the Partnership's work, including coordinating data, facilitating meetings, completing an evaluation design, drafting reports and providing consultation on the development of pilot projects. CP 638. The Partnership's final report was issued July 2002. CP 625. Ms. Nutley was appointed to the PAB on April 1, 2003. CP 822. At the PAB hearing, Member Nutley did not solicit any testimony from Secretary Lehman. RP 1058-1068.

#### V. STANDARD OF REVIEW

This Court reviews a PAB decision *de novo*, using the same standards of review as did the superior court. *Dedman v. Wash. Pers. Appeals Bd.*, 98 Wn. App. 471, 476, 989 P.2d 1214 (1999). This Court reviews the decision of the PAB based upon the record made at the PAB

(not the superior court) level. *See Nelson v. Dep't of Corr.*, 63 Wn. App. 113, 115, 816 P.2d 768 (1991).

Review of PAB decisions is governed by RCW 41.64.130 and RCW 41.64.140. *See* Appendix B and *Ballinger v. Dep't of Soc. & Health Servs.*, 104 Wn.2d 323, 328, 705 P.2d 249 (1985). An aggrieved employee may appeal the PAB decision on the grounds that the decision is (1) founded on or contained an error of law; (2) contrary to a preponderance of the evidence; (3) materially affected by unlawful procedure; (4) based on violations of any constitutional procedure; and (5) arbitrary or capricious. RCW 41.64.130(1).

**A. Question Of Fact Standard.**

This Court will uphold a board factual finding if substantial evidence supports it. *Skelly v. Criminal Justice Training Comm'n.*, 135 Wn. App. 340, 344, 143 P.3d. 871 (2006) (quoting *Ballinger*, 104 Wn.2d at 328.; *Gogerty v. Dep't of Inst.*, 71 Wn.2d 1, 8–9, 426 P.2d 476 (1967)). RCW 41.64.130(1)(b) nominally sets forth a preponderance of the evidence test for reviewing challenged findings of fact. However, the Washington Supreme Court has held that the Legislature intended review to be akin to a substantial evidence test. *Ballinger*, 104 Wn.2d at 328. The reviewing court grants to the PAB's determinations a "presumption of correctness" and are accorded deference. *State ex rel. Hood v. Wash. State*

*Pers. Bd.*, 82 Wn.2d 396, 400, 511 P.2d 52 (1973). See also *Lawter v. Empl. Sec. Dep't*, 73 Wn. App. 327, 332–333, 869 P.2d 102 (1994). The determination of witness credibility is a matter for the PAB, as finder of fact, and not a matter for the court upon review of the record. *In re Kuvara*, 97 Wn.2d 743, 747, 649 P.2d 834 (1982); *Vermette v. Andersen*, 16 Wn. App. 466, 470, 558 P.2d 258 (1976).

**B. Error Of Law Standard.**

This Court reviews asserted errors of law *de novo* while giving substantial weight to the administrative agency's interpretation of its rules and the law authorizing agency action. *Dedman*, 98 Wn. App. at 477; *Sullivan v. Dept. of Transp.*, 71 Wn. App. 317, 321, 858 P.2d 283 (1993) review denied, 123 Wn. 2d 1018 (1994) (citing *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982)). When reviewing questions of law, the court has held that, as an adjudicative body exercising its interpretive authority, the PAB is entitled to substantial weight in interpreting merit system rules. *Sullivan*, 71 Wn. App. at 321.

In reviewing mixed questions of fact and law, the court determines the applicable law independently from the agency's decision and applies the law to the agency's factual findings. *Skelly*, 135 Wn. App. at 344 (citing *Franklin Cy*, 97 Wn.2d at 330).

**C. Arbitrary And Capricious Standard.**

An administrative agency cannot be said to have acted in an arbitrary or capricious manner if the action is exercised honestly upon due consideration, even though there may be room for two opinions or even though one may believe that conclusion to be erroneous. *Dupont-Ft. Lewis Sch. Dist. No. 7 v. Bruno*, 79 Wn.2d 736, 739, 489 P.2d 171 (1971); *Trucano v. Dep't of Labor & Indus.*, 36 Wn. App. 758, 761–762, 677 P.2d 770 (1984). See also *Pierce Cy. Sheriff v. Civil Serv. Comm'n of Pierce Cy.*, 98 Wn. 2d 690, 695, 658 P.2d 648 (1983). An administrative agency acts in an arbitrary or capricious manner only if it takes "willful and unreasonable action, without consideration of facts or circumstances." *Terhar v. Dep't of Licensing*, 54 Wn. App. 28, 34, 771 P.2d 1180 (1989), review denied, 113 Wn.2d 1008 (1989); *Sullivan*, 71 Wn. App. at 321. See also *Dedman*, 98 Wn. App. at 477 (citing *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 29, 978 P.2d 481 (1999)). This court applies the arbitrary and capricious standard to decisions of the PAB regarding the appropriate level of discipline. *Trucano*, 36 Wn. App. at 761.

**D. The Record On Review.**

In reviewing a prior decision, a reviewing court properly considers only evidence which was admitted in the proceeding below. See *D/O*

*Center v. Dep't of Ecology*, 119 Wn.2d 761, 771, 837 P.2d 1007 (1992). The review “must be on the record of the administrative hearing, not what came later.” *Christensen v. Terrell*, 51 Wn. App. 621, 634–635, 754 P.2d 1009 (1988). The court reviews the PAB’s decision on the record made at the PAB level and is limited to those issues properly before the PAB. *Trucano*, 36 Wn. App. at 761.

**E. Unchallenged Determinations.**

Unchallenged administrative findings are verities on appeal. *Lawter*, 73 Wn. App. 332–333.

**VI. SUMMARY OF ARGUMENT**

The superior court erred first by granting Ms. Walters’ motion to vacate. Ms. Walters waived any right to challenge Member Nutley’s participation in the PAB hearing when she failed to make a timely objection. Member Nutley disclosed her prior professional relationship on the Governor’s Cabinet with DOC Secretary Lehman when Ms. Walters called him as her witness. Ms. Walters proceeded with the hearing without further inquiry or objection. Ms. Walters was therefore precluded from raising a claim of bias on appeal that could have been raised at that time.

Even if the untimely motion is considered, Ms. Walters failed to support her claim with evidence of actual or potential bias by the PAB

member. She offers a sweeping speculation that Member Nutley's participation on the Partnership with Secretary Lehman in 2002 (along with dozens of other people), coupled with the negative publicity surrounding the Secretary's son's arrest, would impugn the credentials of Member Nutley thereby affecting her view of testimony from Secretary Lehman. Ms. Walters also argued that Member Nutley solicited materially misleading testimony from Secretary Lehman but provided no evidence to support that. However, Ms. Walters offered *no* evidence that Secretary Lehman's testimony had an impact on the outcome of the case, that Member Nutley harbored any bias towards her during the proceedings, or that Member Nutley had any personal interest in the outcome.

Ms. Walters' claim of a biased and unfair tribunal should have been rejected by the superior court and the merits should have been determined in favor of DOC. A review of the record below will reveal to this reviewing court that the PAB found substantial evidence to support Ms. Walters' termination, that it was not an error of law for the PAB to accept the interpretation of DOC's own policy as being violated by the actions of Ms. Walters, and that it did not act in an arbitrary and capricious manner in upholding her termination.

## VII. ARGUMENT

### A. The Superior Court Erred By Allowing Ms. Walters To Raise The Untimely Issue Of Bias On Review.

A litigant's failure to assert a timely objection concerning a judge's or administrative tribunal's qualifications to hear a matter precludes consideration of the issue on appeal. *Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 279–280, 580 P.2d 636 (1978). The *Hill* court explained:

The same common-law rules of disqualification for conflict of interest as apply to judges also apply to administrative tribunals (*Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. State Human Rights Comm'n*, 87 Wn.2d 802, 807, 557 P.2d 307 (1976)), but the objection must be raised or it will be deemed waived. See *Leschi Imprv. Coun. v. State Highway Comm'n*, 84 Wn.2d 271, 274, 525 P.2d 774 (1974).

*Id.* This rule applies whether disqualification of the judge is sought under statute or based upon due process grounds. *Brauhn v. Brauhn*, 10 Wn. App. 592, 597, 518 P.2d 1089 (1974). The reason underlying this rule was explained in *Brauhn*, where the court stated:

Were the rule otherwise a litigant, notwithstanding his knowledge of the disqualifying factor, could speculate on the successful outcome of the case and then, having put the court, counsel and the parties to the trouble and expense of the trial, treat any judgment entered as subject to successful attack.

*Brauhn*, 10 Wn. App at 597–598.

Here, Ms. Walters failed to preserve an objection at the PAB to Member Nutley's qualification to hear her dismissal appeal, and the

superior court erred by allowing her to raise the issue of bias on review.<sup>10</sup> The PAB record establishes that Member Nutley specifically disclosed a past professional relationship with DOC Secretary Lehman when Ms. Walters called Lehman to testify. Member Nutley made the broad statement, “I’d like to acknowledge for the record that Mr. Lehman and I spent time together in the Governor’s Cabinet.” RP 1058. She then stated to Secretary Lehman, “[s]o, you know me, Busse Nutley.” *Id.* Member Nutley made introductions to witness Lehman, and finished with, “Mr. Rose, your witness.” *Id.*

Ms. Walters’ counsel, Mr. Rose, thanked Member Nutley and, without hesitation, proceeded to direct examination. *Id.* Ms. Walters made no inquiry or objection to Member Nutley’s qualification to hear the case at that time or at any other time during the hearing. RP 1058–1068. Moreover, she made no further inquiry of Secretary Lehman—her own witness—to elicit the facts that were raised later in superior court as the basis for vacating.

*Hill*, 90 Wn.2d 276 is analogous. In *Hill*, the court considered whether an industrial insurance claimant waived, by failing to object during the Board of Industrial Insurance Appeals hearing, to the

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<sup>10</sup> Ms. Walters filed her judicial review to TCSC on January 21, 2005. CP 13–14. She failed to raise the issue in her opening brief, supplemental brief or consolidated brief, and did not move to vacate the PAB order until June 23, 2006. CP 789–803.

participation by the Board's chairman. The chairman had been a supervisor of industrial insurance at the Department of Labor and Industries at the time the claimant's claim was closed by the Department. *Id.* at 277–278. Plaintiff's counsel was aware that the Board's chairman had served as a supervisor of industrial insurance at the time plaintiff's claim was closed. *Id.* at 278. The court held that the right to raise the question before the superior court had been waived. *Id.* at 280.

Similarly, Ms. Walters' counsel was aware that Member Nutley and Secretary Lehman knew each other and had served together on the Governor's cabinet. In both cases, counsel for the petitioners "failed to object at any point in the administrative process. The right to raise the question before the Superior Court has been waived." *Id.* at 280.

The superior court erred by failing to follow *Hill*. Contrary to *Hill*, the court held that even after Member Nutley disclosed serving on the Governor's cabinet with DOC Secretary Lehman, "this information did not give rise to any duty on the part of Petitioner [Ms. Walters] to make further inquiry regarding the relationship between Ms. Nutley and Mr. Lehman." CP 864.

In *Buckley v. Snapper Power Equip. Co.*, 61 Wn. App. 932, 939, 813 P.2d 125 (1991), the court reiterated that, "[a] litigant who proceeds to a trial or hearing before a judge despite knowing of a reason for *potential*

disqualification of the judge waives the objection and cannot challenge the court's qualification on appeal." *Buckley*, 61 Wn. App. at 939 (citing *Brauhn*, 10 Wn. App. at 597–598) (emphasis added)). In that case, the attorney for the plaintiff (a child), knew of the trial judge's improper ex parte communication with the child's guardian ad litem. *Buckley*, 61 Wn. App. at 935–936. However, because no objection was made during the proceedings, the court properly found that the appellant had waived any grounds for disqualification of the judge. *Id.* at 939–940. The court noted that had a timely objection been made, the court's failure to recuse itself would have been reversible error. *Id.* at 938. *See also Brauhn*, 10 Wn. App. at 597–598 (failure to object to judge's bias waives claim on appeal); *In Re Marriage of Duffy*, 78 Wn. App. 579, 582–583, 897 P.2d, 1279 (1979) (wife's failure to object to judge's bias based on prior working relationship with husband's counsel waives claim on appeal).

As in *Hill*, *Brauhn*, *Buckley*, and *Duffy*, this Court should find that Ms. Walters' failure to timely object to Member Nutley affirmatively waived her ability to raise this claim on appeal. Based on this reason alone, this Court should reverse the superior court's ruling vacating the Board's order.

**B. Even If Ms. Walters' Untimely Argument Is Considered, Ms. Walters Provided No Evidence Of Busse Nutley's Actual Or Potential Bias, But Rather Relied Upon Supposition And Speculation.**

The standard of review for a decision granting a motion to vacate a judgment or order under Civil Rule (CR) 60(b) is abuse of discretion.<sup>11</sup> *Barr v. MacGugan*, 119 Wn. App. 43, 46, 78 P.3d 660 (2003), (citing *Lockett v. Boeing Co.*, 98 Wn. App. 307, 309, 989 P.2d 1144 (1999)). A court abuses its discretion when its decision is based on untenable grounds or reasoning. *Lockett*, 98 Wn. App. at 309. Where a motion to vacate is premised on an "irregularity in obtaining a judgment or order" due to bias of the judge or tribunal, the appearance of fairness doctrine requires a party to provide evidence of a judge's or decision maker's actual or potential bias before the decision can be vacated. *State v. Perala*, 132 Wn. App. 98, 113, 130 P.3d 852 (2006); *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, (1992) *opinion amended by* 837 P.2d 599 (1992). Therefore, in order to prevail on her motion to vacate, the law required that Ms. Walters' show proof of Member Nutley's actual or potential bias. The evidence submitted by Ms. Walters', even if true, failed to support a violation of the appearance of fairness.

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<sup>11</sup> Neither Ms. Walters, in her motion, or the superior court, in its order, identified what authority they were relying upon for the motion to vacate, but Civil Rule 60 is the only mechanism available for vacating an order.

Ms. Walters alleged that she was denied due process of law, that she was denied a fair, impartial and neutral hearing, and that Member Nutley had a conflict of interest in hearing the case because of a prior, professional relationship. CP 789–803. Specifically, she alleged that Member Nutley: 1) made misleading statements, and 2) solicited misleading testimony. *Id.* at 793–794. Ms. Walters failed to provide any proof. Instead, to support these allegations, she merely relied upon the following statements from the record:

(Board Member) MS. NUTLEY: Thank you. I'd like to acknowledge for the record that Mr. Lehman and I spent time together in the Governor's Cabinet.

MR. LEHMAN: Um-hum.

MS. NUTLEY: So, you know me, Busse Nutley. To my left is Teresa Parsons, who is Special Assistant to the Board. You've been asked today to testify on behalf of the Respondent and you will be asked questions, oh by the Appellant. I'm sorry. I was in this groove. We've been doing the State's case.

MR. LEHMAN: Right.

MS. NUTLEY: By the Appellant. And Mr. Rose will ask you questions first, followed by questions from Assistant Attorney General Valerie Petrie. I may have questions for you when they're finished. Mr. Rose, your witness.

MR. ROSE: Yes. Thank you. Good afternoon, Secretary Lehman.

RP 1058.

Mr. Lehman's testimony was brief, taking up only ten pages of the report of proceedings below. CP 1058–1068. At the end of Ms. Petrie's cross examination, this exchange occurred:

MS. PETRIE: I don't have any further questions.

MS. NUTLEY: Any follow-up on that?

MR. ROSE: No further questions.

MS. NUTLEY: Thank you, Mr. Lehman, for your time. We appreciate that. And...

MR. LEHMAN: Good to see you again.

MS. NUTLEY: hopefully, we'll see each other under less formal circumstances.

MR. ROSE: That was efficient.

MS. PETRIE: Yes.

RP 1068.

Member Nutley did not ask any questions of Secretary Lehman and no objections were made or ruled upon during his testimony. RP 1058–1068. Secretary Lehman was called by Ms. Walters to testify on her behalf. He was not treated as a hostile witness by her counsel. *Id.*

Ms. Walters argued that Member Nutley's statement, "So, you know me..." coached the witness and that it "cut off further comment or inquiry". CP 794. This is bald speculation, and Ms. Walters provided no additional evidence to support this contention. The record shows this was

a mere exchange of formalities. There is no reasonable inference that Member Nutley was trying to cut off Secretary Lehman's testimony or interfere with the questioning. RP 1058-1068.

Ms. Walters also argued that "there is no innocent explanation why Nutley or Lehman failed to disclose their participation on the DOC sponsored **Partnership.**" (emphasis theirs). CP 794. In fact, there are a number of reasons why this Partnership would not have been discussed. First, it was so tangential that no reasonable person would believe it created a bias. The Partnership had completed its report and goals in July 2002, more than two years before this case was initiated before the PAB in September 2004. CP 625. Member Nutley had left her position at the Office of Community Development to take the position of PAB member on April 1, 2003. CP 822. The issues that the Partnership were tasked with exploring had to do with housing and community safety issues related to sex offenders and mentally ill offenders released into the community. CP 625-709. The issues before the PAB related to a violation of DOC policy and inappropriate conduct by a high level employee. CP 15.

Moreover, Member Nutley revealed that she had served on the Governor's Cabinet with Secretary Lehman, which is a far more

significant connection than the brief connection to the Partnership. Yet, Ms. Walter's counsel found no reason to explore that matter further.

The appearance of fairness doctrine applies equally to judicial and quasi-judicial proceedings. *Hill*, 90 Wn.2d at 279, (citing *Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. State Human Rights Comm'n*, 87 Wn.2d 802, 807, 557 P.2d 307 (1976)). The doctrine seeks to prevent "the evil of a biased or potentially interested judge or quasi-judicial decision maker." *Post*, 118 Wn.2d at 619. A judge must not just be impartial, but that judge must also *appear* to be impartial. *State v. Madrey*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). *Post* reformulated this requirement, while not overruling *Madrey*, tightening the application of the doctrine to require *evidence of a judge's actual or potential bias*. The *Post* court explained:

Past decisions of this court have applied the appearance of fairness doctrine when decision-making procedures have created an appearance of unfairness... Our decision here does not overrule this line of decisions, but reformulates the threshold that must be met before the doctrine will be applied: *evidence of a judge's or decision maker's actual or potential bias*. This enhanced threshold requirement is more closely related to the evil which the doctrine is designed to prevent.

*Post*, 118 Wn.2d at 619 n. 8 (citation omitted) (emphasis added).

In *Post*, the defendant was attempting to attribute bias he perceived on the part of the probation officer who prepared his presentence report, to

the judge who relied upon the report to sentence him. The reviewing court disagreed, finding that:

Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit. Because Post's appearance of fairness claim does not contain evidence of actual or potential bias of the judge *toward him*, Post's appearance of fairness claim is without merit.

*Id.* at 619 (emphasis added). The doctrine has further been defined to require that "a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995). "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts." *In re Marriage of Davison*, 112 Wn. App. 251, 257, 48 P.3d 358 (2002) (quotation marks and citations omitted). The above evidence regarding Member Nutley, the Partnership, and Mr. Lehman is not objective evidence supporting a conclusion of bias on the part of Member Nutley, particularly in light of the lack of concrete information about their actual involvement in the Partnership, the time lapse since the Partnership met, and the lack of additional evidence from the hearing itself evidencing bias directed from Member Nutley at Ms. Walters.

The superior court, however, relied upon the Code of Judicial Conduct (CJC) Canon 3(D) and (E) to support her conclusions that Member Nutley's failure to disclose a professional relationship required reversal of the PAB decision. CP 864. Canon 3(D)(1) provides in part:

**(D) Disqualification.** Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding...

(c) the judge knows that, individually or as a fiduciary, the judge or the judge's spouse or member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or is an officer, director or trustee of a party or has any other interest that could be substantially affected by the outcome of the proceeding, unless there is a remittal of disqualification;

(d) the judge or the judge's spouse or member of the judge's family residing in the judge's household or the spouse of such a person: (i) is a party to the proceeding, or an officer, director, or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is to the judge's knowledge likely to be a material witness in the proceeding.

**(E) Remittal of Disqualification.** A judge disqualified by the terms of Canon 3(D)(1)(c) or Canon 3(D)(1)(d) may, instead of withdrawing from the proceeding, disclose on

the record the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing or on the record that the judge's relationship is immaterial or that the judges' economic interest is de minimis, the judge is no longer disqualified, and may participate in the proceeding. When a party is not immediately available, the judge may proceed on the assurance of the lawyer that the party's consent will be subsequently given.

Although the superior court relied upon both Canon 3(D) and (E), it included no analysis to support that either Member Nutley or a member of her family had any fiduciary interest in the outcome of the case, in the subject matter of the controversy or in any party to the action. CP 845–848, 863–865. No evidence was presented that Member Nutley harbored bias toward Ms. Walters. CP 789–803. There was nothing offered to show that Member Nutley relied upon anything before her but the evidence and trial testimony presented by the parties. CP 15–24. There was no evidence that she had any type of outside interest with a party to the case. CP 789–803. Secretary Lehman was not a *party* to the case, he was merely one of eighteen witnesses called. The only parties were the Department of Corrections and Ms. Walters.

Misidentifying Secretary Lehman as a party was one of several mistaken facts the superior court relied upon to support its conclusions. The court wrongly found that Secretary Lehman was the appointing and disciplinary authority for the action against Ms. Walters. CP 863. The

appointing authority was Assistant Deputy Secretary Anne Fiala, who testified to such before the PAB. Findings 2.6, 2.15, CP 18, 21; RP 1173. The superior court also identified Member Nutley as being the Hearing Officer and the Director of the Office of Community Development. CP 864. These two positions were not held concurrently, but rather Member Nutley resigned from her position with the Office of Community Development prior to her appointment to the PAB in April 2003. CP 822–823.

The superior court also found that Member Nutley and Secretary Lehman “worked together and met regularly” for the DOC sponsored Partnership. CP 864. However, there was no evidence of that before the court. The only evidence offered by Ms. Walters was the Partnership report. CP 625–709. That report identified both Ms. Nutley and Secretary Lehman as two of twenty-five members of that Partnership. CP 626. Further, although the report identifies three meetings for a specially designated workgroup, it does not identify who was on that workgroup, nor does it identify who attended the four meetings of the Partnership between April 1 and June 30, 2002. CP 639. The report clarified that, “[w]hile most members kept their commitment and attended the Partnership meetings, if they were unable to attend, they routinely sent representative/s in their place.” CP 639–640. No other evidence was

presented to the court below about Ms. Nutley's and Secretary Lehman's involvement in preparing the Partnership report, establishing goals for the Partnership, or the nature of their involvement. CP 789–803. Neither of them chaired the Partnership.<sup>12</sup> *Id.*

To stretch the concept of an unfair and biased interest in the proceedings to Member Nutley, Ms. Walters relied upon the publicity about Secretary Lehman's son's conviction. She attached a number of newspaper articles to support this contention and claimed that this publicity would have reflected poorly on Member Nutley. CP 720–746. However, a review of these articles reveals no mention of Secretary Lehman's involvement in the Partnership, nor do they ever identify Ms. Nutley in any way. *Id.*

The nebulous “interests” argued by Ms. Walters were rejected in *Sherman v. Moloney*, 106 Wn.2d 873, 877, 725 P.2d 966 (1986). Sherman was a State Patrol Officer charged with use of excessive force during an arrest. *Id.* at 874, 877. He appealed the charge of force to a trial board, presided over by the chief of the patrol, Neil Moloney, and consisting of two state patrol captains, and one officer of equal rank with Sherman's. *Id.* at 877. After a full evidentiary hearing, the board found that he used

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<sup>12</sup> Contrary to what was argued by Ms. Walters in her brief, the co-chairs of the Partnership were Suzanne Brown, of the WA Coalition of Sexual Assault Programs, and Kevin Glackin-Coley of the Washington State Catholic Conference. CP 637.

excessive force and recommended a 15 day suspension without pay, which Chief Moloney adopted and imposed as discipline. *Id.* at 878. Sherman argued to the Supreme Court “because of this hierarchical relationship between the chief and the trial board members, they were jeopardized if they made findings favorable to Sherman.” *Id.* at 884. The Supreme Court found this argument unconvincing. It ruled:

In absence of specific evidence, it is far too speculative to conclude that the board members’ employment relationship with the chief itself prevented them from deciding the case fairly.

In summary, there is no evidence that the chief was actually biased against Sherman. Furthermore, we believe that a reasonably prudent and disinterested observer of the trial board hearing would conclude that Sherman received a fair and impartial hearing. Therefore, the hearing was fair both in substance and appearance.

*Id.*

The superior court’s ruling concerning member Nutley’s connection with Secretary Lehman cannot be reconciled with *Sherman*. Just as the close relationship between the patrol chief and his subordinates does not create an undue influence over their decision making, neither does publicity about a former committee member’s son rise to the level of creating a bias for Member Nutley when that publicity in no way connects her to Secretary Lehman or his son.

The superior court's error is revealed by its inaccurate summary: "At issue in the hearing was Secretary Lehman's testimony, his agency's decision to terminate, and, as importantly, the substance of the dismissal charges involving workplace discussions regarding Secretary Lehman's family business." CP 864. Secretary Lehman's testimony was not significant—it takes up only ten pages of the transcript. RP 1058–1068. Secretary Lehman's testimony was solicited *by Ms. Walters*. Secretary Lehman, although the head of the agency, had no connection to the decision to fire Ms. Walters and the record demonstrated that he was shielded from the decision, that he did not know the action was taken until it was over, that he did not even know the nature of the charges against her until some time just before he was called as a witness. RP 822, 1065–1066, 1173–1175.

Further, the disciplinary action was about a violation of DOC policy and Ms. Walters' neglect of her duties as the State Staff Counselor. Where is the nexus between that charge and the involvement of Ms. Nutley on the Partnership? There is none. Without direct evidence of prejudice or bias on the part of Member Nutley, the charge of unfair proceedings must fail. Additionally, Member Nutley did not render the PAB's decision independently. The PAB order specifically references that Gerald Morgen, Vice Chair, "listened to the recorded proceedings,

reviewed the file and exhibits, and participated in the decision”. CP 15. Finally, the PAB decision does not make any reference to the testimony of Secretary Lehman; it did not factor into their findings or conclusions. CP 15–24.

The PAB record and its decision shows that the PAB was fair to both parties and that there was no appearance of fairness in favor of the DOC or Secretary Lehman. The superior court abused its discretion by vacating the order based on the insubstantial evidence concerning the connection between Member Nutley and Secretary Lehman.

**C. The Court Erred By Issuing An Advisory Ruling On The Merits To Go To The PRB.**

At two hearings, on June 30 and December 7, 2006, the court orally indicated its agreement with the procedural error argued by Ms. Walters, and in a letter dated September 18, 2006, found that the failure to disclose by Member Nutley required reversal. CP 848, 863–865, 997. On February 5, 2007, the court entered an order to vacate and remand, and appended its’ advisory oral ruling from December 7, 2006, finding that the PAB erred in its Conclusion of Law 4.3 and in affirming Ms. Walters’ dismissal. CP 985–1037. DOC objected to the court entering an advisory opinion to accompany the order on the basis that it could be prejudicial to the agency on remand. CP 1045–1046. DOC noted that having remanded

for further proceedings, the superior court should not address the merits in an advisory fashion. The superior court's jurisdiction was to perform an appellate review as provided by statute in RCW 41.64.130 and RCW 41.64.140.<sup>13</sup> The order to vacate and remand disposed of Ms. Walters' appeal to the superior court; issuance of that order foreclosed further orders, such as the advisory order to the PRB.<sup>14</sup>

If this Court determines that any further superior court review is necessary, Judge Casey's advisory ruling should be treated as a disqualification because she has pre-judged the merits. A reasonably prudent and disinterested person would conclude that the court could not be objective in reviewing the PAB record on remand.<sup>15</sup> *See State v. Perala*, 132 Wn. App. 98. To compel DOC "to submit to a judge who has already confessedly prejudged" the case, when she has been "candid enough to announce [her] decision in advance, and insist[s] that [s]he will adhere to it, no matter what the evidence may be" would be manifestly wrong. *State ex rel. Barnard vs. Bd. of Educ.*, 19 Wn. 8, 19, 52 P. 317, 40

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<sup>13</sup> RCW 41.64.130, RCW 41.64.140 were repealed pursuant to Laws of 2002, ch. 354, § 404, effective July 1, 2006. For the Court's convenience they are attached as Appendix B.

<sup>14</sup> Our Supreme Court addressed this issue when it found: "[j]ust as an appellate court loses jurisdiction upon remand to the trial court, . . . a superior court reviewing action of an administrative agency loses jurisdiction upon remand to the agency." *Pierce Cy.*, 98 Wn.2d at 695.

<sup>15</sup> Furthermore, in light of Judge Casey's conclusion that the PAB was biased, a reasonably prudent and disinterested person could only conclude that the court could not be objective in reviewing a PAB record on remand that it had already found to be flawed by procedural error.

L. R. A. 317, 67 Am. St. Rep. 706 (1898). *See also Caffrey v. Superior Court of King Cy.*, 72 Wn. 444, 448, 130 P. 747 (1913). Therefore, should this Court remand for further proceedings before the superior court, DOC asks this Court to direct that the case be assigned to another judge.

However, no remand is necessary as this Court acts de novo, with no deference to the superior court. Accordingly, it is proper for this Court to review the PAB's decision. *Dedman*, 98 Wn. App. at 476; *Adams v. Dept. of Soc. and Health Servs.*, 38 Wn. App. 13, 14, 683 P.2d 1133 (1984), (citing *King Cy., Water Dist. 54 v. King Cy. Boundary Review Bd.*, 87 Wn.2d 536, 554 P.2d 1060 (1976)). Moreover, for purposes of judicial economy, this Court should exercise its de novo review of the Board's decision to avoid a later appeal on the merits. *See Reeves v. Dep't of Gen. Admin.*, 35 Wn. App. 533, 667 P.2d 1133, *review denied*, 100 Wn.2d 1030 (1983).

**D. The PAB Order Should Be Affirmed Because Its Findings Are Supported By Substantial Evidence In The Record, The Conclusions Of Law Are Not Contrary To The Evidence, And The Decision Was Not Arbitrary And Capricious.**

**1. This Court Should Affirm The Order Of The Personnel Appeals Board After De Novo Review Of The Record.**

When an appeal is from the ruling of an administrative agency which entered findings of fact and conclusions of law, findings and conclusions by the superior court are not necessary. *Adams*, 38 Wn. App.

at 15. A court of appeals may treat the findings and conclusions of the superior court as superfluous and determine de novo whether the Board's order was erroneous as a matter of law. *Id.* Rules of Appellate Procedure (RAP) 10.3(h) emphasizes that the Respondent, Ms. Walters continues to carry the burden to assign error and show error by the PAB.

The Board's Conclusion of Law 4.3 states as follows:

4.3 As the Statewide Director of the Staff Counseling program and a Washington Management Service Manager, Appellant had a duty and responsibility to maintain confidentiality as required by the department's policy. A preponderance of the credible evidence supports Appellant had a clear understanding of DOC Policy 870.800 because she had a key role in developing the Staff Counseling program and writing the policy. While there is no question the situation with Secretary Lehman's son was public knowledge because of the media coverage, we conclude Appellant's decision to discuss the matter with Ms. Sutliff was highly inappropriate and unethical. Even though Appellant did not disclose specific information related to a counseling session, the policy clearly states that "all communication relating to staff counseling, intervention, and consulting services shall be confidential" (emphasis added). Despite the policy, Appellant gave DOC employees the impression she went to headquarters to perform counseling services and then proceeded to discuss the situation and specific names of individuals with Ms. Sutliff, which was contrary to the intent of the policy.

CP 23.

Ms. Walters was dismissed from her position as the Director of the Staff Resource Center for neglecting her duties and violating agency policy by gossiping about her counseling activities, including disclosing

the names of administrators she claimed to have assisted and implying that she had counseled the DOC Secretary. Ms. Walters challenged Conclusion of Law 4.3 by arguing that the confidentiality directive in Policy 870.800 was designed only to preserve the confidentiality of communications and discussions acquired from a client. CP 544–545. Hence, she argued that because there was no specific communication divulged within a counseling session, there could be no violation of Policy 870.800. *Id.* The PAB disagreed, finding that Ms. Walters’ actions gave the impression that she was counseling and thereby violated the policy.<sup>16</sup>

Ms. Walters developed the Staff Counseling Program and was the primary author of Policy 870.800. Finding 2.3, CP 16; RP 839, 841–842, 864–865, 943–944, 1023, 1029, 1155, 1192, 1259–1260. At both the PAB hearing and in her judicial review appeal, she acknowledged her understanding that the very facts surrounding an employee’s access to or participation in the program, as well as the content of any services rendered, were to remain confidential under the policy. CP 533; RP 844–845. She testified that “[s]pecific names of people that I had seen in a therapeutic type of relationship. Those sorts of things, I could not share. Names.” RP 1380, 1383.

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<sup>16</sup> The PAB concluded that it did not matter whether Ms. Walters actually counseled staff at DOC headquarters because Policy 870.800 protects all communication relating to staff counseling, etc. and Ms. Walters had given the impression that she gave counseling. Conclusion of Law 4.3, CP 23. Further, as DOC Deputy Secretary Eldon Vail and DOC Investigator Jim Blodgett pointed out, whether Ms. Walters provided counseling or not, she gave the impression that she had. Therefore, by gossiping, she destroyed her credibility either way. RP 822, 1165.

In sum, Ms. Walters produced no credible evidence to the PAB that the policy was unclear. Rather, DOC presented substantial evidence to the Board that the policy protected not only confidential communications occurring within the context of a counseling session, but any information associated with an employee's access to, consultation or participation in services. CP 603–604; RP 807–810, 844–845, 973, 1024, 1125–1126, 1260, 1266, 1380. Accordingly, PAB Conclusion of Law 4.3 regarding the intent and application of Policy 870.800 was supported by substantial evidence and not contrary to law.

Similarly, the PAB's conclusion that Ms. Walters' conduct was highly inappropriate and unethical is not contrary to law and substantial evidence supported this finding. DOC's determination that Ms. Walters acted in an inappropriate, indiscreet and unethical manner was based on its expectations of her as a Washington Management Service (WMS) manager and the highest ranking member of the Staff Counseling Program. Ms. Walters' WMS job description required that she have "sufficient maturity and judgment to operate independently," and "the ability to maintain the highest standards of personal, professional and ethical conduct." CP 580–581, 604–605; RP 375, 378, 823–824, 841, 1200–1202.

The sole basis for the superior court's conclusion that the PAB erred was Conclusion of Law 4.3. However, DOC provided substantial evidence supporting this Conclusion of Law, as well as all of the

challenged PAB Findings and Conclusions of Law. CP 567–580, 594–605. Therefore, on review this Court should affirm the PAB decision.

**2. The PAB’s Decision Was Not Arbitrary And Capricious.**

On review, considerable deference is given to the choice of remedies imposed by an administrative agency. *Skold v. Johnson*, 29 Wn. App. 541, 550, 630 P.2d 456 (1981). The PAB’s decision upholding dismissal does not display willful or unreasoning disregard of the facts and circumstances and is therefore neither arbitrary nor capricious. *Terhar*, 54 Wn. App. at 34. The PAB record demonstrates extensive support for the DOC’s decision to dismiss Ms. Walters.

The PAB was in the position to not only hear the testimony of witnesses during five days of hearing, but was able to observe the demeanor of each witness. Hence, this Court should not substitute its own judgment for that of the PAB. The PAB found “inconsistencies in the Appellant’s [Ms. Walters] version of the conversation” with Mary Sutliff on February 10, 2003. Finding 2.11, CP 19–20. On the other hand, the PAB found Ms. Sutliff’s testimony before the Board, as well as throughout the investigative process, to be consistent, credible, and corroborated by other witnesses. Finding 2.13, CP 20. Further, the Board found “no motive for Ms. Sutliff to be untruthful about her discussion with Appellant [Ms. Walters].” *Id.*

In addition to weighing the evidence and assessing credibility, the PAB was tasked with determining whether the level of sanction was

appropriate. *Trucano*, 36 Wn. App. at 761–762. The PAB found that Ms. Walters had been put on notice in multiple corrective actions to behave professionally, honestly and ethically. Finding 2.5, CP 17–18; Conclusion of Law 4.4, CP 23; RP 364–373. The PAB properly considered the totality of the credible evidence, and determined that given Ms. Walters position of responsibility and authority within the department and her history of corrective action, there was no reason to overturn her termination. *See* Conclusion of Law 4.4, CP 23. Even if others might reach another opinion, it cannot be said that the PAB displayed a “willful and unreasoning disregard” for the facts and circumstances in affirming the dismissal. *Trucano*, 36 Wn. App. at 761–762. Therefore, the PAB’s decision was neither arbitrary nor capricious, and should be affirmed on review as it shows abundant consideration of the evidence presented by both parties.

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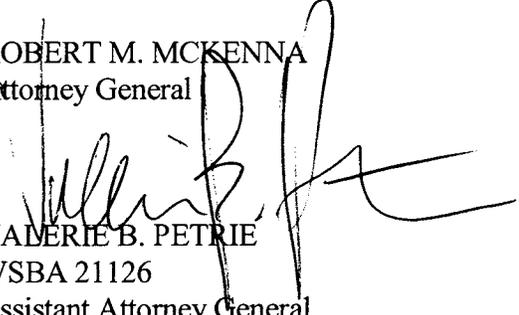
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**VIII. CONCLUSION**

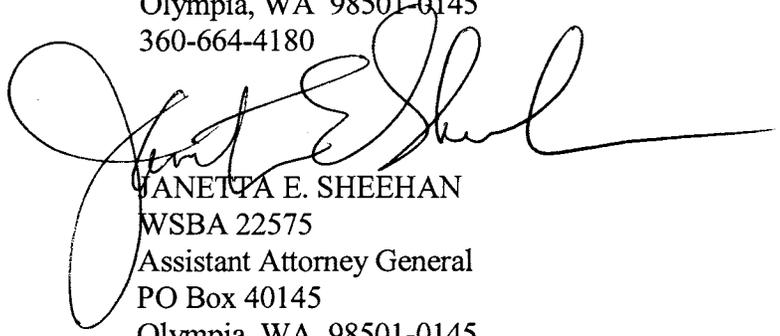
DOC respectfully requests that the Court reverse the superior court order vacating the order of the PAB and to affirm the order of the PAB.

DATED this 14<sup>th</sup> day of June, 2007.

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# APPENDIX A

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

CYNDI WALTERS,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

)  
) Case No. DISM-03-0093

) FINDINGS OF FACT, CONCLUSIONS OF  
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, BUSSE NUTLEY, Member. The hearing was held in the Personnel Appeals Board Hearing Room, 2828 Capitol Boulevard, Olympia, Washington, on September 9, 10, 15, 16, and October 4, 2004. GERALD L. MORGEN, Vice Chair, listened to the recorded proceedings, reviewed the file and exhibits and participated in this decision.

1.2 **Appearances.** Appellant Cyndi Walters was present and was represented by David M. Rose of Minnick-Hayner, P.S. Valerie Petrie, Assistant Attorney General, represented Respondent Department of Corrections.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal. Respondent alleges Appellant failed to abide by the agency's policy regarding confidentiality when she inappropriately shared information with an employee outside of her departmental program.

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## II. FINDINGS OF FACT

2.1 Appellant, Dr. Cyndi Walters, was a permanent employee working in a Washington Management Service (WMS) Band 3 position as the Statewide Director of the Staff Resource Centers for Respondent Department of Corrections (DOC). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on October 20, 2003.

2.2 In 1998 DOC appointed Appellant into a dual role as the Southeast Regional Counselor and the Statewide Director of the Staff Counseling program. As the staff counseling program evolved, Appellant had an instrumental role in developing program policies as well as writing the job description for her position.

2.3 The primary objective of the Staff Counseling program is to allow employees the opportunity to anonymously debrief after a critical or stressful incident with the assurance of confidentiality. The department believed that without the proper assurance of confidentiality, employees would be reluctant to participate in the program. Therefore, with Appellant's input, the department developed a policy to insure that attendance at counseling sessions and anything discussed in those sessions remained confidential. DOC Policy 870.800, Staff Counseling and Occupational Health Programs, reads in relevant part:

II. All communication relating to staff counseling, intervention, and consulting services with the Staff Resource Center shall be confidential unless otherwise specified by law and/or department policy directive(s).

1 2.4 In 2001 Appellant began working full-time as the Statewide Director of the Staff Resource  
2 Center. Consequently, she stopped performing counseling duties to staff in the region but continued  
3 to counsel staff housed at DOC Headquarters in Olympia.

4  
5 2.5 Appellant reported to Regional Administrator Marjorie Littrell until March 2003, when  
6 Assistant Deputy Secretary Lynne DeLano began supervising Appellant. Both Ms. Littrell and Ms.  
7 DeLano had discussions with Appellant regarding accountability issues and Appellant's tendency to  
8 use Policy 870.800 to justify not having to report her work activities to her supervisors. Appellant  
9 had the following history of corrective actions:

- 10
- 11 • On June 20, 2002, Appellant received a memo from Ms. Littrell as a follow-up to  
12 a Whistleblower Complaint investigated by the State Auditor's Office that found  
13 Appellant committed misconduct. In the memo, Ms. Littrell provided Appellant  
14 with a copy of the department's ethics policy and directed her to perform her  
15 duties in a professional manner that did not create the appearance of using her  
16 position for personal gain or using state resources for personal benefit.
  - 17 • On September 30, 2002, Appellant received a memo of concern regarding issues  
18 specific to travel authorization and mileage reimbursement. Ms. Littrell's  
19 memo, in part, addressed Appellant's use of her personal vehicle instead of the  
20 available state vehicle state business travel. Ms. Littrell stated her expectation  
21 that Appellant provide a sufficient explanation for travel reimbursement, due to  
22 Appellant's previous refusal to provide such information by citing her belief it  
23 violated confidentiality laws.
  - 24 • On May 30, 2003, Appellant received a letter of reprimand for failing to comply  
25 with her supervisor's directives to produce e-mails related to a public disclosure  
26 request she had known about for more than a year. Appellant's supervisor,  
Lynne DeLano, wrote that Appellant "asserted a confidentiality privilege on  
documents [Appellant could not] even identify." Ms. DeLano considered  
Appellant's actions to be "deliberately evasive and dishonest" and concluded  
Appellant's actions demonstrated a lack of integrity.
  - On June 9, 2003, Appellant received a letter of expectations from Ms. DeLano in  
an effort to improve Appellant's communication, accountability, and credibility.  
Specifically, Ms. DeLano asked Appellant to provide her with an updated work  
schedule and calendar for accountability purposes. Ms. DeLano also addressed  
Appellant's numerous claims of protection for communications due to  
confidentiality. Ms. DeLano reminded Appellant she was serving as the

1 Statewide Director of the Staff Counseling Program and not a staff counselor.  
2 Ms. DeLano also noted that Appellant's credibility was at risk due to her  
inappropriate use of the confidentiality statutes.

- 3
- 4 • On August 22, 2003, Appellant received a letter of reprimand from Ms. DeLano  
for her refusal to respond to her supervisor's request for information concerning  
work activities. Ms. DeLano wrote as follows:

5 . . . I have on several occasions requested additional details of your work  
6 activities in order to ensure accountability and performance, as well as to  
7 verify your claims for excessive hours of work. I have only requested the  
8 names of persons you see and never the content of your discussions. You  
9 have continued to deny my requests based on your claim that release of  
such information will violate confidentiality laws and undermine the Staff  
10 Resource Center program. You are seemingly unable to separate the  
Staff Resource Center program from your individual role and  
responsibilities as an employee of the Department of Corrections. . . .

11

12 2.6 By letter dated September 22, 2003, Assistant Deputy Director Anne Fiala notified  
13 Appellant of her dismissal, effective October 7, 2003. Respondent alleged Appellant neglected her  
14 duty and violated the department's confidentiality policy when she shared information regarding a  
15 crisis situation at DOC Headquarters following the publicized arrest of the Secretary of the  
16 Department's son. Specifically, Ms. Fiala alleged Appellant discussed the situation regarding  
17 Secretary Lehman with an office assistant lead in the Walla Walla Field Office, including making  
18 the comment that Mr. Lehman was "in hiding."

19

20 2.7 Appellant was in Olympia on agency business on or about February 6, 2003, when the news  
21 media reported the arrest of Secretary Lehman's son. Appellant believed the news to be a critical  
22 incident for DOC and volunteered to assist at Headquarters. Appellant briefly met with Mr.  
23 Lehman's Chief of Staff, Patria Robinson-Martin, who informed Appellant that Mr. Lehman and  
24 DOC were considering the situation a personal matter.

1 2.8 While in Olympia, Appellant spoke with DOC emergency response managers and regional  
2 counselors regarding the need for counseling services, and she made the decision to remain at  
3 Headquarters an extra day. Appellant spoke with numerous DOC managers and counselors and  
4 based on her statements to them, they believed that the purpose for Appellant's presence at  
5 Headquarters was to provide counseling services to Mr. Lehman and other administrative staff.  
6 Appellant sent a February 6, 2003, email to her supervisor, Marjorie Littrell, and wrote:

7 I spoke with Patria today and will be visiting with Mr. Lehman tomorrow. I'm  
8 going to offer my assistance to his wife as well. I talked with a lot of staff today  
9 and will continue to 'mill about' tomorrow at HQ. Staff are speechless and  
10 agonizing with Mr. Lehman. . . .

11 2.9 Appellant never met with Secretary Lehman, and she returned to the Walla Walla Field  
12 Office on or about February 10, 2003. Appellant engaged in a conversation with Office Assistant  
13 Lead Mary Sutliff, who was in Appellant's office to work on technical problems related to  
14 Appellant's office equipment, regarding the arrest of Secretary Lehman's son. Located on  
15 Appellant's desk was a laminated news article that referred to Mr. Lehman. The exact nature of the  
16 conversation between Appellant and Ms. Sutliff is in dispute.

17  
18 2.10 Ms. Sutliff testified Appellant engaged her in a conversation regarding Mr. Lehman's son,  
19 told her she was in Olympia to assist in the "crisis" and mentioned the names of managers at  
20 Headquarters. She testified Appellant also remarked that Mr. Lehman was in "hiding" in order to  
21 avoid discussing the issue. Ms. Sutliff also testified that based on Appellant's comments to her, she  
22 believed the purpose for Appellant's presence at Headquarters was to perform counseling services to  
23 staff.

24  
25 2.11 During her testimony, Appellant denied sharing any confidential information with Ms.  
26 Sutliff. Appellant asserted she told Ms. Sutliff people in Olympia might call her and instructed Ms.

1 Sutliff to give her cell phone number to anyone trying to reach her. We find inconsistencies in  
2 Appellant's version of the conversation. Appellant first testified that Ms. Sutliff initiated the  
3 conversation about Secretary Lehman. However, Appellant later said she pointed to the laminated  
4 article regarding Mr. Lehman on her desk and asked Ms. Sutliff if she had been aware of the  
5 incident, indicating she might be receiving related calls. Appellant also testified she never told  
6 anyone or insinuated to anyone that she met with Secretary Lehman. We find a preponderance of  
7 the evidence presented supports that Appellant went to DOC Headquarters to act in a counseling  
8 capacity and implied to other DOC employees that she would be offering counseling services to Mr.  
9 Lehman and administrative staff. Additionally, Appellant's email to Ms. Littrell clearly  
10 substantiates Appellant's intent to provide counseling services.

11  
12 2.13 We find Ms. Sutliff's testimony before this Board, as well as throughout the investigative  
13 process, to be consistent and credible. Ms. Sutliff's testimony is further corroborated by the general  
14 consensus of the DOC managers and counselors that Appellant either had met or was going to meet  
15 with Mr. Lehman and offer counseling services to administrative staff. Furthermore, we do not find  
16 any motive for Ms. Sutliff to be untruthful about her discussion with Appellant.

17  
18 2.14 Regional Administrator Jim Blodgett was selected to investigate the Employee Conduct  
19 Report (ECR). Appellant had previously worked with Mr. Blodgett when he was the superintendent  
20 at the Washington State Penitentiary. During the interview with Mr. Blodgett, Appellant stated she  
21 had been in Olympia counseling "secretaries and janitors." Appellant also expressed to Mr.  
22 Blodgett her theory that her supervisor and others were conspiring against her. When Mr. Blodgett  
23 asked Appellant to provide him with information substantiating her theory, she said she could not  
24 comply with his request for confidentiality reasons.

1 2.15 Ms. Fiala, Appellant's appointing authority, held a meeting on May 12, 2003, to discuss the  
2 allegations. Appellant denied the allegations, stated it was Ms. Sutliff who initiated the discussion  
3 about Mr. Lehman, and thought Ms. Sutliff either overheard another conversation or was  
4 manipulated into writing the complaint. On July 18, 2003, Ms. Fiala advised Appellant of her  
5 preliminary decision to dismiss her from her position. Ms. Fiala met with Appellant again on  
6 September 11, 2003, to provide another opportunity for Appellant to mitigate the allegations.  
7 Appellant revised statements previously provided to Ms. Fiala, but did not provide any new  
8 substantive information. Appellant also changed her original statement regarding the comment  
9 about Mr. Lehman "hiding out" to say she must have "parroted" that statement back to someone in a  
10 phone conversation, suggesting once again that Ms. Sutliff might have overheard the comment. Ms.  
11 Fiala determined Appellant continued to be inconsistent and focus on unrelated issues, while Ms.  
12 Sutliff's account of the conversation remained consistent and credible. Therefore, Ms. Fiala  
13 concluded termination was the appropriate sanction.

### 14 15 III. ARGUMENTS OF THE PARTIES

16 3.1 Respondent argues the testimony and evidence presented confirm Appellant acted in a  
17 counseling role at Headquarters, gave the appearance of counseling, and then shared that  
18 information with another employee outside of her division. Respondent contends Appellant clearly  
19 understood DOC Policy 870.800 because she helped write the policy, had an integral role in  
20 implementing the Staff Counseling program, was a counselor, and the lead manager of the program.  
21 Respondent contends the policy is more restrictive than mandates related to health care providers  
22 and patient confidentiality and that even alluding to others that an employee has received counseling  
23 services from the Staff Resource Center is a violation of the policy. Respondent further contends  
24 Appellant's past history of referencing confidentiality as the reason for not complying with  
25 supervisory directives proves she understood the stringent intent of the policy. Therefore,  
26

1 Respondent argues Appellant's inappropriate and indiscreet actions damaged her credibility and  
2 harmed the integrity of the Staff Counseling program.

3  
4 3.2 Appellant categorically denies having disclosed any confidential information to Ms. Sutliff  
5 or any other person outside of the Staff Counseling program. Appellant asserts that as a highly  
6 qualified professional she understands confidentiality. Appellant argues she could not have divulged  
7 privileged or confidential communications because she never met with or counseled Secretary  
8 Lehman. Appellant argues a professional consultation had to occur for confidential information to  
9 exist and her supervisors were aware of the fact she never counseled Secretary Lehman. Appellant  
10 also asserts Ms. Sutliff initiated the conversation, mentioned it to her supervisor days later, and was  
11 then directed to write the email that resulted in the allegations against Appellant. In addition,  
12 Appellant contends DOC Policy 870.800 is vague, does not list specific guidelines for counselors,  
13 and could not be clearly explained by DOC managers with regard to confidential communications.  
14 Therefore, Appellant argues her dismissal was unwarranted and improperly motivated by  
15 Respondent.

#### 17 IV. CONCLUSIONS OF LAW

18 4.1 Washington Management Service employees may appeal disciplinary actions to the  
19 Personnel Appeals Board under WAC 356-56-600.

20  
21 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
22 the charges upon which the action was initiated by proving by a preponderance of the credible  
23 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
24 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of  
25 Corrections, PAB No. D82-084 (1983).

1  
2 4.3 As the Statewide Director of the Staff Counseling program and a Washington Management  
3 Service Manager, Appellant had a duty and responsibility to maintain confidentiality as required by  
4 the department's policy. A preponderance of the credible evidence supports Appellant had a clear  
5 understanding of DOC Policy 870.800 because she had a key role in developing the Staff  
6 Counseling program and writing the policy. While there is no question the situation with Secretary  
7 Lehman's son was public knowledge because of the media coverage, we conclude Appellant's  
8 decision to discuss the matter with Ms. Sutliff was highly inappropriate and unethical. Even though  
9 Appellant did not disclose specific information related to a counseling session, the policy clearly  
10 states that "all communication relating to staff counseling, intervention, and consulting services  
11 shall be confidential" (emphasis added). Despite the policy, Appellant gave DOC employees the  
12 impression she went to headquarters to perform counseling services and then proceeded to discuss  
13 the situation and specific names of individuals with Ms. Sutliff, which was contrary to the intent of  
14 the policy.

15  
16 4.4 In assessing the level of discipline, we have considered the totality of the credible evidence,  
17 Appellant's position of responsibility and authority within the department and her history of  
18 corrective action. We find no reason to overturn Appellant's termination. An individual in the  
19 position of Statewide Director of the Staff Resource Center must be held to a higher standard and  
20 must be a credible and trustworthy resource for DOC employees. Appellant's actions harmed her  
21 credibility, damaged her effectiveness as Statewide Director, and undermined the credibility of the  
22 Staff Counseling program. Under the totality of the proven facts and circumstances, Respondent  
23 has proven that dismissal is the appropriate disciplinary sanction, and the appeal should be denied.

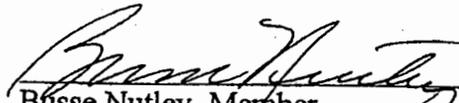
V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Cyndi Walters is denied.

DATED this 3<sup>rd</sup> day of December, 2004.

WASHINGTON STATE PERSONNEL APPEALS BOARD

  
Gerald L. Morgen, Vice Chair

  
Busse Nutley, Member

Personnel Appeals Board  
2828 Capitol Boulevard  
Olympia, Washington 98504

# APPENDIX B

his or her appointing agency shall be notified reasonably in advance of the hearing and may select representatives of their choosing, present and cross-examine witnesses, and give evidence before the board. Members of the board or the executive secretary may, and shall at the request of either party, issue subpoenas and subpoenas duces tecum. All testimony shall be on oath administered by a member of the board. The board shall certify to the superior court the facts of any refusals to obey a subpoena, take the oath, or testify. The court shall summarily hear the evidence on such refusal and, if the evidence warrants, punish such refusal in the same manner and to the same extent as for contempt committed before, or in connection with the proceedings of, the court. The board shall prepare an official record of the hearing, including all testimony, recorded manually or by mechanical device, and exhibits; but it may not be required to transcribe such record unless requested by the employee, who shall be furnished with a complete transcript upon payment of a reasonable charge. However, payment of the cost of a transcript used on appeal shall await determination of the appeal and shall be made by the employing agency if the employee prevails. [1985 c 461 § 7; 1981 c 311 § 12.]

**Severability—1985 c 461:** See note following RCW 41.06.020.

**41.64.120 Employee appeals—Findings of fact, conclusions of law, order—Notice to employee and employing agency. (Effective until July 1, 2006.)** (1) Within thirty days after the conclusion of the hearing, the board shall make and fully record in its permanent records the following: (a) Findings of fact; (b) conclusions of law when the construction of a rule, regulation, or statute is in question; (c) reasons for the action taken; and (d) the board's order based thereon. The order is final, subject to action by the court on appeal as provided in this chapter.

(2) The board shall simultaneously send a copy of the findings, conclusions, and order by certified mail to the employing agency and to the employee or the employee's designated representative. [1981 c 311 § 13.]

**41.64.130 Employee appeals—Review by superior court—Grounds—Notice, service—Certified transcript. (Effective until July 1, 2006.)** (1) Within thirty days after the recording of the order and the mailing thereof, the employee may appeal the decision and order of the board on appeals made pursuant to RCW 41.06.170(2), as now or hereafter amended, to the superior court of Thurston county on one or more of the grounds that the 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.

(2) Such grounds shall be stated in a written notice of appeal filed with the court, with copies thereof served on a member of the board or the executive secretary and on the employing agency, all within the time stated.

(2004 Ed.)

(3) Within thirty days after service of such notice, or within such further time as the court may allow, the board shall transmit to the court a certified transcript, with exhibits, of the hearing; but by stipulation between the employing agency and the employee the transcript may be shortened, and either party unreasonably refusing to stipulate to such limitation may be ordered by the court to pay the additional cost involved. The court may require or permit subsequent corrections or additions to the transcript. [1981 c 311 § 14.]

**41.64.140 Employee appeals—Review by superior court—Procedure—Appellate review. (Effective until July 1, 2006.)** (1) The court shall review the hearing without a jury on the basis of the transcript and exhibits, except that in case of alleged irregularities in procedure before the board not shown by the transcript the court may order testimony to be given thereon. The court shall upon request by either party hear oral argument and receive written briefs.

(2) The court may affirm the order of the board, remand the matter for further proceedings before the board, or reverse or modify the order if it finds that the objection thereto is well taken on any of the grounds stated. Appellate review of the order of the superior court may be sought as in other civil cases. [1988 c 202 § 42; 1981 c 311 § 15.]

**Severability—1988 c 202:** See note following RCW 2.24.050.

**41.64.910 Severability—1981 c 311. (Effective until July 1, 2006.)** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1981 c 311 § 24.]

## Chapter 41.68 RCW

### REPARATIONS TO STATE EMPLOYEES TERMINATED DURING WORLD WAR II

#### Sections

41.68.010	Legislative finding.
41.68.020	Eligibility for reparation.
41.68.030	Submission of claim.
41.68.040	Determination of eligibility.
41.68.050	Payment of reparation.

*Redress authorized for municipal employees dismissed during World War II:*  
RCW 41.04.580.

**41.68.010 Legislative finding.** The dismissal or termination of various state employees during World War II resulted from the promulgation of federal Executive Order 9066 which was based mainly on fear and suspicion rather than on factual justification. It is fair and just that reparations be made to those employees who were terminated from state employment during the wartime years because of these circumstances. The legislature therefore finds that equity and fairness will be served by authorizing the filing of claims with the state for salary losses suffered by the state employees directly affected, and by authorizing the payment thereof, subject to the provisions of this chapter. [1983 1st ex.s. c 15 § 1.]

**41.68.020 Eligibility for reparation.** Any state employee or the living surviving spouse of a state employee

COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON,  
DEPARTMENT OF CORRECTIONS,

Appellant,

v.

CYNDI WALTERS,

Respondents.

CERTIFICATE OF  
SERVICE

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DIVISION II  
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STATE OF WASHINGTON  
BY [Signature]

I certify that I served a copy of the Appellant's Brief on all parties

or their counsel of record on June 14<sup>th</sup>, 2007 as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- State Campus Delivery
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 14<sup>th</sup> day of June, 2007 at Olympia,

Washington.

*Lori Webb*  
LORI WEBB