



NO. 35919-7

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

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS,

Appellant,

v.

CYNDI WALTERS,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

This appeal presents two primary issues: (1) did the superior court abuse its discretion when it invalidated the Personnel Appeals Board (PAB) decision and ordered a remand based solely on Ms. Walters' untimely and unsubstantiated argument that a member of the PAB Board should have disqualified herself; and (2) is there substantial evidence in the record to support the PAB's ruling affirming Ms. Walters' termination and is that ruling soundly based in law.

Ms. Walters' argument in support of the court's remand order relies on bare assumptions that a PAB member intentionally concealed a personal and professional relationship to both Department of Corrections (DOC) and a witness, Secretary Lehman, thereby depriving her of due process and a fair hearing. Her argument is based on speculation and misrepresents the record before the superior court.

Ms. Walters' attack upon the merits of the PAB decision primarily turns on the PAB's interpretation of the DOC policy and its application to the facts of this case. The PAB agreed with DOC's interpretation of its own policy regarding the confidentiality provisions of the Staff Resource Center and the importance of that policy. Ms. Walters proposes that only her interpretation of DOC's policy is correct. In doing so, she challenges only one PAB Finding of Fact (FF) and two Conclusions of Law (CL),

making the remaining Findings of Fact (hereinafter Findings) verities on appeal. However, there is substantial evidence in the PAB's record to support all of its Findings that Ms. Walters violated DOC policy and neglected her duties, which fully supports the PAB order affirming her termination.

II. ARGUMENT

A. **The Superior Court Erred By Vacating The PAB Order Because Ms. Walters' Bias Objection Was Waived As Untimely, And Because There Is No Compelling Evidence of Actual or Potential Bias**

As shown in the DOC's Brief of Appellant (Br. Appellant) at 30, the standard for review of the court's decision regarding remand is abuse of discretion. A court abuses its discretion when its decision is "manifestly unreasonable or exercised on untenable grounds, or for untenable reasons." *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006), (quoting *Associated Mortgage Investors v. G.P. Kent Constr. Co., Inc.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976)). A discretionary decision rests on "untenable grounds or is based on untenable reasons if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take." *Id.* (internal quotation marks and citations omitted). Questions of law are reviewed de

novo. *Id.* The superior court abused its discretion in two ways: first, by considering an issue that Ms. Walters did not raise before the PAB; and second, by vacating the PAB order without actual evidence of bias.

1. PAB Member Nutley's Disclosure Provided Sufficient Notice To Require Ms. Walters To Raise Any Objection At That Time.

A litigant's failure to assert a timely objection concerning a judge 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, 279–80, 580 P.2d 636 (1978). This rule applies whether one is seeking to disqualify the judge on statutory grounds, or as Ms. Walters has sought to do here, upon due process grounds. *Brauhn v. Brauhn*, 10 Wn. App. 592, 597, 518 P.2d 1089 (1974). The reason underlying this rule is to avoid exactly what happened in the instant case: a litigant, notwithstanding her knowledge of the allegedly disqualifying factor, chooses to speculate on the successful outcome of the case but then attacks a contrary judgment on grounds of bias. *Brauhn*, 10 Wn. App. at 597–98. Member Nutley acknowledged her work with Secretary Lehman on the Governor's cabinet in the open hearing. That knowledge required Ms. Walters to object when that information was revealed, not in an appellate-like judicial review proceeding months later.

The superior court's reasoning that Ms. Walters' counsel had no duty to inquire further regarding Member Nutley's disclosure was an abuse of discretion because it is contrary to *Hill* and *Brauhn*. The superior court offered only a conclusion, but no sound reason for allowing Ms. Walters to attack the PAB Board months later:

In her capacity as the Director of Community Development she [Ms. Nutley] served on the Governor's cabinet. Mr. Lehman, in his capacity as the Secretary of the Department of Corrections, served on the Governor's cabinet at the same time. During the course of the hearing this information was disclosed. 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. The superior court thus recognized that Ms. Walters had notice of the basis for her later claim of bias. But the court imposed no obligation to raise the objection at the PAB or to even inquire further about potential bias. This is contrary to the Washington courts' long established rules on waiver of bias claims.

Ms. Walters argues that Member Nutley should have done more than disclose her past connection to Secretary Lehman on the Governor's cabinet, and should have specifically disclosed her participation on the partnership committee that formed the post-hoc arguments of bias. She cites two federal cases to support this argument that Member Nutley

should have disclosed more, but neither case is factually or legally relevant.

First Interstate Bank of Ariz. v. Murphy, Weir & Butler, 210 F.3d 983 (9th Cir. 2000), involved whether a law firm has a duty to disclose that it had hired a law clerk who worked for a judge before whom it practiced. The case provides no relevant analysis of what duty is imposed upon judges or fact-finders to disclose potential bias.

Am. Textile Mfrs. Inst. Inc. v. The Limited, Inc., 190 F.3d 729 (6th Cir. 1999), addressed whether a party must engage in any pre-hearing investigation of a judge. There, a judge made a ruling in a case, but when he later determined that one of the attorneys before him worked for a firm he previously retained personally, he recused himself. The Sixth Circuit explained that a litigant has no duty to investigate the impartiality of the presiding judge prehearing, rather, they can rely on the judge's ethical duty to "disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification." *Id.* at 742 (internal quotations and citation omitted). Factually, *American Textile* is very different from the present case. DOC is not arguing that anything should have been researched before Member Nutley's revelation was made. Here, Ms. Walters failed to object or to inquire further from Member Nutley when she disclosed her connection

based on the Governor's cabinet. Having disclosed that major connection, it makes little sense to complain that Member Nutley did not mention participation in the partnership committee.

Ms. Walters also misstates or misconstrues the law related to judicial bias. She relies on *Hill* by referring to the following holding: "The same common-law rules of disqualification for conflict of interest as apply to judges also apply to administrative tribunals," but she omits the rest of the sentence: "but the objection must be raised or it will be deemed waived." *Hill*, 90 Wn.2d at 279–80 (emphasis added). Ms. Walters waived objections based on Member Nutley's disclosed connections to Secretary Lehman, by failing to object or even inquire modestly, at the time of the hearing. When queried by the superior court about his failure to object or inquire at the time, Ms Walters' counsel responded by saying:

And I suppose that I could have inquired of Ms. Nutley, so, did you have any working relationships? Did you serve on committees? Did you do all of that? Perhaps I could have done that. But if she would have disclosed it, then I wouldn't have had to go in to grill. It's not my duty to grill a jurist.

CP 837. Counsel is correct – he could have and should have inquired of either or both Member Nutley and Mr. Lehman to determine if there was any reason to believe a bias existed after Member Nutley disclosed their history on the Governor's cabinet. RP 1058.

Ms. Walters's contention that there was insufficient information to cause her to explore the relationship further is based on the Code of Judicial Conduct Canons and *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994). However, she provides no analysis of how the Canons apply here. *Schmitz* offers no relevant analysis as it addresses an arbitrators' duty to disclose potential partiality where "the actual standard for arbitrators does differ from that for judges," and "[i]n an actual bias case, a court must find actual bias. Finding a reasonable impression of partiality is not equivalent to, nor does it imply, a finding of actual bias." *Id.* at 1047 (internal quotations and citations omitted).

The cases relied upon by Ms. Walters do not overcome the long standing requirements of *Hill* that if an objection is not raised at the time it is waived. Ms. Walters has no excuse for her untimely objection that simply points out Member Nutley's connection to Secretary Lehman on a large committee. Therefore, the superior court's order on the motion to vacate was an abuse of discretion because it ignored the mandate of *Hill* and *Brauhn* that a party must make a timely bias objection, or deems it waived. Thus, without even evaluating the merits of the alleged bias, the superior court's order should be overturned because the objection was untimely.

2. The Superior Court Abused Its Discretion When It Vacated The PAB Order Based Solely Upon A Review Of The Report, With No Other Evidence Of Bias.

Assuming arguendo that the Walters' objection is not waived as untimely, it is without merit. As the moving party seeking to vacate the PAB order, Ms. Walters bore the burden to prove that a vacation of the PAB order was justified due to either a violation of due process rights or because there was an irregularity in obtaining a judgment or order due to bias. *State v. Perala*, 132 Wn. App. 98, 113, 130 P.3d 852 (2006). She retains the burden to show that she provided the superior court with "evidence of the judge's [or decision maker's] actual or potential bias" before the decision can be vacated. *Id.* Ms. Walters has not proved Member Nutley's actual or potential bias in the record before the superior court. The law requires specific evidence that a hearing officer was influenced by something outside the hearing process which affected a decision. *Gibson v City of Auburn*, 50 Wn. App. 661, 670, 748 P.2d 673 (1988). "It need not be shown that a commission member's interest actually influenced his decision," but "the potential for influence must be shown by specific evidence." *Id.* (emphasis added). Here, Ms. Walters' offered one piece of evidence to support her contention of bias, the Phase One Final Report (Report) of the collaboration, *Housing High Risk Offenders: A Partnership For Community Safety*. CP 625-711. The

Report, however, lacks any concrete facts revealing any kind of relationship between Member Busse Nutley and either DOC or Secretary Joseph Lehman. It does not reveal any specific information that may have influenced how Member Nutley viewed the actions of Ms. Walters as charged in the disciplinary letter. The Report merely identifies her as a Group Member of the partnership, along with 24 other persons. The Report includes no recitation of the number of meetings both persons attended, or whether they even attended any meetings.

Besides the Report, there is nothing to support any of Ms. Walters' assumptions about a bias on the part of Member Nutley in favor of DOC and against Ms. Walters. No specific rulings made by Member Nutley are challenged by Ms. Walters, even on appeal. She offers instead, blatant conjecture and reckless allegations of an intentional sabotage by Member Nutley, with no evidence. This falls far short of the legal requirement that she provide specific evidence to support proof of actual or implied bias.

Ms. Walters even admits that there was insufficient information before the superior court to reveal the nature of the "relationship" between Member Nutley and Mr. Lehman. She notes, "The full expanse, depth, and scope of the Nutley-Lehman connection has not been established on the record." Brief of Respondent (Br. Resp't) at 19 n.2 (emphasis added).

With so little information before it, the superior court abused its discretion when it vacated the PAB order relying solely on the Report and Ms. Walter's conjectures. Washington courts require an actual finding of bias supported by credible evidence before a superior court can vacate an order on a finding of disqualification. When the superior court ruled, "It is not necessary to prove bias or that Ms. Nutley's decision was actually influenced by the relationship with Mr. Lehman," it was an error of law and an abuse of discretion that should be reversed. CP 864.

B. The PAB's Decision Should Be Affirmed

The PAB record contains relevant and substantive evidence supporting the PAB's Findings, and those Findings should not be overturned upon review. Likewise, because the PAB made no errors of law in arriving at its decision, the decision should be affirmed. Further, the PAB based its decision upon full consideration of the record, and that decision was neither arbitrary nor capricious.

The standard of review applied to a PAB decision is treated in detail in DOC's Brief of Appellant at 20–24. Ms. Walters cannot dispute that review of PAB decisions is governed by RCW 41.64.130 and RCW 41.64.140. Br. Appellant at 20–24, Appendix (App.) B. This Court reviews the 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 upholds an administrative board's factual finding if substantial evidence supports it. *Skelly v. Criminal Justice Training Comm'n*, 135 Wn. App. 340, 344, 143 P.3d 871 (2006), (citing *Ballinger v. Dep't of Soc. & Health Servs.*, 104 Wn.2d 323, 328, 705 P.2d 249 (1985), (citing *Gogerty v. Dep't of Inst.*, 71 Wn.2d 1, 8-9, 426 P.2d 476 (1967))). Questions of law are reviewed *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. 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. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 330, 646 P.2d 113 (1982)).

1. Ms. Walters Must Assign And Establish Error By The PAB In This Court's Review Of The PAB Decision.

Under the Rules of Appellate Procedure, (RAP) it is Ms. Walters' burden to assign error to the PAB's ruling. RAP 10.3(g) and (h) require:

(g) A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

(h) The brief of an appellant or respondent who is challenging an administrative adjudicative order under RCW 34.05 or *a final order under RCW 41.64 shall set forth a separate concise statement of each error which a party contends was made by the agency issuing the order, together with the issues pertaining to each assignment of error.*

RAP 10.3 (g) (h) (emphasis added). *See also* RAP 10.4(c) (requiring findings to be set forth in a brief or appendix when challenged).

Although the rules of this Court have been modified by General Order 98-2 In Re the Matter of Assignments of Error, the requirement to either include challenged findings verbatim, or to at least attach the findings to the moving party's brief, has not changed. Ms. Walters, who carries the burden, has cited and set out verbatim one Finding in her brief, Finding 2.10. Thus, the other PAB Findings are verities and should not be considered as part of her assignments of error. *See Lawter v. Empl. Sec. Dep't*, 73 Wn. App. 327, 332–33, 869 P.2d 102 (1994), (citing *Ass'n of Capital Powerhouse Eng'rs v. State, Div. of Bldg. & Grounds*, 89 Wn.2d 177, 183, 570 P.2d 1042 (1977)); *Shoreline Cmty. Coll. Dist. No. 7 v. Empl. Sec. Dep't*, 59 Wn. App. 65, 70, 795 P.2d 1178 (1990), *aff'd*, 120 Wn.2d 394, 842 P.2d 938 (1992), (if a party fails properly to assign error to the findings of an administrative agency, they become verities on appeal).

2. Ms. Walters' Arguments Fail To Show Any Error In Any Findings By The PAB.

Ms. Walters, in an apparent effort to re-try the PAB hearing, submits a lengthy and selective recitation of her version of the case presented to the PAB. However, she assigns error only to PAB Finding 2.10. *See* Br. Resp't at 32. The remaining unchallenged PAB Findings 2.1–2.9, 2.11, 2.13–2.15 are verities.¹ *See* CP 16–21; Br. Appellant at App. A.

It is undisputed that in February 2003, Ms. Walters responded to DOC Headquarters to what she perceived as an agency crisis when Secretary Lehman's son was arrested. Ms. Walters went in her role as the agency's head staff counselor to offer counseling services to Secretary Lehman and other administrators. FF 2.7, 2.8; CP 1819. Ms. Walters attempted to meet with Secretary Lehman, but his assistant informed her that the Secretary and DOC considered it a personal matter. FF 2.7; CP 18. During her visit, Ms. Walters spoke with numerous DOC managers and counselors, and sent an e-mail to her supervisor about her intentions to

¹ There is no Finding 2.12 in the PAB's decision.

assist both Secretary Lehman and other agency administrators.² FF 2.8, 2.11, 2.13; CP 19–20.

Upon returning to her office, Ms. Walters engaged in a discussion with Mary Sutliff, who was in her office to work on technical problems related to Ms. Walters' office equipment. FF 2.9; CP 19. She discussed the arrest of Secretary Lehman's son. *Id.* As discussed below, challenged Finding 2.10 sets out Ms. Sutliff's testimony regarding this conversation. In Finding 2.13, the PAB found that Ms. Sutliff's testimony throughout the case, which includes her testimony as outlined in Finding 2.10, was consistent and credible. CP 20. Ms. Sutliff's consistency was also a factor for DOC appointing authority Anne Fiala, in comparison to Ms. Walters' inconsistent and irrelevant responses to the charges. FF 2.15; CP 21. The PAB further found no motive for Ms. Sutliff to be untruthful about her discussion with Ms. Walters. FF 2.13; CP 20. The PAB also found corroboration for Ms. Sutliff's testimony from other DOC witnesses with whom Ms. Walters had stated she either had met or was

² Ms. Walters' email to her supervisor stated that she had spoken with Secretary Lehman's assistant, "and will be visiting with Mr. Lehman tomorrow. I'm going to offer my assistance to his wife as well. I talked with a lot of staff today and will continue to 'mill about' tomorrow at HQ. Staff are speechless and agonizing with Mr. Lehman." CP 62; FF 2.8, CP 19.

going to meet with Secretary Lehman to offer counseling services to him and other administrative staff. FF 2.11, 2.13; CP 1920.³

In contrast, the PAB found Ms. Walters' testimony inconsistent. FF 2.11; CP 19–20. She changed her testimony about her version of whether she or Ms. Sutliff initiated discussion regarding the Secretary. *Id.* Also, she denied ever telling or insinuating to anyone that she met with Secretary Lehman, when in fact she had. *Id.* The PAB found in Findings 2.8, 2.11 and 2.13 that Ms. Walters did communicate to other staff that she was meeting with Secretary Lehman and others. CP 19–20. Further, the PAB found that Ms. Walters changed her original statement about Secretary Lehman “hiding out” to say that she must have “parroted” that statement back to someone in a phone call that Ms. Sutliff must have overheard. FF 2.15; CP 21. Additionally, the PAB noted the testimony of Jim Blodgett, the disciplinary investigator, regarding Ms. Walters' claims that her supervisor and others were conspiring against her, but when asked

³ DOC rebuttal witnesses Linda Gaffney and Tom Foley, and Ms. Walters' witness, Jocelyn Hofe testified that Ms. Walters told them at the time of her visit to DOC Headquarters that she *had* met with Secretary Lehman and others about the “crisis”. Ms. Walters told Mr. Foley, a staff counselor, that she had talked with Secretary Lehman, and was doing a walk around Headquarters following it up. RP 1345. She also told another staff counselor, Ms. Gaffney, that she “had been with Joe [Lehman] and others on the 7th floor, kind of behind closed doors.” RP 1097–98. DOC manager Joceyln Hofe testified that Ms. Walters came to her office and said she was there working with people in the building. She said she had been spending some time with Secretary Lehman and he was taking it hard, and she may be needed more. *See* RP 1297–99.

to substantiate her theory, she would not offer any corroboration due to a claim of “confidentiality.” FF 2.14; CP 20.

Ms. Walters does not include a separate assignment of error for the above Findings, nor does she identify them by setting them out verbatim anywhere in her brief. Therefore, under RAP 10.3(g) & (h) and 10.4(c), these Findings are verities on appeal.

3. PAB Finding 2.10 Is Supported By Competent, Relevant, And Substantive Evidence.

Finding 2.10 provides:

Ms. Sutliff testified Appellant engaged her in a conversation regarding Mr. Lehman’s son, told her she was in Olympia to assist in the “crisis” and mentioned the names of managers at Headquarters. She testified Appellant also remarked that Mr. Lehman was in “hiding” in order to avoid discussing the issue. Ms. Sutliff also testified that based on Appellant’s comments to her, she believed the purpose for Appellant’s presence at Headquarters was to perform counseling services to staff.

CP 19.

The sworn testimony of Ms. Sutliff supports each sentence of Finding 2.10. On direct she testified about her conversation with Ms. Walters regarding the “crisis” in Olympia. RP 876. The same issue was addressed on cross, with little change in her account of the discussion. RP 889–92. The comment about Secretary Lehman being in “hiding” was discussed at RP 877 and RP 892–93. Although Ms. Walters’ counsel tried

to muddy the waters on cross, Ms. Sutliff was confident that she would not have included the term “hiding” in the e-mail she prepared about the conversation if Ms. Walters had not used it. RP 893; CP 65. Finally, Ms. Sutliff testified that this conversation lead her to believe that Ms. Walters was in Olympia to counsel staff at Headquarters. RP 877.

Finding 2.10 is also supported by unchallenged Findings 2.6–2.9 and 2.11–2.15 which are verities and must be accepted as true. In light of this supporting evidence, Finding 2.10 cannot be reversed unless the supporting evidence is overwhelmed by opposing evidence. *Ballinger*, 104 Wn.2d 323, 328–29. Ms. Walters offers little evidence to meet that high hurdle.⁴ Accordingly, the material Findings of the PAB are sound and should be affirmed.

4. The PAB’s Interpretation Of Policy 870.800 Was Based On Substantial Evidence In The Record.

Ms. Walters attacks Finding 2.3 without properly assigning error, arguing that DOC and the PAB misrepresent the terms and meaning of Policy 870.800. *See* Br. Resp’t at 33. Policy 870.800 at Sec. II provides:

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).

⁴ The only *evidence* she relies on is her statement of the events. She refutes only that she provided the names of counseling clients. Br. Resp’t at 37.

CP 41; FF 2.3, CP 16. It is Ms. Walters, however, who misrepresents the wording and intent of this policy. To support her argument, she reconstructs the policy as follows:

(1) all communication (2) with the staff resource center (3) relating to staff counseling, intervention, and consulting services (4) shall be confidential unless otherwise specified by law and/or departmental policy directive(s).

See Br. Resp't at 33 (emphasis added). Ms. Walters flips the wording of the policy to support her argument that only privileged communications from a client *with the staff resource center* are protected under policy. But the policy is broader and addresses "[a]ll communication relating to staff counseling." CP 41 (emphasis added).

Grammatically, the term "relating" in this context means all communication "connected," "associated," or in "reference" to staff counseling services. *See Webster's II New Riverside University Dictionary* 992 (2d ed. 1988). Yet, even while Ms. Walters theorizes that Policy 870.800 is restricted to protecting only privileged communications, she acknowledges that "under Washington law, the content and fact of counseling and identification of the client are all confidential."⁵ Br. Resp't at 34. Accordingly, Ms. Walters' disclosures to Ms. Sutliff indicating the *fact* that she was providing counseling services coupled with

⁵ In Ms. Walters' brief, she cites to her expert, Dr. Feldman's testimony that "the fact that someone comes to you for counseling is also confidential under the law of Washington." Br. Resp't at 34 (citing RP 1245).

her *identification* of individuals she had met or would meet with would be violation of the law and Policy 870.800.

Unchallenged Finding 2.3 captures the broader intent of Policy 870.800(II)'s confidentiality provision. Here, the PAB found that DOC developed the Staff Counseling Program knowing that:

[W]ithout the proper assurance of confidentiality, employees would be reluctant to participate in the program. Therefore, with Appellant's [Walters'] input, the department developed a policy to insure that attendance at counseling sessions and anything discussed in those sessions remained confidential.

CP 16.

The PAB's view of the policy in Finding 2.3 is further supported by the testimony of DOC Deputy Secretary Eldon Vail, who initiated the program with Ms. Walters. He explained that to encourage employee participation and to assure their labor unions that participation would not be tied to employee discipline, it was critical that the program include confidentiality provisions to safeguard employees' access and involvement in the program. RP 807-10; *See* CP 41-51 (Policy 870.800). Ms. Walters' witness, Michael Robbins, confirmed that testimony. RP 1259-60. Significantly, Ms. Walters' own testimony established her understanding that Policy 870.800 protected more than privileged communications obtained in a counseling relationship, admitting that both

the fact that counseling services were being provided and the content of those services were confidential under the policy. RP 844. She also testified that under the policy, staff counselors could not share, with someone outside of the program, the name of a staff member to whom they were providing services. RP 844-45, 1380, 1383. Ms. Walters own testimony renders her attack on Policy 870.800(II) meritless. Ms. Walters understood the policy, helped write the policy, and understood the common sense restriction that communications relating to counseling were to be confidential.

5. The PAB Decision And Its Conclusions Of Law Are Not Contrary To Law And Are Supported By The Evidence.

Ms. Walters assigns error to PAB Conclusion of Law (hereinafter Conclusions) 4.3.⁶ It states:

As the Statewide Director of the Staff Counseling program and a Washington Management Service Manager, Appellant [Walters] 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

⁶ Ms. Walters does not assign error to PAB Conclusions 4.1 or 4.4. In regard to Conclusion 4.2, in a footnote she alleges her "belief" that the burden of proof should be "clear and convincing." Br. Resp't at. 30 n.6. From its inception, the PAB has consistently held that the standard of proof in a disciplinary appeal is a preponderance of evidence, and cited to its decision in *Baker v. Dept. of Corrs.*, Personnel Appeals Board (PAB) No. D82-084 (Feb. 11, 1983). Therefore, given the long history of the standard of proof applied by the PAB as one of a preponderance of the evidence, that standard should control this Court's review of the PAB's order.

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. Every legal conclusion drawn by the PAB in this Conclusion has support in the record and will be addressed individually below.

Ms. Walters was a Washington Management Services (WMS) manager and the highest ranking member of the Staff Counseling Program.⁷ Her 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.” RP 34–39; CP 34–39; *See also* RP 838–841. Ms. Fiala testified that as the head of the Staff Counseling Program, Ms. Walters had a clear understanding about what confidential information should or should not be shared. RP 1192. Ms. Fiala also explained that because the situation involving the Secretary’s son was a personal issue for the Secretary, and not an agency issue, it heightened Ms. Walters’ obligation to maintain confidentiality. RP 1193–94.

⁷ A WMS position raises the expectation that managers are to have certain standards because of their background, training and education. Individual accountability for program results, and efficient management of resources, including development of leadership and interpersonal abilities, training and critical management skills are some of the requirements to be in the WMS. *See* WAC 357-58-010, 020, (formerly codified at WAC 356-56-001-002).

The testimony of Ms. Walters, her supervisor Ms. Littrell, and investigator Mr. Blodgett, support this conclusion, as their testimony identified Ms. Walters as developing the bulk of the policy before it went through other reviews. RP 839, 842, 943–44, 1029–30, 1037. Ms. Walters further testified that she was certainly responsible for implementing the program policies and she generally agreed with the policy. RP 842.

The PAB's determination in Conclusion 4.3 that Ms. Walters' actions—sharing information with Mary Sutliff—were highly inappropriate and unethical is well-supported. Ms. Sutliff was *not* her secretary or a member of the Staff Counseling Program who would be privy to confidential counseling information. Ms. Sutliff was only the technical site coordinator for the office where Ms. Walters worked, she never reported to Ms. Walters, and she was never assigned as clerical support for Ms. Walters, other than to mail or complete a copying job. RP 871–72, 914, 946.⁸

⁸ Ms. Sutliff testified that her duties were to provide clerical support for community corrections staff. Ms. Sutliff was not a subordinate of Ms. Walters and provided only technical support to Ms. Walters, e.g., assisting her with problems with office equipment. RP 870–71. Ms. Sutliff explained that she was not a member of the Staff Counseling Program and phone calls for Ms. Walters did not go through her. RP 871. Ms. Walters had her own post office box, fax and telephone lines, and locks for her office and storage closet. RP 872–73, 946. Ms. Walters' support staff was provided by Ms. Littrell's secretary and administrative assistant. RP 945. Hence, the evidence clearly refutes Ms. Walters' assertion that according to her expert, "Sutliff was herself within the ambit of any confidentiality obligation supporting health care provider services under federal and

Ms. Walters' response claims her discussion with Ms. Sutliff was necessary during the repair of her phone so that administrators at DOC could contact her during the "crisis." *See* Br. Resp't at 39. She also claims that any discussion between her and Ms. Sutliff was "legally and ethically permissible" asserting that Ms. Sutliff was an administrative aide to her as registered counselor. Br. Resp't at 35, 41-42.

Assistant Deputy Secretary Fiala, however, explained that as a support staff in a field office, "there would have been no reason for her [Sutliff] to know any of that information. It was . . . very specific information that actually no one should have been aware of." RP 1192. Further, Ms. Walters admitted that she was never in a relationship with Ms. Sutliff where she shared things about the Staff Counseling Program that were confidential. RP 1377-78. It is disingenuous and contrary to the evidence for Ms. Walters to assert that Ms. Sutliff was her administrative aide or assigned clerical support who would be privy to confidential information associated with the Staff Counseling Program. In addition, even assuming Ms. Walters needed assistance from Ms. Sutliff relating to a phone problem, that was no reason "to discuss the matter with

Washington privacy laws." Br. Resp't at 42. Ms. Walters also omits the significant fact that her expert, Dr. Stephen Feldman, admitted at the conclusion of his testimony that his opinion had been premised under the mistaken belief that Ms. Sutliff was Ms. Walters' lead secretary. RP 1251-52.

Sutliff to explain why specific people should be given access to her personal numbers.” Br. Resp’t at 35.

The PAB’s Conclusion is also consistent with the explanation of the situation by Deputy Secretary Eldon Vail:

By being the director of the Staff Counseling Program and gossiping about [Secretary Lehman’s] son is not a very productive activity or an activity designed to do anything but harm to the individual I believe that it is a violation of an ethical requirement that folks at the, that level of the organization should have to adhere to For anybody in a leadership position in the Agency to engage in behavior like that is outrageous.⁹

RP 823–24.

In her attack of Conclusion 4.3 regarding the disclosure, Ms. Walters argues that there can be no breach of confidentiality if she did not actually meet with Secretary Lehman or other managers. However, it does not mitigate the policy violation that Ms. Walters did not disclose actual counseling. The record supports the PAB’s determination that Policy 870.800(II) applies to “all communication relating to staff counseling, intervention, and consulting services,” and not to just privileged communications arising out of a counseling session. CP 41. As

⁹ Notably, when Ms. Walters was asked whether it would be inappropriate for the director of the Staff Counseling Program to make the comment that Secretary Lehman was hiding from people in the hopes to avoid discussing the situation, her answer was, “I believe, personally, yes that would be inappropriate.” RP 860.

explained by Assistant Deputy Secretary Anne Fiala, who was the appointing authority, Ms. Walters violated the policy:

Because she was giving Mary [Sutliff] information about what she had been doing in the role of a counselor. She let Mary know information so it became apparent of the fact that she was offering services to someone and why those services were being offered. And I think our policy is clear that those communications are to be confidential. That, you know, that's the whole intent of the Program.

RP 1196.

Deputy Secretary Vail agreed with Ms. Fiala, and explained that whether she was lying about having provided those services or not, "either way, she's destroyed her credibility and put at risk the credibility of the Program. Whichever version is true." RP 822; *see also* RP 813.

Finally, there is evidentiary support for the PAB's Conclusion in 4.3 that Ms. Walters gave the impression that she went to DOC Headquarters to perform counseling services. First, Ms. Sutliff credibly testified that Ms. Walters initiated the discussion about her response to the "crisis" involving the Secretary's son's arrest, showing her a copy of the newspaper articles about the event. RP 875-77, 905; Findings 2.10, 2.12, CP 19-20. Ms. Walters then proceeded to tell Ms. Sutliff that she had been assisting with the crisis and that people were upset. RP 876. She also mentioned some names of people she had assisted and mentioned that Secretary Lehman was in hiding to avoid seeing people. *Id.*

Ms. Sutliff logically presumed that Ms. Walters had met with Secretary Lehman and had this information because she had been at Headquarters responding to the incident as the Director of Staff Counseling. RP 877; FF 2.10; CP 19.

Next, Ms. Walters' discussion with Ms. Sutliff was consistent with the content of the email she sent to her supervisor while she was at DOC Headquarters. *See supra* note 2, at 13; CP 62; *see also* Finding 2.8, CP 19. Furthermore, Ms. Sutliff's testimony was corroborated at the hearing by the testimony of three witnesses with whom Ms. Walters had made very similar disclosures. *See supra* note 3, at 14–15; *see also* Findings 2.8, 2.11, 2.13, CP 19–20. Ms Littrell, who had designated authority over the program, also testified “that any communication that would, could possibly lead to identifying a person or anything about specific issues regarding that person’s contact with the Staff Counseling Program was a violation of confidentiality.” RP 973.

In summary, there is substantial evidence to support the PAB's Findings and Conclusions. The record confirms that Ms. Walters went to DOC Headquarters to perform counseling services, and then inappropriately discussed with Ms. Sutliff facts about the situation, including providing specific names, and how Secretary Lehman was coping with the situation.

C. Ms. Walters Cannot Establish That Policy 870.800 Is Unconstitutionally Vague

Ms. Walters argues briefly that Policy 870.800 as applied is unconstitutionally vague. Her argument is devoid of analysis other than a rehash of her contention that Policy 870.800 is limited to protecting confidential communications obtained in the course of a professional relationship.

Under the “void for vagueness doctrine” cited by Ms. Walters, a “statute is presumed to be constitutional.” *Haley v. Medical Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991), (citing *Seattle v. Eze*, 111 Wn.2d 22, 26, 759 P.2d 366 (1988)). The party challenging a statute’s constitutionality on vagueness grounds has the burden of proving its vagueness beyond a reasonable doubt. *Haley*, 117 Wn.2d at 739.

Assuming that the void for vagueness standard even applies to a personnel policy, applying that heavy burden here, Ms. Walters fails to prove that DOC Policy 870.800 is unconstitutionally vague. The policy’s provisions regarding confidentiality and the application to bar her from discussing Secretary Lehman is straightforward. Her claim of vagueness is particularly frivolous because it was Ms. Walters’ job, as she herself defined it, to develop all policies associated with the Staff Counseling Program. *See* FF 2.2, 2.3; CP 16; *see also* CP 34–39 (WMS Position

Description). Indeed, Ms. Walters own testimony demonstrated that it aligned with DOC and the PAB's interpretation of Policy 870.800. She understood that it protected counseling services, the content of those services, and identities of staff accessing the program. RP 844-45.

Ms. Walters offers no credible showing that Policy 870.800 is vague. The PAB therefore made no legal errors in Conclusion 4.3 regarding the intent and application of Policy 870.800 and it should be affirmed.

D. The PAB's Decision Upholding Ms. Walters' Dismissal Is Neither Arbitrary Nor Capricious

In light of the sound Findings and Conclusions, Ms. Walters' assertion that the PAB's decision to uphold her dismissal was arbitrary and capricious is without merit. On review, considerable deference is given to the choice of remedies imposed by an administrative agency. *Skold v. Johnson*, 29 Wn. App. 541, 550-51, 630 P.2d 456 (1981). Because the PAB's decision to affirm Ms. Walters' dismissal does not display willful or unreasoning disregard for the evidence, it is neither arbitrary nor capricious. *See Terhar v. Dep't of Licensing*, 54 Wn. App. 28, 34, 771 P.2d 1180 (1989).

The record contains extensive support for DOC's decision to dismiss Ms. Walters from her position as Director of Staff Counseling,

and the PAB's detailed Order demonstrates its careful consideration of that record. Specifically in reference to the sanction, the PAB found that:

In assessing the level of discipline, we have considered the totality of the credible evidence, Appellant's position of responsibility and authority within the department and her history of corrective action. We find no reason to overturn Appellant's termination. 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. Under the totality of the proven circumstances, Respondent has proven that dismissal is the appropriate disciplinary sanction, and the appeal should be denied.

CL 4.4; CP 23.

Assistant Deputy Secretary Lynne Delano testified that during her supervision of Ms. Walters, she was compelled to issue expectations and corrective action relating to Ms. Walters' lack of accountability, dishonesty and failure to follow the agency's ethics policy. RP 1074-78; *see also* FF 2.5; CP 17-18. Ms. Delano was concerned that Ms. Walters' behaviors were hurting her credibility and that of the program, and considered her to be one of the most difficult employees she had ever supervised. RP 1078, 1092.

Appointing Authority Anne Fiala testified that as head of the Staff Counseling Program, and a WMS employee, Ms. Walters was held to a

very high ethical standard. RP 1202. She explained that Ms. Walters was expected to be a role model, not only through what she said but through her actions in carrying out the program's policy. RP 1195. Ms. Walters neglected her duties to uphold the expectations of her job description, and damaged the program and its credibility by sharing confidential information with Ms. Sutliff. RP 1195–96. Ms. Fiala explained:

[A]s soon as anyone in the Agency realizes that they [staff counselors] do talk about circumstances or talk about things that have happened . . . then . . . the Program's not effective. There's no reason to have it. I mean, you know, if you've lost staff's faith in what it was intended to do.

RP 1195.

Ms. Fiala considered all of the information before her in totality, including Ms. Walters' misconduct, and her history of corrective action, before concluding that the DOC could not continue her employment. She determined "that that was not what we could do in order to make sure that this Program continued to operate at a high level of integrity." RP 1202; *see also* FF 2.5; CP 17–18. Additionally, Deputy Secretary Eldon Vail, who gave final approval for Ms. Walters' dismissal, testified that Ms. Walters' comments to Ms. Sutliff went "well beyond the behavior that we can accept out of any staff counselor, let alone the director of the program." RP 814.

Based on this testimony and the complete record, the PAB agreed that Ms. Walters' behavior was detrimental to the integrity of the Staff Counseling Program and that the sanction of dismissal was not too severe.

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. *Terhar*, 54 Wn. App. at 34. Therefore, the PAB’s decision was neither arbitrary nor capricious, and should be upheld on review.

E. Attorney’s Fees Are Not Authorized By RCW 41.06

Ms. Walters relies upon RAP 18.1 and 18.9(a), without any further support, for her contention that she should be awarded attorney’s fees. The Court need not reach this issue because it has already denied Ms. Walters’ Motion to Dismiss, Motion to Strike, and Request for Sanctions.¹⁰ However, if the Court examines Ms. Walters’ demand for attorney’s fees, it should reject the claim because attorney’s fees are not authorized by any applicable law.

If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expense as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

RAP 18.1(a) (emphasis added). Attorney’s fees are not authorized in an action brought pursuant to former RCW 41.06.130 and RCW 41.06.140, nor are they authorized by RCW 41.06.220(2), if an employee is reinstated

¹⁰ See this Court’s Ruling signed by the Clerk dated September 10, 2007.

after a successful appeal before the PAB or Personnel Resources Board (PRB).

In *Trachtenberg v. Dep't of Corrs.*, 122 Wn. App. 491, 93 P.3d 217 (2004), *review denied*, 103 P.3d 801 (2004), the Court squarely upheld the precedent set by *Cohn v. Dep't of Corrs.*, 78 Wn. App. 63, 895 P.2d 857 (1995). *Trachtenberg* found:

The *Cohn* court's reasoning on this issue is sound:

While RCW 49.48.030 affords a state employee some right to recover attorney fees, the right does not explicitly apply to an administrative appeal. Because an attorney fee award for a successful administrative appeal is not listed as one of the 'rights and benefits' specifically afforded to an aggrieved employee in RCW 41.06.220(2), attorney fees – like interest on back pay – cannot be recoverable in an administrative appeal of [a] state agency disciplinary action. Thus, not only does the Board lack authority to award attorney fees, but a fully reinstated state employee does not appear to possess the right to receive attorney fees after a successful administrative appeal.

Trachtenberg, 122 Wn. App. at 497 (citing *Cohn*, 78 Wn. App. at 69).

In *Trachtenberg*, the plaintiff had been terminated from his position with DOC. Like Ms. Walters, he had a right to administratively pursue an appeal of his termination. RCW 41.06.170(2). *Trachtenberg's* right of appeal was also to the PAB. Regarding the function of the PAB, the *Trachtenberg* court noted:

Under the statutory framework, the Board can hear "appeals" and can enter "orders." In addition, the Board is given the

authority to affirm, reverse, or modify disciplinary decisions. WAC 358-30-050. If the Board reinstates an employee, RCW 41.06.220 applies and the employee is entitled to restoration of back pay, sick leave, vacation accrual, retirement and OASDI . . . credits.

Trachtenberg, 122 Wn. App. at 496. With respect to the recovery of attorney's fees for pursuing an appeal at the PAB, the *Trachtenberg* court found:

Attorney fees are *notably absent* from the enumerated remedies available. If the legislature had intended attorney fees to be available for Board appeals, *the logical place to include that provision would be in the statutes governing the Board.*

Id. at 496. (emphasis added).

Therefore, there is no applicable law granting a party the right to recover attorney's fees and Ms. Walters' request for such fees should be soundly denied.

III. CONCLUSION

The superior court abused its discretion by granting Ms. Walters' motion to vacate because Ms. Walters waived any right to challenge Member Nutley's participation in the PAB hearing and the superior court record is devoid of any evidence of Member Nutley's actual or potential bias. Furthermore, the PAB's Findings are supported by substantial evidence in the record and its Conclusions are not contrary to law. Additionally, the PAB's decision to deny Ms. Walters' appeal was neither arbitrary nor capricious. Therefore, the DOC respectfully requests that the

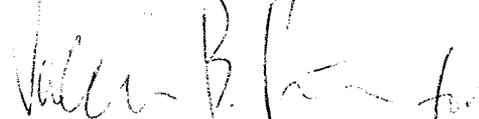
Court reverse the superior court order vacating the order of the PAB and affirm the order of the PAB.

RESPECTFULLY SUBMITTED this 10th day of November, 2007.

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BY  NO. 35919-7-II

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

STATE OF WASHINGTON,
DEPARTMENT OF CORRECTIONS,

CERTIFICATE OF
SERVICE

Appellant,

v.

CYNDI WALTERS,

Respondent.

I certify that I served a copy of the Appellant's Reply Brief on all parties or their counsel of record on November 20th, 2007 as follows:

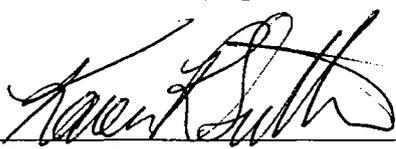
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of November, 2007 at Olympia,
Washington.


KAREN SUTTER