


No. 35919-7-II

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

**STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS,**

Appellant,

vs.

CYNDI WALTERS,

Respondent.

BRIEF OF RESPONDENT

David M. Rose
WSBA #32849
Attorney for Respondent

249 West Alder Street
P.O. Box 1757
Walla Walla, WA 99362
Tel: (509) 527-3500
Fax: (509) 527-3506
Email: david@minnickhayner.com

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I. INTRODUCTION

By this appeal, the Washington State Department of Corrections (“DOC”) asks this court to endorse and condone deliberate misconduct by the DOC and a Personnel Appeals Board (“PAB”) hearing officer. It further asks this court to uphold the DOC’s unjustified and illegal pretext firing of a senior civil servant for doing her job and protecting the rights and privacy of DOC staff. There are no close questions of fact or law in this case, and there is none on appeal. Either the administrative agencies and tribunals of this state are governed by the rule of law, or they are not. It is that simple.

The Respondent, Dr. Cyndi Walters (“Walters”), timely appealed her discharge from a DOC Washington Management Service (“WMS”) position as State Director of the Staff Resource Centers (“SRC”) to the PAB. Five days of testimony failed to produce any evidence to substantiate the charges against her - that she violated a DOC Policy and Directive by disclosing employee communications related to counseling. Yet, the PAB upheld the discharge. During the superior court review of the PAB Order, Walters discovered that the PAB hearing officer had concealed a prior professional and personal relationship to the DOC and its then Secretary, Joseph Lehman, Sr., who was the central figure in the charges leveled against Dr. Walters.

Walters produced unchallenged evidence that the hearing officer Ms. Busse Nutley had, during a critical time in her career shortly before her appointment to the PAB, participated in a high-profile “partnership” sponsored by and conducted at DOC under the direction and with the participation of Secretary Lehman. The partnership addressed issues directly relevant to the charges leveled against Dr. Walters. **Nutley failed to**

disclose that connection at any time. Moreover, she concealed any personal knowledge of and relationship with Lehman whatsoever until the middle of the PAB trial when Dr. Walters called him as an adverse witness. She then minimized their knowledge and relationship to each other, acknowledging only that they had served on the Governor's Cabinet at the same time. Dozens of pages of published documents proved otherwise.

The superior court vacated the PAB proceeding and remanded the entire case to its successor Personnel Resources Board ("PRB").

IT IS HEREBY ORDERED that the Appellant's Motion to Vacate PAB Order; Biased Tribunal & Failure to Disclose Relationship To Party & Witness, is granted and this case is remanded for a new administrative hearing before the Personnel Resources Board. *The decision from the hearing is appended, addressing the merits on an advisory basis.*

(Court's handwritten text italicized.) CP 985-86.

The DOC appeals that Order and assigns error to the court's attachment of an advisory opinion that the termination of Dr. Walters was wrongful and the DOC's position in firing her had no merit.

The Order vacating the PAB proceeding was compelled by an obvious due process violation. The DOC knew of the hearing officer's concealed relationships to the DOC and Secretary Lehman all along, and they have continued to defend the violation of the Code of Judicial Conduct and the fundamentals of administrative due process throughout these proceedings, including this appeal.

The DOC has raised numerous other issues seemingly outside the scope of review of this appeal, including a request that this court now do what the DOC argued the superior court had no jurisdiction to do after it granted

Walters's *Motion to Vacate* below - review and decide the case on the merits of the administrative action. Walters unsuccessfully opposed this maneuver by her *Motions to Dismiss and Strike* in this court, in part on the grounds that the superior court is designated by statute as the appropriate forum for initial review of administrative decisions. Without waiving her objections, Dr. Walters will address the merits of her termination as the court apparently has rejected her request to limit this appeal to a review of the order granting her *Motion to Vacate*.

The Walters discharge was factually unjustified, arbitrary and capricious, and contrary to law. Walters was falsely charged with disclosing a confidential and privileged communication relating to staff counseling where no such communication had been disclosed, and there was no privileged communication or counseling relationship. There is no competent evidence to support the charge that Walters violated DOC Policy 870.800 (addressing health care confidentiality of SRC communication) when she spoke with an assigned administrative and information technology assistant regarding telephone and other communication problems.

The DOC managers wanted to punish Walters for other reasons, and they seized upon the bizarre and insubstantial allegations of an office assistant, Mary Sutliff, as their vehicle. They worked with Sutliff in creating her vague and subjective allegations, but then they had to distort DOC Policy interpretation to meet the charges. Finally, they concocted a disciplinary record to support termination instead of a lesser sanction.

The DOC manufactured *post facto* disciplinary charges for her personnel record - after they had concluded she should be fired, and then

cited them as grounds and justification for her dismissal. One of these *post facto* reprimands included discipline against Walters for her refusal to disclose names of counseling clients in violation of DOC Policy and state and federal law. This disciplinary record is false and groundless - as a matter of law.

When the DOC realized that there was no evidence to support their firing of Walters based upon a violation of the confidentiality policy, they changed the offense to one of unethical and inappropriate “gossiping” about a notorious arrest of Secretary Lehman’s son. The DOC position on this discharge is untenable because Walters was performing her job when she discussed the need for her to be accessible to DOC staff during a public relations disaster with significant impact on staff morale.

The DOC’s conduct and arguments in this case would give George Orwell nightmares. This court must vindicate the rule of law and common sense and reject the DOC’s appeal and restore Dr. Walters to her position.

II. ASSIGNMENTS OF ERROR

1. The administrative hearing officer of the Personnel Appeals Board erred as a matter of law by failing to disclose a prior professional and personal relationship to the DOC and its highest ranking officer.
2. The administrative hearing officer of the Personnel Appeals Board erred as a matter of law by failing to recuse herself from hearing the civil service appeal of Walters.
3. The Personnel Appeals Board erred as a matter of law upholding the dismissal of Walters as the DOC State Director of the Staff Resource Centers.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the administrative hearing officer fail to comply with Due Process, the appearance of fairness doctrine and Canon

3(D)(1) of the Code of Judicial Conduct when she failed to disclose a prior professional and personal relationship to the DOC and its highest ranking officer?

2. Was the statement during the third day of the five day hearing that the administrative hearing officer and the DOC Secretary “spent time together in the Governor’s Cabinet” sufficient disclosure to comply with Due Process, the appearance of fairness doctrine and Canon 3(D)(1) of the Code of Judicial Conduct?
3. Did the participation of the administrative hearing officer in the DOC-sponsored *Partnership* with DOC Secretary Lehman addressing issues involving housing for sex offenders require her recusal when the discharge of Walters arose out of a discussion allegedly relating to the publicity surrounding the arrest of Lehman’s son for a sex offense?
4. Does the absence of any evidence that any “communication relating to staff counseling” was disclosed by Walters during the discussion with her assistant determine that the discharge was arbitrary and capricious and contrary to the evidence?
5. Does the *post facto* re-writing of the DOC Policy to cover this firing violate Walters’s right to Due Process of Law?

IV. STATEMENT OF THE CASE

A. DOC Harassment of and Retaliation against Walters

Walters obtained a Ph.D. in Educational Leadership from Gonzaga University in 1998 with a focus on correctional institution management. RP 1348, 1373. The DOC hired her as both a state licensed Staff Counselor and the first State Director of the Staff Resource Centers on May 9, 1998. RP 1348. Walters helped develop pioneering SRC programs and draft DOC policies on counseling client privacy and the protection of confidential staff information and communications based on state and federal privacy law. RP 160, 943. The SRC provides short-term staff counseling and intervention and notifies DOC staff and managers of available community and government resources for personal and professional issues. RP 160. Among

other roles, the SRC program functions similarly to employee assistance programs like the Washington State Employee Assistance Program (“EAP”). Employee participation in the EAP and information gathered in the process are held in strict confidence. RCW 41.04.730.

After complaining about the abusive conduct of a male subordinate and serial litigant, Walters found herself the target of repeated disciplinary actions by DOC. Regional Administrator Marjorie Littrell, Walters’s direct supervisor, recruited DOC Assistant Deputy Secretary Lynne DeLano in escalating the discipline. They challenged Walters on petty issues such as travel approvals and reimbursements, and they criticized her for her protection of SRC client confidentiality as questions of her “integrity” and “credibility.” They demanded to know whom she was meeting with, where, and when. RP 292-99.

Since DeLano and Littrell were general DOC operations supervisors and not licensed counselors, Walters stood fast that she could not disclose this confidential information to them. In apparent punishment, Littrell and DeLano moved Walters away from her SRC colleagues and secure office at the Washington State Penitentiary to cramped offices in the local community corrections Walla Walla Field Office (“WWFO”). RP 1348. The move was done while Walters was on vacation and without any concern for the confidentiality or security of Walters’s files or personal effects. RP 1348.

B. The Joseph Lehman, Jr. Incident

In late January 2003, DOC Secretary Joseph Lehman’s then 38-year-old son, Joseph Lehman, Jr., was arrested and charged with first degree rape of a child for sexually assaulting his girlfriend’s two-month old baby

daughter. RP 144. The Secretary's son had a prior 1989 conviction for the armed robbery of a bank-courier vehicle in Tacoma. Secretary Lehman, then a senior DOC manager, had argued for leniency, and his son served only one day in prison. RP 145. The Lehmans relocated to Pennsylvania and later Maine, before Lehman, Sr. returned to head up the Washington State DOC. According to press reports, Lehman, Jr. also admitted to police sexual activity with a nine-year old Maine girl, while his father had been Commissioner of the Maine Department of Corrections. RP 145-46.

News of the sensational Lehman arrest broke in early February 2003 in local and national print, on-line, and broadcast media. It included accounts regarding the latest offense, the previous sentence of probation, and commentary whether a fair investigation and prosecution were possible. RP 144-47. There was immediate concern that this negative attention would reflect poorly upon the Department and affect staff morale.¹

C. Dr. Walters Visits DOC Headquarters

Dr. Walters was in Olympia during the first week of February 2003 to attend several DOC management and SRC program-related meetings. One of the SRC counselors suggested that Walters go to the DOC headquarters to promote the availability of the SRC's resources or to provide services in response to the Lehman incident. RP 1263-64. It was Dr. Walters's job to gauge staff reactions to events and coordinate SRC responses. RP 160-67.

¹ Secretary Lehman's son pleaded guilty to rape of a child in the first degree, and there was an ensuing national media outcry about the prosecution's sentencing recommendation of only probation, which a judge of the superior court rejected. In December 2003, Joseph Lehman Jr. was sentenced to four years in prison, to be served outside the Washington DOC. CP 623-776, Ex. 4

Walters visited the DOC headquarters building on February 6, 2003, and spoke with Secretary Lehman's Chief-of-Staff, Patria Robinson-Martin. Lehman was not available and was due to return later. After Walters checked in with her again on February 7, Robinson-Martin told Walters that her services were not needed since the Secretary was dealing with his son's arrest as a private matter. Robinson-Martin did so on her own initiative, since she never told Lehman about Walters's visit before she had sent Walters away. RP 927-28. Thus, (1) it is undisputed that Walters **never met** with Secretary Lehman, and that DOC management soon learned this, RP 851-53; and (2) it is undisputed that Walters received no communication from Lehman of any kind during her visit to Olympia.

D. The Sutliff Conversation

Upon the return to her cramped offices at the WWFO on Monday, February 10, 2003, Walters had a pre-arranged meeting with the lead secretary and information technology coordinator Mary Sutliff ("Sutliff") to obtain telephone and computer repair services. After her precipitous office relocation several months earlier, Walters had experienced a number of problems with her telephone, cell phone, computer, printer, and fax equipment. Her office phone would not ring at all or ring in someone else's office. RP 886, 956, 1010-11. Littrell had also tasked Sutliff to provide Walters with local clerical support, since the dedicated SRC support staff were located at the Penitentiary. **Littrell instructed Walters to keep Sutliff informed about her activities and whereabouts.** RP 855-56, 871, 884, 907, 914, 920, 946, 1350, 1375-76. Sutliff had arranged for a technician to address Walters's telephone problems that morning at 8:00 a.m.

Walters was concerned about being reachable by telephone. RP 1354. When they met to discuss telephone, fax, and computer repairs, Walters gave Sutliff her personal cell phone and her home and parents' home numbers with instructions to give them to the specific, named SRC and emergency response staff and other managers in Olympia if they needed to contact her in connection with her visit to Olympia, including issues completely unrelated to the Lehman arrest publicity, such as editing brochures, working on the Critical Incident Stress Management ("CISM") policy, and academy training issues. RP 1297, 1354, 1357.

Sutliff had already learned of the arrest incident through office discussion at the WWFO, RP 1353, and she seemed preoccupied with the incident and a news article on Walters's desk which had come from Assistant Deputy Secretary DeLano's own administrative assistant at DOC headquarters in Olympia. Sutliff told Walters that some WWFO staff thought that Secretary Lehman should resign. RP 1353-54.

Sutliff and Walters were not social or office friends, and they did not discuss their personal lives or activities with each other casually. Walters knew that Sutliff had long-harbored misplaced resentment against her and her husband since they had attended high school together. CP 537; RP 873, 908.

E. Termination by Pretext

Following Littrell's instructions about travel and activities, Walters had notified Littrell by e-mail that she was in contact with Robinson-Martin and intended to offer SRC services to Secretary Lehman and his wife during her trip to Olympia and DOC headquarters. RP 319. Littrell and DeLano then investigated Walters's stay-over at the DOC headquarters, even before Sutliff

entered the picture. They interrogated Robinson-Martin about whether she or the Secretary had requested to see Walters, even though any such counseling requests should have been confidential . RP 928; Appendix C. They consulted by telephone and e-mail on Walters's activities up to and including the morning of Walters's scheduled performance review with Littrell on February 12, 2003 at the WWFO. They found no evidence that Walters was acting improperly, to their well-documented chagrin. Appendix C. During her performance review on February 12, 2003, Walters routinely informed Littrell about staff morale issues, including the comment that Sutliff and other WWFO staff felt that Secretary Lehman should resign in response to his son's arrest. RP 1354.

Nine days after their February 10, 2003 conversation, Sutliff claimed she was "appalled" that Walters discussed the Lehman arrest incident with her during their brief interaction. After consulting with several layers of DOC supervisors, Appendix D, Sutliff sent an e-mail account to her immediate supervisor for forwarding up the chain of command. The contents of the Sutliff e-mail contain the entire factual basis of the case against Walters. RP 303.

The e-mail claimed to be an initial report of an incident, although the managers receiving it knew that it was the product of at least three levels of their own approval and instruction right up to Regional Administrator Littrell. Appendix D. Sutliff begins her written account of her conversation with Walters by admitting that another WWFO staff member showed her a newspaper article about the incident, but claims "I shared no comment." RP 303. Sutliff stated that she had a meeting with Walters "later in the day"

when her meeting with Walters was just minutes later at 8:00 a.m., shortly after the WWFO opened. CP 537-38; RP 303.

Sutliff alleged that Walters told her that she had been late in returning to the WWFO from Olympia due to the “crisis” she was dealing with there. Sutliff claimed not to know what situation Walters was discussing, and Sutliff alleges that Walters then pointed to a news article about the Lehman arrest. RP 303. Walters allegedly went on to discuss how she was “assisting those [sic] (dropped a bunch of names of the Administrators in Olympia) with dealing with the crisis.” Sutliff did not discuss the context of the conversation - Walters’s instructions about relaying her personal phone numbers to address her accessibility or the telephone problems preventing Walters from communicating with anyone else at the DOC. RP 303.

Sutliff also alleged that Walters commented that Secretary Lehman “was ‘hiding’ from people in hopes to avoid discussing the situation.” Sutliff later testified that she was “inclined to believe” Walters made the “hiding” comment, because it was contained in the e-mail she first prepared nine days after the incident. RP 893. Sutliff claimed that she was “appalled” that a person in Walters’s position would discuss “something of this magnitude without being warranted.” Sutliff then included an entirely gratuitous statement of her sympathy for the Secretary and his family. Sutliff concluded that she “felt it was inappropriate and unnecessary for her to bring it to my attention, especially considering her position with this agency.” Sutliff makes no mention of **her** role at that time or the context of the conversation to assist Walters by making sure that people, including administrators from the DOC headquarters, could reach Walters - especially in a “crisis.” RP 303.

On March 3, 2003, Littrell launched a formal Employee Conduct Report (“ECR”) against Walters alleging a violation of DOC Policy 870.800 “by sharing information regarding specific individuals you have worked with in an official capacity, or information about staff that you are aware of from your role as State Director.” RP 301.

The ECR did not specifically allege that Walters breached any DOC manager’s or administrator’s confidentiality. No confidential communication was identified. It was “sharing information” that violated Policy. When the ECR was prepared Littrell already knew from Lehman’s Chief of Staff, Robinson-Martin, **that Walters and Lehman never met or spoke during her trip to Olympia.** RP 928-30, 1340-41; Appendix C.

At Littrell’s request, fellow Regional Administrator James Blodgett conducted an “investigation” into the ECR charges. Aside from a meeting with Littrell to set up the ECR, and his in-person interrogation of Walters, Blodgett’s entire “investigation” was conducted by telephone with each “witness” that had participated in creating the Sutliff e-mail. Blodgett found the Sutliff charges independently “corroborated” since each such DOC manager reported that the e-mail account was “consistent” with their reading of the e-mail and their discussion with Sutliff while creating it. RP 323-24.

Blodgett never even interviewed Littrell or DeLano during his “investigation,” and he made no effort to cross-check any facts or accounts. Significantly, Mary Sutliff told Blodgett that Walters had previously wrongfully asserted confidentiality to block certain disclosures. This criticism by Sutliff is revealing since it can only come from Assistant Deputy Secretary DeLano and Regional Administrator Littrell, Walters's supervisors.

RP 321.

Sutliff has testified that she “did not pay attention” to the names Walters mentioned and did not know the names of anyone at DOC headquarters even though she handled routine SRC contacts between headquarters and Walters. RP 876. She later claimed that she “assumed” that they were counseling clients. During the Blodgett investigation, she mentioned the names of two top DOC managers, but Blodgett omitted those names from his report. RP 316-24; Appendix D. It was already a matter of record that Walters either never tried to contact or did not counsel them (Deputy Secretary Eldon Vail and Chief of Staff Patria Robinson-Martin.)

Regional Administrator Blodgett concluded that Walters violated this DOC Policy and Directive:

POLICY:

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).

DIRECTIVE:

IV. C. 6. Maintain privileged communication with the employee(s), unless otherwise specified by law and/or Department Policy Directive(s).

(Emphasis in original.) RP 293-94. RP 355, 357.

Blodgett also found that Walters clearly violated these provisions by a Walters e-mail not cited in the ECR. On the evening after visiting DOC headquarters on February 6, 2003, Walters notified Tacoma DOC employee, Rory Pederson, that she would not be able meet with him to edit a brochure as planned for the next day as she was “still needed in Olympia” until the

afternoon and by the time she arrived at his facility he would be on the way home. RP 319. In accord with Littrell's explicit directives and expectations, Walters amended a comment on her activities at headquarters to the Pederson e-mail and forwarded it to Littrell. Of course, Mr. Pederson did not see the e-mail as forwarded to Littrell with the additional comments only to Littrell:

I spoke with Patria today and will be visiting with Mr. Lehman tomorrow. I am 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. Anyway, I'll keep you posted.

RP 324, 329.

Blodgett found this a "clear violation" of the Policy and Directive, RP 324, while Littrell and Assistant Deputy Secretary Anne Fiala concluded that it did not violate DOC Policy 870.800. RP 977, 1207.

Assistant Deputy Secretary Anne Fiala accepted the Blodgett findings on the Sutliff conversation as a violation of the cited Policy and Directive as the basis for terminating Walters and incorporated his report into her formal termination letter. RP 292-99.

She later explains the importance of the connection of the discipline to Secretary Lehman:

To have violated the confidentiality of any staff member, much less that involving the Secretary of the Department, who is the highest ranking member of our Agency, not only constitutes neglect of duty, but is appalling and egregious at best. Additionally, your comments about the Secretary "hiding out" were inappropriate, indiscreet, and petty gossip beneath someone of your position within this Agency.

RP 293 (emphasis added).

F. The PAB Proceeding

Walters sought review of her termination before the PAB pursuant to RCW 41.64. The Legislature abolished the PAB effective July 1, 2006. RCW 41.06. The PAB hearing officer, Busse Nutley, ruled that the Board would decide what the DOC confidentiality policy meant, RP 825, even as no one in DOC management could say what “confidentiality” was violated.

The e-mail allegation that Dr. Walters said Lehman was “hiding” in the hopes of avoiding discussion of his son’s arrest was “a violation of confidence for him” even though nationwide news reports and DOC public statements said as much. “It’s sharing information about his behavior that is, borders on the line of gossip rather than necessarily being something that should even be discussed, period,” according to Regional Administrator Littrell. RP 975. Littrell admitted it was not privileged information, it was “just wrong” when attributed to Walters. RP 986.

Expert testimony before the PAB, provided by Dr. Stephen Feldman, established that there was no breach of confidential communications: “I saw nothing in the letter of dismissal, the ECR, or the other documents that I looked at, that provided any statement at all that was uttered by Dr. Walters that was confidential.” RP 1239.

The PAB rejected all of the testimony and arguments put forth by Walters and accepted the DOC version and interpretation of the facts and upheld the Walters termination in its purported “Conclusion of Law 4.3” discussed in detail *infra*.

G. The Superior Court Proceedings

Walters petitioned for superior court review under RCW 41.64.130.

During the pendency of the superior court proceedings, and prior to the review of the merits of the Appeal, Walters discovered that the PAB hearing officer had concealed a prior professional relationship with the DOC and a personal relationship to DOC Secretary Lehman including extended service together on the politically high-profile DOC *Housing for High Risk Offenders: Partnership for Community Safety* addressing the needs of high-risk sexual and dangerously mentally ill offenders, such as Lehman's own son. Walters promptly moved to vacate the entire PAB proceedings and the PAB Order and requested compulsory process to investigate the irregularities in the PAB hearing process. CP 608-22.

The Honorable Paula Casey of the Thurston County Superior Court indicated, at hearing, that she had reviewed the record and was prepared to rule in Walters's favor on the merits, but she could not do so since she was compelled to grant the *Motion to Vacate* and remand the entire matter to the PRB for a new hearing. Before entering a formal ruling, the Court referred the parties to mediation. When mediation failed, the Court granted the *Motion to Vacate* and entered a formal order to that effect, along with an informal "*Advisory Opinion*" sharing its view of the merits to the PRB (and to the supervising attorneys at the Attorney General's Office). CP 985-1037.

The superior court held no final hearing on the merits and entered no order deciding the merits of the case since there was no valid record upon which to base such a review. In the *Motion for Reconsideration* filed by Walters requesting a ruling on the merits of the DOC agency decision (that it was arbitrary and capricious DOC agency action in violation of Walters's rights), the DOC vigorously opposed any further ruling on the grounds that

the Court's ruling rendered the PAB record a nullity and that the remand order deprived the superior court of jurisdiction to consider the merits.

“That decision emphatically ends all further considerations about the PAB's decision. *The PAB decision no longer exists and the appellant [Walters] returns to the status she was in just prior to the PAB hearing.* The appeal of her termination by the DOC now must be heard by an administrative tribunal statutorily authorized to hear such appeals.”

CP 1163 (emphasis added).

V. ARGUMENT: THE MOTION TO VACATE WAS PROPERLY GRANTED

A. Vacating PAB Proceeding Not an Abuse of Discretion

The standard of review for a decision to vacate an order is abuse of discretion. There is no basis for overruling Judge Casey's Order vacating the PAB proceedings and order. A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons: if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

B. Walters Was Deprived of a Fair PAB Hearing

Due process requires an opportunity to be heard before a neutral adjudicator. *Wash. Med. Disciplinary Bd. v. Johnston*, 99 Wn. 2d 466, 475, 663 P.2d 457 (1983). It is axiomatic that an impartial decision maker is a central guarantee of due process, fully applicable to adjudicatory proceedings before administrative agencies. *Withrow v. Larkin*, 421 U.S. 35, 46-47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). “Due process, the appearance of fairness doctrine and Canon 3(D)(1) of the Code of Judicial Conduct (CJC) also

require a judge to disqualify himself if he is biased against a party or his impartiality may reasonably be questioned.” *State v. Dominguez*, 81 Wn. App. 325, 328, 914 P.2d 141 (1995).

The appearance of fairness doctrine targets the problem of a biased or potentially interested judge. *State v. Carter*, 77 Wn. App. 8, 12, 888 P.2d 1230 (1995). A judicial proceeding is valid only if a reasonably prudent and disinterested person 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 principles governing the disqualification of judges apply as well to administrative agencies.” *Nationscapital v. Dep’t of Fin. Insts.*, 133 Wn. App. 723, 765, 137 P.3d 78 (2006). *See also, Hill v. Dep’t of Labor & Indus.*, 90 Wn. 2d 276, 279-80, 580 P.2d 636 (1978) (“The same common-law rules of disqualification for conflict of interest as apply to judges also apply to administrative tribunals”).

The appearance of partiality is as harmful as actual bias. *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). The Code of Judicial Conduct requires judges to perform their duties without bias or prejudice, and judges should not participate in a tribunal “in which their impartiality might reasonably be questioned.” CJC Canon 3(D)(1). “The CJC recognizes that where a trial judge’s decisions are tainted by even a mere suspicion of partiality, the effect on the public’s confidence in our judicial system can be debilitating.” *Sherman v. State*, 128 Wn. 2d 164, 205, 905 P.2d 355 (1995).

C. PAB Hearing Officer Connected to Party and Central Personality in Walters Case

Walters uncovered evidence during the superior court appeal that the

PAB hearing officer, Busse Nutley, failed to disclose her relationship to the DOC and its Secretary. This discovery unmasked her misleading statement, and the misleading testimony from then DOC Secretary Joseph Lehman, claiming only a tangential connection through the Governor's Cabinet and concealing her relationship to the DOC and association with Lehman.²

Nutley deprived Walters of a fair hearing by failing to disclose her work with the DOC and Lehman regarding community release and housing of mentally ill and sexual offenders. The nondisclosure demonstrated actual or implied bias and certainly the appearance of bias. CP 608-22. No reasonable person can have confidence that Nutley provided a neutral forum for the appeal of the Walters discharge in connection with charges concerning "gossip" about the Lehman arrest. Walters certainly cannot.

1. The Partnership Was a Significant Connection

In 2002, while Director of the Office of Community Development,³ Nutley collaborated with Secretary Lehman in a DOC-sponsored *Housing High Risk Offenders: A Partnership For Community Safety* (the "*Partnership*") addressing public and government responses to the release of high-risk sexual and dangerously mentally ill offenders into the community. CP 626, Ex.1, p.1.

² The full expanse, depth, and scope of the Nutley-Lehman connection has not been established on the record since the discovery of their relationship came after the close of trial, and Walters was not granted an order for compulsory discovery that she had sought in her superior court *Motion to Vacate*.

³ During the first half of 2002, the Department of Community, Trade, and Economic Development ("CTED") was still divided into two departments- the CTED and the Office of Community Development ("OCD"). The Director of the OCD was Busse Nutley, and she represented the OCD/CTED on the *Partnership*.

The DOC initiated the *Partnership* “under the direction of Secretary Lehman” and with “support from the Governor’s Office.” It was a high-profile state and federally funded “collaborative process” with “the stated goal of promoting greater community safety through increased access to housing with appropriate supervision and support services.” CP 626, Ex.1, pp. 1-32.

The *Partnership* was “a relationship with close cooperation between parties that have common interests and specified and joint rights and responsibilities.” “There was an effort to select members who were leaders and/or had decision-making authority within their organization or constituency.” CP 626, Ex.1, pp. 1-32. A “working group” of ten staff members supported the *Partnership*: seven were from the various DOC regions, including Marjorie Littrell’s Southeast Region, one from OCD, and two from the Department of Social and Health Services.

The *Partnership*’s “well-attended meetings,” “noteworthy for their collegial atmosphere and productive energy,” were hosted at the DOC headquarters in Olympia. CP 626, Ex.1, pp. 1-32. The DOC is judicially estopped from arguing now that there was no evidence that Nutley attended at least every *Partnership* meeting. The DOC had exclusive control over the evidence of *Partnership* attendance, **and they put forth no evidence whatsoever in opposition** to the *Motion to Vacate*. CP 804-10.

The two key state agencies represented in the *Partnership* were Lehman’s DOC and Nutley’s OCD. Nutley and Lehman were the leading government officials associated with the *Partnership*, its published report, and its legislative agenda. They were two of only three Cabinet members and

agency heads among the twenty-five *Partnership* group members. The third was from the Department of Veteran's Affairs. CP 626, Ex.1, pp. 1-32.

2. The *Partnership* and the Lehman Arrest Impact Nutley

The *Housing High Risk Offenders: A Partnership For Community Safety - Phase One Final Report* marked only the first step in a planned several-year process, including pilot projects and a legislative agenda. It is unavoidable to question whether Nutley's participation on the DOC's *Partnership* played any role in her career prospects or credentials.

On January 22, 2003, just as the news of the arrest of Secretary Lehman's son for a child sex offense was exploding in the Washington and national media, the Washington State House of Representatives Criminal Justice and Corrections Committee was engaged in a Full Committee Work Session on the *Partnership* report. (*The Olympian*, Jan. 22, 2003, WA House Committee Calendar.) CP 611-12.

The negative publicity attending the arrest of Secretary's Lehman son may well have had a direct personal impact upon Nutley as well as Lehman. Due to the exigent circumstances of the *Motion to Vacate*, the superior court record is incomplete on the reasons why the *Partnership* was abandoned and disappeared from public light. It is reasonable to infer a relationship to negative publicity surrounding the Lehman arrest. Secretary Lehman could hardly be viewed as an objective proponent of releasing high-risk sexual offenders into the community. His son had molested at least two children in two states where the Secretary occupied the top corrections jobs. The record is clear and incontrovertible on one point: Busse Nutley **never** disclosed its

existence or her participation in the *Partnership* to Walters or her attorneys.

3. Nutley Knew Walters Termination Involved Lehman from the Start

Even before the first day of PAB hearings in the Walters appeal, Member Nutley was aware that the DOC had terminated Walters for an alleged discussion about the publicity concerning the arrest of Lehman's son as a sexual offender like the target population of the *Partnership*. Walters's *Trial Brief* charges numerous DOC managers by name with misconduct, collusion, and outright deceit in her wrongful discharge. Appendix A.

Lehman or his son were mentioned by name thirty-four times in Walters's seventeen page PAB trial brief. The witness list provided to Nutley before the hearing included Lehman and the other DOC managers. Appendix B. The termination letter by Anne Fiala - the agency decision on appeal - discusses the Lehman incident right from the first substantive paragraph:

During the course of this conversation, you showed Ms. Sutliff a copy of a newspaper article regarding Secretary Lehman's son's arrest, and proceeded to share with her that you had been involved in assisting staff in the HQ Building in dealing with this crisis during your recent visit to Olympia.

Fiala Termination Letter. RP 292.

4. Soliciting Silence & Cover-up Testimony

PAB Member Nutley herself made misleading statements minimizing and concealing her connection to the DOC and Lehman, and she solicited misleading testimony or silence from Secretary Lehman. The following exchange took place as Joseph Lehman, Sr. was sworn in as a witness in the Walters PAB proceeding:

MR. LEHMAN: Okay. Joseph D. Lehman. L-E-H-M-A-N.

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.

RP 1058.

Nutley appears to coach Lehman to avoid mentioning their potentially compromising former association. Nutley and Lehman were *not* just former members among the dozens on the Governor's Cabinet as Nutley's comment suggested; they had *also* been lead participants in the DOC's *Partnership* just months before the DOC public-relations scandal created by the Lehman arrest.

The uncontested evidence in the superior court record establishes that Nutley and Lehman did more than spend "time together in the Governor's Cabinet;" they spent time together at the DOC's headquarters in the *Partnership* meetings, and they lent their names to the *Partnership* report submitted to the Governor and Legislature. PAB Member Nutley's curious statement "So, you know me, Busse Nutley" was an opaque ruse pretending to remind Lehman that they served on the Cabinet together and that is how he might recognize her. It effectively cut off further comment or inquiry on their connection. It provided no notice of the *Partnership*.

The DOC contends that PAB hearing officer Nutley had no duty to disclose her prior association with Secretary Lehman and participation on the

DOC-sponsored *Partnership*, even though the Walters termination was based upon the supposed violation of Lehman's so-called "confidentiality" and "the highest ranking member of our Agency" was central to the case against Walters.⁴ RP 293. **In this case, the DOC's use of "confidentiality" is a code word for the *taboo* against mentioning his son's arrest.**

Nutley's failure to disclose the nature of her relationship to the DOC and Lehman raises an irrefutable presumption of actual or implied bias against Walters *ab initio*. The disclosure should have come at the outset of the PAB proceeding, and it would have led to an immediate motion for recusal. The prejudice to Walters is obvious. Nutley would not be allowed to sit on a jury in this case: she would be disqualified for cause. She had no right to conceal the facts that disqualify her as administrative fact finder and adjudicator. Nutley was responsible for admitting and evaluating the evidence used against Walters and for judging demeanor and credibility. It is noteworthy and bitterly ironic that the DOC testimony was an orchestrated attack on Walters's credibility, character, and ethics for violating Secretary Lehman's supposed "confidentiality."

D. Violation of the Code of Judicial Conduct

The Code of Judicial Conduct applies to administrative hearing officers such as PAB member Busse Nutley.

⁴ Lehman was mentioned or referred to by name 967 times in the PAB proceeding on 248 of 648 pages of transcript. RP 791-1438. Not only did Nutley know of Lehman's centrality to the case against Walters from the Walters PAB *Trial Brief*, but Lehman was mentioned in 104 pages of transcript before Nutley understated her prior connection with him when he took the stand.

CANON 3 -- JUDGES SHALL PERFORM THE DUTIES OF THEIR OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of judges should take precedence over all other activities. Their judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

Adjudicative Responsibilities.

(5) Judges shall perform judicial duties without bias or prejudice.

(D) Disqualification.

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

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

Washington Rules of Court, Code of Judicial Conduct, Canon 3 (2002).

In this case, we have only partial disclosure of a relationship, simultaneous Cabinet membership, **during the third day of the hearing.** “In non-disclosure cases, a showing of actual bias is not required.” *Schmitz v. Zilveti*, 20 F.3d 1043, 1046 (9th Cir. 1994). “Evident partiality is present when facts that are not disclosed by an arbitrator create a ‘reasonable impression of partiality.’” *Fidelity Federal Bank FSB v. Durga Ma Corporation*, 386 F.3d 1306, 1312 (9th Cir. 2004), quoting *Schmitz v. Zilveti*.

E. Failure to Disclose Violates Due Process

PAB hearing officer Nutley’s failure to disclose her connection to the DOC and Lehman violated professional and governmental ethics and fundamental principles of due process. It gives rise to an appearance of judicial partiality far worse in character and gravity than any of the charges

asserted against Dr. Walters. The whole PAB proceeding was corrupted by deceit, and it brings disrepute to the entire adjudicative process. The DOC now seeks this court's seal of approval for this breach of ethics in this appeal.

The right to procedural due process is "absolute" and must be "scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252 (1978). Judicial impartiality is the hallmark of the American system of justice.

A fair trial and a fair tribunal is a basic requirement of due process. The fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end, no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

In Re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

This neutrality principle has been applied to administrative adjudications, in order to protect the "independent constitutional interest in fair adjudicative procedure." *Marshall v. Jerrico*, 446 U.S. 238, 241-42 n. 2, 100 S.Ct. 1610, 1613 n.2, 64 L.Ed.2d 182 (1980). "Such protections are inherent in the word 'hearing' and without them hearing procedures could be seriously infected." *State ex rel. Beam v. Fulwiler*, 76 Wn. 2d 313, 316, 456 P.2d 322 (1969). These protections, and the concepts of fundamental fairness they project, are inherent in the notions of "administrative due process." *Ibid.*

It is fundamental to our system of justice that judges be fair and unbiased. An interest that is alleged to create bias or unfairness need not be direct or obvious. "Any interest, the probable and natural tendency of which is to create a bias in the mind of the judge for or against a party to the suit, is sufficient to disqualify...pecuniary interest in the result of the suit is not the only disqualifying interest."

Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Human Rights Comm'n, 87

Wn.2d 802, 807-08, 557 P.2d 307 (1976)(citations omitted).

The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial. Next in importance to rendering a righteous judgment is that it be accomplished in such a manner that it will cause no reasonable questioning of the fairness and impartiality of the judge. A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. *See Canon 3C(1)(a) Code of Judicial Conduct of the American Bar Association* (1972).

State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972).

The standard for questioning a judge's impartiality is "an objective test that assumes that 'a reasonable person knows and understands all the relevant facts.'" *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995), quoting, *In Re: Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988)(emphasis omitted), *cert. denied*, 490 U.S. 1102 (1989). *State v. Dugan*, 96 Wn. App. 346, 354, 979 P.2d 885 (1999).

The constitutional defects created by the appearance of bias in the PAB hearing cannot be cured by subsequent judicial review in state court even by an unbiased tribunal. *Walker v. City of Berkeley*, 951 F.2d 182, 184 (9th Cir.1991). The US Supreme Court expressly rejected the argument that any unfairness in the lower court could be corrected on appeal and trial *de novo*. *Ward v. Village of Monroeville*, 409 U.S. 57, 59-60, 93 S.Ct. 80, 83, 34 L.Ed.2d 267 (1972).

Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. ***Petitioner is entitled to a neutral and detached judge in the first instance.***

Ward 409 U.S. at 61-62, 93 S.Ct. at 84 (emphasis supplied).

PAB Vice-Chair Gerald L. Morgan's participation in the Board's decision also does nothing to cure the fatal defect created by Nutley's

concealed relationship to the DOC and Lehman.

“[W]here one member of a tribunal is actually biased *or where circumstances create the appearance that one member is biased*, the proceedings violate due process. The plaintiff need not demonstrate that the biased member’s vote was decisive or that his views influenced those of other members. *Whether actual or apparent, bias on the part of a single member of a tribunal taints the proceedings and violates due process.*”

Stivers v. Pierce, 71 F.3d 732, 748 (9th Cir. 1995). (Emphasis added).

F. Waiver Requires Effective Notice

DOC contends that Walters waived the PAB Nutley bias objection. There could be no waiver where there was no disclosure of the information needed to make a knowing waiver. Walters was entitled to rely upon the presumption that Nutley was acting according to her legal and ethical obligations to disclose. There was no basis for inquiry to cross-examine Lehman on his membership in the Cabinet, and no duty to explore Nutley’s prior career more fully. It was Nutley’s duty to disclose and Lehman’s obligation to give truthful testimony about their relationship.

Judges and administrative hearing officers have affirmative duties to disclose potential conflicts of interest or sources of bias and partiality. Judges are presumed to be impartial and to discharge their ethical duties faithfully to avoid even the appearance of impropriety. “Lawyers are entitled to assume that judges (and law clerks) will perform their duty.” *First Interstate Bank of Arizona, N.A. v. Murphy, Weir & Butler*, 210 F.3d 983, 988 (9th Cir. 2000). Full and fair disclosure is essential to a fair and impartial tribunal.

A litigant’s duty to investigate the facts of a case does not include a mandate for investigation into a judge’s background. The Sixth Circuit Court

of Appeals explained:

We believe instead that litigants (and, of course, their attorneys) should assume the impartiality of the presiding judge, rather than pore through the judge's private affairs and financial matters. Further, judges have an 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." *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995). "[B]oth litigants and counsel should be able to rely upon judges to comply with their own Canons of Ethics." *Ibid.*

American Textile Mfrs. Institute, Inc. v. The Limited, Inc., 190 F.3d 729, 742 (6th Cir. 1999)

G. DOC Misrepresents Facts and Issues of *Motion to Vacate*

The DOC has mis-characterized the *Partnership* as a "committee" addressing housing for "offenders" with twenty-three other members besides Nutley and Lehman. The DOC refuses to acknowledge that the *Partnership* addressed the problems facing "high-risk sex offenders" and "dangerous mentally ill offenders" - like Joseph Lehman, Jr. - because of negative reactions to their community presence.

This explains the "logical connection" between Nutley's undisclosed *Partnership* participation and the charges against Walters in the PAB proceedings - the adverse publicity concerning Secretary Lehman son's arrest as a sex-offender with obvious mental problems. Even alluding to this *taboo* topic in a professionally appropriate context could get you fired from the DOC, as Walters learned. Nutley's former *Partnership* collaborators at the DOC brought charges against Walters for discussing these unfortunate facts concerning Secretary Lehman's "confidentiality," and Nutley sustained every one of those charges in upholding the Walters dismissal.

H. Delay Violates Due Process

Walters was deprived of a property right under state law, and she has not received a timely post-deprivation hearing after her dismissal. The U.S. Supreme Court has recognized that such an “unjustified delay in completing a post-deprivation proceeding” would constitute a constitutional violation of due process. *F.D.I.C. v. Mallen*, 486 U.S. 230, 242, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988).

The DOC had full institutional and individual witness knowledge of the *Partnership* from the time the case was assigned to Nutley. It deliberately proceeded *sub silentio* with the hearing before Nutley, knowing that she was concealing her service with Lehman on the DOC’s *Partnership*.⁵ This appeal is a further unjustified delay in giving Walters a timely hearing mandated by due process. The DOC has forfeited its right to a “do over” after deliberately proceeding with a potentially biased tribunal.

VI. ARGUMENT: PAB RULING CONTRARY TO EVIDENCE AND ARBITRARY AND CAPRICIOUS

A. The DOC’s Basis for Terminating Walters

In the PAB, the DOC had the burden of proving that Walters committed the offenses set forth in the disciplinary letter at least by a preponderance of the credible evidence.⁶ WAC 358-30-170; PAB Conclusion of Law 4.2. CP 22-23. In the September 22, 2003 dismissal letter constituting the DOC

⁵ The DOC was certainly on notice that the PAB hearing was tainted by Nutley’s violation of the CJC and appearance of fairness doctrine.

⁶ Walters believes that the DOC has to meet the higher burden of clear and convincing evidence since the disciplinary action falls within the *Nguyen v. State, Dept. Of Health*, 144 Wn.2d 516, 526, 29 P.3d 689 (2001) line of authority. The DOC cannot meet even the lower preponderance of evidence standard.

formal agency action under review in this case, Assistant Deputy Secretary

Anne Fiala stated the basis for firing Walters:

Specifically, you neglected your duty and violated Agency policy when on or about February 10, 2003, you shared information regarding a crisis situation in DOC Headquarters with Mary Sutliff, an Office Assistant Lead in the Walla Walla Field Office. During the course of this conversation you showed Ms. Sutliff a copy of a newspaper article regarding Secretary Lehman's son's arrest, and proceeded to share with her that you had been involved in assisting staff in the HQ Building in dealing with this crisis during your recent visit to Olympia. You specifically named some of the Managers with whom you had met, and informed Sutliff that Mr. Lehman was "hiding" from people in the hopes of avoiding discussion regarding the issue. A copy of the Employee Conduct Report (ECR) describing this incident in more detail is attached hereto and incorporated by this reference (Attachment 1.)

Fiala Termination Letter. RP 292.

Fiala goes on to dismiss Dr. Walter's version of events and credit all her accusers. Fiala demonstrates highly impaired reasoning in doing so. For example, she concludes that it was "illogical" for Littrell to discuss the Sutliff conversation (Sutliff's comment that Secretary Lehman should resign) during her meeting with Walters on February 12, 2003 - since Littrell only received the Sutliff complaint e-mail on February 19, 2003. RP 293. This is nonsense.

Walters had just returned from Olympia on February 10, 2003 and had been keeping Littrell informed about her trip in the famous Pederson e-mail cited by "Inspector Blodgett" as a policy violation. We also know - from documentary evidence - that Littrell and Deputy Secretary DeLano were conducting an active inquisition of Lehman Chief of Staff Patria Robinson-Martin on February 12, 2003 about Walter's trip to headquarters and her interaction, if any, with Robinson-Martin or Lehman. Appendix C.

Eventually, Fiala gets around to the gist of the DOC's rational for terminating Walters:

To have violated the confidentiality of any staff member, much less that involving the Secretary of the Department, who is the highest ranking member of our Agency, not only constitutes neglect of duty, but is appalling and egregious at best. Additionally, your comments about the Secretary "hiding out" were inappropriate, indiscreet, and petty gossip beneath someone of your position within this Agency.

RP 293.

The DOC has made every effort to obscure the issues in the Walters dismissal and to run away from and distort the actual grounds of her dismissal as well as the actual terms of the DOC Policy she supposedly violated. The DOC has employed a sleight-of-hand throughout the proceedings talking about "impressions," "confidentiality" in the abstract, and "gossip." They cannot evade the actual words of the key PAB Finding of Fact upon which their whole case rests:

2.10 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.

PAB Finding of Fact 2.10. CP 19.

This tracks the Sutliff e-mail and Fiala termination letter (except Fiala misquotes Sutliff by claiming Walters said that Lehman was "hiding out"). These facts establish **nothing** improper, unethical, or in violation of any DOC Policy or Directive.

Fiala contended that Walters violated DOC Policy 870.800 (II) on

confidentiality of communication with the SRC, and DOC Policy Directive (IV)(C)(6) on maintaining privileged communication with DOC employees.

POLICY:

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).

DIRECTIVE:

IV.C.6. Maintain privileged communication with the employee(s), unless otherwise specified by law and/or Department Policy Directive(s);

DOC “Staff Counseling and Occupational Health Programs” Policy Directive adopted on January 29, 2001. (Emphasis in original.) RP 355, 357. Fiala termination letter RP 293-94 (incorrectly citing Policy Directive (IV)(C)(6) as (IV)(2)(6)).

It is essential to understand this Policy and Directive since the DOC and Nutley misrepresent its terms and meaning. The elements of the Policy are simple: (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 department policy directive(s). This is the only grammatically correct reading of the Policy (which could have been improved by better word order or use of semicolons).

It is communication **with the SRC** relating to counseling, etc., that is confidential under Policy 870.800 (II). Likewise, privileged communication **with the employee** must be maintained under Policy Directive (IV)(C)(6). The plain meaning is to safeguard employee communication with the SRC.⁷

⁷ The DOC has claimed that the Policy prohibits all “communications” concerning counseling services (See, Brief of Appellant, p. 5). Even the letter formally terminating Walters misquotes the applicable policy by making “communication” plural. RP 293. Yet, the terms of the applicable policy and directive are precise and consistent - “communication” - “with the SRC” or “with the employee.” The policy

RCW 18.19.180 and RCW 18.83.110, pertaining to confidential counseling communication, are helpful interpretive aids. RCW 18.19.180 prohibits disclosure of “any information acquired from persons consulting the individual in a professional capacity when that information was necessary to enable the individual to render professional services to those persons...” Likewise, RCW 18.83.110 provides that “[c]onfidential communications between a client and a psychologist shall be privileged against compulsory disclosure to the same extent and subject to the same conditions as confidential communications between attorney and client...” RCW 18.83 is expressly referenced in the “Staff Counseling and Occupational Health Programs” Policy Directive. RP 355

These statutes address an established professional relationship and reasonable expectation that the communication would be confidential or privileged. Under Washington law, the content and fact of counseling and identification of the client are all confidential. RP 1245. “Privilege” is defined by statute. As with other evidentiary privileges, “the communication must originate in confidence that it will not be disclosed.” *State v. Coe*, 109 Wn.2d 832, 843 P.2d 208 (1988).

B. PAB Decision Lacks Factual and Legal Support

The heart of the PAB decision upholding the Walters termination is found in its Conclusion of Law 4.3. CP 23. It also merits close examination as it is internally inconsistent, contrary to the evidence, and erroneous as a matter of law. The factual findings do not support its legal conclusions; they

does not cover “all communication” or “communications” in the abstract.

preclude them. The DOC agency action terminating Walters and the PAB Order upholding it are consistent: both were arbitrary and capricious.

While there is no question the situation with Secretary Lehman's son was public knowledge because of the media coverage, we conclude [Walters's] decision to discuss the matter with Ms. Sutliff was highly inappropriate and unethical.

PAB Conclusion of Law 4.3. CP 23. (PAB opinion page 9, lines 9-11.)

There is nothing inappropriate or unethical about Dr. Walters discussing "the matter" with Sutliff. The DOC and PAB both ignored the context and purpose of the interaction between Walters and Sutliff: contact with managers on her personal phones during repair of her communications equipment. Walters had to discuss the matter with Sutliff to explain why specific people should be given private access to her personal numbers. Walters is a professional counselor, and it is her job to address *taboo* topics.

The DOC has not provided a single *iota* of support for the *ipse dixit* conclusion that such a discussion was "unethical." Applicable state and federal patient privacy laws make it legally and ethically permissible. Such discussions happen every day in every professional setting using confidential information. The PAB's adoption of the DOC's vague and unsupported "inappropriate and unethical" argument is absurd. Calling something inappropriate or unethical does not make it so.

Even though [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).

PAB Conclusion of Law 4.3. CP 23. (PAB opinion page 9, lines 11-14.)

This statement establishes conclusively that Walters did not violate the policy she was charged with breaching. It is not a fair reading of the

Policy. It is not even a correct quotation of the Policy! It omits a critical term explaining just what kind of “communication” is confidential: communication with the Staff Resource Center.

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).

DOC Policy 870.800 (bold emphasis added).

There was *no* “communication” with the SRC disclosed during the Sutliff conversation. Since there was no “communication” with the SRC, there was none “relating to staff counseling.” There was no disclosure of anything “confidential” and no breach of the policy. Relaying widely disseminated information, indeed broadly published in the media, or voicing an observation or opinion cannot be a violation of a policy directed at protecting a specific class of communication. These provisions do not concern a newspaper article, personal opinion, speculation, editorial comment, or speculation by any employee or counselor. The terms “all communication” does not mean “any communication we feel like deeming a violation if we want to discipline you.”

It is equally absurd to divorce “all communication” from “relating to counseling” of a specific identifiable SRC client. Dr. Walters or another counselor or SRC administrator would never be able to speak to anyone, submit a travel voucher or reimbursement request, send or receive a letter, fax, or telephone message without running the risk of arbitrary discipline since such conduct could be construed as a prohibited “communication” relating to counseling.

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.

PAB Conclusion of Law 4.3. CP 23. (PAB opinion page 9, lines 14-17.)

This also establishes that Walters's conduct **was not prohibited by policy**. Walters **never denied** or contested that she went to DOC headquarters to offer SRC services to Secretary Lehman and others. That was her job. Dr. Walters **did discuss** the incident in general terms with Ms. Sutliff although there are two different versions of that conversation. She **did mention specific names** of fellow counseling and crisis intervention administrators with Sutliff; however, **the names were not counseling clients and Walters never claimed that she had counseled any of the people she mentioned**. They were the names of other emergency response and Critical Incident Stress Management program staff, not even contacts initiated in connection with the public relations fiasco of the Lehman arrest. There is nothing improper or contrary to the policy in any such conduct - even under the version of facts alleged by the DOC and found by the PAB.

C. No Communication, Counseling, or Policy Violation

Walters did not obtain or share any privileged or confidential information under the Sutliff version of the conversation. She did not provide any counseling, intervention, or therapeutic services to any administrator or manager during her trip to Olympia, and the DOC supervisors knew this before the ECR was filed against her. At no time did Dr. Walters share any names of any individuals whom she had counseled. As to Secretary Lehman, expert witness Dr. Stephen Feldman summarized: "She

had no counseling relationship with [Lehman]. There was nothing to violate. She neither acquired information from him nor revealed information to him that would be confidential. She didn't see him. You can't have a confidential interaction with someone you haven't seen." RP 1243.

D. There is No "Confidentiality" in the Abstract

The DOC has deliberately tried to confuse the concept of confidential information. In the absence of evidence of a violation of any confidential or privileged communication, or breach of a counseling relationship, the DOC charges morphed to a violation of ethereal and undefined "confidentiality" of someone she had not met or counseled. According to the Fiala termination letter, Walters had "the duty and responsibility to maintain the confidentiality of all staff." RP 293. This is nonsense.

E. Impressions Are Irrelevant

The DOC has made much about Walters "giving the impression" that she was sharing confidential information, even though those were not the charges against her or the provisions of the DOC Policy being applied. The obvious problem with this subjective standard is that it is arbitrary and capricious without support in policy language, statutory authority, professional practice standards, or common sense. There is no objective, credible evidence in the record that Walters even gave such an impression to Sutliff or that such an impression would be reasonable or sane. Such an "impression" is not relevant to the charges of a Policy violation.

The *Brief of Appellant*, on page 46 and footnote 16, include the bald-faced assertion that it did not matter whether Walters actually counseled anyone at headquarters since she had given the "impression" that she had. So

what? Counseling is her profession. She could “give the impression” of counseling every time someone entered into her office or she left it.

F. Work-related Conversation is Not Inappropriate “Gossip”

The DOC has also tried to bootstrap a Policy violation from a distorted allegation of “gossip.” RP 293. “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.” *Brief of Appellant* p.5. The DOC combines the “impression” of counseling with the inappropriate “gossip” charge and together they destroy Walters’s “credibility” - necessitating her discharge. *Brief of Appellant*, p. 46, fn. 16. This is an unholy trinity of subjective charges to justify a pretext firing.

The DOC discipline hinges on condemnation of “gossip” even though the Walters-Sutliff conversation was directly related to a work issue - availability during repair of Dr. Walters’s phone so that specific administrators at headquarters could contact her. The crux of the “gossip” allegation that “Joe was ‘hiding’ from people in hopes to avoid discussing the situation” is not actionable. It could be protected opinion, recapitulation of published information, or personal speculation. **It was the official public position of the DOC communicated to the media at the time - Secretary Lehman had “no comment” about the arrest of his son.** CP 144-47.

The comment could be considered directly work related: if Lehman were “hiding,” he was abdicating any leadership role in addressing the growing public relations crisis created by his son’s latest arrest. Thus, it was incumbent upon Walters and the SRC to repair or stem the damage to DOC

morale. In order to do so, she had to be accessible to DOC staff by phone. In addition, there is nothing inherently negative about such a comment. It may be an expression of sympathy for Lehman as much as a statement of fact. There is nothing in the record to support the DOC's position that it was confidential information under any definition.

**G. The DOC Policy as Applied Is Unconstitutionally Vague
And Deprived Walters of Due Process of Law**

As applied to Walters in this case, the DOC Policy is unconstitutionally vague and arbitrary in violation of due process of law. The DOC has ignored the actual terms of the policy as written and given biased, subjective interpretations to "impressions" "gossip" and abstract "confidentiality" without regard to well established professional standards and language.

A Policy is unconstitutionally vague if (1) the Policy does not define the sanctionable offense with sufficient definiteness that ordinary people can understand what conduct is proscribed (Fair Notice Prong), and (2) that the Policy does not provide ascertainable standards of misconduct to protect against arbitrary enforcement (Ascertainable Standards Prong). "The purpose of the vagueness doctrine is to ensure that citizens receive fair notice as to what conduct is proscribed, and to prevent the law from being arbitrarily enforced." *Haley v. Medical Disciplinary Board*, 117 Wn.2d 720, 739-40 (1991).

In this context, it is clear what a confidential communication would be for an ordinary professional - one obtained in the course of a professional relationship where the client had a reasonable expectation that the information would be maintained confidential and private. See *Haley v.*

Medical Disciplinary Board, 117 Wn.2d. 720, 742, 818 P.2d 1062 (1991) (“the common knowledge and understanding of members of the particular vocation or profession to which the statute applies”); *Keene v. Board of Accountancy*, 77 Wn.App. 849, 856, 894 P.2d 582 (1995) (“While it does not provide an objective standard for judging accountants’ conduct, the common knowledge and understanding of other CPA’s provide additional specificity.”)

The DOC’s position and PAB’s conclusion that an “impression” of counseling - along with an uneducated and unprofessional objection to discussion of a topic - are constitutionally invalid. Such a violation would depend upon the subjective belief of the listener, someone who may have little or no understanding of rules of confidentiality. It fails both fair notice and ascertainable standards prongs of the test for constitutional infirmity.

VII. ARGUMENT: DOC’S POSITIONS VIOLATE STATE AND FEDERAL MEDICAL PRIVACY LAW

A. Sutliff Conversation Was Permissible

Mary Sutliff had been assigned to provide clerical and technology support to Walters and her SRC program activities. Littrell and DeLano had directed Sutliff to monitor Walters’s faxes and incoming and outgoing mail. RP 1376. Sutliff had complete access to all documents that Dr. Walters printed in the WWFO since Walters’s printer was at Sutliff’s desk. RP 1376.

In this appeal, the DOC has misrepresented the record to minimize Sutliff’s clerical and technical support roles assisting Walters. They characterize her as just another staff member with whom Walters was sharing “gossip,” ignoring Sutliff’s actual role as an administrative support person

to Walters and their lack of social friendship.

Walters's expert witness at the PAB hearing explained that as an administrative aide to a registered counselor, Sutliff was herself within the ambit of any confidentiality obligation supporting the health care provider's services under federal and Washington health care privacy laws. TR 1246, 1251. A health care provider may share confidential health care information with support staff such as a secretary, technician, or nurse. The Uniform Health Care Information Act provides as follows:

A health care provider may disclose health care information about a patient without the patient's authorization to the extent the recipient needs to know the information, if the disclosure is: (b) to any person who requires health care information for...administrative ... services to the health care provider...

RCW 70.02.050(1)(b).

Federal law is consistent with Washington law on this point through the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub.L. 104-191, Aug. 21, 1996, 110 Stat.1936. A health care provider may use or disclose Protected Healthcare Information (“PHI”), without the patient's authorization, if the information is used for treatment, payment **or health care operations**. The information conveyed from Dr. Walters to her secretary was not confidential information, and even if it were, it was permissible to convey such information in a health care practice.

If the charges against Walters were true, Sutliff herself violated the policy by sending her e-mail to her immediate supervisor and her supervisor who were not within the SRC program. Regional Administrator Blodgett was eager to find Walter’s use of the e-mail system to communicate with her supervisor a violation of the Policy on confidential communication. RP 324.

Similarly, the DOC supervisors were not at all concerned about breaching confidential information when they ordered Walters to turn in her computer, referenced in the May 30, 2003 Letter of Reprimand, so that the “Intelligence Manager” for DOC could search for some requested records. This was certainly a disclosure of confidential information to “someone outside the SRC program.” RP 292-99. We have already noted the interrogation of Patria Robinson-Martin about her interactions with Walters.

B. Discipline Concocted to Bolster Firing

After deciding to dismiss Walters (on April 22, 2003 RP 1312), the DOC managers papered her file with a flurry of *post hoc, ex post facto* disciplinary memoranda up to her final days with the DOC. RP 292-99. In a June 9, 2003 document sarcastically entitled “Expectations Revisited,” Assistant Deputy Secretary DeLano instructs Walters to maintain her outlook calendar on the DOC intranet in more detail so that people would know where she was and with whom she was meeting. RP 295. Had Walters complied, such an open disclosure of that information would have constituted a violation of DOC Policy, the informed consent of those with whom Walters met, and state and federal health care privacy law.

In a “Directive to Provide Information” dated July 14, 2003, just four days before the DOC formally notified Walters of her termination, DeLano again criticizes and disciplines Walters for failing to disclose the names of counseling clients. CP 548-51; RP 294. The Directive cited Washington law governing the privacy of patient medical records, RCW 70.02, but it turned the statute on its head by claiming that Walters was wrong and insubordinate for **not** divulging confidential counseling client names to DOC supervisors

who had no counseling role, license, or proper use for such information.

On August 22, 2003, DeLano issued another letter of reprimand - over a month after Walters was notified of her impending dismissal. RP 294. This letter again disciplines Walters for her refusal to reveal names of staff whom she had counseled. In her September 22, 2003 dismissal letter, Assistant Deputy Secretary Anne Fiala pointed to this last minute flurry of concocted discipline in "deciding" what level of punishment should be meted out to Walters for the Sutliff conversation: termination. RP 294-97.

C. Washington Health Care Information Act

Walters was actually fired for defending the integrity of the SRC program and protecting DOC employees. She was a client-centered staff advocate, and that marked her for termination. As a registered counselor, Walters had a duty to preserve the confidential information of staff. RCW 18.19.180. Walters could be subject to discipline for violation of these rules under the Uniform Disciplinary Act, RCW 18.130.900, including loss of her license.

The Uniform Health Care Information Act, RCW 70.02, regulates the disclosure of health care information. There are exceptions to the general rule against unauthorized disclosure of health care information. RCW 70.02.050(1) provides, in pertinent part, as follows:

A health care provider may disclose health care information about a patient without the patient's authorization to the extent a recipient needs to know the information, if the disclosure is:

- (b) To any other person who requires health care information for health care education, or to provide planning, quality assurance, peer review, or administrative, legal, financial or actuarial services to the health care provider; or for assisting the health care provider in the delivery of health care and the

health care provider reasonably believes that the person:

- (i) Will not use or disclose the health care information for any other purpose; and
- (ii) Will take appropriate steps to protect the health care information.

RCW 70.02.050(1)

As we have seen in this case, the DOC knows that the only use Walters's supervisors had for the names of staff in this case is misuse - for purposes unrelated to health care services or the delivery of health care. For example, Littrell and DeLano repeatedly asked Patria Robinson-Martin about the Walters visit at headquarters on February 6 and 7 and specifically whether Robinson-Martin or Lehman had asked Walters to come to HQ. Appendix C. This was precisely the evil that DOC Policy 870.800 and the state and federal statutes were designed to prevent.

The SRC Program's integrity depended upon DOC staff understanding that information from the program would not be misused by management.

Deputy Secretary Eldon Vale testified as follows:

It was something important to the union. It was, it was huge in terms of the purpose of the program. I mean, "why you guys were doing this" was the question, and, "aren't you going to use this and give this information to supervisors?" and we had to share with them, that, no, that is not what we're trying to do. This very much runs against the culture of the agency.

RP 809. Despite these "assurances" to the union, Walters was disciplined and ultimately discharged for refusing to divulge the names of counseling clients to line supervisors who could only misuse the information.

VIII. ARGUMENT: DOC ACTS IN BAD FAITH

A. DOC's Claim of Bias Against Judge Casey

The DOC claims that the case should not be remanded to Judge Casey because she has “prejudged” the case. This is insulting and contrary to law. The DOC never raised this argument before Judge Casey, despite knowing of her negative evaluation of its position since June 30, 2006. CP 848. Moreover, “judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.” *Liteky v. U.S.*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Opinions formed by the judge during the course of proceedings “do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Liteky v. U.S.*, 510 U.S. at p. 555. There is no evidence in this record of favoritism or antagonism by Judge Casey, only an honest and objective evaluation of the bankruptcy of the DOC's arguments.

B. DOC Objects to Adverse Opinion

The DOC's objection to Judge Casey's advisory opinion is another desperate effort to generate an appellate issue and stall the inevitable end to its case. The DOC just does not like what Judge Casey had to say. Advisory and explanatory opinions are as common as written words in this and every jurisdiction in Anglo-American jurisprudence. They are the vehicle by which dispassionate jurists offer guidance to courts, litigators, and parties outside the most rigid confines of narrowly construed holdings. The DOC would have this court outlaw *dicta* and create a basis for appeal whenever a trial or appellate court made any statement in reviewing a case beyond the very minimum necessary to decide it. There would be no opinions addressing

otherwise moot cases where the issues might arise again.

The superior court's "advisory opinion" was entirely proper. After an exacting review of the record, the superior court designated its objective insights as "advisory" so not to mislead or infringe upon the jurisdiction of the PRB to which it was remanding the matter for hearing and decision. The DOC objects only because it does not like the well-deserved criticism.

C. The DOC Deliberately Misrepresents the Record

"Ms. Walters had disclosed to a coworker, confidential information following the arrest of the DOC Secretary's son." *Brief of Appellant*, p. 1. There is no evidence what-so-ever that confidential information was disclosed. This is a bald faced lie.

The DOC deliberately distorts the record in its brief at page 16 where it selectively quotes the superior court that "the issues that are presented by this record are really quite ridiculous." It omits the rest of the quote explaining that **its case** against Dr. Walters was "ridiculous."

THE COURT: Well, I think the solution today is I'm going to send the two of you to ADR, and it must be completed within 30 days because the issues that are presented by this record are really quite ridiculous. **The record is not in dispute that there was never a confidential conversation to disclose.**

Verbatim Report of Proceedings, Motions, Before the Honorable Paula Casey, Presiding, June 30, 2006, 27:4-9. CP 856. (emphasis added).

These are typical of the distortions and bad faith exhibited by the DOC throughout the handling of the Sutliff allegations, subsequent proceedings in the PAB and the superior court, and this appeal.

D. Walters Entitled to Sanctions and Attorney Fees

RAP 18.9(a) authorizes an award of terms for compensatory damages against the party who files a frivolous appeal. *Pain Diagnostics and Rehabilitation Associates, P.S. v. Brockman*, 97 Wn. App. 691, 701, 988 P.2d 972 (1999). “An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it [is] so totally devoid of merit that there is no reasonable possibility of reversal.” *Delaney v. Canning*, 84 Wn. App. 498, 510, 929 P.2d 475, *review denied*, 131 Wn.2d 1026, 937 P.2d 1101 (1997).

This appeal was taken for purposes of spite and delay. Four years after her termination from her civil service career position, Dr. Walters has yet to be treated fairly and honestly by the DOC or other executive branch agencies. We have examined her treatment by the PAB in detail. In this appeal, the DOC is stalling for time in a punitive fashion rather than proceeding with the remand to the PRB, as it previously argued was required.

The rules of appellate procedure are designed to promote considered review of issues raised by the parties and not “to place unjustified burdens, financial and otherwise, upon opposing parties nor are they designed to provide recreational activity for litigants.” *Rich v. Starczewski*, 29 Wn. App. 244,250, 628 P.2d 831 (1981).

The DOC continues its bad faith defense of a wrongful termination by knowingly misstating the law and promoting the continuing violation of fundamental rights to which a civil service employee is entitled. Accordingly, terminating and monetary sanctions and attorney’s fees should be awarded to Walters under the court’s inherent power and in compliance

with RAP 18.1(d).

IX. CONCLUSION

The record on appeal demonstrates that Walters was unjustly dismissed from her position with DOC, and that the validity of that dismissal was submitted for review to a biased tribunal.

Dr. Walters was denied a fair hearing before an unbiased tribunal. There is an irrefutable appearance of partiality when a hearing officer actively conceals a personal relationship to a key witness and the chief executive and appointing authority of a party, involving matters implicated in the disciplinary action being reviewed. It is inconceivable the hearing officer did not have personal knowledge and a preexisting perspective of relevant and material facts and personalities.

The superior court correctly vacated the tainted PAB proceedings and decision which violated Walters's fundamental constitutional due process rights and was otherwise unsupported by the facts or law. A decision for the DOC on this appeal would endorse unethical conduct by a hearing officer and corrupt the judicial process in turn.

The superior court also saw through the nonsense arguments and distortions of fact and law used to justify the Walters termination. A clear and unbiased examination of the case leads to the unavoidable conclusion that Walters did not violate DOC Policy, and the DOC did not meet their burden of proving the charges against her underlying the agency action. The DOC and PAB both violated Walters's due process rights by rulings that were contrary to the evidence, arbitrary and capricious, and contrary to law.

The DOC also has sought to gain endorsement for conspicuous

violations of counseling client privacy rights. This court should not endorse such a flagrant distortion of law and common decency.

The DOC's misconduct is so egregious that it cannot be remedied by a new evidentiary hearing by an impartial and ethically untainted panel. The DOC's decision to discharge should be reversed and Judgment entered reinstating Dr. Walters with back pay and benefits, costs, and attorneys' fees. Justice requires nothing less.

RESPECTFULLY SUBMITTED this 10th day of October, 2007.

MINNICK • HAYNER

By: 
David M. Rose, WSBA #32849
Minnick • Hayner, P.S.
P.O. Box 1757
Walla Walla, WA 99362
Tel: (509) 527-3500
Fax: (509) 527-3506
Email: david@minnickhayner.com
Attorneys for Respondent

APPENDIX LIST:

- APPENDIX A: Trial Brief of Appellant
Cyndi Walters
- APPENDIX B: Witness List of Appellant
- APPENDIX C: DeLano – Littrell – Patria
Grrrrr E-mails
- APPENDIX D: Investigator Blodgett's
Notes

APPENDIX A

1 David M. Rose
2 Minnick-Hayner, P.S.
3 PO Box 1757
4 Walla Walla, WA 99362

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5 BEFORE THE PERSONNEL APPEALS BOARD
6 STATE OF WASHINGTON

7 CYNDI WALTERS,)
8 Appellant,) NO. DISM-03-0093
9)
10 v.)
11) TRIAL BRIEF OF
12 DEPARTMENT OF CORRECTIONS) APPELLANT
13 Respondent.) CYNDI WALTERS
14)

15 COMES NOW appellant, Cyndi Walters, and submits her trial brief as
16 follows:

17 I. INTRODUCTION

18 This is an appeal from a wrongful and improperly motivated dismissal of
19 appellant Cyndi Walters ("Dr. Walters") as Statewide Director of the Staff Resource
20 Centers for the Department of Corrections ("DOC"). At its heart, this case involves
21 improper conduct by Dr. Walters's supervisor in collaboration with other DOC
22 management who are apparently threatened by the independent judgement and high
23 standards of a professional. These managers have relied upon patently false and
24 bizarrely distorted allegations that Dr. Walters improperly disclosed "confidential
25 information" as a pretext to dismiss her. An honest examination of the facts
26 demonstrates the hollowness of the charges against Dr. Walters and the imperative
27 that she be reinstated.

28 DOC Assistant Deputy Secretary Anne Fiala notified Dr. Walters of her
29 dismissal in a letter dated September 22, 2003 alleging that she had neglected her
30 duty and violated agency policy when, on or about February 10, 2003, Dr. Walters
supposedly shared "confidential" information regarding a crisis situation in DOC

1 headquarters with Mary Sutliff ("Sutliff"), an office assistant lead in the Walla Walla
2 Field Office who had been tasked with assisting Dr. Walters with her telephone
3 system and other office issues. The dismissal letter claims that Dr. Walters
4 improperly named some of the headquarters personnel with whom she had met while
5 responding to an agency public relations crisis, and that Dr. Walters indicated that the
6 Secretary of the DOC, Joseph Lehman, was "hiding" from people to avoid discussing
7 the situation. Dr. Walters has denied, repeatedly and in detail, any such conduct.

8 The dismissal of Dr. Walters was highly improper. The supervisor filing a
9 disciplinary action against Dr. Walters was well aware of the falsity of the charges
10 against her through independent channels of inquiry. Even if the factual basis for the
11 charges against Dr. Walters had occurred, they would not constitute a violation of
12 DOC policy and hence would not support any disciplinary action against her. The
13 undisputed facts, known to all involved, are that Dr. Walters did not counsel or
14 provide clinical or therapeutic services to any manager or administrator in Olympia
15 during the relevant time period alleged in the ECR against her, and that none of her
16 discussions with agency personnel alleged contained confidential communications.
17 There was no confidential information to disclose, and there was no actionable
18 disclosure of confidential information.

19 The complaining witness, Mary Sutliff, had been tasked to assist Dr. Walters.
20 Any alleged conversations with her on the specified subjects would themselves have
21 been within the ambit of privileged communications and consistent with the DOC
22 policy 870.800 Dr. Walters was accused of violating. Dr. Walters did not tell Sutliff,
23 or anyone else for that matter, that the DOC Secretary was "in hiding," although that
24 characterization might have derived from published accounts or communications from
25 Dr. Walters's supervisor. It appears that Sutliff made false allegations against Dr.
26 Walters to cover up her own perceived indiscretion in sharing her personal opinion
27 with Dr. Walters that the DOC Secretary should resign.

28 The Fiala letter of dismissal contended that Dr. Walters violated DOC Policy
29 870.800, Staff Counseling and Occupational Health Programs:
30

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

5 IV. Staff Counseling Program.

6 2. The staff counselor/designee shall:

7 6. Maintain privileged communication with the
8 employee(s), unless otherwise specified by law and/or
9 department policy directive(s).

10 At no time did Dr. Walters reveal or divulge confidential communications to
11 Sutliff since there was no such confidential or privileged communications to
12 divulge, and the managers concocting Dr. Walters's dismissal were fully aware of
13 this. Indeed, the evidence reveals that the alleged breach of confidentiality was a
14 pretext for discipline of Dr. Walters engineered after a concurrent search for other
15 disciplinary grounds against her, in connection with her annual performance review,
16 was unsuccessful. There is no corroboration for any allegations against Dr. Walters,
17 and there are no independent grounds for any discipline against her. A highly-
18 unprofessional "investigation" of the allegations against Dr. Walters was deceitfully
19 and inadequately conducted without any real effort to determine the truth of the
20 allegations presented. It was admittedly conducted by someone prejudiced against
21 Dr. Walters before it began.

22 The record demonstrates that prior to Dr. Walters' dismissal, the managers
23 generating and documenting the disciplinary proceeding were fully aware that there
24 were no confidential communications that could have been disclosed to Sutliff since
25 they had determined that there had been no confidential counseling or privileged
26 communications among the parties named in the charges. The dismissal must be
27 overturned since there was no violation of DOC policy nor neglect of duty. The
28 improper and unethical conduct and motivation of the managers involved in this
29 dismissal proceeding should be independently investigated and addressed by
30 responsible State agencies.

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II. SUMMARY OF RELEVANT FACTS

A. Dr. Cyndi Walters and the Department of Corrections.

Cyndi Walters was born and raised in Walla Walla, Washington and graduated from Walla Walla High School. She received a Bachelor of Arts degree and a Master's Degree in Education with an emphasis on counseling and guidance, from Walla Walla College. Prior to working with the DOC, Walters was a registered counselor and worked at Walla Walla General Hospital. In 1988, Cyndi Walters was asked to provide classes to the Washington State Penitentiary in stress management and wellness issues. She also provided ad hoc counseling services to correctional staff. She was offered a contract in 1989 with the DOC to provide counseling and educational services. Since 1990, Walters has served as the Clinical Coordinator of the Washington State Critical Incident and Post-Trauma Team and provided counseling services to 6,000+ DOC employees and the Governor's staff following major, critical incidents (earthquake, 9/11, etc.).

Cyndi Walters's work with the DOC gradually expanded. Then Superintendent of the Washington State Penitentiary, Tana Wood, recommended to Walters that she obtain a Ph.D. in Education in order to further develop the counseling and education resources at the DOC. After getting additional encouragement from the then Secretary of the DOC, Chase Riveland, Walters enrolled in a doctoral program at Gonzaga University leading to her Ph.D. in Educational Leadership awarded on May 9, 1998. Her dissertation was entitled "Leadership in Maximum-Close Custody Prison Setting." Since obtaining her doctorate, Walters has completed two national research projects for the DOC on critical incident stress management and leadership during times of crisis.

Cyndi Walters is a corrections training specialist, providing instruction at academies in the area of emergency response, critical incident and post-trauma response, stress management and wellness, chemical dependancy and addictive behavior, marriage and family, and leadership development. Cyndi Walters currently serves as a board member of the Washington State Critical Incident Stress Management Network.

1 On March 16, 1998, Walters was hired as a DOC employee in Washington
2 Management Service as both Staff Counselor and Statewide Director of Staff
3 Resource Centers. Although she principally worked with staff at the Washington
4 State Penitentiary, she was detailed to other facilities throughout the state of
5 Washington during emergencies. As Statewide Director, Walters has developed
6 many new programs for the DOC, including the critical incident stress management
7 program. Walters also taught classes at the correctional officer academy, the
8 emergency response officer academy, and for emergency response team programs.

9 In September of 2001, a management position description was created for the
10 job Dr. Walters held as State Director of Staff Resource Centers. The position
11 description outlined the objectives of the job, knowledge and skills required, nature
12 and scope of job, and principal responsibilities. As one of her statewide
13 responsibilities, Dr. Walters was required to "direct and lead the departmental-level
14 response to emergencies, such as natural disasters, major disturbances, etc., that
15 effect vast numbers of staff and private citizens." Dr. Walters was also to provide
16 program oversight and management of the five regional Staff Resource Centers that
17 served the 6,000+ employees of the DOC.

18 Dr. Walters's duties include coordinating responses to critical incidents and
19 crises such as the earthquake that affected many staff in Olympia, the aftermath of
20 September 11, 2001, executions, staff assaults, and inmate suicide and coordinate the
21 provision of services from the Staff Resource Centers.

22 At the time that the disciplinary process was initiated against her, Dr. Walters
23 was fulfilling her duties by assisting the DOC in managing the response to the crisis
24 surrounding the arrest of the son of the Secretary of the DOC.

25 These duties of crisis management and emergency response were also spelled
26 out in DOC Policy 870.800. DOC policy 870.800 provides in Policy I that:

27 The department shall establish and maintain a staff resource center in
28 each region to provide post-trauma/staff critical incident debriefing,
29 staff crisis intervention, assessment/referral, occupational health
30 related consultation services and specialized staff development. In
addition, the staff resource center shall provide limited staff
counseling, intervention, support and clinical services to employees.

1 Dr. Walters was, in fact, coordinating such a response for the Staff Resource Center
2 in February of 2003.

3 B. The February 2003 Incident

4 On February 3, 2003, Dr. Walters traveled to Olympia for various
5 administrative projects, including making a presentation to the Office of Correctional
6 Operations management ("OCO") meeting. During this week, the news broke that
7 the son of the Secretary of the DOC, Joseph Lehman, Jr., had been arrested for
8 sexually assaulting his two-month-old baby. The news was widely disseminated in
9 local and national print and broadcast media. Dr. Walters was scheduled to leave
10 Olympia on February 6, 2003 when a regional DOC counselor, Dr. Michael Robbins,
11 called her and informed her of this news and recommended that Dr. Walters go to
12 headquarters to coordinate the response of the Staff Resource Center to this incident.
13 Dr. Walters traveled to headquarters and made herself available to assist staff in
14 responding to this explosive news story. While Mr. Lehman's son was not a DOC
15 employee, his arrest was noteworthy because he was the Secretary's son. The DOC
16 as a department was implicated in public concern over the impartiality of any
17 prosecution and potential incarceration. DOC employees might be expected to
18 prepare any sentencing recommendations.
19

20 On February 6 and 7, Dr. Walters dropped in on several floors of headquarters
21 to inform staff of the available of Staff Resource Center's services. On February 6, Dr.
22 Walters spoke with Patria Robinson-Martin, the Chief of Staff for DOC Secretary
23 Joseph Lehman, Jr., to indicate her availability to assist the Secretary or his office.
24 Patria Robinson-Martin indicated that Secretary Lehman was not in his office, and Dr.
25 Walters indicated that she would stop in the following day. Dr. Walters spoke with
26 Dan Pacholke and Jocelyn Hoff, two staff members responsible for emergency
27 response. Dr. Walters also informed several secretaries of administrators that she was
28 around if anyone needed her or other Staff Resource Center services.

29 Dr. Walters did not provide any confidential or privileged counseling
30 services to any administrator or manager in Olympia on February 6 or February
7, 2003. She did have several discussions with staff which Dr. Walters believed the

1 particular staff member wanted to maintain private. This was common in the aftermath
2 of a traumatic or critical incident, and it was Dr. Walters's job to keep herself informed
3 of staff reactions and responses to such incidents.

4 In the evening of February 6, 2003, Dr. Walters sent an e-mail to her
5 supervisor, Marjorie Littrell, the Southeast Regional Administrator. In this e-mail, Dr.
6 Walters informed her supervisor that she was changing her schedule and remaining in
7 Olympia in response to the incident involving Joseph Lehman's son. Ms. Littrell had
8 previously directed that Dr. Walters keep her apprised of her schedule. In the e-mail,
9 Dr. Walters told her supervisor that she

10 "spoke with Patria today and will be visiting with Mr. Lehman
11 tomorrow. I am going to offer my assistance to his wife as well. I
12 talked with a lot of staff today and will continue to "mill about"
13 tomorrow at HQ. Staff are speechless and agonizing with Mr.
14 Lehman. Anyway, I will keep you posted."

15 Ms. Littrell had criticized Dr. Walters in the past for not meeting Ms. Littrell's
16 varying expectations concerning travel arrangements and other matters.

17 Ms. Littrell and Lynne Delano, Dr. Walters's immediate supervisor, contacted Patria
18 Robinson-Martin without Dr. Walters's knowledge in an apparent effort to obtain some
19 factual basis or other grounds to criticize or discipline Dr. Walters for remaining in
20 Olympia during that week. Robinson-Martin was critical of the efforts Dr. Walters was
21 making to contact Mr. Lehman, but Littrell and Delano could not come up with any
22 evidence of improper conduct by Dr. Walters - to their obvious chagrin. The Littrell
23 and Delano efforts to obtain some pretext for discipline against Dr. Walters are
24 documented in a series of e-mail exchanges between them on February 12, 2003.

25 Dr. Walters's straightforward, informational, non-confidential communication
26 to her supervisor was later deemed a violation of DOC policy because Dr. Walters was
27 supposedly revealing "confidential communications" even though Robinson-Martin had
28 informed Littrell and Delano that Dr. Walters had not met with her or Mr. Lehman -
29 so no confidential communications could have taken place. Dr. Walters's contact with
30 Robinson-Martin and attempted contact with Mr. Lehman were openly discussed with
Delano and Littrell. Thus, Robinson-Martin herself hardly considered her contact with

1 Walters to be a confidential communication since she freely discussed it with Delano
2 and Littrell.

3 The characterization of the Walters e-mail as a breach of confidential
4 information and grounds for discipline demonstrates the knowing and improper
5 attempt to generate false charges against Dr. Walters by Delano and Littrell. When
6 they could not find actionable fault with Dr. Walters's travel arrangements or her
7 presence in headquarters, Mary Sutliff was recruited and suddenly came up with her
8 bizarre and disturbed allegations concerning Dr. Walters upon her return to Walla
9 Walla. This was at the same time that Littrell and Delano were digging for just such
10 dirt in Olympia to use against Walters. It is no coincidence that Sutliff's nonsense
11 allegations claim breach of confidentiality over communications that never took place.

12 Dr. Walters returned to her office in the Walla Walla Field Office on February
13 10, 2003. Since the relocation of her office from the Washington State Penitentiary to
14 the Walla Walla Field Office in late 2002, Dr. Walters had experienced a number of
15 problems with her office equipment, including her telephones. At times, her office
16 phone would not ring, or it would ring in another office. A technician was scheduled
17 to investigate the telephone problems that morning.

18 Marjorie Littrell directed Sutliff, the Office Assistant Lead in the Walla Walla
19 Field Office, to assist Dr. Walters with her equipment problems and other office needs.

20 Sutliff proceeded to Dr. Walters's office to discuss these problems with her. The
21 Lehman scandal had been widely publicized since the previous week, and it was
22 common knowledge throughout the DOC and among a large segment of the
23 Washington State general population. Sutliff even admits to having been shown a copy
24 of a news article regarding the arrest of Secretary Lehman's son prior to meeting with
25 Walters. Everyone in the Walla Walla Field Office was fully aware of the explosive
26 news story and the unsavory published details.

27 At some point during the discussion between Dr. Walters and Sutliff on the
28 morning of February 10, 2003, the subject of Secretary Lehman came up. Dr. Walters
29 recalls that Sutliff raised the issue by pointing to a newspaper article laying on Dr.
30 Walters' desk. Sutliff told Walters that she was appalled by the story and suggested

1 that Dr. Lehman should resign. Ten days later, in an e-mail sent to her superior, Sutliff
2 claimed that it was Dr. Walters who first raised the issue. Then, Sutliff alleged that Dr.
3 Walters dropped some names of administrators with whom she was assisting and stated
4 that Secretary Lehman was "in hiding." This is the core allegation that led to the
5 Employee Conduct Report and ultimate dismissal of Dr. Walters. It is hard to imagine
6 a less substantial or credible basis for dismissal than the vague and illogical Sutliff
7 allegation. In essence, Sutliff claims shock that Dr. Walters - whom she has known
8 since grammar school - would take her into her confidence in passing remarks within
9 the scope of their common professional relationship - Dr. Walters's availability to
10 receive calls from the DOC headquarters.

11 On February 12, 2003, Dr. Walters met with Marjorie Littrell to discuss her
12 annual employment evaluation. During this meeting, Dr. Walters discussed the internal
13 reaction of staff to the news report regarding Secretary Lehman's son. Dr. Walters
14 reported that the response from the Walla Walla field office staff was negative toward
15 Secretary Lehman. Dr. Walters informed Ms. Littrell that Sutliff specifically had stated
16 that the Secretary should resign. Ms. Littrell indicated that she had heard mostly
17 supportive comments from staff. Ms. Littrell did not disclose that she had been in
18 contact with Lynne Delano and Robinson-Martin in an effort to come up with
19 damaging information about Walters's activity in Olympia during the preceding week.
20

21 A week later, in a February 20, 2003 e-mail addressed to her supervisor, Haley
22 Shepherd, Mary Sutliff claimed that she "agonized over" her discussion with Dr.
23 Walters for several days before deciding to report it - although Sutliff misdates her
24 conversation with Dr. Walters by a whole week. Sutliff claims that she called her
25 supervisor on February 19, 2003 (although there is no record of any such telephone
26 call) and told Shepherd what Dr. Walters had discussed. Shepherd then allegedly
27 instructed Sutliff to document the discussion in an e-mail and send it to her. This e-mail
28 was then used by Littrell to engineer the dismissal of Dr. Walters from her position as
29 the State Director of the Staff Resource Center.

30 Haley Shepherd testified that, during her conversation with Sutliff, Sutliff
indicated that Dr. Walters had mentioned two names, Eldon Vail and Joseph Lehman,

1 to her during their conversation. Haley Shepherd also told the DOC investigator, Jim
2 Blodgett, that Sutliff had mentioned two names to her. However, Sutliff has
3 consistently indicated that she could not recall the names of the administrators that Dr.
4 Walters had allegedly mentioned.

5 It is undisputed that Dr. Walters did not provide any counseling or therapeutic
6 services to Eldon Vail or Joseph Lehman. In fact, during the relevant time frame, Dr.
7 Walters did not even have a meeting or discussion with Eldon Vail or Joseph Lehman.
8 There were no confidential communications to disclose to anyone, and Littrell and
9 Delano knew this when they were preparing the case against Dr. Walters through Mary
10 Sutliff.

11 Haley Shepard forwarded the Sutliff e-mail to Marjorie Littrell. Littrell then
12 called Sutliff to determine whether the e-mail was accurate. The telephone call from
13 Ms. Littrell was made on February 20, 2003. Ms. Littrell then concluded that an
14 Employee Conduct Report ("ECR") was in order, even though she had not yet
15 discussed the e-mail or its particulars with Dr. Walters. On February 25, 2003, while
16 in Tacoma, Ms. Littrell asked Regional Administrator Jim Blodgett whether he would
17 conduct an "investigation" into the alleged violation of DOC Policy 870.800. Ms.
18 Littrell asked Mr. Blodgett if, given his long history with Dr. Walters, he would be able
19 to do such an investigation. Mr. Blodgett replied, "absolutely." Marjorie Littrell and
20 Jim Blodgett discussed the alleged misconduct before Mr. Blodgett commenced his
21 investigation. Blodgett has admitted to harboring a prior negative impression of Dr.
22 Walters which he never communicated to her.

23 Ms. Littrell then telephoned Dr. Walters in the afternoon of February 25, 2003.
24 During the course of the conversation with Dr. Walters that began with a discussion
25 about the telephone problems, Ms. Littrell suddenly grilled Dr. Walters about what she
26 "shared with Mary" during their conversation on February 10. Ms. Littrell had
27 apparently no interest in allowing Dr. Walters a fair opportunity to respond since she
28 did not disclose the e-mail from Sutliff at this time. Dr. Walters told Ms. Littrell that
29 she had discussed the incident with Sutliff. Dr. Walters informed Sutliff that Dan
30 Pacholke or Jocelyn Hofe (emergency response staff) may be trying to reach her, as

1 well as the regional staff counselors and that it was appropriate to give them her home
2 and cell phone numbers if Dr. Walters could not be reached otherwise.

3 Ms Littrell also asked Dr. Walters if she had stated to Sutliff that Mr. Lehman
4 was in "hiding." Dr. Walters has consistently denied mentioning to Sutliff or anyone
5 else that the Secretary of the DOC was hiding out, although it may have been true - and
6 understandably so. Considering the press interest in the salacious allegations against
7 his son, it would be remarkable if Mr. Lehman was not in seclusion and deliberately
8 inaccessible - facts that were in effect relayed to Ms. Littrell by Lehman's Chief of Staff
9 Patria Robinson-Martin.

10 On March 3, 2003, Marjorie Littrell prepared the ECR. The ECR concluded
11 that Dr. Walters violated DOC 870.800 "by sharing information regarding specific
12 individuals you have worked with in an official capacity, or information about staff that
13 you are aware of from your role as the State Director." Ms. Littrell alleged that Dr.
14 Walters had shared with Sutliff that Dr. Walters "had been involved in assisting staff
15 in headquarters (naming some of them) with dealing with the crisis. You also
16 proceeded to discuss with Mary that Joe was 'hiding' from people in hopes to avoid
17 discussing the situation." Nowhere in the ECR does Ms. Littrell identify any
18 confidential communications that Dr. Walters disclosed to Sutliff during their
19 conversation because there were none.
20

21 On or about March 17, 2003, Ms. Littrell faxed to Jim Blodgett thirteen (13)
22 pages of documents to support his "investigation" on the ECR. Mr. Blodgett
23 interviewed Dr. Walters on April 2, 2003. Walters and Blodgett had a wide-ranging
24 discussion, but there was no discussion as to whether Dr. Walters had revealed any
25 confidential communications. Mr. Blodgett reported that Dr. Walters had stated that
26 she informed Sutliff that "Dan Pacholke or J. Hofe, or possibly the staff counselors,
27 may try and contact her." Dr. Walters told Blodgett that these were the only names
28 that she mentioned to Sutliff. Blodgett then interviewed Haley Shepherd, Mary Sutliff,
29 and Debbie Prichard by telephone. Haley Shepherd indicated that Sutliff had identified
30 two names to her: Joseph Lehman and Eldon Vail. Mr. Blodgett never attempted to

1 interview Joseph Lehman or Eldon Vail to determine if they had met with Walters.
2 Indeed, they had not.

3 Mr. Blodgett interviewed Sutliff by telephone where Sutliff indicated that she
4 could not recall the names mentioned by Dr. Walters because "she has never had any
5 contact with staff in Olympia, does not recall the names." Significantly, Sutliff
6 remarked that Walters had previously asserted confidentiality to block certain
7 discussions. This complaint actually originates with Lynne Delano, Walters's
8 supervisor, and it strongly suggests that Sutliff was parroting something she heard from
9 others. After all, in this instance she was complaining against Walters sharing such
10 supposed confidential information with her. Blodgett never asked Sutliff about or
11 identified any confidential communications that were divulged during the course of their
12 conversation.

13 Jim Blodgett had a brief telephone conversation with Ms. Debbie Prichard,
14 Haley Shepherd's supervisor, where Prichard indicated that Ms. Shepard claimed to be
15 concerned about reporting the incident. Mr. Blodgett eventually forwarded his
16 conduct investigation report to Anne Fiala, Assistant Deputy Secretary. Mr. Fiala was
17 assigned the task of determining whether Dr. Walters violated DOC Policy 870.800
18 and, if so, the appropriate level of discipline.

19 On May 22, 2003, Ms. Fiala concluded that the alleged conduct was violation
20 of the policy as alleged in the ECR. Ms. Fiala made a decision that, as a result of the
21 violation of policy, Dr. Walters should be separated from her employment with the
22 DOC. On September 22, 2003, Ms. Fiala informed Dr. Walters that she was
23 dismissed from her position as Statewide Director of the Staff Resource Centers for the
24 DOC. Ms. Fiala claimed that Dr. Walters neglected her duty and violated agency
25 policy when, on February 10, 2003, she shared information with Sutliff. Ms. Fiala
26 repeated the allegations contained in the ECR and concluded that Dr. Walters had
27 violated DOC policy.
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**III. ARGUMENT OF DR. WALTERS IN SUPPORT
OF COMPLETE REVERSAL OF DISMISSAL**

A. Applicable Standards for Review.

The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein. In a hearing on appeal from a disciplinary action, here a dismissal, the respondent DOC has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Department of Corrections, PAB No. D82-084 (1983).

Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Department of Social & Health Service, PAB No. D86-119 (1987). Willful violation of published employing agency or institution or personnel resources board rules or regulations is established by facts showing the existence and publication of the rules or regulations, appellant's knowledge of the rules or regulation, and failure to comply with the rules or regulations. Skaalheim v. Department of Social & Health Services, PAB No. D93-053 (1994).

Respondent DOC has not met its burden of proving by a preponderance of the credible evidence that Dr. Walters violated DOC Policy 870.800 or neglected her duty to the DOC. There is simply no evidence that Dr. Walters revealed or disclosed confidential communications or that Dr. Walters failed to maintain privileged communication with employees. The absence of a violation of DOC Policy 870.800 causes the whole house of cards to collapse.

It is abundantly clear that, throughout this whole disciplinary process, not one of the managers involved (Littrell, Blodgett and Fiala) had a professional understanding of the meaning of confidential communications. It suggests that they were more interested in stretching the Policy to meet the sketchy facts alleged than analyzing whether there was any actionable misconduct.

1 Furthermore, no one analyzed whether the statements made by Dr. Walters to
2 Sutliff, that several individuals may be trying to reach her and, due to her telephone
3 problems, that she could be called at home or on her cell phone, were covered
4 communications by the Uniform Healthcare Information Act (RCW 70.02.050(1)(b))
5 or the Health Insurance Portability and Accountability Act ("HIPAA"): A Healthcare
6 provider may disclose healthcare information to a person providing administrative
7 services to the healthcare provider. Here, Dr. Walters was performing her job when
8 she informed Sutliff that certain individuals may be trying to reach her. This type of
9 information can be shared with support staff such as Sutliff. Yet, in the preordained
10 investigation to dismiss Dr. Walters from her position, no one focused on either of
11 these two obvious and critical overriding issues.

12 **B. Dr. Walters Did Not Commit the Offenses Set Forth in the Disciplinary Letter**

13 The dismissal letter, dated September 22, 2003, is a patchwork of erroneous
14 and tendentious conclusions, revealing a profound misunderstanding of the subject
15 matter. It is important to remember the context of the ECR: the allegation that Dr.
16 Walters violated DOC Policy 870.800 by divulging confidential or privileged
17 communications to Sutliff. Every participant in this inquisition concluded that every
18 word out of Dr. Walters' mouth concerning an employee of the DOC was a
19 confidential communication. This is obviously not the case as all counselors,
20 psychologists, other healthcare providers, and lawyers surely know. The context and
21 character of communications are crucial. Confidentiality is the ethical responsibility of
22 mental-health professionals to safeguard clients from unauthorized disclosures of
23 information given in the therapeutic relationship. As pertaining to psychologists, which
24 is applicable to registered counselors, the definition of confidential information is found
25 in the Washington Administrative Code:
26

27 Confidential client information means information revealed by the client
28 or otherwise obtained by a psychologist, where there is a reasonable
29 expectation, because of the relationship between the client and
30 psychologist, or the circumstances under which the information was
revealed or obtained, that the information was private.

WAC 246-924-352(2)

TRIAL BRIEF OF APPELLANT
CYNDI WALTERS - 14

Minnick • Hayner
attorneys at law

249 W. Alder - PO Box 1757
Walla Walla, WA 99362
Phone (509) 527-3500

1 The essential ingredient in confidential communications has to do with
2 communications "revealed" by a client or "acquired" from a client. Confidential
3 information means information that is told to the healthcare provider by a client who
4 is talking to the counselor in his or her professional capacity, and has the reasonable
5 expectation that - because of the special relationship - the counselor will hold that
6 information as private.

7 The dismissal letter does not identify or specify any confidential
8 communications. It merely repeats the allegations in the ECR, which brazenly omits
9 any analysis pertaining to confidential communications. The letter accurately proclaims
10 that Dr. Walters had a duty and responsibility "to maintain the confidentiality of all
11 staff to the degree required by DOC policy and state law." There is simply no
12 evidence that Dr. Walters failed to maintain the confidentiality of any staff
13 communications or confidences. The second page of Ms. Fiala's dismissal letter reveals
14 the degree to which she misunderstood the legal concept of confidentiality. Ms. Fiala
15 concluded that, even though Dr. Walters did not speak to or meet with Secretary
16 Lehman, Dr. Walters violated his confidentiality:
17

18 to have violated the confidentiality of any staff member, much less that
19 involving the Secretary of the Department, who is the highest-ranking
20 member of our agency, not only constitutes neglect of duty, but is
21 appalling and egregious at best. Additionally, your comments about the
22 Secretary "hiding out" were inappropriate, indiscreet, and petty gossip
23 beneath someone of your position within this agency.

24 This conclusion suggests that Dr. Walters could neglect her duty by violating
25 confidentiality where there was no counselor-client relationship between Dr. Walters
26 and Secretary Lehman and no confidential communications. That preordained
27 conclusion is ridiculous.

28 Ms. Fiala, in making her decision to dismiss Dr. Walters, relied principally
29 upon the Blodgett Conduct Investigation Report. That report is a blatant sham and a
30 parody of a competent investigation. As was noted before, Dr. Walters dropped by
headquarters on February 6 and February 7 to let staff know that she was available if
anyone needed services of the Staff Resource Centers. Dr. Walters spoke with Patria

1 Robinson-Martin, Secretary Lehman's Chief of Staff, letting her know that she was
2 available, if Mr. Lehman wanted to see or speak with her. Amazingly, Mr. Blodgett
3 found that an e-mail describing these activities clearly constituted a violation of DOC
4 Policy 870.800. In Mr. Blodgett's "Conclusions of Investigator," he found in Section
5 5 as follows:

6 In review of attachment number 5, an e-mail sent from Dr. Walters to
7 employee Rory Peterson, Walters makes mention that "I'm still needed
8 here in Olympia until this afternoon," "I spoke to Patria [Martin-
9 Robinson] today and will be visiting with Mr. Lehman tomorrow. I'm
10 going to offer my assistance to his [Joseph Lehman] wife as well." "I
11 talked with a lot of staff and will continue to mill about." This
12 information, written by Dr. Walters to another DOC staff member on
13 a public e-mail system, is clearly a violation of DOC Policy Directive
14 870.800, Policies II and IV. C6. In this email Dr. Walters is sending
15 multiple-access communication relating to her staff counseling
16 activities, intervention and consulting services. She not only
17 communicates about these services but also mentions the names of
18 those receiving or directed for her services, namely Patria [Martin-
19 Robinson], Joe Lehman and Mrs. Lehman.

20 This is a stunningly erroneous conclusion by Mr. Blodgett, and strongly
21 suggests it was improperly and unethically motivated. It also suggests that everything
22 that Dr. Walters did during the course of her employment was "counseling activities,
23 intervention and consulting services." In fact, Dr. Walters's position was primarily
24 administrative. Mr. Blodgett clearly could not distinguish between counseling services
25 provided by a counselor and the administration of the Statewide Staff Resource Centers
26 managed by Dr. Walters. Mr. Blodgett did not understand DOC Policy 870.800, nor
27 did he understand the duties of Dr. Walters as Statewide Director.

28 Mr. Blodgett and Ms. Fjala failed to interview anyone that may have allegedly
29 received counseling services from Dr. Walters even though several names were
30 mentioned during the course of the investigation. This also reveals how one-sided,
inadequate, and unfair this investigation was. If a name was mentioned, a person who
may have received counseling services, then that person should have been interviewed
to find out whether there was a professional counseling relationship with Dr. Walters.

1 No one was interviewed. The investigators merely concluded that, if Sutliff - an
2 untrained administrative employee - claimed that information was confidential - Dr.
3 Walters must lose her job.

4 IV. CONCLUSION

5 Appellant respectfully submits that there is absolutely no evidence that Dr.
6 Walters violated DOC Policy 870.800 by revealing or disclosing confidential
7 communications or failing to maintain privileged communication. The grounds set forth
8 in the disciplinary letter that Dr. Walters violated DOC policy simply cannot be
9 supported and, therefore, the dismissal was unlawful and Dr. Walters should be
10 reinstated with full back-pay and benefits. Appellant respectfully suggests that it would
11 be appropriate to investigate the conduct and motivations of the individuals who joined
12 together to terminate Dr. Walters.

13
14 DATED this ___ day of September, 2004.

15
16 MINNICK-HAYNER

17
18 By:

19 *David M. Rose* *Walter* *JS*
20 David M. Rose, WSBA#32849
21 Attorneys for Appellant
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APPENDIX B

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David M. Rose
Minnick-Hayner, P.S.
PO Box 1757
Walla Walla, WA 99362

RECEIVED
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PERSONNEL
APPEALS BOARD

BEFORE THE PERSONNEL APPEALS BOARD
STATE OF WASHINGTON

CYNDI WALTERS,
Appellant,

NO. DISM-03-0093

v.

DEPARTMENT OF CORRECTIONS
Respondent.

WITNESS LIST OF
APPELLANT

COMES NOW appellant, Cyndi Walters, and submits the list of witnesses
appellant intends to call for the hearing to be held commencing September 9, 2004:

1. Cyndi Walters
2. Mary Sutliff
3. Haley Shepard
4. Marjorie Littrell
5. Jim Blodgett
6. Anne Fiala
7. Eldon Vail
8. Joseph Lehman
9. Michael Robbins
10. Jocelyn Hofe
11. Dan Pacholke
12. Patria Robinson-Martin
13. John Roberts
14. Stephen R. Feldman, Ph.D., J.D.

WITNESS LIST OF APPELLANT-1

Minnick • Hayner
attorneys at law

249 W. Alder - PO Box 1757
Walla Walla, WA 99362
Phone (509) 527-3500

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15. James H. Shaw, Ph.D.

Dated this 1st day of September, 2004.

MINNICK-HAYNER

By: David M. Rose
David M. Rose, WSBA #32849
Of Attorneys for Appellant

WITNESS LIST OF APPELLANT-2

Minnick • Hayner
attorneys at law

249 W. Alder - PO Box 1757
Walla Walla, WA 99362
Phone (509) 527-3500

APPENDIX C

Littrell, Marjorie R

From: DeLano, Lynne N.
Sent: Wednesday, February 12, 2003 9:25 AM
To: Littrell, Marjorie R
Subject: FW: Question
Importance: Low
Confidentiality: Confidential

Large, here's more on the story. It seems Cyndi just volunteered to help. You may want to double check with J Hofe to see if Cyndi had any more legitimate business in HQ after the OCOMT meeting, but I think not. I'd be curious to see if Cyndi claims additional hours of work during this time period. (grrrrrrrr!)

-----Original Message-----

From: Robinson-Martin, Patria N.
Sent: Wednesday, February 12, 2003 9:22 AM
To: DeLano, Lynne N.
Lehman, Joe D.
Subject: RE: Question
Importance: Low
Confidentiality: Confidential

Absolutely not!! That would not have been appropriate.

Cyndi stopped by one day last week, asking to see Joe to offer her assistance. He was out of office, not expected back until late in the day. She dropped in the following day, and Joe was not available. She left a number for him to call if he needed her, and also indicated that she was going to leave the number with several other staff, including you and Eldon. I asked her not to leave the number with OS staff, since I had it. Then she went away.

Hope this helps.

Patria

-----Original Message-----

From: DeLano, Lynne N.
Sent: Wednesday, February 12, 2003 8:34 AM
To: Robinson-Martin, Patria N.
Cc: Littrell, Marjorie R
Subject: Question

Patria,

I was curious if you or Joe requested Cyndi Walters spend time around HQ last week talking to Joe and staff?

Littrell, Marjorie R

From: DeLano, Lynne N.
Sent: Wednesday, February 12, 2003 5:38 PM
Subject: Littrell, Marjorie R
More info

large,
I spoke directly with Patria after I emailed you this morning. She indicated she was uncomfortable with Cyndi hanging around HQ and that Joe did not want to talk to her & thought it inappropriate that he was trying to see him. Patria can give you additional information about Cyndi's time in HQ last week, so I think it would be a good idea if you talked to her directly.

APPENDIX D

492 9th floor conf. Room - Hqs
4-2-03 Cynd. Walter, ECR

- Issue - Reviewed

- Her Response - Looked AT Policy - she pointed out -
- Marys Statement -

Interpretation -

Marys Statement - computer
since move - no electronics
or phones worked
cell phone - not working
- Confidential Records - logs -
computer, scraps of paper
All over the office - MARY
had my office moved ~~***~~ things
lost - confidential, lost projects

cyndi - explanation of
Mary's Statement (cont.)

from Correctional officer (I don't like
seeing what
is going on)
Got a call @ Midnight
Someone saw Johnson
moving my stuff. - He
was in my office. I had
confidential information
in that office - Court order
w/ Johnson. Mary said there
would be an inventory - there
was not.

- when I first started in
downtown office - Mary
approached me & said "I
want you to know that
I had nothing to do with
your office and the
move - I do not think it
was right & wanted to let
you know "Not Kosher".

Auditor issue - Hayley Shepard
was involved - report (Auditor)
indicated she should have been

Sined + Johnson should
Also be fired! (STATE
~~an~~ AUDITOR TOLD BOTH MARY
+ I THAT TOGETHER) MARY DID
NOTHING.
Mr. Johnson would throw files
AT me + threatened me - say
"you better watch your back"
+ "I will have your house"
+ "I will get you" MARY DID NOTHING.
AFTER ^{SUP} JOHN LAMBERT MADE A
DISCIPLINARY DECISION ~~ABOUT~~
IN GLENN'S FAVOR - THING
GOT WORSE - GLENN THREATENED
ME CONTINUALLY - I TOLD
MARY ABOUT IT, I ASKED
FOR HER ASSISTANCE A NUMBER
OF TIMES + SHE WAS FLIPANT
ABOUT IT, IGNORED ME.

When Hayley Shepard left
WSP I DID NOT KNOW
WHERE SHE WENT - PRIOR TO
HER GOING I HAD TO CONTACT
HER ON SEVERAL ~~PERSONAL~~ ~~ISSUES~~

When she worked for me,
 - Hagley & said many
 had things about me
 while working at USF,
 Hospital before she
 left. Other things told me this
 - History of no communication
 in the many said first day
 she was promoted - now
 not given my suggestions
 you will not talk
 to Eliza - again to
 when I wanted to go Downtown
 office I told Mary I
 did not want to make
 there - there is a hostile
 feeling in that office about
 name field staff moving
 in - in ^{office} (told Mary
 Dan) ^{should} not talk to
 me, would not invite me
 to parties - Xmas,
 so even the beginning - not
 a welcome environment -
 Bobbie called me that
 she was into similar situation

"People" wanted me when
I went there that
"Mary Sutcliffe" likes
to write paper "Watch
out."
Mary asked me to
be sure to let Mary
know my whereabouts

The morning I came back
from Olympia Mary
asked if she could
talk to me about electronics
problems - she was
in my office - I told
her that I had a
number of people
that may contact me -
if they called it was
OK to give them my
phone numbers - "she
said oh yes I heard
big things were going on"
I told her Dan Backus &
J. Hoff may be trying to

call me - also my
 have mentioned ^{STAFF} counsels,
 those were the only
 names I mentioned -
 I pointed toward my
 desk at the newspaper
 article & said "ye, there
 are a lot of people grieving".
 She ^(MAY) went on about
 the issue & I told her
 that there were a lot
 of people grieving
 hurting over this
 issue -
 I never mentioned one
 soul that I talked
 to about this -
 the people I talked
 to were secretaries,
 Jan. Tons (at Headquarters)
 I got the article
 from Mary (Lyones, Sec.)
 It was not different
 than the earthquake -
 people just wanted to

Talk to me

I did not say what Mary said I said - she most of one headed ~~and~~ one of my telephone conversations.

(Addition also told me that it appears that Johnson was listening in on my telephone conversations - Mary knew about this) (did nothing) when I moved there I told Mary I was concerned about someone listening to my phone calls. She did nothing.

I think Haley her supervisor wanted to discredit me (Mary knows that Haley wants to get me)

~~Sally~~ Mary was in my husband's high school class + my husband + I were Asperger - Mary accused my husband of

~~was~~ NOT inviting her to
private parties for
over 10 yr - REUNION -
I think she is a person
that does not feel
accepted - My guess
is that she got on
the phone with Halley,
Marry ~~was~~ wanted
to feel more important
& said something that
Halley saw an opportunity
to MANIPULATE Marry
to write the memo -
I did not say anything
to ~~any~~ Marry about
Joe hiding out. Marry
had to make that up.
Marry liked jerking me
around - she accused my
husband of moving telephone
lines in my office.
- People have come to me
& told me that Marry told

CONSPIRACY

Then that she would pay them \$1000 to take my program. She wrote this ECR in haste & anger, not thinking this through. I have not had a single vacation on team off since she has been my supervisor.

Glenn ^{said} I will take this program down if that ~~is~~ is what it takes to get you.

I believe Mary has tainted my relationship with everyone in headquarters. Lynne DeLano - Lynne has her mind made up about me.

~~I have told Mary that~~

(6PM)

Mary, Mary, they're down they have heard on a witch hunt for two (2) years

could move to the downtown office as a demotion

6²⁷

I was called by someone
here to sit down &
have a cup of
coffee. That is
why I went to
olympia.

mentioned Joe Lehman
Eldon Hall

worked

Cyber - 3-4 Months

- Mary - ^{Wife} concerned -
- pulled out articles
- been in Olympia with him - he has been in hiding -
- Mary self had made her ^{very} uncomfortable ^{for anyone} ^{yet heard.}
- send me an e-mail

told supervisor
Dibbie (Kitchener) -
talked to Mary

-
- Don't want to expose her
- left Cyber - unethical actions - blame her for things had to get out - was in to maintain reputation
 - naturally leave - retaliation letter at home

MARY SUTLIF

Apprehensive ^{to Roberts} for fear
of retaliation

Dr. Roberts & her
had a meeting -

Dr. Roberts wanted
me to go have coffee
with him - ~~he~~ talked
to me twice

I was assisting her
w/ phone - She
just returned from
Ohio. "Been there
longer than expected"
showed me a picture
"have you heard about
this" everything is
messy - 11-01-78 - Joe

lying - I remember that
she has talked to you
"spoke to several people"

~~And then~~ she told

me three names - can't

remember - she was assisting ^(conducted)
two females - ^{discovery}

appeared that she

wanted me to know

how important she

was

Hamilton - thought

- ~~AT~~ ^{unproven}

son ~~for weeks~~ several days

ate at her - thought

she is in charge of
whole state - conductors

should serve as

an example - she

continues ~~to~~

learn ~~on~~ ^{cost} but

for many purposes - then

she violates

When I TOLD Haley -
I could tell she
was very cautious
about her advice
to me - ~~she~~ Haley
TOLD me ~~to~~ Don

She was going to
discuss it with
her supervisor
at break to me
shortly after
that Margon -
asked me &
dismissed the situa

- Mary's Den AS/W
NCL to document the
conversation

~~XXXXXXXXXXXXXXXXXXXX~~

Debra
Haley came in office
AA said Mary called
- said she was uncomfortable
with some information
That Cops gave her,
when Haley talked
to me she was very
hesitant to talk
about it because
of her history with

Cyndi - she said
she asked Mary
to send her

E-mail -
Told her to forward
E-mail to me -
Drug course at
Western Connecticut
with Mary - mention
it to her she
wanted the email
sent to her.

Acad - Hasly was
very cautious in trying
to establish
very cautious about

NOT WANTING TO APPEAR
UNFAIR TO CYNDI.

• ~~APPEAR~~ ~~CYNDI~~ ~~MOVED~~
INTO

Cyndi showed up in
office - there for a
while - stop by
- see if you need
some support -
This is very different
from before

- came back following
Monday - told he
Joe did not have
a need - gave me
phone # - wanted
to be available - 515

NOT IN NEED

WALTERS
INV - 01180020

COURT OF APPEALS
DIVISION II

07 OCT 10 PM 1:00
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STATE OF WASHINGTON

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS,

Appellant,
v.

CYNDI WALTERS,

Respondent.

No. 35919-7-II

CERTIFICATE OF
SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT and
CERTIFICATE OF SERVICE on all parties or their counsel of record on
October 10, 2007, as follows:

By ABC Legal Messenger to: Court of Appeals, Division II,
950 Broadway, Ste. 300, Tacoma, WA 98402-4454

By First Class Mail, postage prepaid to:

Valerie B. Petrie
Assistant Attorney General
P.O. Box 40145
Olympia, WA 98501-0145

Janetta E. Sheehan
Assistant Attorney General
P.O. Box 40145
Olympia, WA 98501-0145

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

DATED this 10 day of October, 2007.


Sylvia Acosta