

NO. 35404-7-II

---

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

---

ARNOLD MELNIKOFF,

Appellant,

v.

WASHINGTON STATE PARTOL,

Respondent.

FILED  
COURT OF APPEALS  
DIVISION II  
07 JUN -5 PM 2:19  
STATE OF WASHINGTON  
BY [Signature]

---

**BRIEF OF RESPONDENT**

---

ROBERT M. MCKENNA  
Attorney General

ELIZABETH DELAY BROWN  
Assistant Attorney General  
WSBA No. 21521  
7141 Cleanwater Drive SW  
Olympia, WA 98504-0145  
(360) 664-4174

pm 6-4-07

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTERSTATEMENT OF THE ISSUE .....	2
III.	COUNTER STATEMENT OF THE CASE .....	2
	A. Substantive Facts .....	2
	B. Procedural Facts.....	18
IV.	STANDARD OF REVIEW.....	19
	A. Question of Fact Standard.....	20
	B. Question of Law Standard .....	22
	C. Mixed Question of Fact and Law.....	24
	D. Arbitrary and Capricious Standard .....	24
	E. The Record on Review.....	25
	F. Unchallenged Determinations.....	26
V.	ARGUMENT .....	26
	A. The Personnel Appeals Board’s Findings of Fact Are Supported by Substantial Evidence .....	26
	1. Finding of Fact 5.1. ....	26
	2. Finding of Fact 5.2. ....	34
	3. Finding of Fact 5.3. ....	37
	4. Finding of Fact 5.4. ....	38

B. The Personnel Appeals Board’s Conclusions of Law 6.1, 6.7 and 6.9 Are Supported by The Evidence And Are Not Contrary to Law .....	39
1. The PAB had jurisdiction over the parties and subject matter of this case.....	39
2. It is clear that Mr. Melnikoff’s testimony rose to the level of incompetence and gross misconduct. ....	43
a. Incompetence .....	43
b. Gross Misconduct .....	45
3. Termination was the only appropriate sanction in this matter and the PAB’s decision was not arbitrary and capricious.....	48
VI. CONCLUSION .....	50

APPENDIX A

Personnel Appeals Board Findings of Fact, Conclusions of Law and Order of the Board ( July 26, 2005).

## TABLE OF AUTHORITIES

### Cases

<i>Adams v. Dep't of Social &amp; Health Services</i> , 38 Wn. App. 13, 683 P.2d 1133 (1984).....	19
<i>Ballinger v. Dep't of Social &amp; Health Services</i> , 104 Wn.2d 323, 705 P.2d 249 (1985).....	20, 21, 22
<i>Casco Co. v. Public Utilities Dist. No. 1 of Thurston Cy.</i> , 37 Wn.2d 777, 226 P.2d 235 (1951) .....	25
<i>D/O Center v. Dep't of Ecology</i> , 119 Wn.2d 761, 837 P.2d 1007 (1992).....	25
<i>Dedman v. Personnel Appeals Board</i> , 98 Wn. App. 471, 989 P.2d 1214 (1999).....	19
<i>Dupont-Ft. Lewis School Dist. No. 7 v. Bruno</i> , 79 Wn.2d 736, 489 P.2d 171 (1971) .....	24, 49
<i>Franklin Cy. Sheriff's Office v. Sellers</i> , 97 Wn.2d 317, 646 P.2d 113 (1982), <i>cert. denied</i> , 459 U.S. 1106 (1983).....	23, 24
<i>Gogerty v. Dep't of Institutions</i> , 71 Wn.2d 1, 426 P.2d 476 (1967) .....	21, 22
<i>In re Kuvara</i> , 97 Wn.2d 743, 649 P.2d 834 (1982) .....	22
<i>Lawter v. Employment Security Dep't</i> , 73 Wn. App. 327, 869 P.2d 102 (1994).....	21, 26
<i>Macey v. Dep't of Employment Security</i> , 110 Wn.2d 308, 752 P.2d 372 (1988) .....	23
<i>State ex rel. Hood v. Wash. State Personnel Bd.</i> , 82 Wn.2d 396, 511 P.2d 52 (1973) .....	21

<i>Sullivan v. Dep't of Transportation,</i> 71 Wn. App. 317, 858 P.2d 283 (1993).....	20, 23, 25, 49
<i>Sunrise Express, Inc. v. Dep't of Licensing,</i> 77 Wn. App. 537, 892 P.2d 1108 (1995).....	23
<i>Terhar v. Dep't of Licensing,</i> 54 Wn. App. 28, 771 P.2d 1180, <i>review denied</i> , 113 Wn.2d 1008 (1989).....	25, 49
<i>Trucano v. Dep't of Labor and Industries,</i> 36 Wn. App. 758, 677 P.2d 770 (1984).....	20, 25, 26, 49
<i>Vermette v. Andersen,</i> 16 Wn. App. 466, 558 P.2d 258 (1976).....	22

**Statutes**

RCW 41.06.111 .....	19
RCW 41.06.111 (5).....	20
RCW 41.64.130 .....	20
RCW 41.64.130(1).....	20
RCW 41.64.130(1)(b).....	20
RCW 41.64.140 .....	20

## I. INTRODUCTION

The Washington State Patrol (WSP) terminated Mr. Melnikoff from his employment as a scientist with the WSP crime laboratory because the WSP lost confidence in his ability to be able to perform the essential functions of his job. A scientist, at Mr. Melnikoff's level, was expected to interpret analytical results, prepare written opinion reports and testify as an expert in courts of law. It was clear to the WSP and to the PAB that Mr. Melnikoff's testimony in 1990 in a Montana case did not meet the standards of practice expected of a fully qualified and competent forensic examiner and was contrary to the scientific principles and practices of hair analysis. As a result of Mr. Melnikoff's incompetent testimony in the Montana case, he irreparably harmed his reputation as a credible expert witness and forensic scientist. Without the ability to withstand the close scrutiny by a defense attorney, jury or judge necessary of an expert witness providing a court

and/or jury with scientific information, Mr. Melnikoff could no longer perform the essential functions of a scientist for the WSP. Therefore, his termination was appropriate and should be upheld.

## **II. COUNTERSTATEMENT OF THE ISSUE**

Whether the decision of the PAB upholding Mr. Melnikoff's termination from the WSP should be affirmed because the PAB's findings of fact are supported by substantial credible evidence on the record, its conclusions of law are not contrary to law, and the decision is not arbitrary and capricious.

## **III. COUNTER STATEMENT OF THE CASE**

### **A. Substantive Facts**

Arnold Melnikoff was employed as a Forensic Scientist 3 (FS 3) with the Washington State Patrol (WSP) Crime Lab Division from September 1989, until he was terminated in April

2004. R-1;<sup>1</sup> *see also* RP 000965.<sup>2</sup> The expectations of a person performing the job of an FS 3 include the ability to perform complex analyses on physical evidence in criminal cases submitted to the WSP forensic laboratory. R-1. Additionally, the individual must be able to interpret analytical results, prepare written opinion reports and testify as an expert in courts of law. *Id.* The distinguishing characteristics of an FS 3 include complex analysis of physical evidence which involves casework where applied research, method, modification or a unique approach may be necessary; or a single definite conclusion is not possible and a weighted conclusion is warranted; or casework requiring the reconstruction of an event or series of events based upon the interpretation of physical evidence. *Id.* Dr. Barry Logan, Director of the WSP's Forensic

---

<sup>1</sup> The exhibits from the Personnel Appeals Board (PAB) hearing held on April 26-28, 2005 (contained in the Administrative Record transmitted to this Court with the Clerk's Papers) will be referred to as "R-\_\_" for Respondent's exhibits and "A-\_\_" for Appellant's exhibits.

<sup>2</sup> RP denotes citations to the verbatim transcript of the proceedings before the PAB on April 26-28, 2005 (contained in the Administrative Record transmitted to this Court with the Clerk's Papers). The number following "RP" is the stamped number on each page, placed on the verbatim transcript of proceedings, by the PAB, prior to the transcript being sent to Thurston County Superior Court (TCSC).

Laboratory Services Bureau, indicated in his testimony to the PAB that he needs to rely, and be absolutely confident of, the integrity of anybody who he is prepared to send to court to testify in a case where somebody may be subject to either financial penalties or loss of personal liberty. RP 000721. He expects that an FS 3 will accurately represent the information concerning the evidence they've examined and their interpretation of that evidence and that an FS 3 will keep current with developments in their field. *Id.*

Prior to being hired by the WSP, Mr. Melnikoff had worked for the State of Montana's Crime Lab. *Id.*; *see also* RP 000966-967. He began as a forensic scientist in 1970 and worked up to the position of Laboratory Manager in charge of the Montana Crime Lab. *Id.* While working in Montana, Mr. Melnikoff was often qualified as an expert witness in various court proceedings, to include being qualified as an expert witness in criminal cases involving hair analysis. RP 000968.

He has taken classes regarding hair examination from the FBI.  
RP 000967.

One case in which Mr. Melnikoff was qualified as an expert witness in hair analysis was *State v. Bromgard*. R-19.<sup>3</sup> Bromgard was accused of burglarizing a home in March 1987, and also raping an eight-year old girl in the home, while the rest of the family slept. A-11. In November 1987, Mr. Melnikoff testified at Bromgard's trial. R-19. Among other opinions he rendered, he testified, that in his opinion, there was a "less than one in ten thousand chance that [the hair found at the scene of the crime] was not actually Jimmy Bromgard's hair." *Id.* at 237-38. Additionally, Mr. Melnikoff testified that he had done "over 700 cases involving head hair and have only had five or six cases where [he] could not distinguish the head hair between two individuals." *Id.* at 236. A jury convicted Bromgard of three counts of sexual intercourse without consent

---

<sup>3</sup> The cover page to the exhibit R-19 is the cover page for a case entitled *State v. Kordonowy*; however, the contents of the transcript which make up exhibit R-19 are a portion of the record of the proceedings in *State v. Bromgard*.

and he was sentenced to three forty-year terms of imprisonment and was designated a dangerous offender. A-11. However, on October 1, 2002, Bromgard was released from prison, exonerated as a result of post-conviction DNA testing. R-17; *see also* RP 000685-687.

Bromgard's exoneration was accomplished, in part, as the result of representation he received from the Innocence Project. RP 000686. The Innocence Project at the Benjamin N. Cardozo School of Law was created in 1992. It is a non-profit legal clinic. The Innocence Project only handles cases where post-conviction DNA testing of evidence can yield conclusive proof of innocence. Peter Neufeld is a co-founder and co-director of the Innocence Project. RP 000682.

After Bromgard's exoneration, Mr. Neufeld wrote a letter of complaint about Mr. Melnikoff's scientific practices to then Attorney General of Washington, Christine Gregoire, who

forwarded the complaint on to the WSP.<sup>4</sup> R-1; *see also* RP 000685. This letter of complaint was sent after Mr. Neufeld received the results of an independent “peer review” he had asked to be conducted of Mr. Melnikoff’s testimony in the State v. Bromgard trial.<sup>5</sup> R-17. The peer review committee, found, among other findings, that Mr. Melnikoff’s testimony in State v. Bromgard had contained:

1. [E]gregious misstatements not only of the science of forensic hair examinations but also of genetics and statistics. These statements reveal a fundamental lack of understanding of what can be said about human hair comparisons and about the difference between casework and empirical research. **His testimony is completely contrary to generally accepted scientific principles.**

---

<sup>4</sup> Mr. Neufeld forwarded the letter to the Attorney General of Washington because he incorrectly assumed that since the Attorney General for Montana had ultimate authority for its crime labs, Washington was similar. RP 000689. In fact, in Washington, the Forensic Laboratory Services Bureau of the WSP includes the state crime lab. RP 000716.

<sup>5</sup> Mr. Neufeld had contacted Dr. Walter Rowe, Professor of Forensic Science at George Washington University, because of concerns about Mr. Melnikoff’s testimony in the Bromgard trial. R-17. Professor Rowe, independent of any input from Mr. Neufeld, established a peer review committee to examine Mr. Melnikoff’s testimony. *Id.* Professor Rowe selected four experts in hair examination: Harold Deadman, Max Houck, Skip Palenik, and Richard Bisbing to review the testimony. *Id.* None of the experts were compensated for their review and they reviewed the transcript “blind” (meaning they did not know the identity of the hair examiner testifying). *Id.*

2. [T]estimony . . . contrary to the consensus practice – as it existed in 1987 – for forensic hair comparisons and testimony regarding such comparisons.

R-17 (emphasis added). Mr. Neufeld believed that, given the fact, according to the “peer review” committee, that there was no scientific basis for Mr. Melnikoff’s testimony, Mr. Melnikoff’s actions should be brought to the attention of his current employer. RP 000690. Mr. Neufeld did not think that Mr. Melnikoff should be permitted to practice forensic science anymore where people’s lives and liberty were at stake. *Id.*

Upon receipt of the complaint from Mr. Neufeld, the WSP initiated an administrative investigation of Mr. Melnikoff, alleging that since his hire date of September 18, 1989, to the present, he may have engaged in misconduct involving courtroom testimony and/or case analysis. R-14.<sup>6</sup> Mr. Melnikoff was charged with neglect of duty, gross misconduct, incompetence and willful violation of WSP rules and

---

<sup>6</sup> It was also alleged that Mr. Melnikoff may have misrepresented himself during the original employment process when he applied for his position with the WSP; however, the appointing authority found no evidence to support this allegation. R-1.

regulations, to include neglect of duty, unsatisfactory performance and code of ethics violations. *Id.*

After the investigation began, the WSP learned that in January 1990, Mr. Melnikoff, an employee of the WSP since September 1989, returned to Montana to testify in a criminal trial, *State v. Kordonowy*. R-15; R-18. In that case, like in *State v. Bromgard*, Mr. Melnikoff rendered opinions about hair analysis, using statistical conclusions. R-18. In fact, one opinion rendered was almost identical to the opinion that Mr. Melnikoff gave in *State v. Bromgard*:

Q. Is there one chance in ten thousand, then, that some other individual would have both pubic hair and the head hair which match Mr. Kordonowy's?

A. Yes, a good approximation is if you wanted to look for another individual you'd have to go through at least ten thousand people to find one person who would match all the characteristics of his known head hair and pubic hair.

R-18 at 309. Additionally, again he testified that he had done “between five and seven hundred hair cases when [he] worked in Montana . . . .” *Id.* at 308. Based, in part, on the conclusions

of Mr. Melnikoff, the State of Montana charged Kordonowy by information with one count of aggravated burglary and one count of sexual intercourse without consent. A-12. A jury convicted Kordonowy of both charges on January 18, 1990, and he was sentenced to thirty years imprisonment for the aggravated burglary charge and twenty years imprisonment for the sexual intercourse without consent charge. *Id.* However, on May 2, 2003, the WSP became aware that post-conviction DNA evidence exonerated Kordonowy of the rape charge. R-6.

As a result of learning that Mr. Melnikoff had testified in State v. Kordonowy in 1990, but prior to learning of Kordonowy's exoneration reference the rape charge, the scope of the WSP's administrative investigation against Mr. Melnikoff was expanded to include the following factual allegations:

On or about January 16 through 18, 1990, you provided statistical comparisons based on analysis of hair samples during courtroom testimony for the State of Montana while you were an employee of the Washington State Patrol. The statistical

comparisons you provided were not consistent with scientific principles or training you received.

On or about January 16 through 18, 1990, you provided testimony for the State of Montana while employed by the Washington State Patrol in which you stated you had conducted hair analysis in 500 to 700 cases. It is alleged that you conducted substantially fewer hair analysis than you testified to in court.

R-16.

As a part of the WSP's investigation of Mr. Melnikoff's courtroom testimony, the WSP interviewed Dr. Walter Rowe, Max Houck, Harold Deadman and Richard Bisbing, four of the five forensic science experts that were a part of the "peer review" committee that had been formed to review Mr. Melnikoff's testimony in State v. Bromgard. R-7; *see also* R-8, R-9, R-11 and R-13. All the scientists interviewed indicated that Mr. Melnikoff did not have a scientific basis to incorporate a statistical analysis of the examination of hair samples into his expert testimony. R-8 at 9, R-9 at 11-12, R-11 at 3, R-13 at 5, 8, 14-16. Additionally, the theme of all the scientists'

statements about the deficiencies in Mr. Melnikoff's testimony that they reviewed was the same. For example, one scientist indicated that applying statistics to hair comparison evidence makes the testimony regarding the evidence weigh more than it should. R-8 at 12. Three of the scientists indicated that they would never provide testimony to numerical probability or statistical analysis regarding hair analysis. R-8 at 13, R-9 at 15, R-11 at 14-15.

Additionally, a forensic hair examiner named Dr. Barry Gaudette was interviewed by the WSP in March 2003.<sup>7</sup> RP 000776; *see also* R-10, R-20. One reason that Dr. Gaudette was interviewed was because Mr. Melnikoff's attorney had indicated to the WSP that Dr. Gaudette's theories were a possible explanation for Mr. Melnikoff's use of statistical comparisons reference hair analysis. RP 000776. As a result, the WSP provided Dr. Gaudette the transcripts from the testimony given by Mr. Melnikoff in *State v. Bromgard* and

---

<sup>7</sup> Although there were no signs in March 2003, that he was ill, unfortunately, Dr. Gaudette passed away in October 2003. RP 000778-779.

State v. Kordonowy. R-21, R-20. Dr. Gaudette was asked to review them and provide his opinion as to the quality of the testimony. R-21, R-10 at 2. Dr. Gaudette indicated that Mr. Melnikoff had improperly used his (Gaudette's) data in his (Melnikoff's) testimony (R-10 at 7) and that Mr. Melnikoff had inflated the odds, so to speak, by testifying the way that he did. R-10 at 2. Dr. Gaudette indicated in his March 2003, interview with the WSP:

Q. Okay. How would you characterize the testimony you peer reviewed?

A. I did not feel that it was the uh, standard of uh, proper uh, testimony that uh, given by a fully qualified uh, forensic hair examiner, either back at the time when these testimonies were given or today.

R-10 at 13.

Mr. Melnikoff was not interviewed as a part of the WSP's investigation. There was a concern that there was the potential for Montana to file criminal charges against Mr. Melnikoff as a result of his testimony; therefore, the WSP did

not want to compel a statement from Mr. Melnikoff, thereby inadvertently rendering his statements to the WSP non-useable in any potential subsequent criminal proceeding against Mr. Melnikoff. RP 000847.

At the conclusion of the WSP's investigation, Mr. Marty Knorr, the appointing authority (decision maker), received the entire investigation, reviewed it (RP 000876), had discussions with then Captain Brian Jones, the standards officer for the WSP, and authored an Administrative Insight (a pre-determination letter) to be served on Mr. Melnikoff. R-5; *see also* RP 000843-846. Mr. Knorr contemplated terminating Mr. Melnikoff from his employment with the WSP, because, in summary, Mr. Melnikoff's inaccurate, incorrect, misleading and confused statements in any of the transcripts reviewed taken individually or combined, resulted in a complete lack of respect

for him as a forensic scientist and expert witness in not only hair comparisons, but any other discipline.<sup>8</sup> R-5.

Mr. Melnikoff was afforded a Loudermill hearing, after being served with Mr. Knorr's contemplated discipline. Mr. Melnikoff provided both a written response (R-25) and presented two days worth of evidence to Mr. Knorr at the Loudermill hearing. RP 000870. Included in the information that Mr. Melnikoff wished that Mr. Knorr consider was Mr. Melnikoff's reliance on Dr. Gaudette's work to buttress his own testimony. However, Mr. Knorr did not find Mr. Melnikoff's reliance persuasive, because of Dr. Gaudette's analysis of the testimony that was given by Mr. Melnikoff, in which Dr. Gaudette indicated that Mr. Melnikoff did not use his studies appropriately and did not testify properly. RP 000873.

Additionally, Mr. Melnikoff provided documentation to Mr. Knorr from several prosecutors who were complimentary

---

<sup>8</sup> The record is clear that Mr. Melnikoff did not do hair comparisons while employed by the WSP, but he was employed as forensic scientist. RP 000846. Incumbent upon the duties of a forensic scientist is the ability to provide accurate courtroom testimony. *Id.*

of Mr. Melnikoff. A-8. While Mr. Knorr took the letters into consideration, he ultimately discounted them because the general theme was that the prosecutors did not know all of the issues surrounding Mr. Melnikoff's administrative investigation. RP 000894. Mr. Knorr was not sure of the approach used to garner the letters for use in Mr. Melnikoff's defense of his actions. RP 000874.

Therefore, after the Loudermill, Mr. Knorr still believed termination was the appropriate sanction for Mr. Melnikoff's testimony that he gave in 1990 in Montana, while an employee with the WSP. As Mr. Knorr testified at the hearing in this matter: he had reviewed the transcript of Mr. Melnikoff's testimony in State v. Kordonowy (RP 000880) and felt like someone with Mr. Melnikoff's training and experience should have known what the science of the day was, so to speak, and to testify any differently was flagrant. RP 000881. Additionally, Mr. Knorr placed a lot of weight on the letter that Dr. Gaudette wrote to the WSP, after his review of the transcripts of Mr.

Melnikoff's testimony in State v. Bromgard and State v. Kordonowy. RP 000877. As Mr. Knorr wrote in his Final Determination:

As an expert witness, Mr. Melnikoff is expected to know and understand the science and statistics related to the field and provide testimony that is based on the facts – testimony that is not misleading. Dr. Gaudette, in his testimony to [WSP] internal affairs, indicated Mr. Melnikoff's testimony in 1990 was not that of a **competent** forensic hair examiner. Dr. Gaudette stated Mr. Melnikoff's use of a probability calculation based on personal casework was an improper way to represent the odds that hair could not be distinguished. **Dr. Gaudette further stated that Mr. Melnikoff had a lack of understanding about the difference between casework and empirical research.** Dr. Gaudette said his studies should not have been used to draw statistical conclusions. . . . [T]hat his studies should have been used only to lend value to hair comparison evidence in general. Dr. Gaudette concluded Mr. Melnikoff's testimony did **not meet the standards of practice of a fully qualified and competent forensic hair examiner during that time (of the 1990 trial) or today.**

R-4 (emphasis added).

## **B. Procedural Facts**

As noted above, Mr. Melnikoff was terminated from his position as an FS 3 with the WSP, effective April 7, 2004. R-1. Mr. Melnikoff timely filed his appeal of his termination with the PAB on April 15, 2004. CP 60; *see also* PAB Findings of Fact, Conclusions of Law and Order of the Board (7/26/05), attached hereto as Appendix A.<sup>9</sup> After a three day hearing held April 26 through 28, 2005, in which the PAB heard testimony from numerous witnesses, including Mr. Melnikoff, and admitted exhibits from both the Appellant and Respondent, the PAB issued its Findings of Fact, Conclusions of Law and Order of the Board (PAB Order), upholding Mr. Melnikoff's termination and denying his appeal. *See* Appendix A.

On or about August 25, 2005, Mr. Melnikoff timely appealed the PAB Order to Thurston County Superior Court (TCSC). CP 7. On September 8, 2006, the Honorable Wm. Thomas McPhee, TCSC, signed an Order affirming the PAB

---

<sup>9</sup> CP as used in this brief refers to the Clerk's Papers.

Order. CP 137-38. Judge McPhee denied Mr. Melnikoff's appeal because he found that there was substantial evidence to support the findings made by the PAB, that there were no errors of law shown to have been committed, and that no constitutional right of Mr. Melnikoff had been violated in the appeal process. *See* Transcript of Oral Opinion of the Court dated September 8, 2006, at 6.

On or about October 5, 2006, Mr. Melnikoff timely filed an appeal to this Court. CP 139-42.

#### **IV. STANDARD OF REVIEW**

The Court of Appeals reviews decisions of the PAB<sup>10</sup> de novo on the record made at the Board level, applying the same standard of review as the superior court. *Dedman v. Personnel Appeals Board*, 98 Wn. App. 471, 476, 989 P.2d 1214 (1999); *Adams v. Dep't of Social & Health Services*, 38 Wn. App. 13, 14, 683 P.2d 1133 (1984).

---

<sup>10</sup> The Personnel System Reform Act of 2002 (PSRA) abolished the PAB on July 1, 2005, and transferred powers, duties and functions back to the Personnel Resources Board (PRB) effective July 1, 2006. RCW 41.06.111.

Review of PAB decisions is governed by RCW 41.64.130 and RCW 41.64.140.<sup>11</sup> *Ballinger v. Dep't of Social & Health Services*, 104 Wn.2d 323, 328, 705 P.2d 249 (1985); *Sullivan v. Dep't of Transportation*, 71 Wn. App. 317, 320, 858 P.2d 283 (1993); *Trucano v. Dep't of Labor and Industries*, 36 Wn. App. 758, 760, 677 P.2d 770 (1984). An aggrieved employee may appeal the PAB decision on the grounds that the decision is (1) founded on or contained an error of law; (2) contrary to a preponderance of the evidence; (3) materially affected by unlawful procedure; (4) based on violations of any constitutional provision; and (5) arbitrary and capricious. RCW 41.64.130(1).

#### **A. Question of Fact Standard**

RCW 41.64.130(1)(b) nominally sets forth a preponderance of the evidence test for reviewing challenged findings of fact. However, the Washington Supreme Court has held that the Legislature intended review to be akin to a

---

<sup>11</sup> With the abolishment of the PAB, the statutes enumerated became obsolete. However, for the purposes of this brief and because the transfer of the PAB's powers back to the PRB does not affect the validity of any acts performed before July 1, 2006 (see RCW 41.06.111 (5)), the law cited is applicable to these proceedings.

substantial evidence test. *Ballinger*, 104 Wn.2d at 328-29. The Court has rejected any interpretation of the statute that would confer “*de novo* reviewing powers” over PAB findings of fact. *Id.*; *Gogerty v. Dep’t of Institutions*, 71 Wn.2d 1, 8-9, 426 P.2d 476 (1967). Instead, the reviewing court grants to the PAB’s determinations a “presumption of correctness.” *State ex rel. Hood v. Wash. State Personnel Bd.*, 82 Wn.2d 396, 400, 511 P.2d 52 (1973). *See also Lawter v. Employment Security Dep’t*, 73 Wn. App. 327, 332, 869 P.2d 102 (1994) (administrative findings of fact are accorded deference upon judicial review). The reviewing court’s examination is limited to whether there is “any competent, relevant and substantive evidence which, if accepted as true, would, within the bounds of reason, directly or circumstantially support the challenged findings or findings,” and

[T]hat before the superior court could upset the board’s findings, it would have to demonstrably appear, from the record as a whole, that the quantum of competent and supportive evidence upon which the personnel board predicated a challenged finding or findings of fact was so meager and lacking in probative worth, and the opposing evidence so

overwhelming, as to dictate the conclusion that the pertinent finding or findings did not rest upon any sound or significant evidentiary basis.

*Ballinger*, 104 Wn.2d at 328-29 (quoting *Gogerty*, 71 Wn.2d at 8-9).

This type of approach does not contemplate re-evaluating any of the witness' credibility. *Gogerty*, 71 Wn.2d at 8. The determination of witness credibility is a matter for the PAB, as finder of fact, and not a matter for the court upon review of the record. *In re Kuvara*, 97 Wn.2d 743, 747, 649 P.2d 834 (1982); *Vermette v. Andersen*, 16 Wn. App. 466, 470, 558 P.2d 258 (1976).

## **B. Question of Law Standard**

When reviewing questions of law, the reviewing court applies the error of law standard. Although it is irrefutable that it is the “province and duty of the judicial branch to say what the law is,” it is just as well-founded that, where, as here,

[A]n administrative agency is charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field, the agency's construction of statutory

words and phrases and legislative intent should be accorded substantial weight when undergoing judicial review.

*Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983) (citing *Overton v. Economic Assistance Auth.*, 96 Wn.2d 552, 554-55, 637 P.2d 652 (1981)); *Sullivan*, 71 Wn. App. at 321. In *Sullivan*, the court specifically held that, as an adjudicative body exercising its interpretive authority, the PAB is entitled to substantial weight in interpreting merit system rules. *Id.* at 322.

Under the error of law standard, the Court does not review the facts *de novo* but accepts them as found by the administrative agency. *Macey v. Dep't of Employment Security*, 110 Wn.2d 308, 313, 752 P.2d 372 (1988). The Court is considered the expert in legal questions; however, when interpreting particular statutory terms used in the agency's field of special expertise, substantial weight is given to the agency's view of the law. *Id.* at 313; *Sunrise Express, Inc. v. Dep't of Licensing*, 77 Wn. App. 537, 540, 892 P.2d 1108 (1995).

### **C. Mixed Question of Fact and Law**

If a court characterizes a case as presenting a mixed question of fact and law, that characterization does not affect the appropriate standards of review for questions of fact or questions of law. As the Washington Supreme Court held, "it is not the province of the reviewing court to try the facts *de novo* when presented with questions of law and fact." *Franklin Cy. Sheriff's Office*, 97 Wn.2d at 330. Instead, with mixed questions of fact and law, the reviewing court must determine the correct law independently from the agency's decision and then apply the law to the facts as found by the agency. *Id.*

### **D. Arbitrary and Capricious Standard**

An administrative agency cannot be said to have acted in an arbitrary or capricious manner if the action is exercised honestly upon due consideration, even though there may be room for two opinions or even though one may believe that conclusion to be erroneous. *Dupont-Ft. Lewis School Dist. No. 7 v. Bruno*, 79 Wn.2d 736, 739, 489 P.2d 171 (1971); *Trucano v. Dep't of*

*Labor & Industries*, 36 Wn. App. at 761-62. An administrative agency acts in an arbitrary or capricious manner only if it takes "willful and unreasonable action, without consideration and in disregard of facts or circumstances." *Terhar v. Dep't of Licensing*, 54 Wn. App. 28, 34, 771 P.2d 1180, *review denied*, 113 Wn.2d 1008 (1989); *Sullivan*, 71 Wn. App. at 321.

The arbitrary and capricious standard is the appropriate standard a court uses when reviewing decisions of the PAB regarding the appropriate level of discipline. *Trucano*, 36 Wn. App. at 761-62.

#### **E. The Record on Review**

In reviewing a prior decision, a reviewing court properly considers only evidence which was admitted in the proceeding below. *See D/O Center v. Dep't of Ecology*, 119 Wn.2d 761, 771, 837 P.2d 1007 (1992); *Casco Co. v. Public Utilities Dist. No. 1 of Thurston Cy.*, 37 Wn.2d 777, 784-85, 226 P.2d 235 (1951). The court reviews the PAB's decision on the record

made at the PAB level and it is limited to those issues properly before the PAB. *Trucano*, 36 Wn. App. at 761.

#### **F. Unchallenged Determinations**

Unchallenged administrative findings are treated as verities on appeal. *Lawter*, 73 Wn. App. at 332-33 (citing *Assoc. of Capitol Powerhouse Engineers v. State*, 89 Wn.2d 177, 183, 570 P.2d 1042 (1977)).

### **V. ARGUMENT**

#### **A. The Personnel Appeals Board's Findings of Fact Are Supported by Substantial Evidence**

The record from the PAB clearly shows that all of the PAB's findings of fact are amply supported by both direct and circumstantial evidence, and should be affirmed.

##### **1. Finding of Fact 5.1.**

Finding of Fact 5.1 from the PAB Order reads:

We have reviewed the Kordonowy transcript as well as the testimony presented at the hearing, and we find a preponderance of the evidence supports Appellant's testimony in the Kordonowy trial demonstrated a lack of understanding of the science and statistics related to the field of hair analysis and probability calculations.

Appendix A at 10.

The WSP entered, as evidence at the PAB hearing, the transcript of Mr. Melnikoff's testimony during the State v. Kordonowy trial held in Montana in January 1990. R-18. In that transcript there is evidence that Mr. Melnikoff used statistical comparisons when presenting as an expert in hair analysis. R-18 at 308-09.

Max Houck testified at the PAB hearing. RP 000752-774. Mr. Houck is the Director of the Forensic Science Initiative and Director of Forensic Business Development at West Virginia University. R-27. He has provided testimony in courts of law regarding examination of hair comparisons. RP 000754. He has been recognized as an expert in hair or fiber examination or both. RP 000755. He testified at the PAB hearing that:

1. The following question and answer is a utilization of statistics: "Is there one chance in ten thousand than that some other individual would have both pubic hair and the head hair which matched Mr. Kordonowy?" Answer,

“Yes, a good approximation is if you wanted to look for another individual you’d have to go through at least ten thousand people to find one person who would match all the characteristics of the known head hair and pubic hair.”

2. He’s never been taught that it’s appropriate to use statistics in terms of microscopic hair comparisons.

3. He is not aware of any citation to literature that indicates that it is acceptable to use statistics when referring to microscopic hair comparisons in court.

4. Statistics are not going to be prejudicial if there’s a sufficient foundation for them, but there is no such foundation in hair comparisons.

RP 000764, 000765, RP 000772.

Richard Bisbing testified at the PAB hearing. RP 000782-000817. Mr. Bisbing is the Executive Vice President, Director of Services for McCrone Associates, Inc., a laboratory in Westmont, Illinois. R-28; *see also* RP 000782. Mr. Bisbing has provided expert testimony with regard to examinations of hair and hair comparisons in courts of law. RP 000784. He testified at the PAB hearing that:

MS. BROWN: [I]n your experience as giving expert testimony . . . with regards to hair

comparison, if someone started a question to you with, "Is there a 1 chance in 10,000" and asked you to utilize that statistic in your testimony, would you be able to utilize that statistic and answer your question?

MR. BISBING: No, my answer would be, "I have no basis for telling you or the court what this probability is." I have no basis for doing that.

RP 000800.

Additionally, Mr. Bisbing instructed the PAB, during his testimony, as to the proper, accepted manner in which to provide testimony in court regarding hair comparisons (RP 000784-785) and indicated that it's not acceptable for a scientist to testify to probabilities and/or statistical comparisons when testifying about hair. RP 000791.

Harold Deadman testified at the PAB hearing. RP 000818-838. Mr. Deadman is a Forensic Examiner with the Metropolitan Police Department, Washington D.C. and a professional lecturer in the Department of Forensic Sciences at George Washington University. R-29; *see also* RP 000819. From approximately 1977-1987 Mr. Deadman taught maybe 50

courses for the FBI with regard to dealing with hairs or fibers or both. RP 000820. He testified at the PAB hearing that:

1 Over the years the use of probabilities has been discussed when talking about comparing hair samples, but reflecting on what is actually in the literature, it's not something that has been taught that should be used, to express the significance of the evidence in a criminal case. RP 000820-821. This is because there is no real established procedure for developing the necessary probabilities, the probabilities that would be required in hair comparisons.

2. In his experience in the late 1980s and early 1990s it was less common for experts to testify utilizing statistics when they were testifying about hair comparisons.

3. When he has provided testimony regarding hair comparisons / analysis and has been asked to give a statistical comparison his response has been that hairs are just not an appropriate type of evidence that can be used to develop any type of probabilities. RP 000825. If he had been testifying in court and been asked "is there one chance in 10,000 then, that some other individual would have both pubic hair and head hair that matched the defendant's" he would point out, that in his opinion, it's not possible to generate a probability regarding hair comparisons or regarding hairs that have been matched to a particular person.

4. Before 1987 and today, he doesn't know of, with a few exceptions, anyone that used actual probability number in hair comparisons. RP 000829. Regarding the actual comparison of hairs using microscopic

characteristics, he believes that the consensus of the forensic science community is that you cannot generate probability numbers that have any significance.

RP 000820, 000821, 000824, 000825, 000829.

Dr. Barry Gaudette's review of Mr. Melnikoff's testimony in State v. Bromgard and State v. Kordonowy was admitted into evidence at the hearing as exhibit R-20. Additionally, his statement to WSP internal affairs that was taken during the investigation into this matter was admitted into evidence as exhibit R-10. Dr. Gaudette indicated that there was definitely insufficient scientific basis for the "scientist's testimony when he incorporated statistical analysis of the examination of hair samples." R-10 at 12. Dr. Gaudette indicated in his statement to WSP internal affairs that it has never been a common practice in the field of forensic science to provide a numerical or statistical conclusion to the analysis of hair in a particular case. *Id.*

This Court should note that while Mr. Melnikoff objected numerous times throughout the PAB hearing to the WSP's

references to Mr. Melnikoff's testimony in State v. Bromgard (R-19), because the basis of the termination was only the statements that Mr. Melnikoff testified to in State v. Kordonowy, Mr. Melnikoff, in response to cross-examination questions, **admitted** that several specific statements with regard to his use of statistics when he was testifying about hair comparisons were the same in his testimony in Bromgard and Kordonowy:

MS. BROWN: [A]re you in agreement or disagreement that "one chance out of 100 that another Caucasian randomly chosen" or one chance in 100 that two people's hair" are the same sort of statement?

MR. MELNIKOFF: It's basically talking about the same type of probability.

MS. BROWN: If you look at page 351 [ R-18], and you look at line, um, 3 through 10 – "There's a separate degree of probability for each type of a hair, so it's 1 chance out of 100 for each, and to get both factors present since they're independent events would be the multiplication of two levels of probability, so it would 1 out of 100 times 1 out of 100, which comes out to 1 in 10,000." So do you believe that statement is similar or dissimilar to, "So if you find both head and pubic hair there, you

have a chance in 100 for the head hair matching and 1 chance in 100 for the pubic hair. If you find both it's a multiplying effect. It would be 1 chance in 10,000." [R-19].

MR. MELNIKOFF: Well their [sic] similar statements.

MS. BROWN: And if you turn to page 308, line 23 [R-18], um, the answer is, at line 23, "Well, a similar situation would be like rolling dice." Do you think that statement is similar or dissimilar to, "It's the same as two dice." [R-19]

MR. MELNIKOFF: The previous statement—is similar? Yes, it's similar.

RP 001028-1029. The above admissions as to similarities are important to note because they buttress the conclusions from the blind "peer review" and the findings made by the PAB that Mr. Melnikoff demonstrated a lack of fundamental understanding regarding human hair comparisons. Clearly, he not only testified once, but at least twice in a manner consistent,

but not scientifically sound.<sup>12</sup> Even Judge McPhee noted the similarities in his oral opinion issued on September 8, 2006:

But a reading of the transcripts of at least two of the cases that were in the file, and I've read those transcripts, shows that they were, for all intents and purposes, identical.

*See* Transcript of Oral Opinion of the Court dated September 8, 2006, at 14-15.

There is a preponderance of credible evidence that supports that Mr. Melnikoff's testimony regarding hair analysis and the use of statistics is inconsistent with the scientific principles of hair analysis at the time he testified.

## **2. Finding of Fact 5.2.**

Finding of Fact 5.2 from the PAB Order reads:

Appellant's testimony during the Kordonowy trial was not at the level expected of a forensic scientist providing expert level testimony. The preponderance of the credible evidence supports that Appellant's testimony regarding hair analysis was inconsistent with the scientific principles of hair analysis at that time and demonstrated a lack of

---

<sup>12</sup> *See also* RP 000893-902 where the appointing authority, Mr. Knorr, testifies as to what areas he believes are identical in the testimony Mr. Melnikoff gave in Bromgard and the testimony he gave in Kordonowy.

fundamental understanding regarding human hair comparisons.

Appendix A at 10.

In addition to the evidence discussed above for Finding of Fact 5.1, which supports this finding of fact as well, even the witnesses that testified on behalf of Mr. Melnikoff supported this finding of fact made by the PAB.

Dr. Larry Howard testified for Mr. Melnikoff at the PAB hearing. RP 000912-932. He is currently a forensic science consultant. A-5. He indicated that he testified in the State of Montana as an expert witness in the late 1980s and did, when asked, offer testimony related to statistical analysis of hair samples. RP 000918. However, Dr. Howard reviewed Mr. Melnikoff's testimony in State v. Kordonowy and even he was in disagreement with the "1 in 10,000 statistic." RP 000920. Dr. Howard disagrees with the statistic because he doesn't agree with assumptions that were made by Mr. Melnikoff. RP 000922.

Mr. Michael Howard testified for Mr. Melnikoff at the PAB hearing. RP 000933-964. He is retired from the Oregon State Police and a personal friend of Mr. Melnikoff. RP 000933, 000950. He indicated that in the 1980s and into the 1990s the use of statistics for hair analysis testimony was not common, and he preferred not to use statistics when he testified. RP 000937-938. Additionally, he had reviewed Mr. Melnikoff's testimony in *State v. Kordonowy* and testified at the PAB hearing that he didn't think that you could multiply the "100 times the 100." RP 000943. He did not agree with how Mr. Melnikoff got "to the bottom line of 1 in 10,000." *Id.*

Therefore, even if it is true that this Court finds witness testimony in this record that indicates forensic scientists did, on some occasions, testify to hair analysis using statistical probabilities the **overall** testimony (substantial evidence in **this** case) is that such an approach to hair analysis was inappropriate under the science at the time that the testimony was given.

### 3. Finding of Fact 5.3.

Finding of Fact 5.3 from the PAB Order reads:

Appellant demonstrated his incompetence when, without any scientific basis, he concluded that head and pubic hairs are independent of each other. He then erroneously multiplied the individual probabilities together, reaching the incorrect statistical conclusion that there was a “less than 1 in 10,000 chance” that some other individual would have both head hair and pubic hair which matched Kordonowy’s.

Appendix A at 10.

In addition to the evidence discussed above for Finding of Fact 5.1, which supports this finding of fact as well, Mr. Melnikoff provided **no** evidence to the PAB that contradicted the testimony that his use of the statistical conclusion “less than 1 in 10,000 chance” was incompetent expert testimony. The preponderance of the credible evidence supports the fact that Mr. Melnikoff’s testimony regarding hair analysis demonstrated a lack of fundamental understanding regarding human hair comparisons.

#### **4. Finding of Fact 5.4.**

Finding of Fact 5.4 from the PAB Order reads:

Appellant's testimony during the Kordonowy trial was supposed to provide the court with accurate scientific information and his opinions as an expert; however, the evidence supports his inability to interpret and correctly cite Dr. Gaudette's studies and distinguish between the number of cases he analyzed versus the number of samples he examined.

Appendix A at 11.

This finding of fact is supported both by Dr. Gaudette's testimony during his interview with WSP internal affairs detectives, which has been admitted as exhibit R-10, and in Dr. Gaudette's review of Mr. Melnikoff's testimony that Dr. Gaudette conducted and has been admitted as exhibit R-20. Additionally, Mr. Houck testified as to the proper way to utilize Dr. Gaudette's research (RP 000758), and Mr. Bisbing instructed the PAB as to what exactly his research was and what his conclusions were. RP 000812-813.

The evidence in this matter is abundantly clear that an expert witness, when testifying in a court of law, is to accurately represent the evidence, and be current with the developments in the field for which they are testifying. *See e.g.*, RP 000721. In fact, Mr. Neufeld, in his testimony, explained the impact that forensic science expert testimony has on a jury. RP 000694. He indicated that experts take on an “almost mystical infallibility” and that jurors respect the opinions and conclusions of expert witnesses more than they do lay witnesses. *Id.*

**B. The Personnel Appeals Board’s Conclusions of Law 6.1, 6.7 and 6.9 Are Supported by The Evidence And Are Not Contrary to Law**

**1. The PAB had jurisdiction over the parties and subject matter of this case.**

Mr. Melnikoff argues that the PAB does not have jurisdiction over this matter, or Mr. Melnikoff, because Mr. Melnikoff was not “working for the WSP when he is subpoenaed by another agency” to testify in the State v. Kordonowy matter. CP 19-20; *see also* CP 21. However, Mr.

Melnikoff's assertion that the "WSP made it clear to Mr. Melnikoff that it does not consider Mr. Melnikoff to be working for the WSP when he is subpoenaed by another agency" is baseless. *Id.* There is not an iota of evidence in this record to support that statement.

The record does reflect that, in fact, Mr. Melnikoff considered himself an employee of the WSP, when he testified in *State v. Kordonowy*. In his testimony in *Kordonowy*, he indicated that he worked at the Kelso, Washington, State Patrol Crime Laboratory. R-18 at 266. Mr. Melnikoff indicated that he was a forensic scientist at the laboratory and had held the current position since the September 18, 1989. *Id.* The record is abundantly clear that he was testifying in *Kordonowy* in January 1990.

Mr. Melnikoff's argument to this Court that there is a distinction between "chemist" and "hair examiner," thus subject matter jurisdiction does not attach, is also without merit and misses the point of the conclusions from the "blind" peer

review, the decision maker and the PAB: Mr. Melnikoff was hired to be a **scientist** for the WSP and his actions in 1990, brought to the attention of the WSP in 2002, were not those of a competent **scientist**. The decision maker in this matter was adjudging Mr. Melnikoff's abilities as a **scientist**, not a hair examiner or a chemist, when he evaluated that termination was the only appropriate sanction for his misconduct. RP 000880-881.<sup>13</sup>

Additionally, the passage of time should have no bearing on the validity of the complaint brought forward in 2002 by Mr. Neufeld or the PAB's ability to hear an appeal of the termination of Mr. Melnikoff that resulted from the complaint.

---

<sup>13</sup> *See also* the testimony of Captain Jones, who at the time of this matter was the standards officer for the WSP. He indicated that Mr. Knorr and he discussed whether or not termination fit into the standard range of sanctions for the misconduct found against Mr. Melnikoff. Captain Jones's response was as follows:

MR. JONES: Basically, even though Mr. Melnikoff didn't conduct hair analysis in the State of Washington, he was still employed as a forensic scientist in the State of Washington. Um, I believe one of Mr. Knorr's concerns, which, which I shared, um, was that one of the essential functions of the job of a forensic scientist is to provide courtroom testimony. There was a concern that, uh, there may have been potential flaws in the original analysis and particularly flaws in the courtroom testimony that was provided by Mr. Melnikoff in Montana while he was an employee of the State of Washington.

RP 000846; *see also* RP 000849.

The WSP, upon receipt of the complaint, investigated the matter appropriately and according to policy. As Captain Jones testified:

MR. JONES: Well, I think the case is unique in the fact and how the information came to our attention, uh, the relative, um, the number of years between the actual behaviors that were alleged in the violations of agency policy, and when it came to light for us to investigate. In that fact, I think it's unique. Uh, where it's not unique is, I think, the, the, uh, our standard investigative processes were followed . . . .

RP 000862. As Judge McPhee succinctly pointed out in his oral opinion:

First, Mr. Melnikoff is not being punished for the testimony that he gave 12 years ago, but rather, being sanctioned, terminated, because of the effect of that testimony upon his ability to perform his job to represent the interest of his agency in the present day. Second, this was not an issue of evidence that had grown stale over 12 years of time. Rather, it was a certified transcript of what Mr. Melnikoff actually said at trial. All of that information was before the Board [PAB] and before the experts, the expert opinions that were offered to the Board [PAB] related to the state of science at the time that the evidence was given, not at the time that the hearing was held.

See Transcript of Oral Opinion of the Court dated September 8, 2006, at 20-21.

There is no question Mr. Melnikoff was a permanent employee of the WSP when he was terminated in April 2004. That fact is undisputed and that fact alone affords Mr. Melnikoff the rights under RCW 41.06 and 41.64 to appeal his disciplinary action. It flies in the face of logic for Mr. Melnikoff to argue that the PAB does not have jurisdiction over this matter. If that is the case, then why did he appeal his termination to the PAB?<sup>14</sup>

**2. It is clear that Mr. Melnikoff's testimony rose to the level of incompetence and gross misconduct.**

**a. Incompetence**

Incompetence presumes a lack of ability, capacity, means, or qualifications to perform a given duty. CP 69. The testimony and exhibits that were admitted in this matter carry a

---

<sup>14</sup> In fact, Mr. Melnikoff, in his opening brief to this Court indicates that "he [Mr. Melnikoff] was subpoenaed to the State of Montana in 1990, **while employed by the WSP**, for a case . . . ." See Appellant's Opening Brief at 5 (emphasis added).

common theme: the testimony that Mr. Melnikoff gave in State v. Kordonowy was completely contrary to accepted scientific principles. Mr. Melnikoff cannot cite to any evidence in this record that contradicts that common theme. The only evidence that the PAB had to rely on to rebut the fact that his testimony was proper, was Mr. Melnikoff's own testimony. However, as the PAB correctly cited in Conclusion of Law 6.7, the WSP has the burden by a preponderance of the credible evidence to prove that Mr. Melnikoff's testimony in the Kordonowy trial did not meet the standards of practice expected of a fully qualified and competent forensic examiner. The evidence overwhelmingly supports the fact that the WSP met that burden. Not only were expert witnesses in the field of hair analysis interviewed by WSP internal affairs (R-8-11, R-13), but three of the five testified at the hearing held in this matter as well. Their testimony was unwavering in both forums: the use of statistics in testimony regarding hair analysis is **not** acceptable and rises to the level of incompetence.

Additionally, the decision maker Mr. Knorr testified credibly that Mr. Melnikoff's testimony in Kordonowy did not meet the WSP's expectations based on accepted scientific principles in the use of statistics and probabilities and how Mr. Melnikoff cited research during his courtroom testimony. RP 000882. This testimony went undisputed at the PAB hearing. Mr. Melnikoff did not offer any evidence at all to rebut the fact that he did not meet the WSP's expectations.

**b. Gross Misconduct**

Mr. Melnikoff's actions rose to the level of gross misconduct. Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry out its functions. CP 69. Mr. Knorr credibly testified as to why he believed that Mr. Melnikoff's actions by testifying as he did were flagrant: he felt like somebody with Mr. Melnikoff's training and experience should be able to testify within the parameters of accepted standards. RP 000881. The only evidence in the record was that Mr. Melnikoff had experience and knowledge

in this area, was trained by the FBI, and had actually been the Laboratory Manager of Montana's Crime Lab. *See e.g.*, RP 000877, 000965-968. Mr. Melnikoff was not an entry-level scientist testifying, when he returned to Montana to testify.

Additionally, there was offered to the PAB, through Dr. Logan's testimony, the testimony of the experts, and the testimony of Mr. Knorr, the decision maker in this matter, three basic reasons why the conduct here affected the agency's ability to carry out its functions: effect on courtroom testimony, the laboratory's ongoing working relationship with prosecutors, and the ongoing standards the WSP maintains and expects from its staff. *See* Transcript of Oral Opinion of the Court dated September 8, 2006, at 16-20. Dr. Logan presented credible evidence at the PAB hearing to buttress the appointing authority's decision that Mr. Melnikoff's behavior rose to the level of gross misconduct, because his actions, if he were to return to employ with the WSP, would have an adverse affect

upon the agency's ability to carry out its functions. RP 000723-

728.

MS. BROWN: [I]f this Board were to find that Mr. Melnikoff was in fact incompetent and unsatisfactorily performed his job but did not uphold termination as the appropriate sanction, what effect on your program in your lab would that have?

DR. LOGAN: Well there are two ways you would have to look at that issue. The first is the implications of Mr. Melnikoff returning to his prior employment, he now carries with him a lot of baggage as a result of the testimony he gave in the Kordonowy and the associated cases in Montana that call in to question his judgment and his objectivity and his ability to give trustworthy and accurate testimony. So it would be in my opinion impossible to mitigate that in court, that's something that in every case he went to testify in be it a drug case, or another chemistry case or methamphetamine lab case that the court would have to explore and present information about his prior conduct and that (sic) allow the jury to assess what weight they would give his conduct in the instant case based on his history. . . . The second prospective (sic) would be from the point of view of the laboratories and the association of Mr. Melnikoff's prior conduct with his continued employment with the laboratory and the standards the agency maintains and expects of its staff, sense that it would create a climate in which there was an appearance that the type of testimony, the

approach that he had to his testimony in Montana was something that was acceptable and that was allowed within the Washington State Patrol which is not the case.

RP 000727.

**3. Termination was the only appropriate sanction in this matter and the PAB's decision was not arbitrary and capricious.**

The appointing authority in this matter credibly testified as to why, given the misconduct that Mr. Melnikoff engaged in, he could not be rehabilitated and ever testify in court again. RP 000879-880. Mr. Melnikoff's attorney made a very big deal at the PAB hearing about the fact that Mr. Knorr indicated that "it's hard to unring the bell." RP 000880. That is exactly what has occurred here, however. Mr. Melnikoff continues to assert that what he did was proper and in conformity with Dr. Gaudette's research. This is after Dr. Gaudette, himself, provided evidence to the contrary. It is clear that Mr. Melnikoff has demonstrated that he believes his testimony was in accordance with the accepted scientific standards of the time,

despite overwhelming evidence to the contrary. This matter is not an “overreaction to opinion testimony 17 years ago” as Mr. Melnikoff has written in his brief to this Court. *See* Appellant’s Opening Brief at 39. This matter is about an allegation of a serious breach of Mr. Melnikoff’s competence and reputation as a **scientist**, that, once brought to the attention of the WSP, the agency investigated and found to be sustained.

Even though there may be room for two opinions or even though one may believe that conclusion in this matter to be erroneous, an administrative agency acts in an arbitrary or capricious manner only if it takes “willful and unreasonable action, without consideration of facts or circumstances.” *Dupont-Ft. Lewis School Dist. No.*, 79 Wn.2d at 739; *Trucano v. Dep’t of Labor & Industries*, 36 Wn. App. at 761-62; *Terhar v. Dep’t of Licensing*, 54 Wn. App. at 34; *Sullivan*, 71 Wn. App. at 321. That is not the case here. The PAB’s Order shows abundant consideration of the evidence presented by both parties

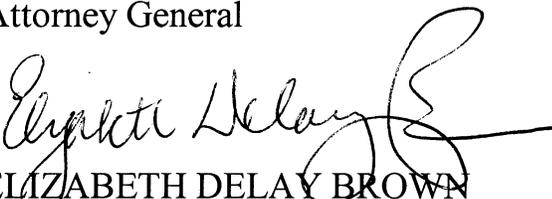
and there is more than substantial evidence to support their decision.

## VI. CONCLUSION

Based on the foregoing, the WSP respectfully requests that the Court affirm the Findings of Fact, Conclusions of Law and Order of the Personnel Appeals Board dated July 26, 2005, and deny Mr. Melnikoff's appeal.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of June, 2007.

ROBERT M. MCKENNA  
Attorney General



ELIZABETH DELAY BROWN  
Assistant Attorney General  
WSBA No. 21521  
7141 Cleanwater Drive SW  
Olympia, WA 98504-0145  
(360) 664-4174

# APPENDIX A

RECEIVED  
JUL 26 2005

OFFICE OF THE ATTORNEY GENERAL  
LABOR & PERSONNEL DIVISION

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

ARNOLD MELNIKOFF,

Appellant,

v.

WASHINGTON STATE PATROL,

Respondent.

Case No. DISM-04-0046

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

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, BUSSE NUTLEY, Vice Chair, and GERALD L. MORGEN, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on April 26, 27, and 28, 2005.

1.2 **Appearances.** Appellant Arnold Melnikoff was present and was represented by Christopher Coker, Attorney at Law, of Parr, Younglove, Lyman & Coker, P.L.L.C. Elizabeth Delay Brown, Assistant Attorney General, represented Respondent Washington State Patrol.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for the causes of neglect of duty, incompetence, gross misconduct, and willful violation of agency policy. Respondent alleges Appellant provided misleading testimony during a trial.

Personnel Appeals Board  
2828 Capitol Boulevard  
Olympia, Washington 98504

Appendix A

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

## II. BACKGROUND

2.1 Appellant was a permanent employee for Respondent Washington State Patrol. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on April 15, 2004.

2.3 Appellant began his employment as a Forensic Scientist 3 with the Washington State Patrol in September 1989. The duties of a Forensic Scientist 3 include performing complex analyses on physical evidence in criminal cases, interpreting analytical results, preparing written opinion reports, and testifying as an expert in courts of law. Appellant has a Bachelor's Degree in biology with a minor in mathematics and a Master's Degree in organic chemistry. Appellant also took a course in hair identification from the FBI laboratory. While employed with the WSP, Appellant worked at the Spokane Crime Lab performing tests on drugs and methamphetamine laboratory evidence. Appellant had no previous disciplines of any type.

2.4 Prior to his employment with the Washington State Patrol, Appellant was a Forensic Scientist and Bureau Chief of the Montana Crime Lab for the state of Montana beginning in 1970. While working in Montana, Appellant performed hair analyses for criminal cases, and he provided testimony in court.

2.5 In October 2002, Barry Logan, Director of the WSP Forensics Laboratory Bureau, received a copy of a letter to the Washington State Attorney General dated September 30, 2002, from Peter Neufeld, founder and director of the Innocence Project. In the letter, Mr. Neufeld complained about Appellant's scientific practices, claiming that Appellant "engaged in scientific fraud during his

1 tenure as the director and hair examiner for the Montana State Crime Laboratory during the 1980's."  
2 Mr. Neufeld's letter indicated that as a result of "false testimony" offered by Appellant during a  
3 criminal trial, defendant Jimmy Bromgard was convicted of a crime. Mr. Bromgard was  
4 subsequently exonerated of the crime based on DNA evidence. Mr. Neufeld provided the WSP with  
5 a peer review report from four experts on hair examination who reviewed Appellant's testimony in  
6 the Bromgard trial and concluded, in part, that Appellant's testimony was "completely contrary to  
7 generally accepted scientific principles."  
8

9 2.6 On October 30, 2002, as the result of the above complaint, Lieutenant Darrin T. Grondel  
10 with the Internal Affairs Section of the WSP, notified Appellant that Internal Affairs had initiated an  
11 investigation into the allegation that Appellant engaged in misconduct related to "courtroom  
12 testimony and/or hair analysis." On January 14, 2003, Lt. Grondel notified Appellant that the scope  
13 of the administrative investigation had been expanded to include the following allegations:

14  
15 On or about January 16 through 18, 1990, you provided statistical comparisons  
16 based on analysis of hair samples during courtroom testimony for the State of  
17 Montana while you were an employee of the Washington State Patrol. The  
18 statistical comparisons you provided were not consistent with scientific principles  
19 or training you received.

20  
21 On or about January 16 through 18, 1990, you provided testimony for the State of  
22 Montana while employed by the Washington State Patrol in which you stated you  
23 had conducted hair analysis in 500 to 700 cases. It is alleged that you conducted  
24 substantially fewer hair analysis than you testified to in court.

25  
26 The above allegations were related to testimony Appellant provided in the state of Montana  
regarding forensic testing he performed, while still employed with the Montana Crime Lab, on head  
and pubic hairs of a defendant named Paul D. Kordonowy.

1 2.7 During his testimony in State of Montana v. Paul D. Kordonowy in 1990, Appellant testified  
2 regarding the probability that hair found at the crime scene did not belong to Kordonowy. Excerpts  
3 from the Kordonowy trial reflect that Appellant, when questioned about statistical probabilities,  
4 indicated that he had done "somewhere between five and seven hundred hair cases" in the state of  
5 Montana. In the Kordonowy trial, Appellant testified that in his personal experience of having  
6 worked on 500 to 700 cases, that "one in a hundred" was a "good, conservative estimate of the  
7 probability of two people's hair matching, either head or pubic hair" of Kordonowy. Therefore,  
8 Appellant testified there was less than a "1 in 10,000 chance" that the pubic and head hair found at  
9 the crime scene did not belong to Kordonowy. In explaining how two individuals would have head  
10 hair and pubic hair of the same characteristics, Appellant, on page 309, lines 7 through 14 of the  
11 trial transcript, testified as follows:

12  
13 You have two separate areas of the body depositing hair whose characteristics are  
14 not the same as the other, and so for both to occur at the time would be a  
15 multiplication of the individual probability. So it would be one chance out of a  
16 hundred for the head hair times one chance out a hundred for a pubic hair, so if  
17 you multiply those two together you get approximately one chance in ten  
18 thousand."

19 2.8 During the Kordonowy trial, Appellant also cited the hair studies and statistics of Dr. Barry  
20 Gaudette. On page 352, lines 18 through 20 of the transcript, Appellant indicated that Dr.  
21 Gaudette's study concluded that the probability of matching two hairs from two different people  
22 was "one chance in three thousand for head hair and about one chance in a thousand for pubic hair  
23 ...."

24 2.9 Appellant's testimony in Kordonowy was similar to testimony Appellant gave in the State of  
25 Montana v. Jimmy Ray Bromgard trial.  
26

1 2.10 Subsequently, the WSP charged Appellant with misconduct, alleging that during his  
2 testimony in the Kordonowy trial, he provided statistical comparisons that were not consistent with  
3 the scientific principles or training he received regarding hair analysis. The WSP also alleged  
4 Appellant was untruthful when he testified he had conducted hair analyses in 500 to 700 cases,  
5 because case records from Montana crime lab reflected he had worked on 255 cases and, therefore,  
6 would have conducted substantially fewer hair analyses.

7  
8 2.11 In response to the allegations, Appellant informed the WSP that his testimony during the  
9 Kordonowy trial was based on scientific studies and the accepted scientific principles of the time.  
10 Appellant indicated that he cited the principles of Dr. Barry Gaudette, a forensic scientist who  
11 specialized in microscopic examination of hair evidence.

12  
13 2.12 To determine whether Appellant's explanations were credible, the WSP contacted Dr.  
14 Gaudette and provided him with Appellant's testimony from both the Montana v. Bromgard and the  
15 Montana v. Kordonowy trials. Appellant's name was redacted from these copies and Dr. Gaudette  
16 performed a blind review of the transcripts of the trials. The following are excerpts from his written  
17 report to the WSP:

18  
19 I have read both transcripts submitted ... Based on my experience as a forensic  
20 hair examiner, my research, and my knowledge of the literature in the field, I  
21 noted that there were several areas in which the testimony given in both  
proceedings did not meet the standards of practice expected of a fully qualified  
and competent hair examiner.

22 2.13 In particular, Dr. Gaudette found several areas of concerns with Appellant's testimony.  
23 Below is a summary of Dr. Gaudette's concerns:

24  
25 Dr. Gaudette noted that while it was proper for Appellant to tell the jury about the  
26 number of times he was unable to distinguish two known hair samples, Appellant  
failed to do this in a proper manner by making "off the cuff" guesses rather than

Personnel Appeals Board  
2828 Capitol Boulevard  
Olympia, Washington 98504

1 basing his testimony on accurate records and calculations. Dr. Gaudette found that  
2 Appellant's use of a probability calculation based on personal casework was an  
3 improper way to represent the odds that hair could not be distinguished and that  
4 Appellant failed to show an understanding about the difference between casework  
5 and empirical research.

6 Dr. Gaudette found that Appellant demonstrated a lack of familiarity with Dr.  
7 Gaudette's literature, failed to cite his correct first name, the title of the articles  
8 and the full journal references and failed to present the correct numbers from his  
9 research. Dr. Gaudette noted that Appellant used a variety of different numbers  
10 when referring to Dr. Gaudette's studies. For example, Appellant used "1 in  
11 3000" but this figure did not appear in Dr. Gaudette's research articles, and the  
12 proper numbers were "1 in 4500" for head hair, and "1 in 800" for pubic hair.  
13 Furthermore, he found Appellant failed to put the numbers in context to how they  
14 related to the case on which he was providing testimony and failed to clarify the  
15 numbers were average numbers.

16 Dr. Gaudette stated that his study could be used to lend value to hair comparison  
17 evidence in general, but should not have been directly applied to any one case or  
18 used as a basis to draw statistical conclusions regarding the probabilities of hair  
19 comparisons, as Appellant had done.

20 He found that Appellant's multiplication of the head and pubic hair probabilities  
21 was not scientifically sound because in order to combine probabilities by simple  
22 multiplication, two probabilities must be independent to each other. However,  
23 because there are some correlations between pubic and head hair characteristics,  
24 they are not totally independent events. He found this area of Appellant's  
25 testimony disconcerting because Appellant indicated he had obtained a minor in  
26 math and therefore should have been aware of the basic principle of probability  
theory.

2.14 Marty Knorr, Communications Division Administrator, was given appointing authority to  
discipline Appellant by former WSP Chief Ronald W. Serpas. Mr. Knorr's two major areas of  
concern regarding the allegations were Appellant's professional competence and his ability to  
provide credible courtroom testimony. He found that Appellant's testimony was inaccurate,  
inconsistent and misleading and that it was irresponsible for Appellant to give "ball park" numbers  
when he should have been providing accurate figures of his casework. Although Mr. Knorr did not  
discipline Appellant for the testimony he gave in Bromgard, he found Appellant engaged in a  
pattern where he failed to properly apply correct probabilities and statistical principles as reflected

1 during his testimony in Kordonowy. In reaching this conclusion, Mr. Knorr placed a great deal of  
2 weight on Dr. Gaudette's blind review of Appellant's testimony in the Bromgard and Kordonowy  
3 trials.

4  
5 2.15 Mr. Knorr met with Appellant and Appellant's attorney at a pre-determination meeting.  
6 After considering Appellant's responses to the charges, Mr. Knorr concluded that Appellant failed  
7 to keep accurate figures of his casework and found that it was inappropriate for Appellant to provide  
8 "off the cuff" numbers during his testimony. Mr. Knorr concluded that Appellant's inaccurate  
9 testimony could not be mitigated, especially when considering Appellant's extensive education,  
10 training and years of experience performing hair analysis.

11  
12 2.16 In determining the level of discipline, Mr. Knorr considered Appellant's length of service,  
13 his employment record, and numerous letters of support provided from various prosecutors on  
14 Appellant's behalf. However, Mr. Knorr was troubled with the lack of credible statistics Appellant  
15 provided in his testimony, especially when considering his experience, training and knowledge as a  
16 forensic scientist. Mr. Knorr did not find that progressive discipline was appropriate in this case  
17 because as a forensic scientist at any level and regardless of the type of analysis being performed,  
18 Appellant would be required to testify in court. Mr. Knorr concluded that Appellant could no  
19 longer provide credible testimony on behalf of the Washington State Patrol. Therefore, Mr. Knorr  
20 concluded that termination was the appropriate sanction.

### 21 22 III. ARGUMENTS OF THE PARTIES

23 3.1 Respondent argues that Appellant's dismissal is based only on the false and misleading  
24 testimony he gave in State of Montana v. Kordonowy, while he was an employee of the Washington  
25 State Patrol. However, Respondent asserts that the testimony Appellant provided in the Bromgard  
26

1 case is pertinent because it supports the contention that Appellant engaged in a disturbing pattern of  
2 providing similar testimony regarding hair analysis and statistics that was not scientifically sound.

3 Respondent argues that the most egregious testimony Appellant gave was the "1 in 10,000"  
4 probability he quoted in both the Bromgard and Kordonowy trials, but which was erroneous and not  
5 founded on proper research. Respondent asserts the testimony from qualified forensic scientists in  
6 the field of hair analysis supports that the statistics Appellant utilized were not acceptable in  
7 courtroom testimony in 1990, or today. Respondent further argues that the credible evidence  
8 supports that even if it had been appropriate for Appellant to cite the numbers he did and even if the  
9 numbers had been correct, there was still an issue with the number of hair analysis cases he claimed  
10 to have performed while employed in Montana.

11 Respondent argues that the testimony Appellant gave in Kordonowy has a negative impact  
12 on the agency because it showed he was incompetent and could no longer provide trustworthy and  
13 reliable expert testimony as a forensic scientist behalf of the Washington State Patrol.

14  
15 3.2 Appellant argues the evidence presented does not support that he testified improperly.  
16 Appellant asserts that in the 1980s and 1990s it was not uncommon for other forensic scientists to  
17 use probabilities in courtroom testimony. Appellant argues that his termination was politically  
18 driven due to pressure on the WSP by Peter Neufeld and by the media attention garnered by the  
19 Innocence Project. Appellant asserts he had excellent performance evaluations while employed by  
20 the WSP and contends that during the entire time he worked for WSP his only assignment was to  
21 test drugs in a lab setting and he was never required to provide testimony in court. Appellant  
22 contends termination is not appropriate because he is a 14-year employee of the WSP and has no  
23 prior disciplinary history.

#### IV. BOARD REVIEW AND ANALYSIS

1 4.1 The only issue before us is whether the testimony Appellant gave in the Kordonowy trial,  
2 while he was employed by the state of Washington, was "inaccurate, incorrect, misleading and  
3 confused," thereby rendering him incompetent to perform in the capacity of a Forensic Scientist 3,  
4 as alleged by the appointing authority, Marty Knorr.  
5

6 4.2 Appellant contends his testimony in 1990 of conducting between "500 to 700 hundred  
7 cases" was an approximation of the number of hair comparisons he conducted, not the number of  
8 cases he was assigned while employed in Montana. Appellant testified that his documented cases in  
9 Montana totaled a least 299, and that each case required at least two hair analyses. In addition,  
10 Appellant asserted that 299 documented cases did not include cases he started but did not finish, or  
11 a year and half worth of cases that could not be found. Appellant testified that the "1 in 100"  
12 statistic resulted from his own casework in Montana, which he tracked. Appellant admitted that he  
13 misquoted Dr. Gaudette's "1 in 4500" research figure when he testified to "1 in 3000."  
14

15 4.3 Although Dr. Gaudette is now deceased, other scientists in the field of forensics credibly  
16 testified that it is unacceptable to make statements of statistical probabilities about hair comparison  
17 conclusions. Their testimony further supports that there has never been a standard by which to  
18 statistically match hairs through microscopic inspection and no probable or accurate statistics exist  
19 when it comes to matching hair samples because no statistical database exists, unlike a DNA  
20 database.  
21

22 4.4 Appellant provided testimony from two forensic scientists. Dr. Larry Howard testified that  
23 when he and Appellant both worked at the Montana Crime Lab, they performed hair analyses and  
24 provided testimony in court, including that the chances that two hair samples are microscopically  
25 indistinguishable are "one in a hundred." However, Dr. Howard disagreed with how Appellant  
26

1 arrived at the probability that there was a "1 in 10,000" chance that the hairs did not belong to the  
2 defendant because head and pubic hairs are dependent events and not independent, as Appellant  
3 testified. Mike Howard, a self-employed forensic scientist, also testified that the manner in which  
4 Appellant arrived at the "1 in 10,000" probability was not appropriate because he multiplied events  
5 which were not independent events, but that he agreed with the conclusion of "1 in 10,000" based  
6 on his personal experience in the field.

## 8 V. FINDINGS OF FACT

9 5.1 We have reviewed the Kordonowy transcript as well as the testimony presented at the  
10 hearing, and we find a preponderance of the evidence supports Appellant's testimony in the  
11 Kordonowy trial demonstrated a lack of understanding of the science and statistics related to the  
12 field of hair analysis and probability calculations.

13  
14 5.2 Appellant's testimony during the Kordonowy trial was not at the level expected of a forensic  
15 scientist providing expert level testimony. The preponderance of the credible evidence supports that  
16 Appellant's testimony regarding hair analysis was inconsistent with the scientific principles of hair  
17 analysis at that time and demonstrated a lack of fundamental understanding regarding human hair  
18 comparisons.

19  
20 5.3 Appellant demonstrated his incompetence when, without any scientific basis, he concluded  
21 that head and pubic hairs are independent of each other. He then erroneously multiplied the  
22 individual probabilities together, reaching the incorrect statistical conclusion that there was a "less  
23 than 1 in 10,000 chance" that some other individual would have both head hair and pubic hair which  
24 matched Kordonowy's.

1  
2 5.4 Appellant's testimony during the Kordonowy trial was supposed to provide the court with  
3 accurate scientific information and his opinions as an expert; however, the evidence supports his  
4 inability to interpret and correctly cite Dr. Gaudette's studies and distinguish between the number of  
5 cases he analyzed versus the number of samples he examined.

6  
7 **VI. CONCLUSIONS OF LAW**

8 6.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.  
9

10 6.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
11 the charges upon which the action was initiated by proving by a preponderance of the credible  
12 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
13 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of  
14 Corrections, PAB No. D82-084 (1983).

15  
16 6.3 Incompetence presumes a lack of ability, capacity, means, or qualification to perform a  
17 given duty. Plaisance v. Dep't of Social and Health Services, PAB No. D86-75 (Kent, Hrg. Exam.),  
18 aff'd by Board (1987).

19  
20 6.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to  
21 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

22  
23 6.5 Willful violation of published employing agency or institution or Personnel Resources  
24 Board rules or regulations is established by facts showing the existence and publication of the rules  
25  
26

1 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the  
2 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

3  
4 6.6 Neglect of duty is established when it is shown that an employee has a duty to his or her  
5 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't  
6 of Social & Health Services, PAB No. D86-119 (1987).

7  
8 6.7 Respondent has met its burden by a preponderance of the credible evidence that Appellant's  
9 testimony in the Kordonowy trial did not meet the standards of practice expected of a fully qualified  
10 and competent forensic examiner and was contrary to the scientific principles and practices of hair  
11 analysis. Appellant was an experienced forensic examiner; however, his testimony in Kordonowy  
12 of statistical probabilities was erroneous, which is especially disturbing considering Appellant's  
13 knowledge, experience, training and education, including a minor in mathematics. Appellant's  
14 testimony was not that of a competent forensic hair examiner and discredited his crucial role in the  
15 courtroom. As an expert witness, Appellant was in a position to influence a jury with his testimony  
16 regarding his analysis and knowledge of evidence. Appellant's failure to provide accurate  
17 testimony based on his own professional experience, his failure to accurately cite scientific research  
18 and his seeming inability to understand probabilities and statistics supports the charge of  
19 incompetence and undermines his ability to continue to represent the WSP in the capacity of a  
20 forensic scientist. Although Respondent has failed to establish that Appellant neglected his  
21 assigned duties or that he violated WSP policies, Respondent has proven Appellant's actions rise to  
22 the level of gross misconduct.

23  
24 6.8 In determining whether a sanction imposed is appropriate, consideration must be given to  
25 the facts and circumstances, including the seriousness and circumstances of the offenses. The  
26

1 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to  
2 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the  
3 program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

4  
5 6.9 The appointing authority presented persuasive testimony that Appellant's incompetent  
6 testimony in his capacity as an expert witness irreparably harmed Appellant's reputation as a  
7 credible expert witness and forensic scientist. Under the circumstances, the appointing authority  
8 concluded that Appellant could not withstand the close scrutiny necessary of an expert witness  
9 providing a court and jury with scientific information. Under the facts and circumstances of this  
10 case, we conclude that Respondent has proven that the sanction of dismissal is appropriate, and the  
11 appeal of Arnold Melnikoff should be denied.

12  
13 **VII. ORDER**

14 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Arnold Melnikoff is denied.

15 DATED this 20<sup>th</sup> day of July, 2005.

16  
17 WASHINGTON STATE PERSONNEL APPEALS BOARD

18  
19  
20   
21 Busse Nutley, Vice Chair

22   
23 Gerald L. Morgen, Member

COURT OF APPEALS  
DIVISION II

07 JUN -5 PM 2:19

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

NO. 35404-7-II

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

ARNOLD MELNIKOFF,

Appellant,

v.

THE WASHINGTON STATE  
PATROL,

Respondent.

CERTIFICATE OF  
SERVICE

I certify that I served a copy of Brief of Respondent, filed by the Washington State Patrol on all parties or their counsel of record on June 4, 2007, as follows:

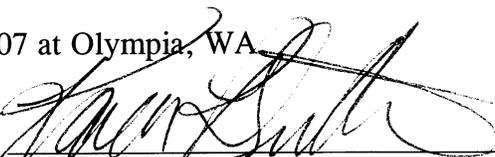
- US Mail via US Postal Service  
 ABC/Legal Messenger  
 State Campus Delivery  
 Hand delivered by \_\_\_\_\_

TO:

1. Paul J. Burns, P.S. One Rock Pointe 1212 N. Washington Street, Suite 224 Spokane, WA 99201-2441	3. Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454
2. Rocco N. Treppiedi Spokane City Attorney's Office 808 W. Spokane Falls Blvd, Spokane, WA 99201-3333	

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

DATED this 4<sup>th</sup> day of June, 2007 at Olympia, WA

  
KAREN R. SUTTER