

63994-3

RECEIVED  
COURT OF APPEALS  
DIVISION ONE

DEC 30 2009

63994-3

No. 63994-3-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

DENISE FRISINO, an individual,

Appellant,

v.

SEATTLE SCHOOL DISTRICT NO. 1, a municipal corporation,

Respondent.

---

BRIEF OF APPELLANT

---

Philip A. Talmadge, WSBA #6973  
Sidney Tribe, WSBA #33160  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188-4630  
(206) 574-6661

Patrick B. Reddy, WSBA #34092  
Emery Reddy, PLLC  
600 Stewart Street, Suite 1100  
Seattle, WA 98101  
(206) 442-9106

John C. Montoya, WSBA #34475  
Law Offices of John C. Montoya, P.L.L.C.  
406 Boston Street  
Seattle, WA 98109  
(206) 352-0500

Attorneys for Appellant Denise Frisino

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2009 DEC 30 PM 2:52

## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	iii - iv
A. INTRODUCTION .....	1
B. ASSIGNMENTS OF ERROR .....	3
(1) <u>Assignments of Error</u> .....	3
(2) <u>Issues Relating to Assignments of Error</u> .....	3
C. STATEMENT OF THE CASE .....	4
D. SUMMARY OF ARGUMENT .....	17
E. ARGUMENT .....	18
(1) <u>Standard of Review</u> .....	18
(2) <u>Disputed Issues of Material Fact Exist         Regarding Whether the District Undertook         Reasonable Accommodation of Frisino’s Disability</u> .....	20
(a) <u>Controlling Law</u> .....	20
(b) <u>The District Did Not Actively Engage             to Help Frisino; Its Efforts Were Not             Reasonably Calculated to Help Her             Find an Alternative Position</u> .....	23
(c) <u>The District Knew or Should Have Known             That the Hale Building Was             Unsuitable; Transferring Frisino There             Constituted a WLAD Violation</u> .....	26
(d) <u>The District Did Not Adduce Evidence             That a Staffing Adjustment or Transfer             Would Be an Undue Burden</u> .....	29

(3)	<u>The District Terminated Frisino in Retaliation for Her Attempts to Protect Her Rights Under WLAD</u> .....	33
(a)	<u>Controlling Law</u> .....	33
(b)	<u>Sufficient Evidence Exists That Frisino Requested Accommodation, and Opposed the District’s Failure to Accommodate, Which Are Protected Activities</u> .....	34
(c)	<u>Sufficient Evidence Exists That the District’s Claim of Job Abandonment Was Pretextual; Frisino Worked Unpaid and Communicated Constantly</u> .....	36
(4)	<u>Frisino Should Be Awarded Attorney Fees</u> .....	39
F.	CONCLUSION .....	40
Appendix		

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>Washington Cases</u>	
<i>Allison v. Housing Auth. of City of Seattle</i> , 118 Wn.2d 79, 821 P.2d 34 (1991).....	36, 40
<i>Barrett v. Weyerhaeuser Co. Severance Pay Plan</i> , 40 Wn. App. 630, 700 P.2d 338 (1985).....	37
<i>Campbell v. State</i> , 129 Wn. App. 10, 118 P.3d 888 (2005).....	37
<i>Carle v. McChord Credit Union</i> , 65 Wn. App. 93, 827 P.2d 1070 (1992).....	20
<i>Clarke v. Shoreline Sch. Dist. No. 412</i> , 106 Wn.2d 102, 720 P.2d 793 (1986).....	29
<i>Clements v. Travelers Indem. Co.</i> , 121 Wn.2d 243, 850 P.2d 1298 (1993).....	19
<i>Davis v. Microsoft Corp.</i> , 149 Wn.2d 521, 70 P.3d 126 (2003)....	22, 23, 24
<i>Delahunty v. Cahoon</i> , 66 Wn. App. 829, 832 P.2d 1378 (1992).....	33
<i>Estevez v. The Faculty Club of the Univ. of Wash.</i> , 129 Wn. App. 774, 120 P.3d 579 (2005).....	33, 34
<i>Griffith v. Boise Cascade</i> , 111 Wn. App. 436, 45 P.3d 589 (2002).....	35
<i>Hale v. Wellpinit School Dist. No. 49</i> , 165 Wn.2d 494, 198 P.3d 1021 (2009).....	19
<i>Hill v. BCTI Income Fund-I</i> , 144 Wn.2d 172, 23 P.3d 440 (2001) .....	20
<i>Holland v. Boeing Co.</i> , 90 Wn.2d 384, 583 P.2d 621 (1978) .....	23, 26, 27, 28
<i>Korslund v. DynCorp Tri-Cities Servs., Inc.</i> , 156 Wn.2d 168, 125 P.3d 119 (2005).....	37
<i>Martini v. State, Employment Sec. Dep't</i> , 98 Wn. App. 791, 990 P.2d 981 (2000).....	37
<i>McClarty v. Totem Elec.</i> , 157 Wn.2d 214, 137 P.3d 844 (2006).....	19
<i>Olympic Fish Prods., Inc. v. Lloyd</i> , 93 Wn.2d 596, 611 P.2d 737 (1980).....	19
<i>Phillips v. City of Seattle</i> , 111 Wn.2d 903, 766 P.2d 1099 (1989)....	<i>passim</i>
<i>Pulcino v. Fed. Express Corp.</i> , 141 Wn.2d 629, 9 P.3d 787 (2000)..	<i>passim</i>
<i>Renz v. Spokane Eye Clinic, P.S.</i> , 114 Wn. App. 611, 60 P.3d 106 (2002).....	33, 35
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004) .....	21

<i>Russell v. Department of Human Rights</i> , 70 Wn. App. 408, 854 P.2d 1087 (1993), <i>review denied</i> , 123 Wn.2d 1011, 869 P.2d 1085 (1994).....	21
<i>Wilmot v. Kaiser Aluminum &amp; Chem. Corp.</i> , 118 Wn.2d 46, 821 P.2d 18 (1991).....	35, 36
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982) .....	19, 34
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	18

Federal Cases

<i>Duvall v. County of Kitsap</i> , 260 F.3d 1124 (9th Cir. 2001).....	29
--	----

Statutes

RCW 49.60.020	21
RCW 49.60.030(1)	20
RCW 49.60.030(1)(a)	21
RCW 49.60.030(2)	40
RCW 49.60.180(2)	21
RCW 49.60.210	33
RCW 49.60.210(1)	34

Rules and Regulations

CR 56(c)	19, 34
RAP 18.1	40
WAC 162-22-080(1)	21

## A. INTRODUCTION

This case involves an employee's attempt to seek accommodation of her work-related illness so that she could remain in the job she loved and performed for the Seattle School District (the "District") successfully for fourteen years.

Denise Frisino sought accommodation for the respiratory illness she developed in response to chemical toxins in her environment. Her illness made her sensitive to airborne toxins, excessive dust, mold, and other irritants. After suffering with symptoms for more than four years, Frisino requested a transfer to a cleaner facility that would be less aggravating to her condition. Despite a standing policy of making routine staff adjustments for disabled employees, the District took no action and did not even assist Frisino in her search for open positions.

When a position came open at another school, Frisino took it. However, the new job was in a school that was old, mold-ridden, and dirty. The District knew it would likely not accommodate Frisino's illness, but transferred her there nonetheless. When her symptoms worsened, Frisino was told by her doctors not to keep exposing herself to that environment. When the media learned of the story about the mold at Hale, Frisino's supervisors were not pleased.

The District began questioning the authenticity of Frisino's illness, and challenging her many doctors' advice. The District even requested a psychological evaluation to see if her disability was mental rather than physical. The evaluation acknowledged Ms. Frisino's condition and recommended to the District that she be transferred to a cleaner environment.

In response to a public outcry about the mold, the District agreed to partially remove mold from the school. However, the District delayed removing all existing mold, deeming it unnecessary and infeasible. It then ordered Frisino to return to her classroom. When Frisino continued to maintain that she could not return to a moldy classroom, the District ordered her to apply for unpaid medical leave and threatened termination. Frisino submitted a new accommodation request and pleaded for a temporary transfer until the remaining, necessary remediation could be completed. The District insisted that there was no threat to Frisino, and terminated her for job abandonment. During the following summer break, the District removed significant quantities of mold from the ceiling of Frisino's classroom.

Although the District claimed it tried to accommodate Frisino, the record is replete with evidence that those efforts were inadequate. Frisino adduced sufficient evidence to let a jury decide whether the District failed

to accommodate her, and then terminated her for requesting reasonable accommodation.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering summary judgment against Frisino and in favor of the District on Frisino's claim for disability discrimination in its order dated July 1, 2009.

2. The trial court erred in entering summary judgment against Frisino and in favor of the District on Frisino's claim for retaliatory discharge in its order dated July 1, 2009.

(2) Issues Relating to Assignments of Error

1. Under WLAD, when an employee has a disability that requires a transfer, may an employer (1) fail to take reasonable routine steps to assist the employee, (2) transfer the employee to a position it knows will exacerbate the employee's disability, and (3) refuse the employee's request for another accommodation, and then claim that insufficient evidence exists to establish a disputed issue of material fact that it failed to reasonably accommodate the employee? (Assignment of Error No. 1)

2. Under WLAD, if there is evidence that an employee cannot return to a job site because it will cause illness and instead requests

accommodation, and the employer then terminates the employee for “abandoning” her position, is there sufficient evidence to create a disputed issue of material fact on a retaliation claim? (Assignment of Error No. 2)

C. STATEMENT OF THE CASE

Frisino worked as a certified teacher for the District for 14 years. CP 86. Frisino had an excellent work record, received commendations and awards,<sup>1</sup> and until 1999 had no health problems that interfered with her work. CP 424. From 1993 to 2000, Frisino worked full-time as a Language Arts teacher and department head of the Unified Arts at Hamilton International Middle School (“Hamilton”).

In 2000, exposure to dust and a chemical sealant peeling from her Hamilton classroom’s deteriorating hardwood floor triggered multiple respiratory and associated symptoms, including congestion, cough, shortness of breath, nausea, and vomiting. CP 415, 424, 1072. Frisino would suffer these symptoms upon entering the classroom, and they would resolve upon leaving the room. CP 1072. She had never before suffered from any environmental toxic illnesses. CP 424.

Frisino requested assistance from the District to reduce her symptoms. At first she requested a different classroom, but the vice

---

<sup>1</sup> One of the awards was the prestigious A+ Award from the nonprofit Alliance for Education. CP 1529.

principal told her finding another room was Frisino's own responsibility. CP 424. Eventually, however, the District classified Frisino as "504 eligible,"<sup>2</sup> entitling her to accommodation. She filed an industrial insurance claim. *Id.* In December 2001, an independent medical examination ("IME") of Frisino was performed in conjunction with that claim. CP 574-77. The allergist and immunologist who performed the IME diagnosed Frisino with cough, variant asthma, sinusitis, incontinence, and headache. CP 577. The doctor concluded that the symptoms "all seem to be related to exposure in the classroom." *Id.* He recommended that the problem with toxic chemicals from the floor "be rectified rather quickly." CP 579.

Frisino was assigned to a classroom with different flooring. However, the same toxic sealant was used in the new room. CP 425. The District promised to increase custodial services and provide a HEPA filter, but the increased cleaning did not occur and the filter was not large enough for the room. *Id.* With the continuing exposure, Frisino's symptoms worsened over the next two years. *Id.* By April 2004, several

---

<sup>2</sup> "504 eligible" refers to section 504 of the Rehabilitation Act, which provides: "No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Schumacher v. Williams*, 107 Wn. App. 793, 803 n.21, 28 P.3d 792 (2001). The ADA was expressly modeled after the Rehabilitation Act, and extended its reach to private employers. However, public employees still have the benefit of the Rehabilitation Act.

doctors had diagnosed Frisino with respiratory sensitivity to molds, chemicals, and other environmental toxins. CP 653-54, 596-97. One of those doctors was pulmonary specialist, Dr. Jeffrey Cary, whom Frisino continued to see throughout 2004. CP 597.

In May 2004, Frisino's attending physician, Dr. Fernando Vega, notified the District that Frisino's symptoms dictated that she needed a transfer to a different building with a clean environment. Frisino informed the District's Risk Management office that she needed to be transferred to another building. CP 568. From May to August 2004, Frisino was not contacted about her 504 status or need for accommodation. CP 522. District Employment Services Manager Margo Holland admitted that she did not assist Frisino in her search over the summer of 2004, but that "all District job openings were posted on the District's website and were readily available to the public, including Ms. Frisino." CP 518. During this same period, District supervisors began expressing skepticism regarding Frisino's illness and the kind of accommodation her doctor was recommending. Risk Loss Manager Richard Staudt said that he did not understand what Frisino's doctor meant by a "clean" environment, and that Frisino's request for a building 5-10 years old, with no off-gassing, heavy chemicals, clean, with good air circulation was "not much help." CP 521. In June 2004, Frisino underwent an independent medical

examination (“IME”). CP 652-62. The examiner’s conclusions contradicted those of the 2001 IME; he concluded that Frisino’s symptoms were anxiety related and not caused by Hamilton’s environment. *Id.* However, Frisino’s doctors disagreed, and she still had an accommodation request pending to transfer away from the toxic environment at Hamilton. CP 90, 522, 568.

Staffing adjustments were a “routine” part of the District’s system. The District explained that “whatever the staffing assignments were, there may be a need to adjust them at some point in the year....” CP 962. Holland was in charge of staffing adjustments. *Id.* They could occur for many different reasons – a need for class size adjustment, an employee going on leave, or when an employee “request[s] an accommodation.” CP 963. Despite the fact that adjustments for accommodations were “routine,” during the summer of 2004 the District undertook no staffing adjustments in order to accommodate Frisino. Again, Frisino was not even contacted about her 504 status. CP 522.

When Frisino contacted Holland in August about her status as a 504 employee and her request for accommodation, Holland told her to “check out the [District’s] website” for jobs. *Id.* At that point, two weeks before the school year was to commence, the only open position for which Frisino was qualified was at Nathan Hale High School (“Hale”). CP 522.

That Language Arts position was being vacated by Jodee Reed, who was going to the Ballard High School. CP 676. Because Reed's former job at Hale was the only position available in another building, and because Hamilton did not accommodate her condition, Frisino accepted the position. CP 425-26. Because the building was under construction over the summer, Frisino was unable to visit her new classroom, Hale's Room 216. CP 425. She did have a short visit right before classes started to view the room.

The Hale building was old and had a history of problems with flooding and mold, including in Room 216. CP 486-87, 635. It contained visible mold and blackened and missing ceiling tiles. CP 426. Parents of children with respiratory problems had expressed ongoing concern about the indoor environmental conditions at Hale. CP 431. One such child, North Aspelund, Jr., had missed a significant number of school days due to respiratory illnesses. CP 432. His mother, Jennifer Aspelund, was on Hale's safety committee and was involved in the effort to rectify the environmental problems at Hale. CP 430. Frisino also served on the safety committee, and had discussed the mold problem with Aspelund. CP 430-31.

Despite relief from her symptoms in the spring (when she was on unpaid medical leave) and summer of 2004, Frisino's respiratory

symptoms returned and increased shortly after she began teaching at Hale. CP 426. In the fall of 2004, Frisino encountered Jennifer Aspelund in the hallway, and the two of them discussed the mold problem, observing visible mold in a stairwell near where they were standing. CP 431. Aspelund's position on the safety committee kept her informed about the environmental problems. *Id.*

During fall of 2004, public concern about the mold problem at Hale increased dramatically. A sample taken by the District from the stairwell ceiling near Frisino's classroom revealed the presence of the toxigenic mold *Stachybotrys chartarum*. CP 395. Because of "media attention and ...concerns from faculty and parents about adverse health effects," the District hired a firm, GlobalTox, to conduct a walk-through inspection of Hale, which was scheduled for December 3, 2004. CP 529.

In the meantime, Frisino's condition worsened. CP 426. She requested to be moved to another classroom, but the two choices the District offered were a portable room with mostly water-stained and missing ceiling tiles and windows nailed shut, and a dirty interior storage room, with no outside ventilation. CP 426. Neither of these rooms met her doctor's recommendation of being clean, with outside ventilation, so Frisino stayed in Room 216.

On November 21, 2004, Frisino finished her work in severe respiratory distress and went to the emergency room. CP 426, 702. Dr. Vega recommended that she stay away from Hale until the planned remediation (presumably to take place after the GlobalTox inspection) for Hale was complete and the mold removed. CP 427.

A KOMO-TV reporter published an online article about Frisino's situation. CP 515. Staudt was concerned about the article, noting that Frisino had transferred to Hale because of illness, and again expressing skepticism that mold could be causing her symptoms. *Id.* Lisa Hechtmann responded that she claimed to have warned Frisino in August 2004 that Hale would "probably not be the best place for one suffering from breathing difficulty and/or asthma." CP 515.

The GlobalTox report pronounced Hale to be safe for most students, and only a danger to those with "the most severe forms of immunocompromise." CP 529. GlobalTox claimed that the air concentrations of mold were no greater than in the outside environment, and that in any event air sampling "cannot be used...to help determine the need for response." CP 531-32. GlobalTox recommended that visible mold be removed, and said that even if mold existed behind the water-stained tiles, it was not a danger because "the ceiling is normally inaccessible and the pathway for potential mold above the tiles and

occupied space is limited.” CP 529. However, GlobalTox made no mention of the fact that many rooms at Hale, including Room 216, had missing tiles (CP 426-27, 431) that would have provided a “pathway for potential mold” to escape from behind the ceiling. CP 529.

In response to the GlobalTox report, during 2004’s winter break, the District conducted limited remediation at Hale. Visible mold was removed, but the District did not check behind the water-stained tiles to see if mold was growing. CP 1181. The District painted over some water-stained tiles with a sealant, but did not replace missing tiles. *Id.*<sup>3</sup> The District claimed that conducting a full scale remediation was not possible during the short winter break, and that the hidden mold, if any, would be removed during the longer summer break of 2005. *Id.*

However, Dr. David R. Anderson, toxicologist and director of the Children’s Indoor and Environmental Health Society, was deeply skeptical of the GlobalTox report and its recommendations. He had attended the GlobalTox walkthrough and reviewed its report. CP 821. In a letter to School Board Director Sally Soriano, Dr. Anderson noted that the report

---

<sup>3</sup> Painting over mold-ridden tiles is not an acceptable form of remediation, according to the EPA. CP 823.

made no reference to “the findings of Clayton Environmental and the lab report, which identified the toxigenic mold *Stachybotrys chartarum* on the surface sample from the ceiling.” CP 822. *Stachybotrys* is a black mold that can trigger severe respiratory symptoms in persons who have previously been exposed to chemical irritants. CP 1285. Dr. Anderson particularly disagreed with the GlobalTox report’s conclusion that no additional testing for mold was necessary. CP 824.

When Frisino learned that the mold remediation would only be partial, she contacted Dr. Vega and Dr. Cary for their recommendations. Both insisted that Frisino should not return to Hale until a complete remediation was done to remove all mold from the building. CP 671, 904. Frisino contacted the school, explaining the situation and her doctor’s recommendations. CP 1193-94.

Hale’s response was that Room 216 had been sufficiently remediated and it was “okay” for Frisino to return to that room. CP 963, 1193, 1196, 1198. The District’s risk management firm ordered a psychological IME of Frisino. CP 714. The examiner concluded that Frisino’s problems were psychological, not physical. CP 724-25. The risk manager also ordered an occupational pulmonary disease IME of Frisino. CP 590-601. That examiner concluded that Frisino’s illness was partly psychological and partly physical. *Id.* However, the examiner also noted

that the workplace conditions “were not ideal as evidenced by the facts that the patient worked in an area with poor ventilation that was poorly maintained with water incursion and failure to maintain clean conditions.” CP 600. The examiner recommended that the District accommodate Frisino’s Multiple Chemical Sensitivity Syndrome by returning her to “a workplace where there is good ventilation and no evidence of any odors or strong chemical smells . . . or any dust in the workplace.” CP 601. The examiner went on to encourage the District to accommodate Frisino, noting that patients with her disorder “usually can be returned to the workplace after some type of accommodation is made for them and they continue to work with a psychiatrist or psychologist.” *Id.*

Frisino, following the advice of her doctors and the independent examiner, refused to return to her classroom. CP 903. Although she was not being paid, she continued working from home and stayed in close contact with the school, requesting that Room 216 be fully remediated so that she could return. CP 586, 902, 981. During this nearly 6 months of unpaid leave status, she repeatedly contacted her superiors to discuss her return to work in a clean environment. CP 586, 909, 1193, 1196, 1198. On February 16, 2005, Frisino requested that she be allowed to conduct testing of Room 216. Staudt responded that Frisino’s doctors had failed to specifically describe the right “level of clean,” and “[h]aving someone

come in and test [Room 216] without knowing specifically what we should be testing for would not make a lot of sense at this point.” CP 1200.

Despite the District’s protestations that Room 216 was clean and that Frisino could return to work there, the District had failed to remove all of the mold, and had not even bothered to clean the shelving and ventilation systems of dust. CP 1545, 1720.

In February and March 2005, Dr. Anderson conducted the testing for mold that GlobalTox said was unnecessary. CP 807. His testing included Room 216. The lab results showed “that toxigenic molds remained in [Room 216] or were spread into the room from mold-contaminated areas of ceiling or tiles....” CP 807, 819. Dr. Anderson concluded that the mold remediation effort was not successful. *Id.* He also reviewed Dr. Cary and Dr. Vega’s medical opinions and concluded that Frisino’s symptoms were consistent with her exposure to the molds, and on a more probable than not basis her symptoms were caused by her exposure. CP 808. Dr. Anderson photographed Room 216 in February and March 2005. CP 826-871; Appendix A. His photographs revealed dust and visible mold in Room 216 after the partial remediation took place. *Id.*

According to the District's accommodation procedures an employee who was unable to work with or without accommodation *shall* be "separated...from his or her regular position and placed on an unpaid medical leave of absence for up to twelve (12) months." CP 940 (emphasis added). The policy is mandatory, self-actuating and required no additional effort from Frisino to initiate. *Id.* Frisino had already been on unpaid leave at this time, though she was never granted the full twelve months required by the policy. On February 7, 2005, the District again wrote to Frisino and told her to accept unpaid medical leave or return to work. CP 588. The District told her that a failure to respond would be interpreted as abandonment and result in her termination despite the accommodation policy. *Id.* However, Frisino wanted and needed to work, and three days later, Frisino submitted a revised accommodation request, asking for a transfer to another school until Hale was completely remediated over the summer 2005 break. CP 604. Again, she asked for a room free of *stachybotrys* mold, with outside ventilation, and no extreme temperature changes. *Id.* Her request was supplemented with a letter from Drs. Cary and Vega and supported by the District's IME examiner. CP 244, 607.

In May 2005, Staudt requested a visual inspection of Hale in anticipation of the full mold remediation scheduled for the upcoming

summer break. CP 396. Approximately 1600 ceiling tiles were listed as stained, missing, or loose. *Id.* In Room 216, 36 tiles were stained, more than twice the number listed as “stained” just six months earlier in December 2004. CP 394, 397.

The District continued to insist that a transfer would not work because they could not be certain that another building would be accommodating. CP 609-10, 622. Again, the District did not inform Frisino of specific available positions within the District. CP 522. Frisino met with supervisors in May in a last attempt to explain that she was not abandoning her job, but she could not return to Room 216 for health reasons. CP 253. The District responded that Frisino had not presented any evidence to contradict the findings that Hale had mold problems, and that Dr. Vega had failed to be sufficiently specific about what modifications would allow her to return to work. CP 255. The District terminated Frisino on June 1, 2005, citing “failure to return to [her] position as a certified teacher at Nathan Hale High School.” *Id.*

During the summer of 2005 after Frisino’s termination, the full remediation of Hale took place. Thousands of ceiling tiles were replaced, including many moldy tiles. CP 1337. In August 2005, Jennifer Aspelund emailed the District and asked for information on where additional mold was found. CP 1337. The District found mold behind the ceiling tiles in a

number of rooms, including 216:

Mold was found and removed from the following rooms. 102 (custodian room), 214, 216, 219, 220, 222, 223, 224, 229, 230.

CP 1337.

Frisino filed a claim in King County Superior Court against the District for employment discrimination and retaliation in violation of RCW 49.60, Washington's Law Against Discrimination ("WLAD"), along with other common law claims for the emotional distress caused by the District's actions. CP 8-9. The case was assigned to the Honorable Gregory Canova. On summary judgment, the trial court ruled that Frisino had not presented sufficient evidence of any disputed issue of material fact regarding any of her claims, and dismissed her case. CP 1856, 1895. Frisino timely appealed.

#### D. SUMMARY OF ARGUMENT

To prevail on summary judgment, the District was required to demonstrate a lack of disputed issues of material fact. First, the District had to show that it undertook every reasonable accommodation that was not an undue hardship. Second, the District had to show that there was no evidence to suggest that its claimed reason for firing Frisino – job abandonment – was not a pretext for a discriminatory motive.

The District did not meet its summary judgment burden to demonstrate that there were no genuine issues of material fact regarding Frisino's accommodation and retaliation claims. On the contrary, the record is replete with evidence to support Frisino's theory that the District did not provide her with every reasonable accommodation before terminating her. Instead of proving to the trial court that the various available accommodations would have caused undue hardship, the District either made no offer of proof or relied upon pure speculation.

The record also contains sufficient evidence that the District's true motivation for Frisino's termination was not job abandonment. Frisino consistently responded to the District's demands that she return to a toxic classroom by explaining that her disability made the classroom dangerous and that she needed an accommodation. Frisino presented evidence that the District simply did not want to accommodate a disabled employee who had caused problems for administrators with respect to the media and the public.

#### E. ARGUMENT

##### (1) Standard of Review

When reviewing the grant or denial of a motion for summary judgment, the standard of review is *de novo*. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). In

reviewing an order granting summary judgment, this Court engages in the same inquiry as the trial court and considers the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c).

The purpose of a summary judgment is to avoid a useless trial when there is no genuine issue of any material fact. *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000).<sup>4</sup> A motion for summary judgment “should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Summary judgment in favor of the employer in discrimination cases is often inappropriate because the evidence will generally contain

---

<sup>4</sup> Six years after *Pulcino*, the Washington Supreme Court rejected the definition of “disability” it offered in that opinion. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). The Legislature superseded the *McClarty* definition by amending WLAD. *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009).

reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury. *Carle v. McChord Credit Union*, 65 Wn. App. 93, 102, 827 P.2d 1070 (1992). Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for summary judgment as a matter of law. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 184-86, 23 P.3d 440 (2001).

(2) Disputed Issues of Material Fact Exist Regarding Whether the District Undertook Reasonable Accommodation of Frisino's Disability

(a) Controlling Law

WLAD protects employees from discrimination based on a disability. RCW 49.60.030(1). RCW 49.60.030(1) declares: "The right to be free from discrimination because of race creed, color, national origin, sex, or the presence of any sensory, mental, or physical handicap is recognized and declared to be a civil right." More specifically, this civil right includes the "right to obtain and hold employment without

---

However, *Pulcino's* discussion of summary judgment standards and holdings regarding what constitutes reasonable accommodation have not been overruled.

discrimination.” RCW 49.60.030(1)(a).

WLAD mandates a liberal construction of the Act to accomplish its purposes. RCW 49.60.020; *Phillips v. City of Seattle*, 111 Wn.2d 903, 907, 766 P.2d 1099 (1989); *Russell v. Department of Human Rights*, 70 Wn. App. 408, 414, 854 P.2d 1087 (1993), *review denied*, 123 Wn.2d 1011, 869 P.2d 1085 (1994).

Under WLAD, it is unlawful for an employer to discharge any employee because of the presence of any sensory, mental, or physical disability. RCW 49.60.180(2). Employers must reasonably accommodate a disabled employee who is able to perform the essential functions of the job, unless to do so would impose undue hardship on the employer. WAC 162-22-080(1).<sup>5</sup> *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004) (citing *Pulcino*, 141 Wn.2d at 639).

To establish a prima facie case of failure to accommodate a disability, an aggrieved employee must show that he or she (1) had a sensory, mental, or physical abnormality that substantially limited his ability to perform the job; (2) was qualified to perform the essential

---

<sup>5</sup> WAC 162-22-080(1) states: “It is an unfair practice for an employer to fail or refuse to make reasonable accommodations to the sensory, mental, or physical limitations of employees, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business.”

functions of the job with or without reasonable accommodation, or was qualified to fill vacant positions; (3) gave the employer notice of the disability and its accompanying substantial limitations; and (4) upon notice, the employer failed to reasonably accommodate the employee. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 532, 70 P.3d 126 (2003).

Because the District conceded below that Frisino was disabled, qualified her as disabled under section 504 of the Rehabilitation Act (CP 568) and made no legal argument that she was not disabled, (CP 751 n.161) the first prong of the test is not at issue. The District also did not argue below that Frisino was unqualified to perform the work. In fact, the District's consistent position was that Frisino should have returned to her classroom, which it maintained met her medical needs. CP 569-70. Notice is also not at issue, because the District claims it attempted to accommodate Frisino. *Id.* Therefore, the issues on appeal are whether a reasonable accommodation was available, and/or whether the District failed in its affirmative duty to accommodate Frisino. CP 752-61.

The employee has the burden to show that a specific reasonable accommodation was available to the employer when it learned of the disability and that accommodation was medically necessary. *Pulcino*, 141 Wn.2d at 643 (citing *MacSuga v. County of Spokane*, 97 Wn. App. 435, 442, 983 P.2d 1167 (1999)). If the employee meets this initial burden, the

burden then shifts to the employer to show that the proposed accommodation is not feasible. *Pulcino*, 141 Wn.2d at 643 (citing *MacSuga*, 97 Wn. App. at 442). An employer need not necessarily grant an employee's specific request for accommodation. *Pulcino*, 141 Wn.2d at 643. Rather, an employer must “reasonably” accommodate the disability. *Pulcino*, 141 Wn.2d at 643 (quoting *Snyder*, 98 Wn. App. at 326).

(b) The District Did Not Actively Engage to Help Frisino; Its Efforts Were Not Reasonably Calculated to Help Her Find an Alternative Position

Reasonable accommodation “envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available positions.” *Davis*, 149 Wn.2d at 536 (quoting *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408-09, 899 P.2d 1265 (1995)). The employer must take affirmative steps to assist the employee in the internal job search by determining the extent of the employee's disability, by inviting the employee to receive personal help from the employer's personnel office, and by sharing with the employee all job openings in the company. *Davis*, 149 Wn.2d at 536-37.

A *de minimis* effort to accommodate is insufficient. *Phillips*, 111 Wn.2d at 911, citing *Holland*, 90 Wn.2d at 390. An employer is *required* to make every reasonable accommodation that is not an undue burden.

“Necessarily, any reasonable accommodation not requiring an undue burden would be required [for the employer to prevail].” *Phillips*, 111 Wn.2d at 911. Our Supreme Court has articulated a strong legislative mandate for employers to take “positive steps” to eliminate unfairness in the workplace. *Id.* at 387-89.

Even when an employer has taken more than *de minimis* steps to reassign an employee to a suitable job, such as giving the employee access to a company job database, the employee can survive summary judgment if he or she adduces facts to show that the employer’s efforts were not reasonable. *Davis*, 149 Wn.2d at 538. For example, in *Davis*, the employer took many active steps to assist the employee, including: soliciting physician information to determine the extent of disability; giving the employee six months to conduct an in-house job search; providing office space and immediate access to a complete computerized job databank; and assigning an internal resource specialist who attempted to provide personal assistance in the job search. *Id.* at 538. Despite all these efforts, our Supreme Court concluded that *Davis* had raised an issue of fact for the jury on failure to accommodate, because the resource specialist who assisted him did not screen potential job openings to determine if they fit his work restrictions. *Id.* The Court concluded, “In sum, the fact-finder must determine whether Microsoft's efforts were

reasonably calculated to assist Davis in finding an alternative position within the company.” *Id.*

The facts of this case weigh against summary judgment far more than the facts of *Davis*. The District had any number of reasonable methods available to accommodate Frisino – removing mold and dust from her classroom, undertaking a routine staffing adjustment to find another position, offering her the Ballard position filled by another teacher, transferring her to positions in buildings known to her to be suitable, putting her on unpaid medical leave until the Ballard position opened.

The District referred to various actions it allegedly undertook to accommodate Frisino (CP 755; VRP 6/12/09 at 6), but there is sufficient evidence to show that they were not reasonably calculated to find her a position that accommodated her. When Frisino went to Hale and her symptoms worsened, the District offered dirty, moldy, and unventilated classrooms, conducted insufficient partial remediation, insisted that she return to a dirty and moldy classroom despite her doctors’ objections, and refused her request for accommodation in the form of a transfer to a newer, cleaner building. There are also disputed issues of material fact regarding whether inspection and removal of the mold and dust from Room 216 during the partial remediation of Hale in the winter of 2004

was a reasonable accommodation that the District refused. The District insisted that removing all mold from Hale during that winter 2004 time period was impossible. Whether this was a reasonable accommodation that the District refused is a question of fact for the jury.

(c) The District Knew or Should Have Known That the Hale Building Was Unsuitable; Transferring Frisino There Constituted a WLAD Violation

Transferring an employee to a position in which the employer knows the employee cannot perform, and then taking adverse action against the employee such as demotion, is also a violation of WLAD. *Holland v. Boeing Co.*, 90 Wn.2d 384, 391, 583 P.2d 621 (1978). In *Holland*, an employee with cerebral palsy had worked for the employer for many years in various roles. *Id.* at 386. The employer was aware of the employee's physical limitations. *Id.* Eventually, the employer transferred the employee to a position which included soldering duties and increased manual dexterity. When it became clear that the employee could not do the work because of his physical limitations, the employer suggested a transfer. *Id.* The employee insisted upon a lateral transfer to an equal grade position. Such positions were available, but given the employee's recent negative performance, supervisors were reluctant to take him on. The employee eventually accepted a lower grade position, and then sued for violation of the WLAD. *Id.* at 387. Our Supreme Court concluded

that although the employer had facially attempted to accommodate the employee – first by attempting a lateral transfer, and then by offering a downgraded position – the employee had offered sufficient evidence from which the jury could conclude the employer violated the WLAD. *Id.* at 391.

*Holland* makes clear that after transferring an employee to a job which the employer knew or should have known the employee could not perform, an employer may not then make inadequate attempts at accommodation and rely upon those efforts to overcome a prima facie case of disability discrimination.

Here, as in *Holland*, the District transferred Frisino to a position in a school it knew to be old, mold-ridden, under construction and asbestos remediation, and a source of respiratory ailments since at least 2003 (CP 486-87, 635) despite knowing that Frisino’s disability was a respiratory ailment caused by sensitivity to environmental toxins. CP 635. The move exacerbated Frisino’s symptoms. It then made no reasonable attempt to accommodate her, refusing to remove all mold from her classroom or clean it, then insisting that it was fine for her to return. When Frisino explained – bolstered by medical and environmental evidence – that the classroom was unsuitable and requested a transfer to a newer, cleaner building such as Ballard or downtown, the District refused, claiming that

no building could meet Frisino's needs. It then terminated her. Comparing this case to the far less egregious facts of *Holland*, Frisino has met the test to survive summary judgment.

Generally, whether a requested accommodation placed an undue burden on the employer is also a question of fact for the jury, not for the judge to decide as a matter of law. *Pulcino*, 141 Wn.2d at 644; *Phillips*, 111 Wn.2d at 910-11, 766 P.2d 1099. In *Pulcino*, an employee requested an accommodation of light duty work. 141 Wn.2d at 644-45. The employer responded that there were no positions entailing duties lighter than the employee's current assignment. The employee testified that she had personally observed other employees and found their duties to be lighter than hers. *Id.* This Court concluded that the employee's testimony raised an issue of material fact for the jury, and reversed the trial court's grant of summary judgment. *Id.* In *Phillips*, an alcoholic employee requested that his job be kept open while he completed an inpatient treatment program. Our Supreme Court held that whether such an accommodation was reasonable was a question of fact for the jury, not for the Court as a matter of law. *Phillips*, 111 Wn.2d at 911.

Frisino adduced evidence that the District usually engaged in staffing adjustments in order to accommodate disabled employees, but did not do so in her case. The language arts teacher whose position Frisino

filled at Hale had been moved to Ballard. CP 676. Yet during the summer of 2004, the District made no effort to notify Frisino that a Ballard position was open; nor did it seek to determine if Frisino was qualified for the Ballard position. Only after the Ballard position had been filled did the District suggest Frisino look on the District's website, where she discovered the opening at Hale.

(d) The District Did Not Adduce Evidence That a Staffing Adjustment or Transfer Would Be an Undue Burden

The District had an affirmative obligation to investigate whether a requested accommodation was reasonable, and if not, to explain why not. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1136 (9th Cir. 2001).<sup>6</sup> The District and the trial court should not have relied upon pure speculation to determine as a matter of law that the available accommodations were an undue burden. *Id.* In *Duvall*, a hearing impaired party to a dissolution requested that the court provide the proceedings on a videotext display. The trial court did not have such technology, and was unaware that the technology was available. *Id.* However, there was evidence in the record

---

<sup>6</sup> When Washington state courts have not addressed a particular issue, both the Ninth Circuit Court of Appeals and the Washington Supreme Court agree that federal case law interpreting the ADA and the Rehabilitation Act are instructive regarding claims of disability discrimination under the WLAD. *Duvall*, 260 F.3d at 1135-36; *Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 118, 720 P.2d 793 (1986) (“when Washington statutes or regulations have the same purpose as their federal counterparts, [Washington courts] will look to federal decisions to determine the appropriate construction”).

that the technology was available from a private firm. *Id.* The Ninth Circuit Court of Appeals, interpreting WLAD, the Rehabilitation Act, and the ADA, concluded that this was sufficient evidence to survive summary judgment on an accommodation claim:

[M]ere speculation that a suggested accommodation is not feasible falls short of the reasonable accommodation requirement; the Acts create a duty to gather sufficient information from the disabled individual and qualified experts as needed to determine what accommodations are necessary....

*Id.* (citing *Wong v. Regents of the University of California*, 192 F.3d 807, 818 (9th Cir. 1999)).

The District claimed on summary judgment that transferring Frisino to an open position in a newer, cleaner building would be an undue burden because such a transfer was not guaranteed to accommodate Frisino's illness. The District claimed that Frisino's request amounted to nothing more than "trial and error." CP 761. It is unclear upon what evidence the District based its assumption that accommodating Frisino would require multiple frequent transfers. The only transfer the District actually undertook was to a mold-ridden school. That transfer was destined to fail. Yet based on that failed attempt, the District assumed that no building would accommodate Frisino. The District was provided with specific instructions from its own medical examiners to transfer Frisino to

“a workplace where there is good ventilation and no evidence of any odors or strong chemical smells . . . or any dust in the workplace.” CP 601. The District ignored these instructions without explanation.

The notion that the process would have resulted in endless “trial and error” was mere speculation. At the time, the District never articulated to Frisino that it was unwilling to engage in trial and error but instead claimed that it did not understand what “clean” meant. CP 515, 521, 541. The District made no attempt to place Frisino in a suitable building by pursuing a staffing adjustment. Frisino told the District that a temporary transfer to Ballard or to downtown would be accommodating until the remediation of Hale was complete. CP 648. Frisino testified in her deposition that she had been to Ballard for extended periods and had not experienced symptoms. CP 648. Frisino also continued to pursue the remediation of her classroom, Room 216, but the District refused. It is possible that the first transfer would have been successful.

Despite knowing that appropriate options were available, the District refused to follow through on either a staffing adjustment, a transfer to Ballard, or a removal of mold from Room 216, arguing that there were no openings in those locations at the time Frisino sought transfer, that the cleanup of Room 216 was sufficient, and that they did not understand what Frisino and her doctors meant by “clean” and “mold

free.” CP 621-22.

Summary judgment was inappropriate. There are disputed issues of material fact as to whether reasonable accommodations were available. There is no case law to suggest that an employer need not attempt to accommodate an employee simply because the employer doubts whether the accommodation will succeed. The question is whether the accommodation would be unduly burdensome—a question the District did not address before terminating Frisino.

Taking all the facts in the light most favorable to Frisino, a jury could reasonably conclude that the reasonable accommodation of a transfer to Ballard or downtown was available, and the transfer would not have been an undue burden. Had the District transferred Frisino to Ballard for 2004-2005 instead of transferring Reed, or continued to work with her to find an open position, it could have reasonably accommodated Frisino by placing her at Ballard either during 2004 or 2005. Similarly, the District could have followed its own self-actuating accommodation policy, and at the very least, separated Frisino as an accommodation until it could verify that Room 216 was mold free (which it did just months after terminating her). The District’s accommodation policy is clear evidence of what accommodations were reasonable. Frisino had already been working from home, unpaid for 6 months, when the District terminated

her. It would not be unreasonable or inconsistent with its own policy for the District to continue this limbo status until Frisino could be placed in a suitable position. Whether such accommodations were reasonable, or would have created an undue hardship for the District, are questions of fact for the jury. *Pulcino*, 141 Wn.2d at 644; *Phillips*, 111 Wn.2d at 910-11.

(3) The District Terminated Frisino in Retaliation for Her Attempts to Protect Her Rights Under WLAD

(a) Controlling Law

WLAD prohibits employers from terminating employees for opposing acts violating its provisions. RCW 49.60.210; *see also, Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 618, 60 P.3d 106 (2002). To maintain her prima facie retaliation claim, Frisino must establish disputed issues of material fact that: (1) she participated in a statutorily protected activity; (2) an adverse employment action was taken against her; and (3) her activity and the employer's adverse action were causally connected. *Estevez v. The Faculty Club of the Univ. of Wash.*, 129 Wn. App. 774, 797, 120 P.3d 579 (2005); *Delahunty v. Cahoon*, 66 Wn. App. 829, 839-41, 832 P.2d 1378 (1992).

Here, there is no dispute that adverse action was taken; Frisino was terminated. Therefore, the questions on appeal are whether Frisino

presented evidence sufficient to survive summary judgment that (1) she engaged in protected activity based on a reasonable belief that the District's actions were discriminatory, and (2) there was a causal link between that activity and her termination. *Estevez v. The Faculty Club of the Univ. of Wash.*, 129 Wn. App. 774, 797, 120 P.3d 579 (2005).

As with her discrimination claim, Frisino need only establish a genuine issue of material fact taking the evidence in the light most favorable to her. CR 56(c); *Pulcino*, 141 Wn.2d at 639. Summary judgment was improper unless reasonable minds could reach but one conclusion on the subject. *Wilson*, 98 Wn.2d at 437.

(b) Sufficient Evidence Exists That Frisino Requested Accommodation, and Opposed the District's Failure to Accommodate, Which Are Protected Activities

Failure to reasonably accommodate an employee's disability is illegal under WLAD and constitutes discrimination. *Pulcino*, 141 at 639. Seeking reasonable accommodation, requesting a 504 accommodation plan, and opposing an employer's failure to accommodate are all protected activities under WLAD. RCW 49.60.210(1). In recognition of the difficulty of proving motive, Washington courts have allowed an employee to establish the causation element of the prima facie case merely by showing that the employee participated in a protected activity, the employer had knowledge of the activity, and the employee suffered an

adverse employment action. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 70, 821 P.2d 18 (1991).

Frisino provided sufficient evidence that she reasonably believed that her opposition to the District's insistence that she return to an unhealthy classroom was protected activity. Reasonable minds could believe that when Frisino opposed the District's order for her to return to Room 216, questioned its refusal to help her find a more suitable position, refused an unfair unpaid leave of absence, and tried to save her job, she was opposing a discriminatory practice.

Contrary to what the District argued at summary judgment (CP 761-62) the survival of Frisino's retaliation claim was not dependent on the survival of her reasonable accommodation claim.<sup>7</sup> The conduct complained of need not actually be unlawful; the employee must establish only that he or she *reasonably believed* that the employer's conduct was discriminatory. *Renz*, 114 Wn. App. at 619.

---

<sup>7</sup> The District argued to the trial court that if "a retaliatory discharge claim is predicated on a claim that an employer has not provided reasonable accommodation, and the employer is determined to have provided a reasonable accommodation, then there is not forbidden practice to oppose." CP 761. The District cited *Griffith v. Boise Cascade*, 111 Wn. App. 436, 45 P.3d 589 (2002) in support. However, *Griffith* contained no discussion of the reasonable belief standard for retaliation. Therefore *Griffith* is unhelpful.

Frisino has met the first element of the test, she engaged in protected activity of which the District knew, and she was subsequently terminated.

(c) Sufficient Evidence Exists That the District's Claim of Job Abandonment Was Pretextual; Frisino Worked Unpaid and Communicated Constantly

In response to Frisino's prima facie case, the District claimed that it had a legitimate reason for terminating her – she “abandoned” her position. CP 762.

The only remaining question is whether there was a causal link between Frisino's protected activity and her dismissal. To show a causal connection, the employee in a retaliation action must provide evidence that the employer's motivation for the discharge was the employee's exercise of his protected rights. *Wilmot*, 118 Wn.2d at 68. The employee need not establish that retaliation was the sole reason for the adverse employment actions, but he must show that it was a substantial factor. *Allison v. Housing Auth. of City of Seattle*, 118 Wn.2d 79, 95-96, 821 P.2d 34 (1991).

Showing motive includes adducing sufficient evidence that the District's proffered reason for dismissing the employee is pretextual and unworthy of credence. *Hill*, 144 Wn.2d at 180-81. When a court inquires as to retaliatory motive, it will take into account the “[p]roximity in time

between the adverse action and the protected activity, along with satisfactory work performance.” *Campbell v. State*, 129 Wn. App. 10, 23, 118 P.3d 888 (2005).

Although “job abandonment” is seldom used as an employer defense in retaliation cases, it is frequently raised in the context of constructive discharge claims. “Abandonment” of employment in the constructive discharge context implies that the employee voluntarily left a job “because of a desire to leave, including such a desire motivated by dissatisfaction with working conditions.” *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn. App. 630, 638, 700 P.2d 338 (1985). However, if an employee does not come to work because it jeopardizes his or her health, or because the employer is committing violations of the law, the employee has not abandoned the job. Instead, he or she has been constructively discharged. *See Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 180, 125 P.3d 119 (2005); *Martini v. State, Employment Sec. Dep’t*, 98 Wn. App. 791, 990 P.2d 981 (2000).

Evidence that Frisino was trying desperately to keep her job but was unwilling to risk physical harm to do so precludes judgment as a matter of law that the District’s claim of job abandonment was not a pretext for dismissing her. Frisino presented evidence that, far from abandoning her position, she was actively engaged with the District in

trying to work out a reasonable accommodation. She contacted the District numerous times, seeking information and assistance. CP 586, 902, 909, 981, 1193, 1196, 1198, 1548, 1552. Frisino made clear that she had not abandoned her position, and expressed concern that the threatened termination was related to her disability status. CP 1552.

Frisino also developed evidence that the District was unhappy about Frisino's attempts to bring the mold problem at Hale to the media. CP 515, 529, 926, 934. Far from showing concern about the effect that toxic mold might be having on Frisino, Richard Staudt questioned Frisino's illness and complained that the KOMO reporter who wrote the story about Frisino did not question her more intensely:

I am struggling to see how the mold in a ceiling at Hale caused these symptoms which have existed since last spring. It appears that was not a question the KOMO reporter asked, though.

CP 515. This "media attention" generated concern among parents, which apparently prompted Staudt to ask for the GlobalTox inspection pronouncing Hale to be a safe environment. CP 529.

The record is full of contradictions as to the District's actions and motives. There are suggestions in the record that despite the District's claims it had accommodated her disability, it did not believe she was

disabled at all. CP 515.<sup>8</sup> The District claimed that there was not a mold problem at Hale in the spring of 2005, but in the summer removed large quantities of mold from the ceilings. CP 930. The District maintained that Frisino “refused to return to work after the District exhausted all reasonable accommodation efforts.” CP 763. The District maintained that Frisino’s protected activity was not the cause of her termination, but her failure to specifically identify exactly what classroom environment would be suitable. *Id.*

Inconsistencies in the record raise an inference that the District was not truly attempting to accommodate Frisino, but instead was presenting a façade of accommodation in order to justify terminating a troublesome employee.

It does not matter which of these explanations for Frisino’s termination is more credible. That is not a suitable inquiry for summary judgment. These positions represent disputed issues of material fact that must be evaluated by a jury. They demonstrate why summary judgment on Frisino’s retaliation claim should be reversed.

(4) Frisino Should Be Awarded Attorney Fees

---

<sup>8</sup> Despite the District’s acceptance of Frisino’s disability status for four years, and despite its decision not to challenge her disability on summary judgment, the District reserved the right to claim at trial that Frisino was not disabled at all. CP 751 n.161.

Under RAP 18.1, a party may be awarded attorney fees “if applicable law grants” them.

Under WLAD, a prevailing employee is entitled to attorney fees. RCW 49.60.030(2) provides that “[a]ny person deeming himself or herself injured by any act in violation of [the WLAD] ... shall have a civil action in a court of competent jurisdiction ... to recover the actual damages sustained by the person ... together with the cost of suit including reasonable attorneys' fees.” Although RCW 49.60.030(2) does not specifically authorize an award of fees on appeal, it has been interpreted by the Washington Supreme Court as granting a prevailing party attorney fees and expenses on appeal. *Allison v. Hous. Auth. of Seattle*, 118 Wn.2d 79, 98, 821 P.2d 34 (1991).

In the event that Frisino prevails, she is entitled to an award of attorney fees both at trial and on appeal.

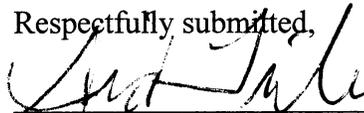
#### F. CONCLUSION

The District did not meet its summary judgment burden to show no disputed issues of material fact regarding Frisino’s claims. There is ample evidence in the record from which a reasonable juror could conclude that the District failed in its accommodation duties, and that its proclaimed reason for her termination was mere pretext.

The trial court erred in granting summary judgment to the District on this record. The order should be reversed, and this case remanded for trial on Frisino's claims.

DATED this 30<sup>th</sup> day of December, 2009.

Respectfully submitted,



---

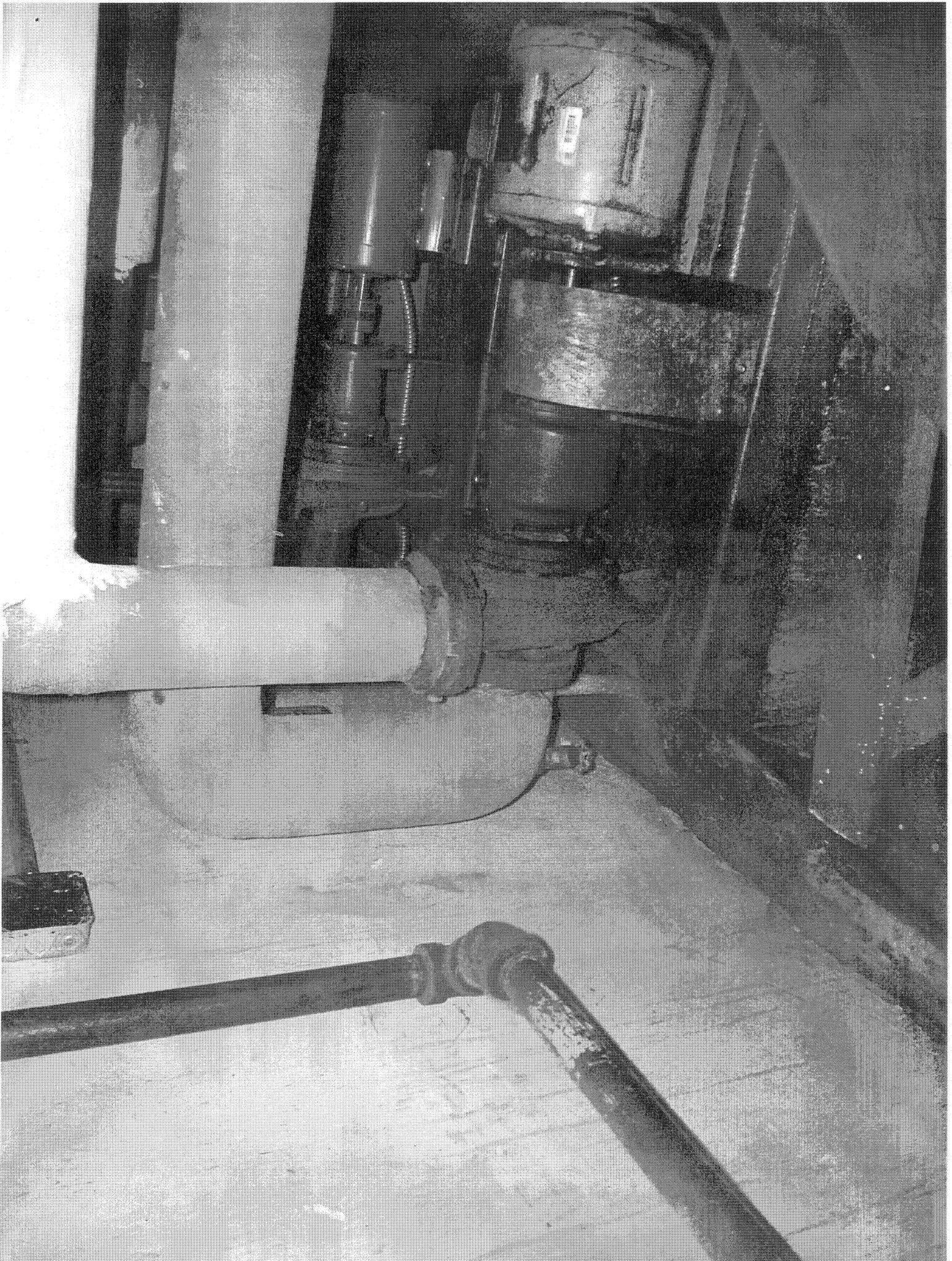
Philip A. Talmadge, WSBA #6973  
Sidney Tribe, WSBA #33160  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188  
(206) 574-6661

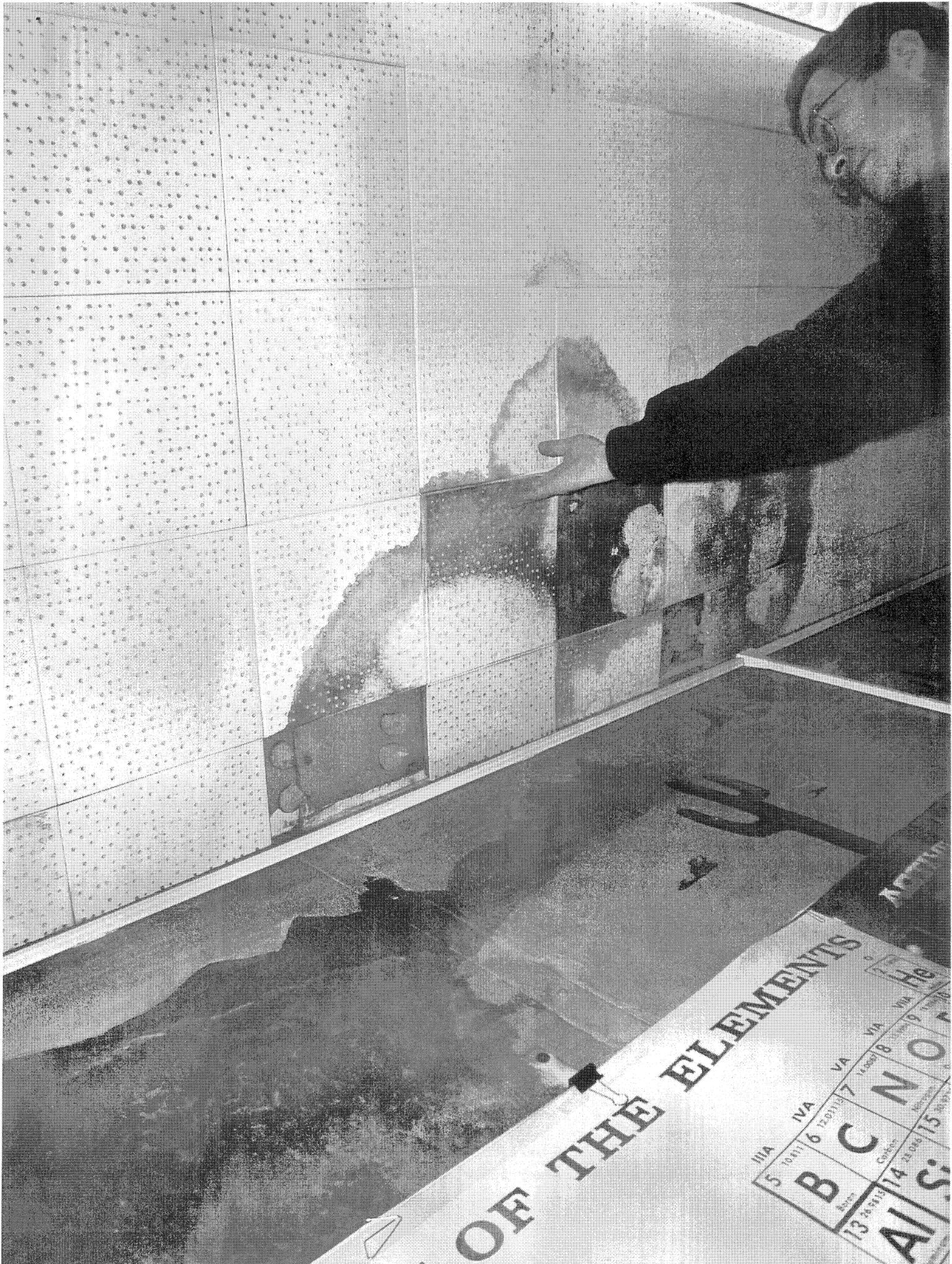
Patrick B. Reddy, WSBA #34092  
Emery Reddy, PLLC  
600 Stewart Street, Suite 1100  
Seattle, WA 98101  
(206) 442-9106

John C. Montoya, WSBA #34475  
Law Offices of John C. Montoya, P.L.L.C.  
406 Boston Street  
Seattle, WA 98109  
(206) 352-0500

Attorneys for Appellant Denise Frisino

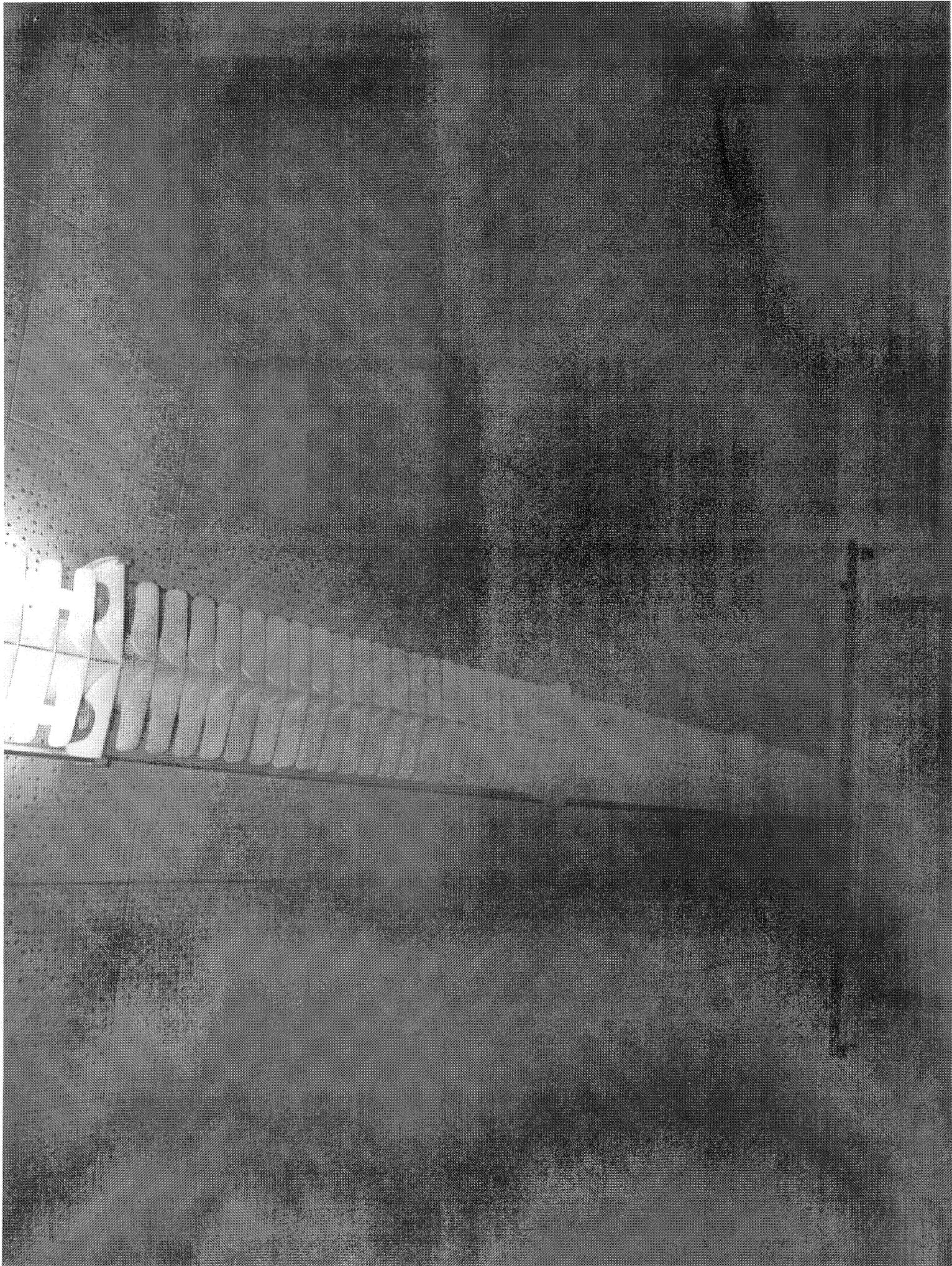
# APPENDIX

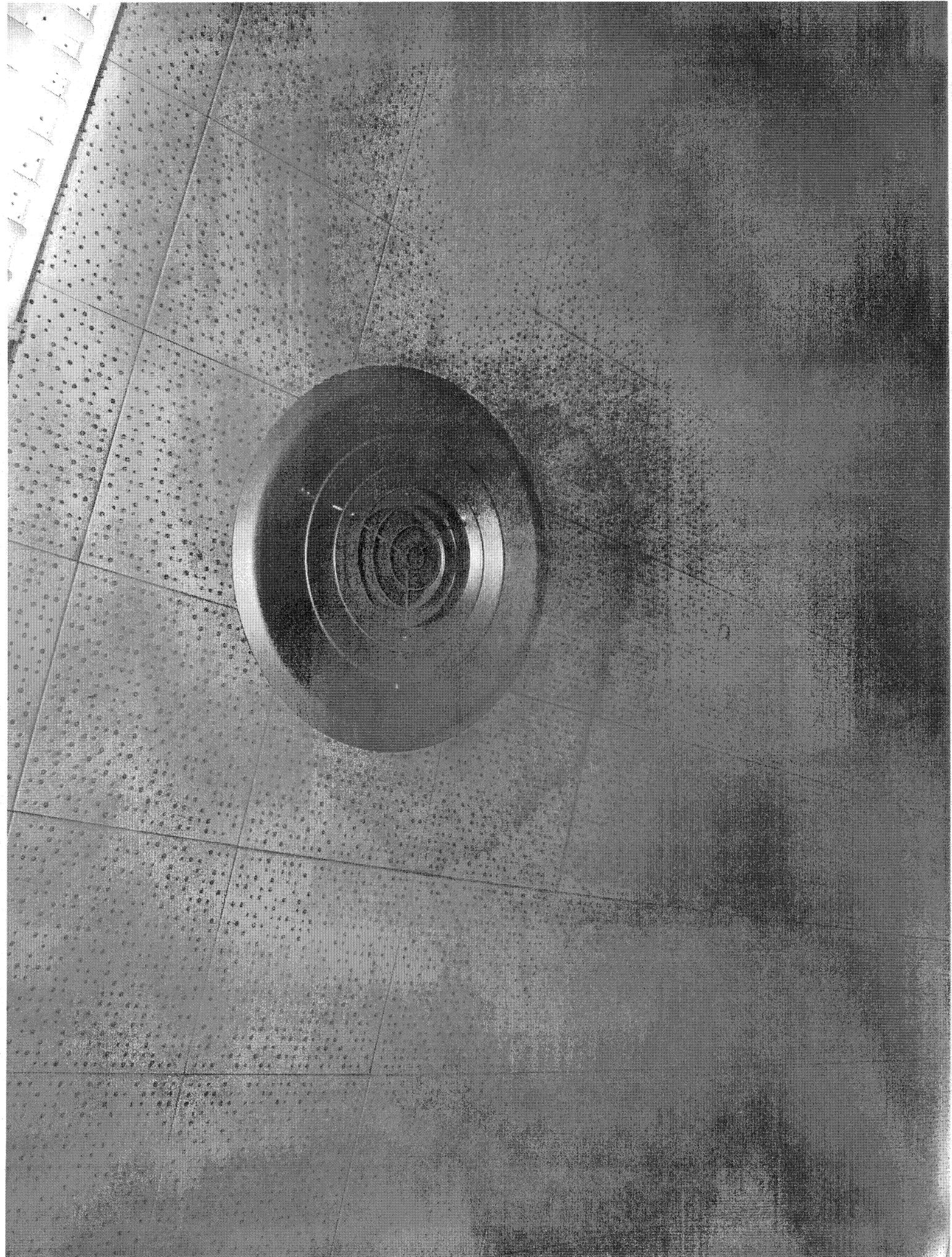




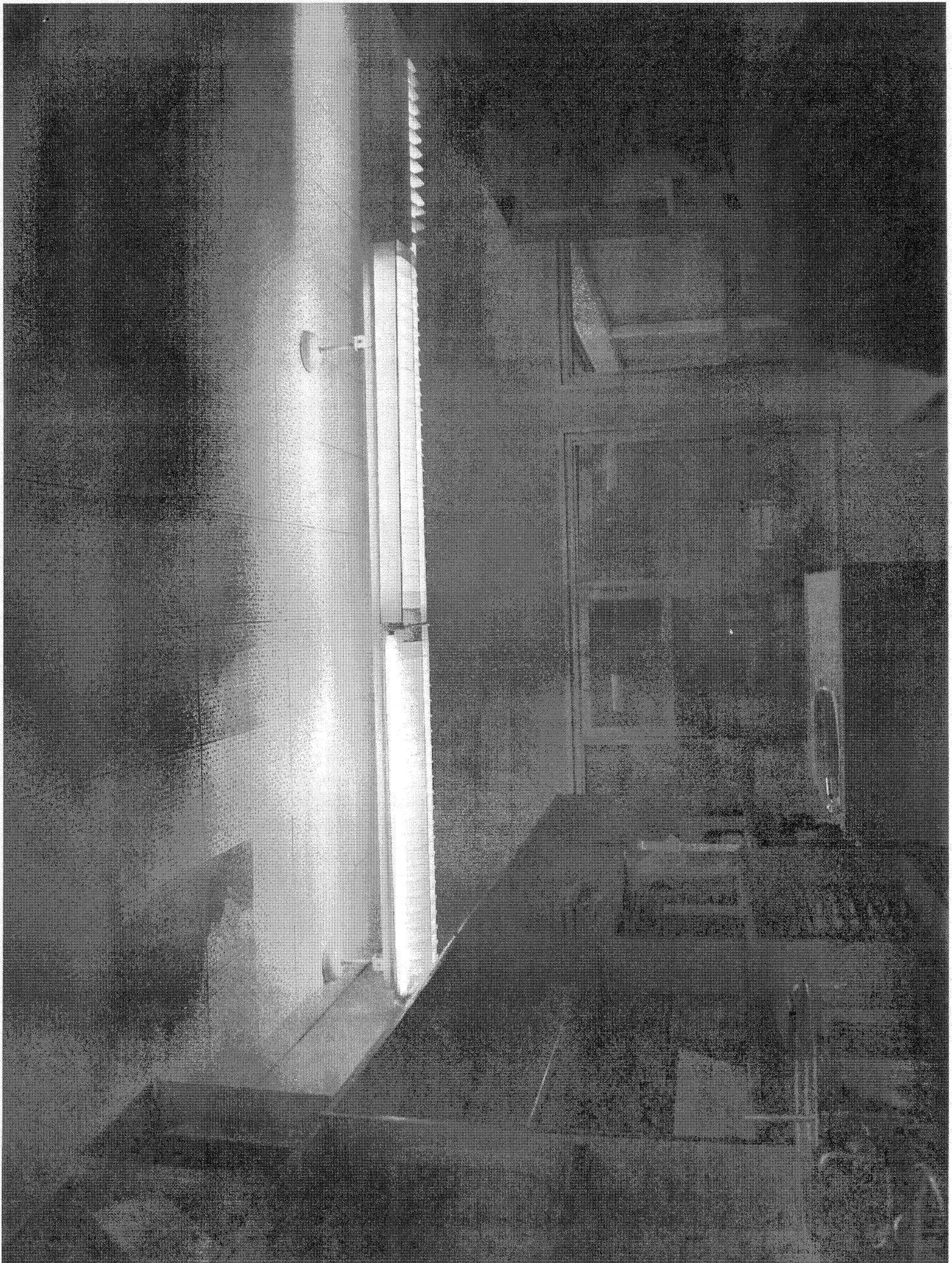
# OF THE ELEMENTS

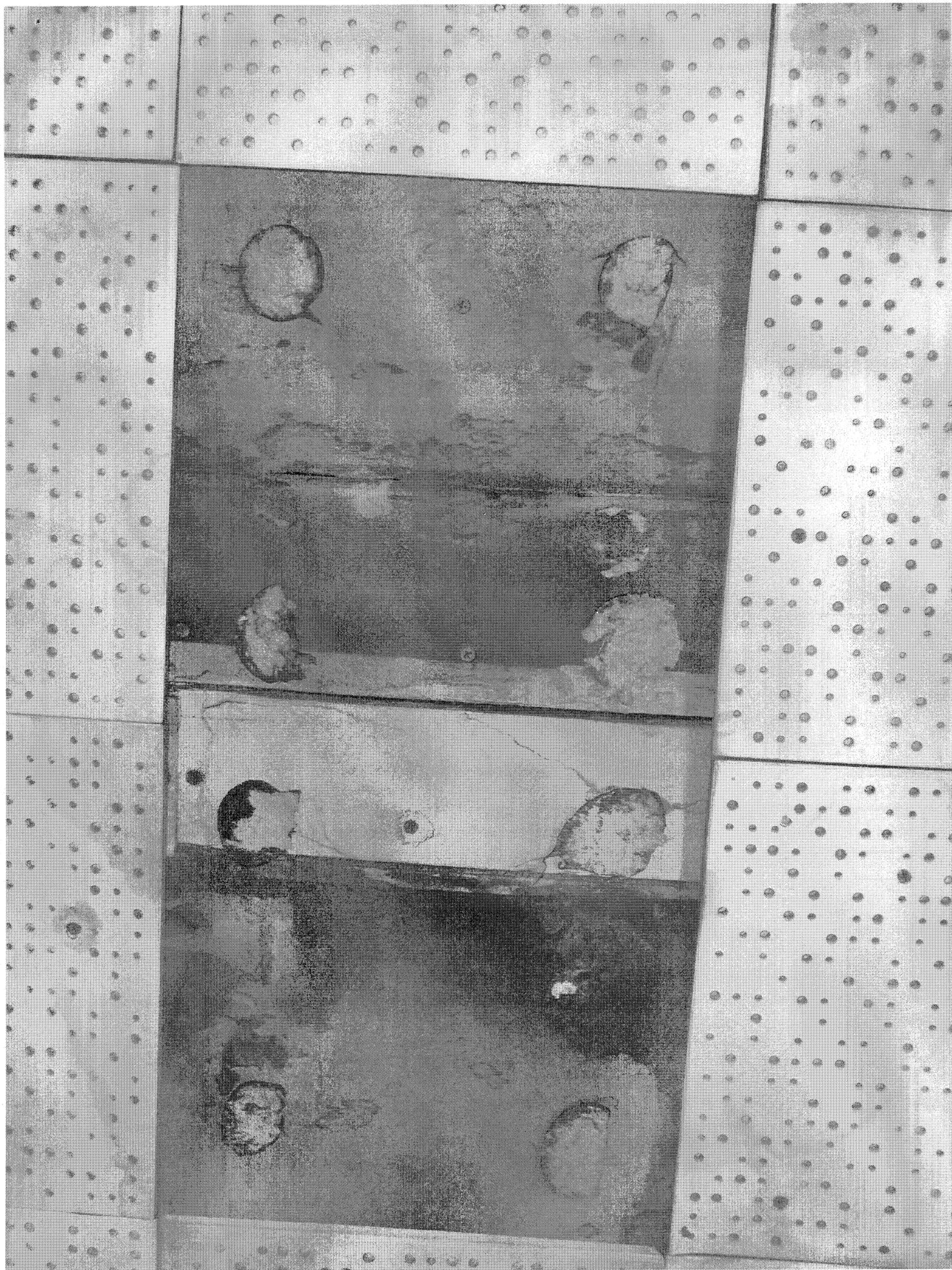
III A	IV A	V A	VI A	VII A	He
5	6	7	8	9	10
B	C	N	O	F	Ne
13	14	15	16	17	18
Al	Si	P	S	Cl	Ar

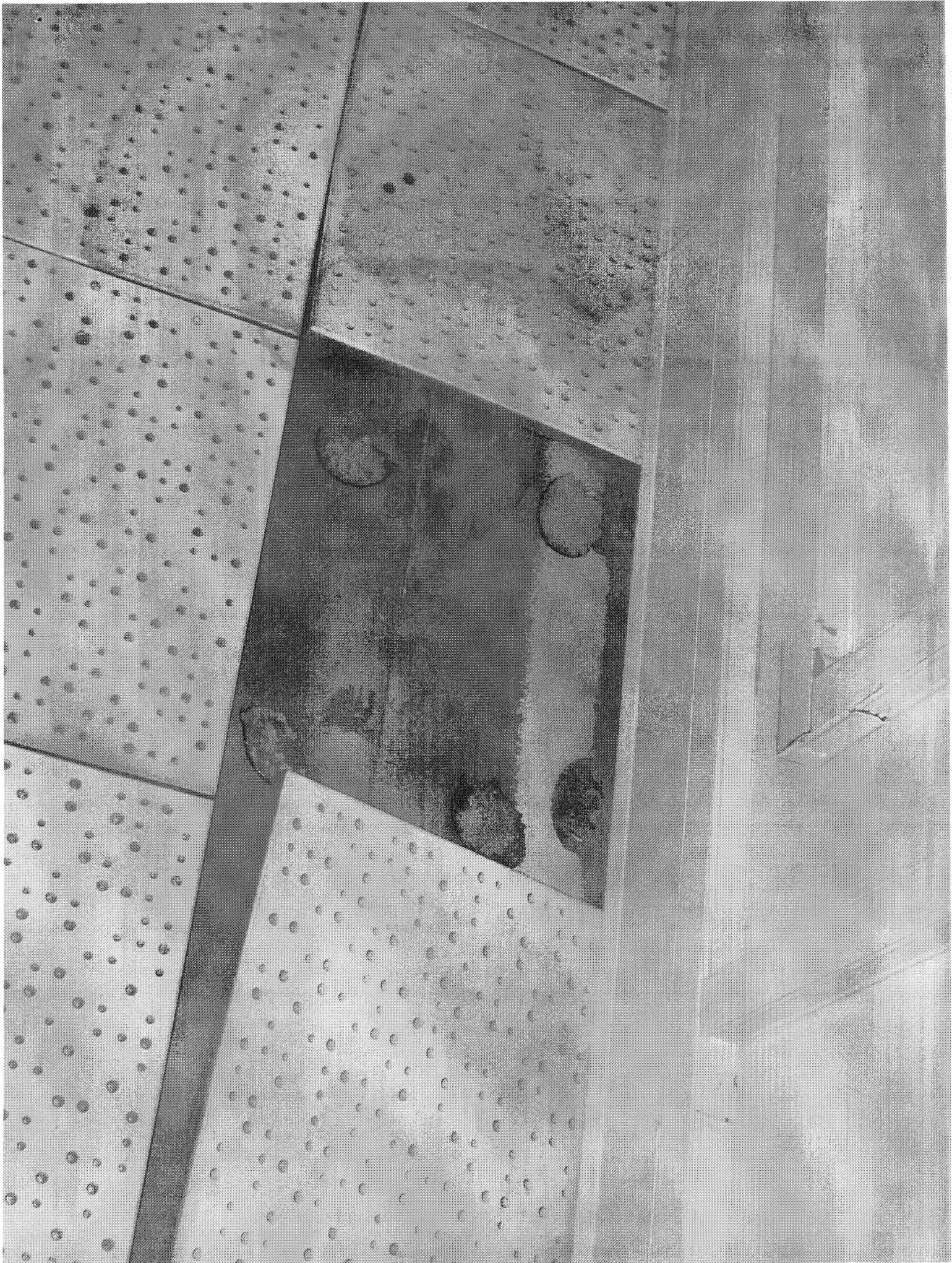






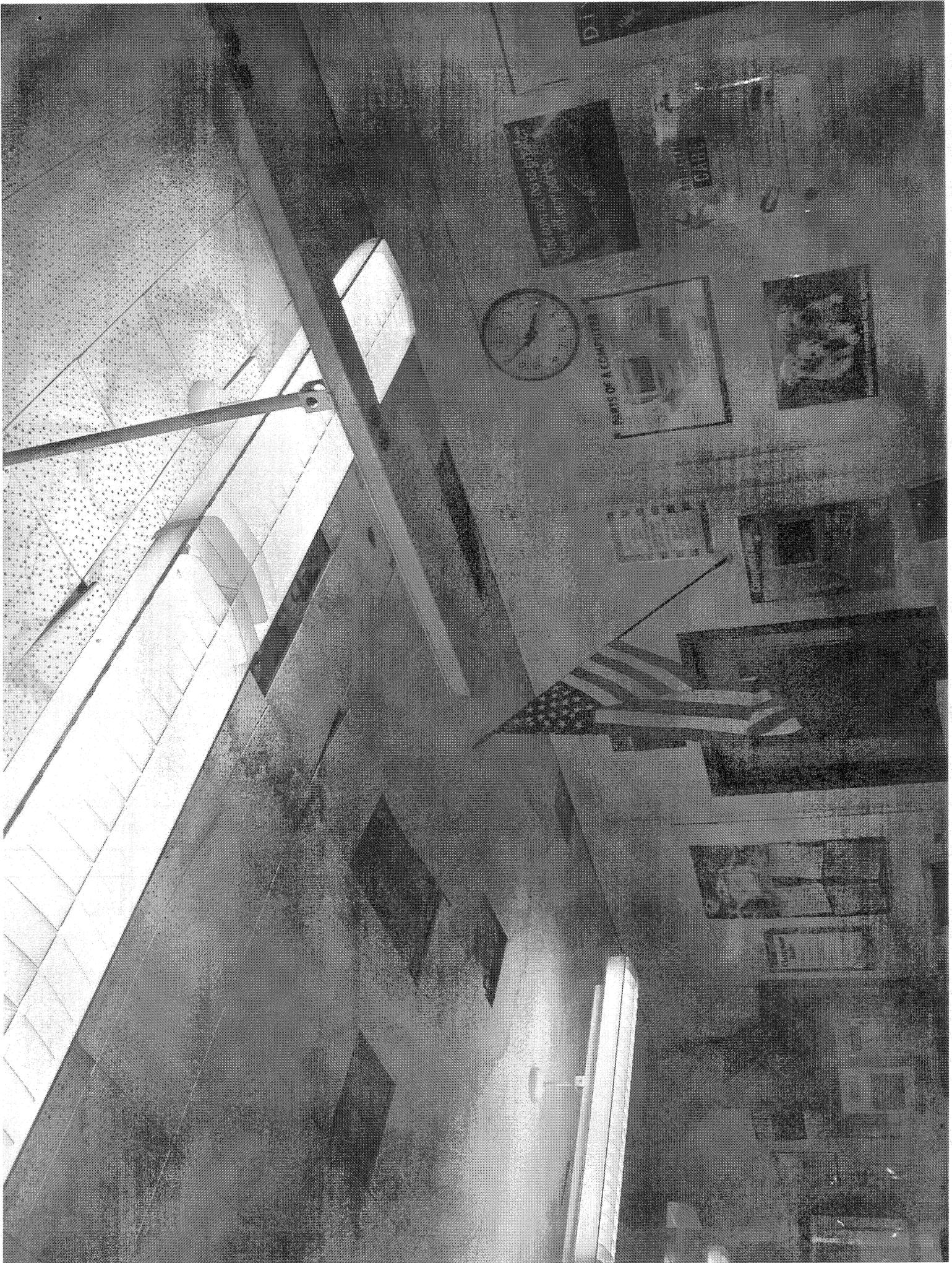


















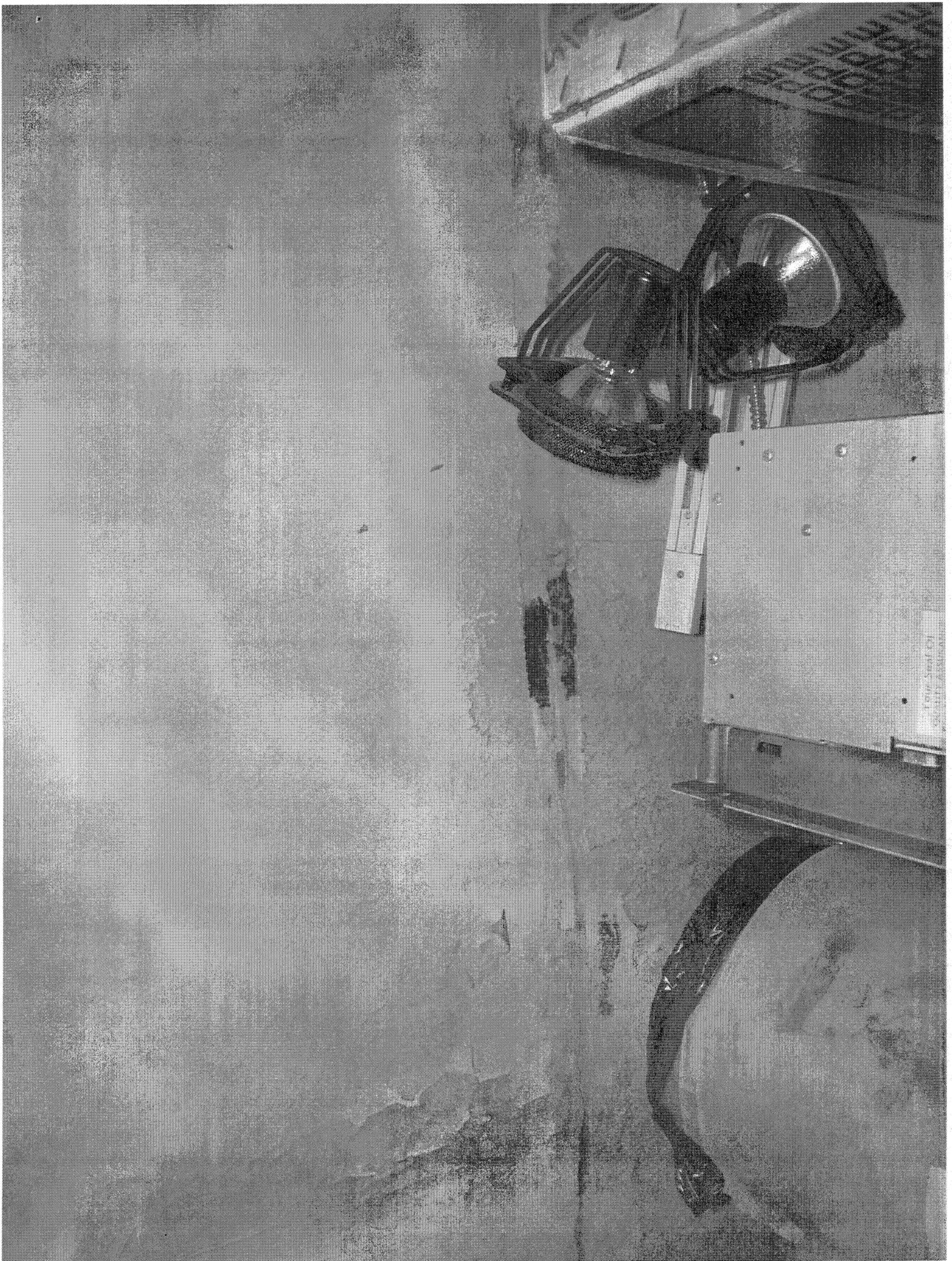
STORAGE  
ROOM

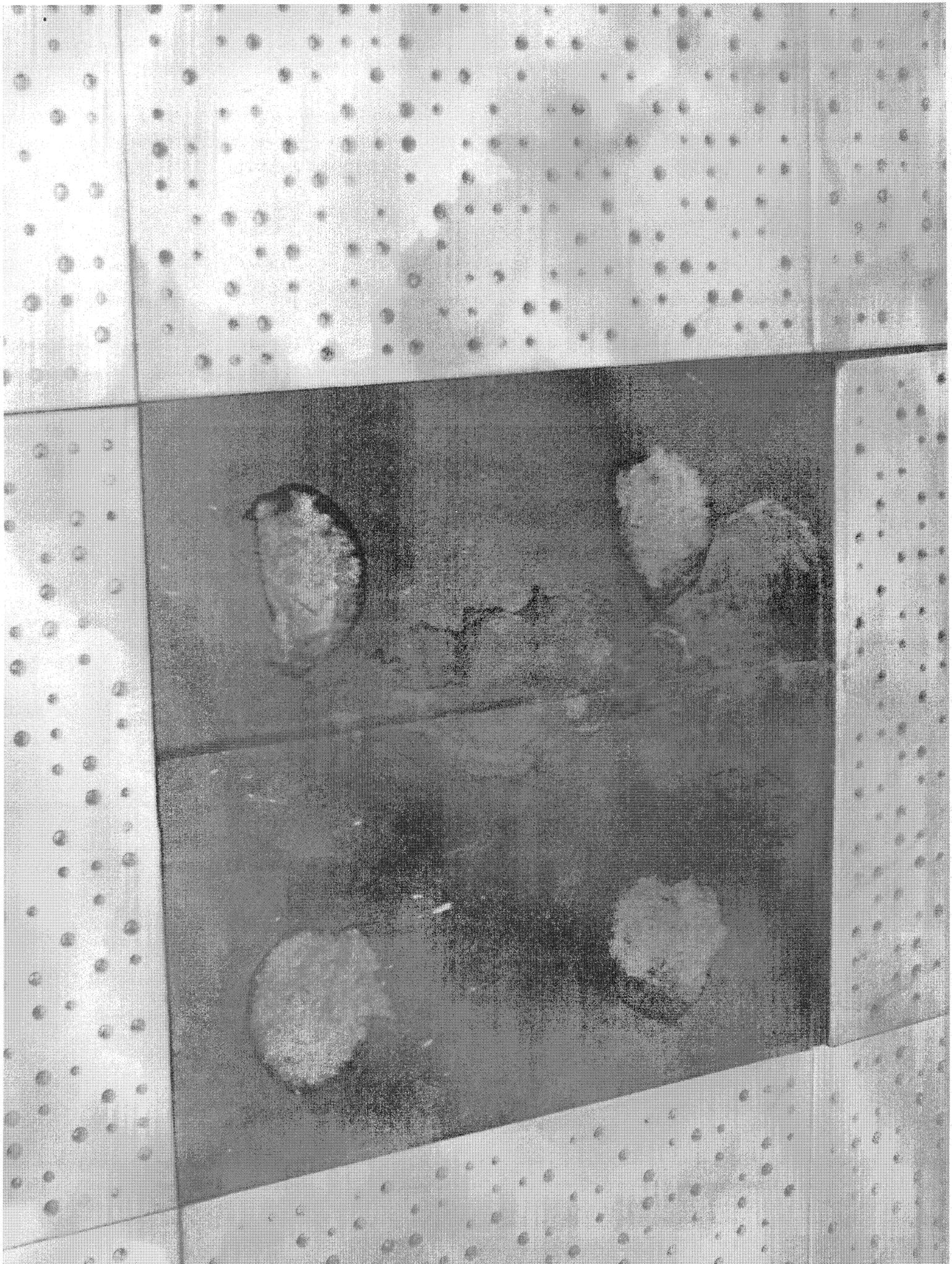
NO ENTRY FOR ALL







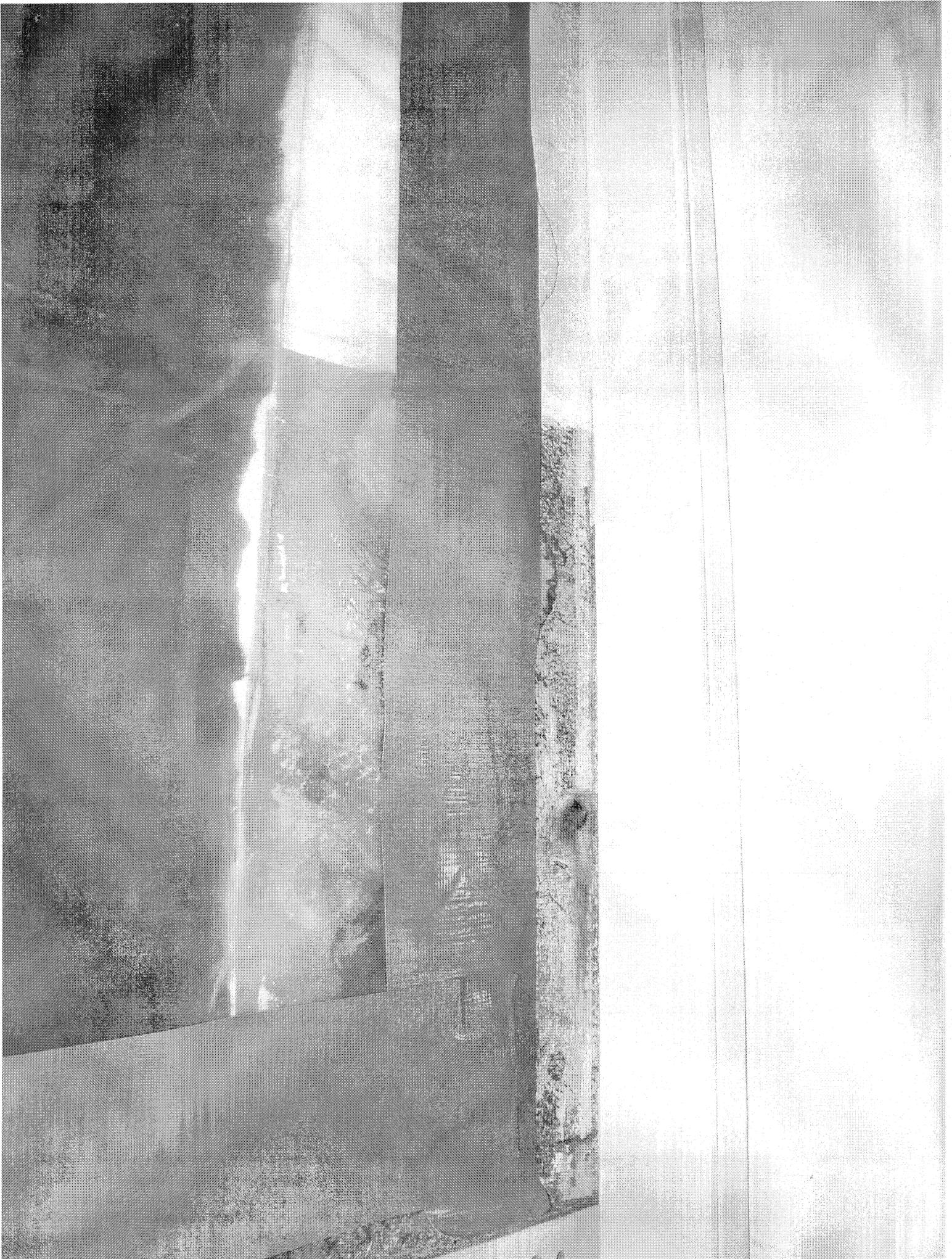




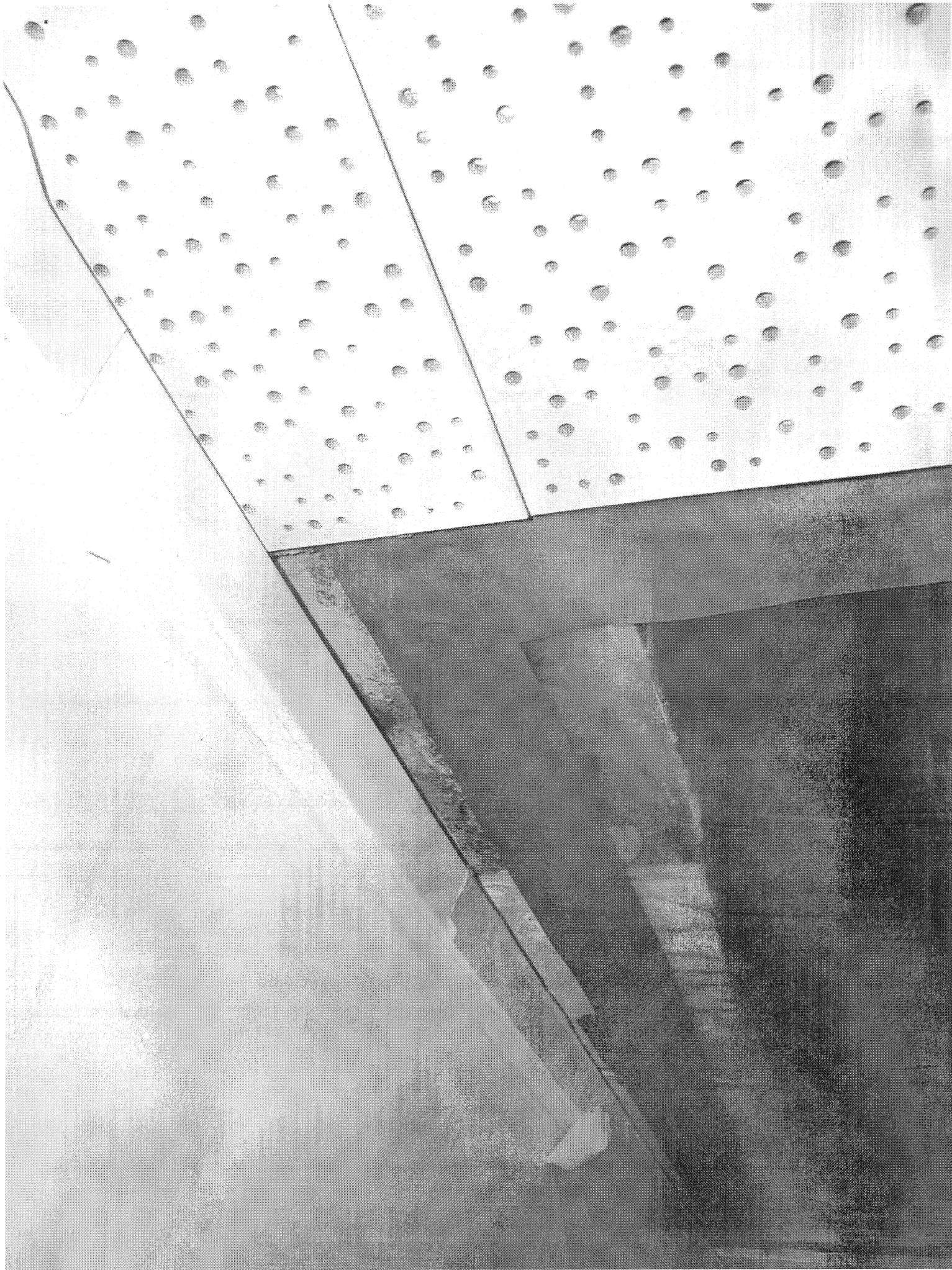
**EXHIBIT - 4**

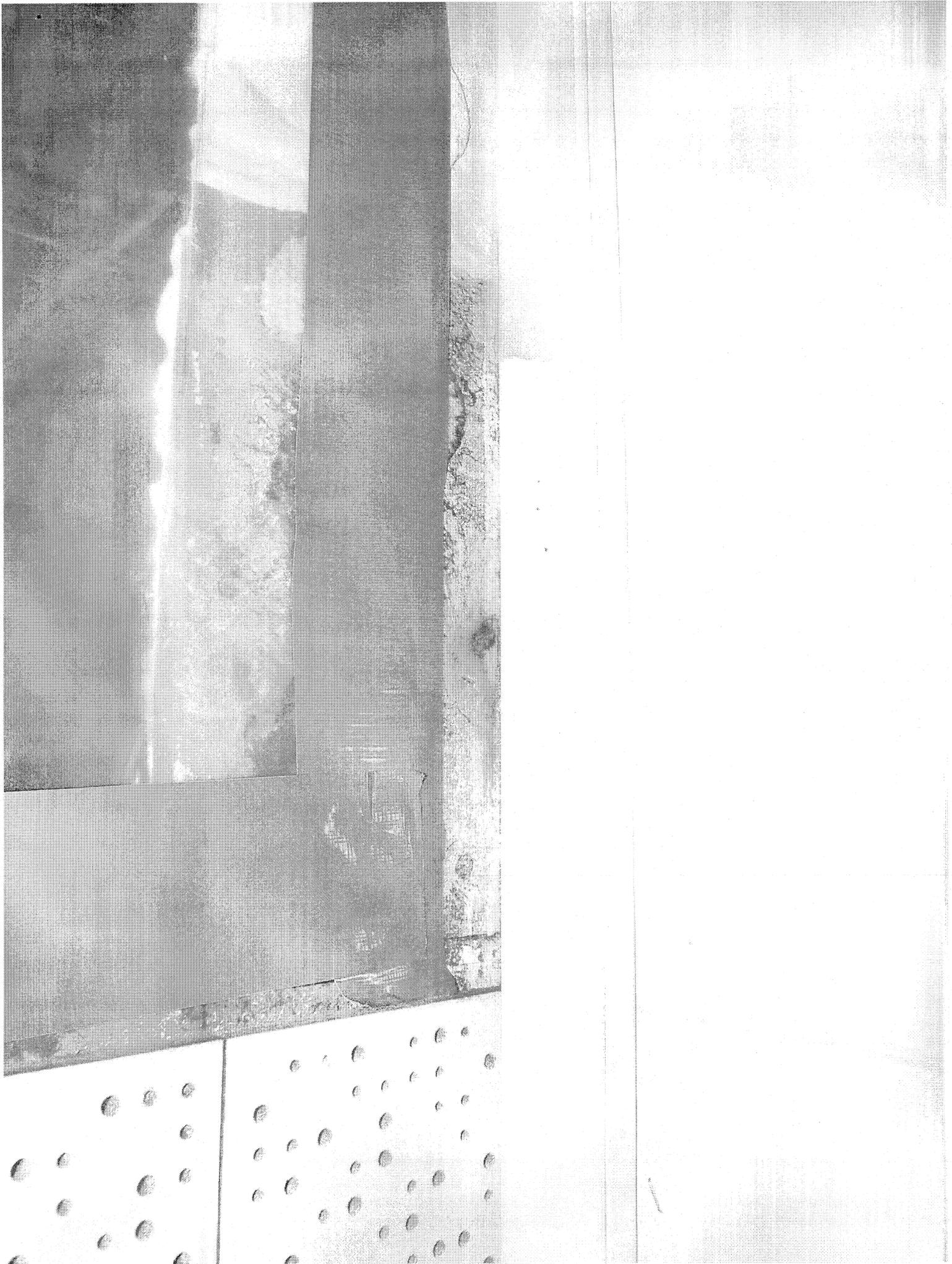


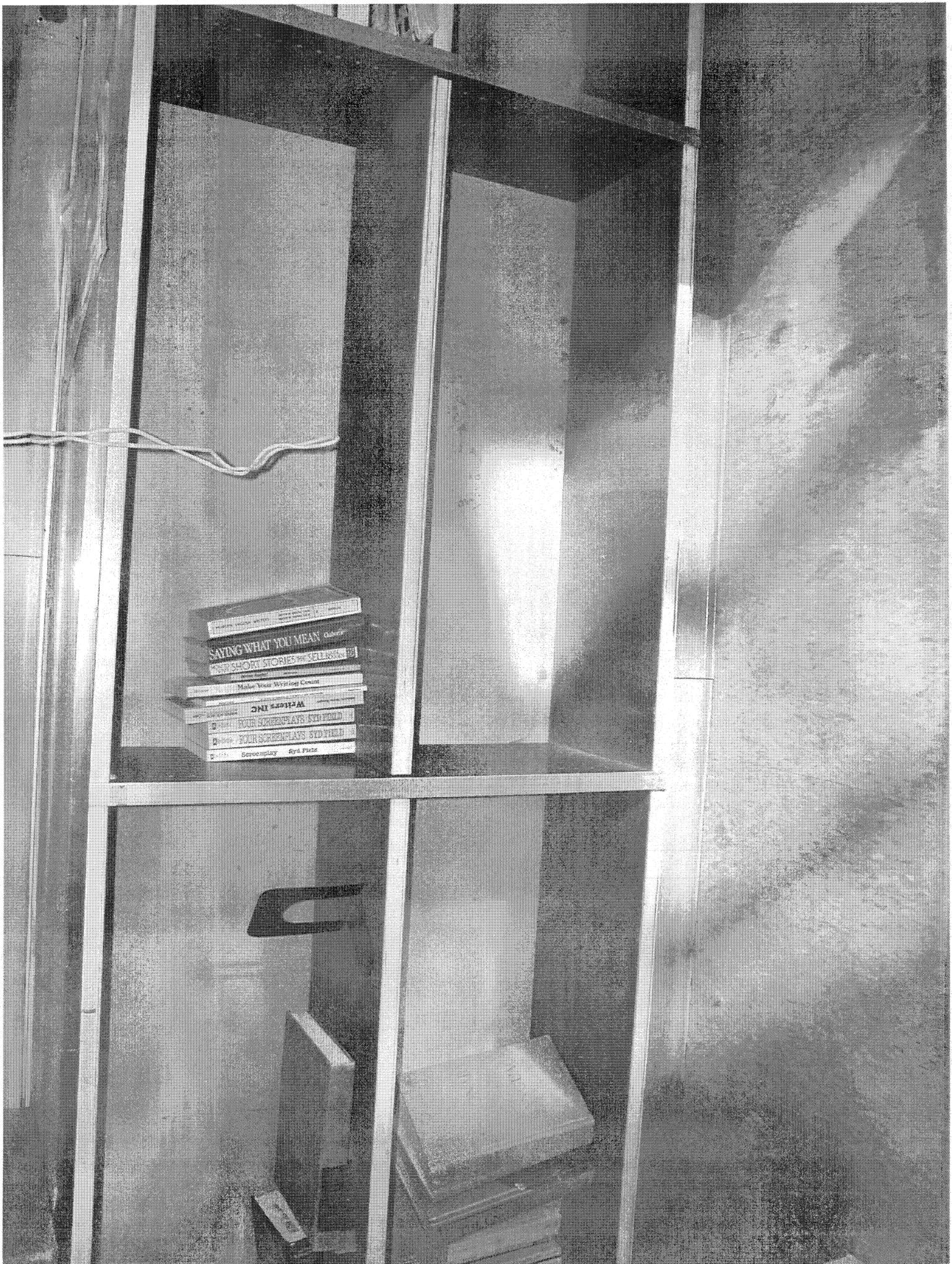








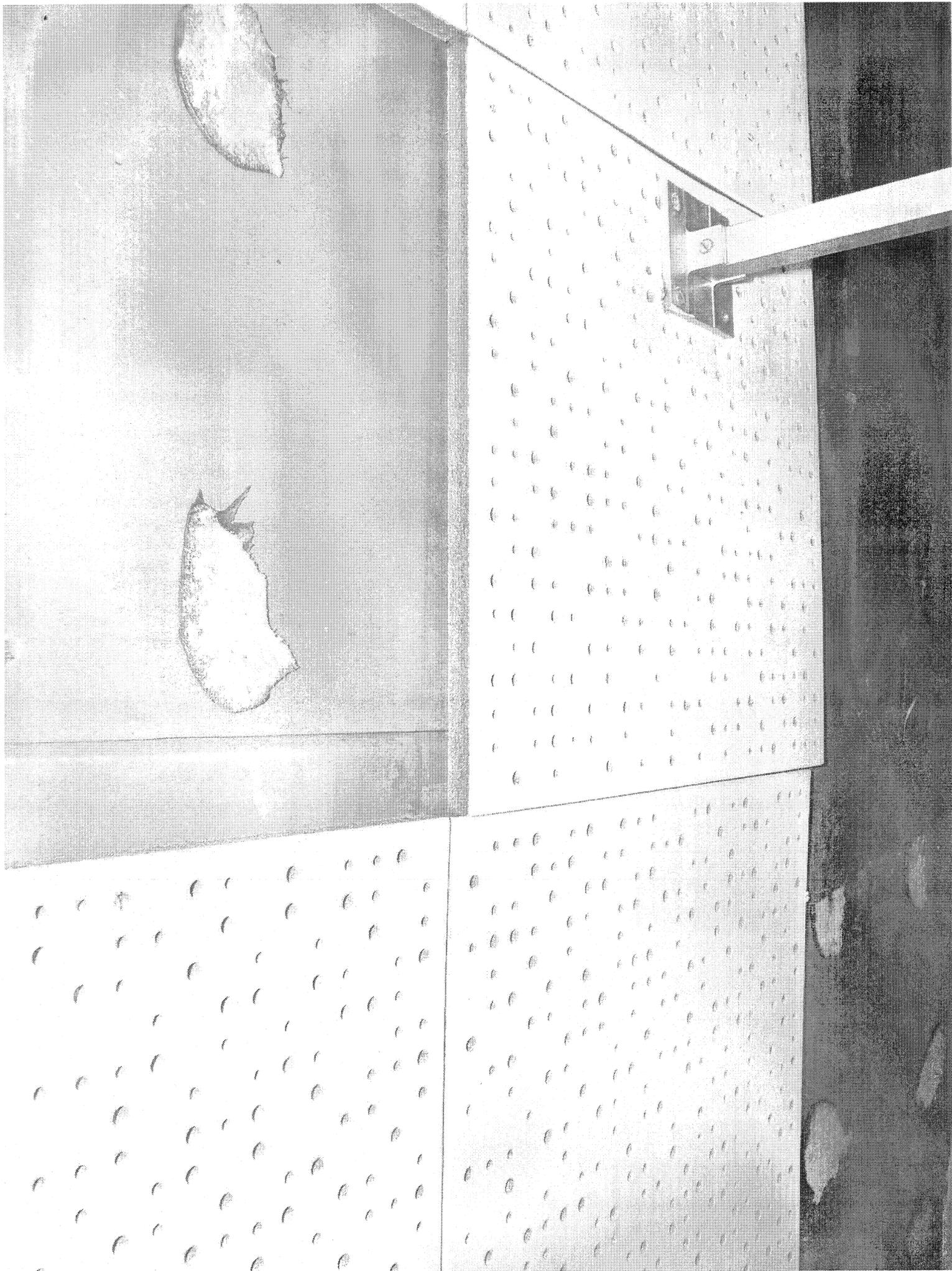




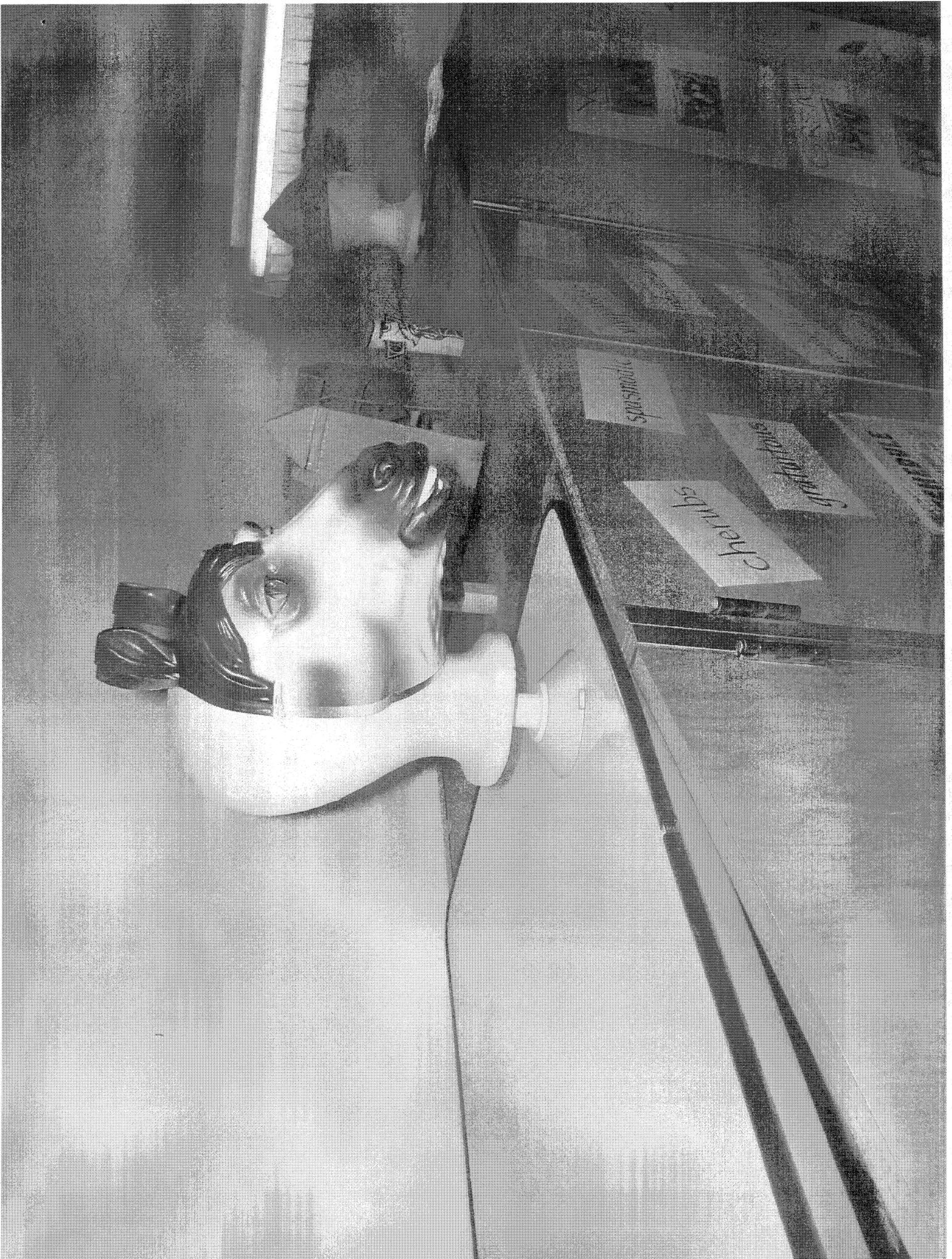


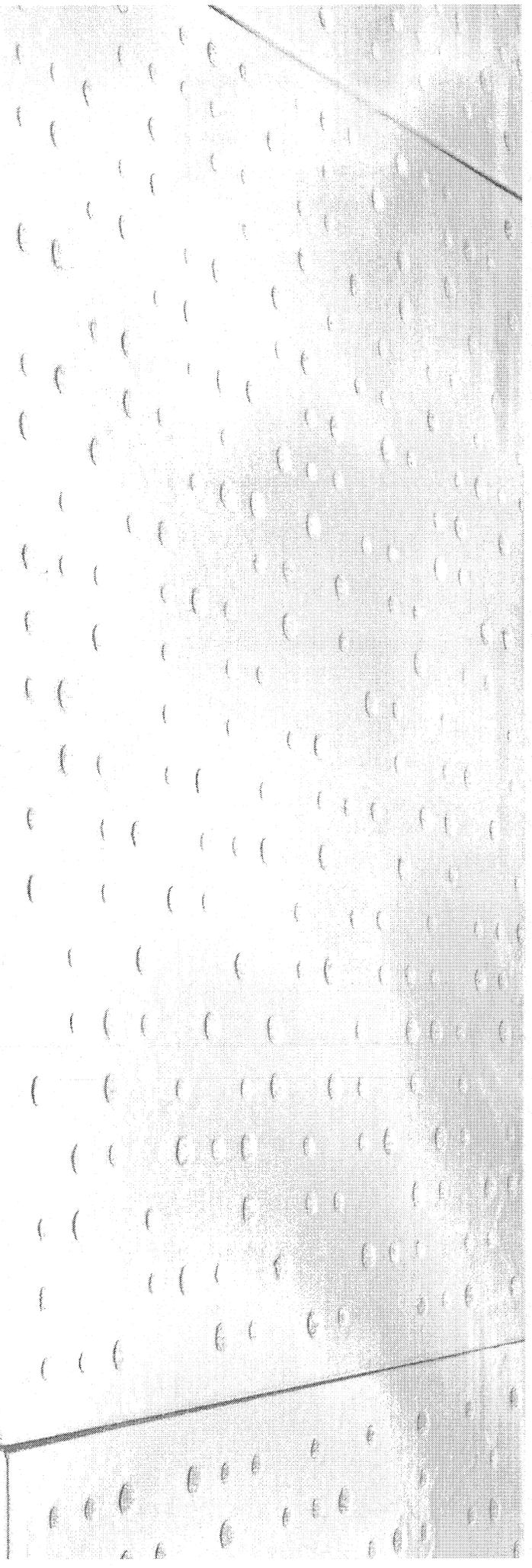
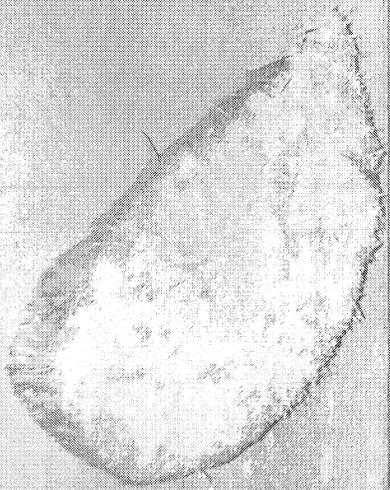
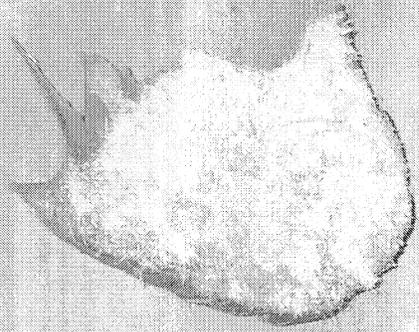


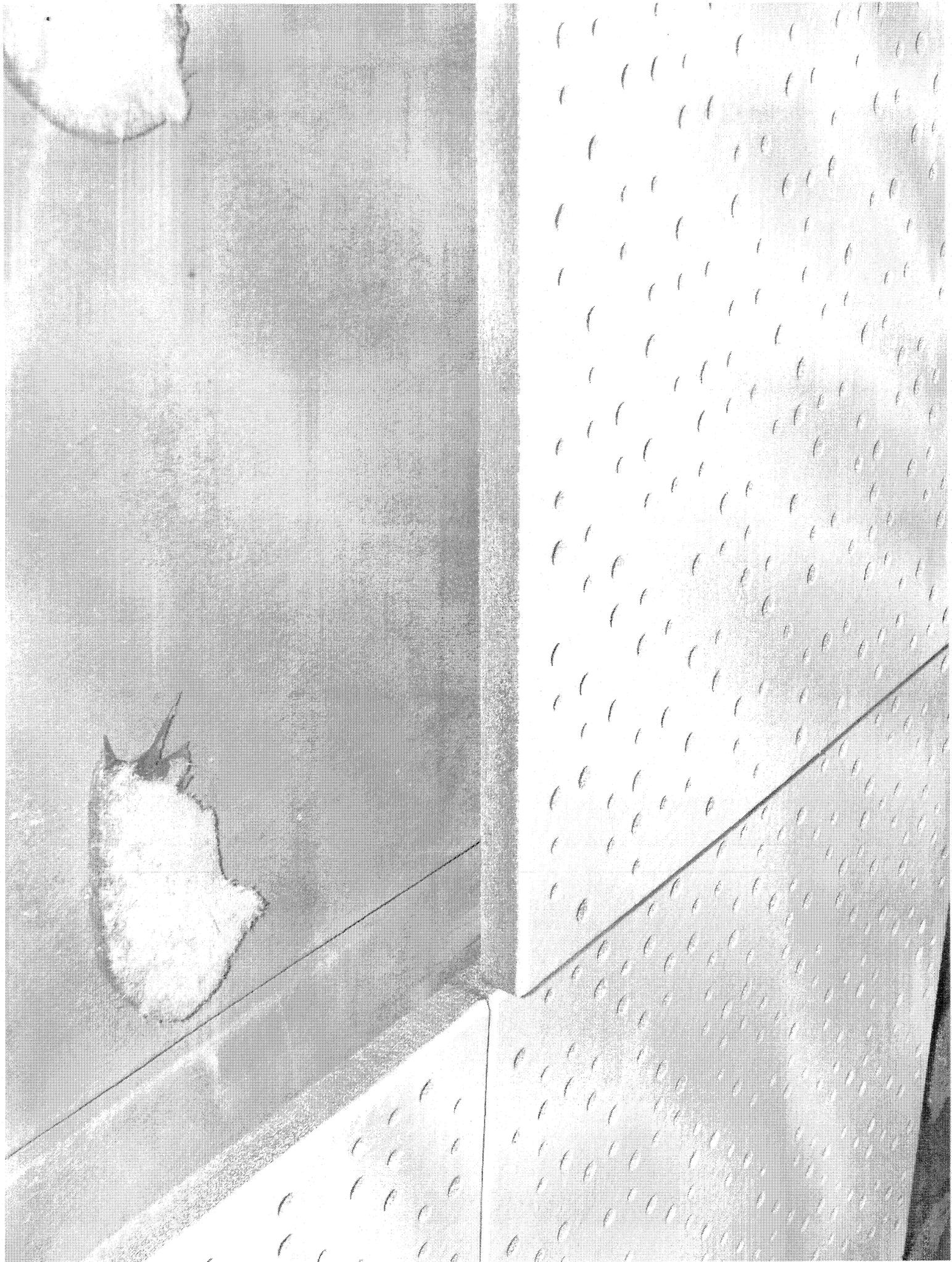




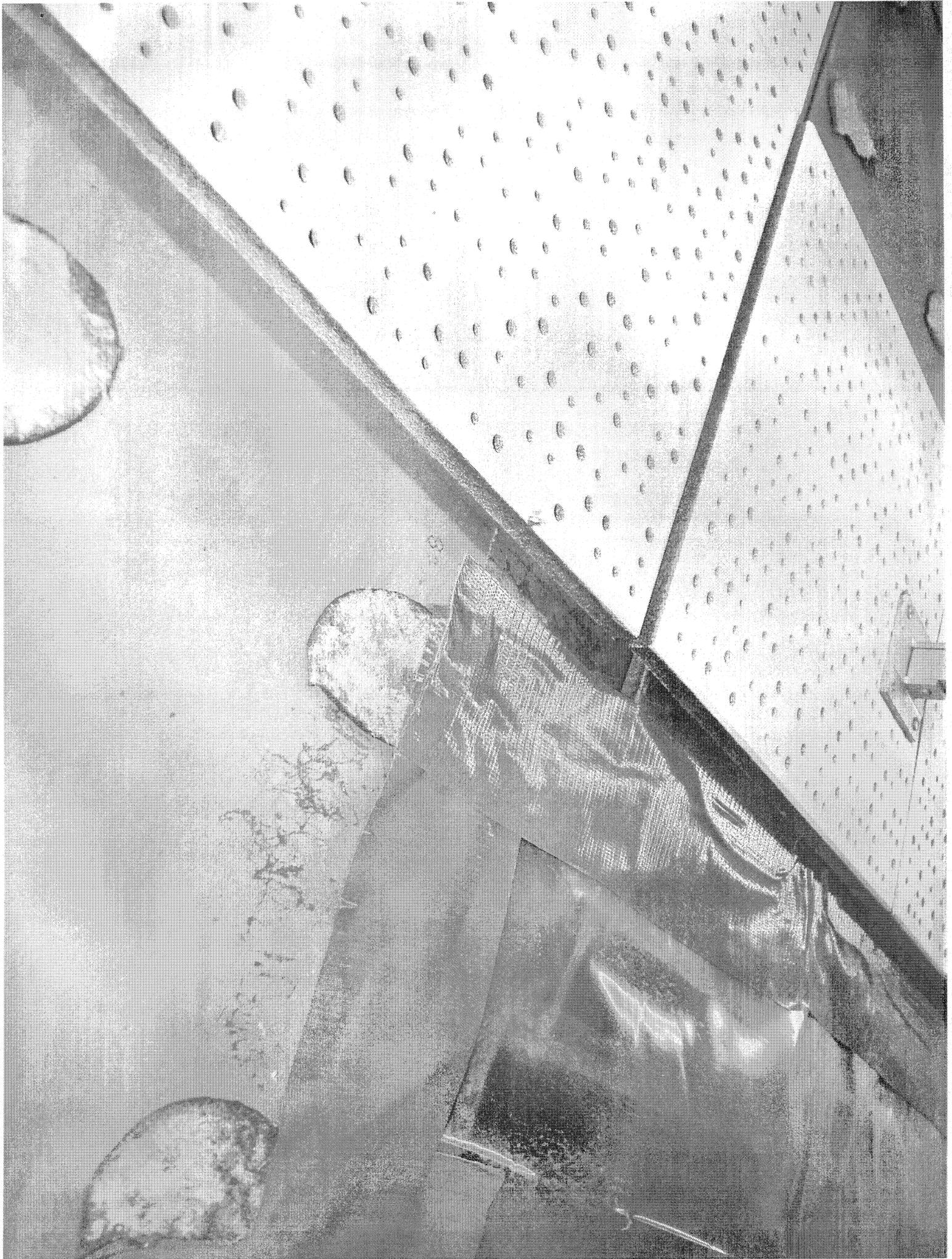


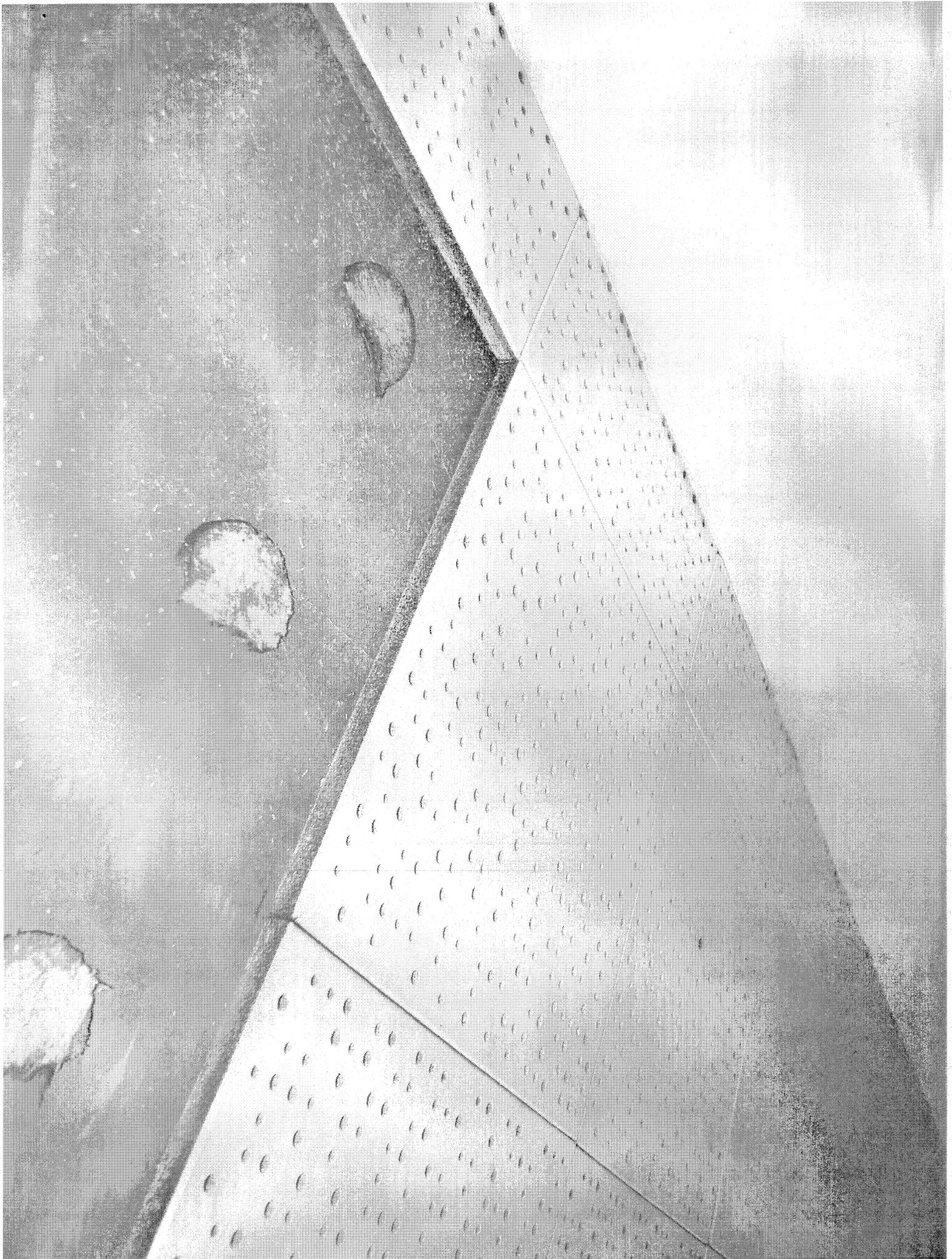


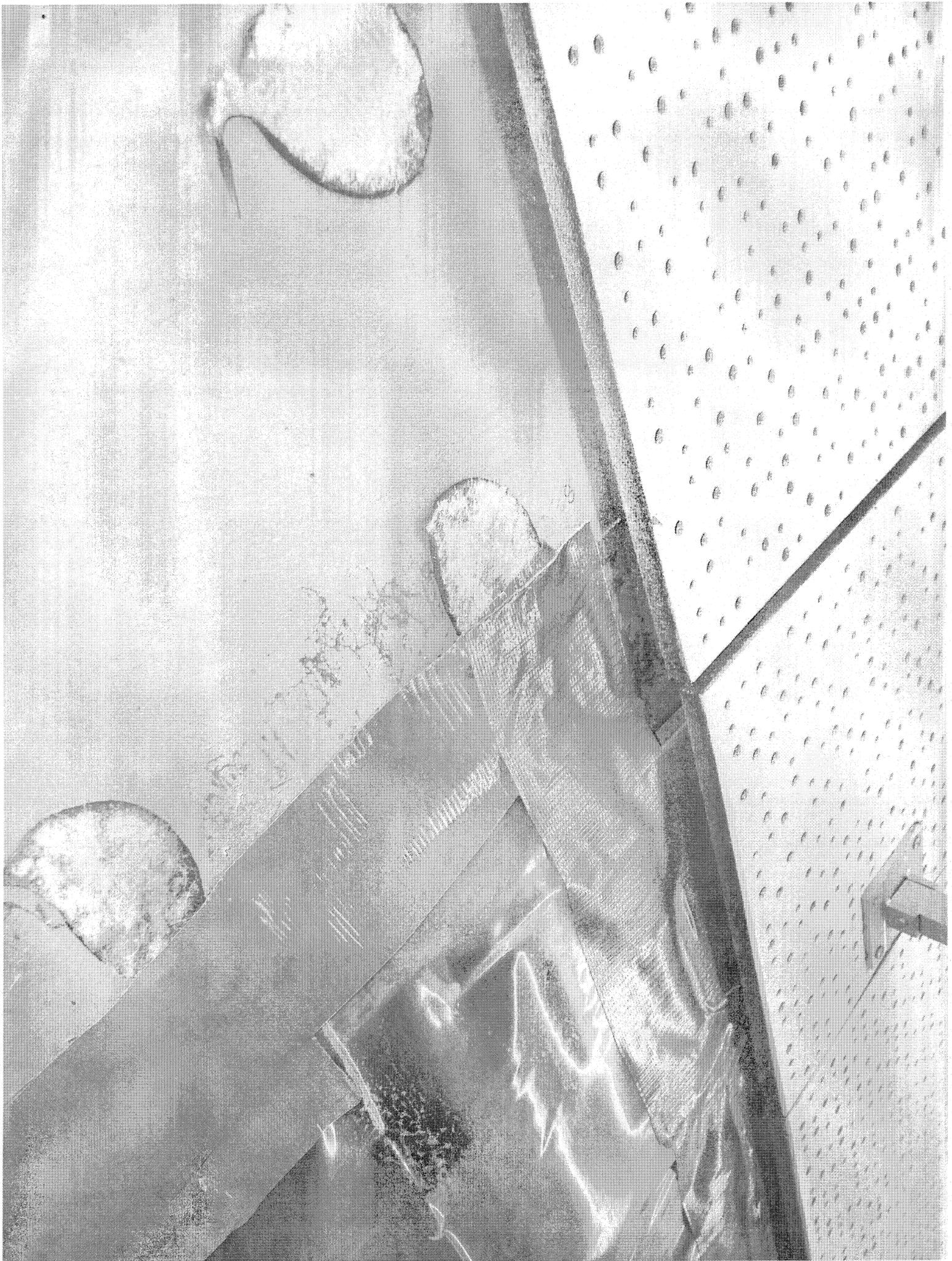








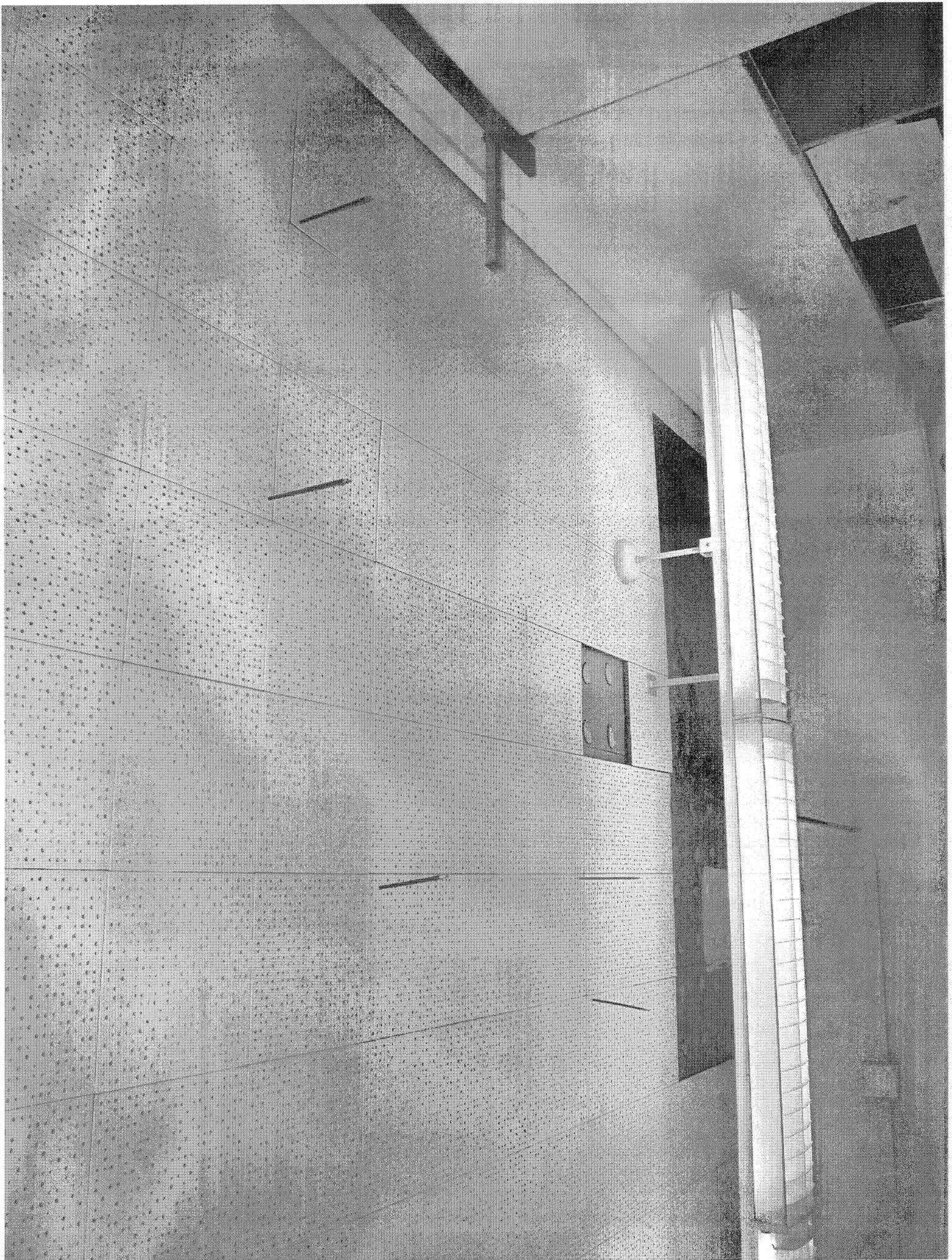


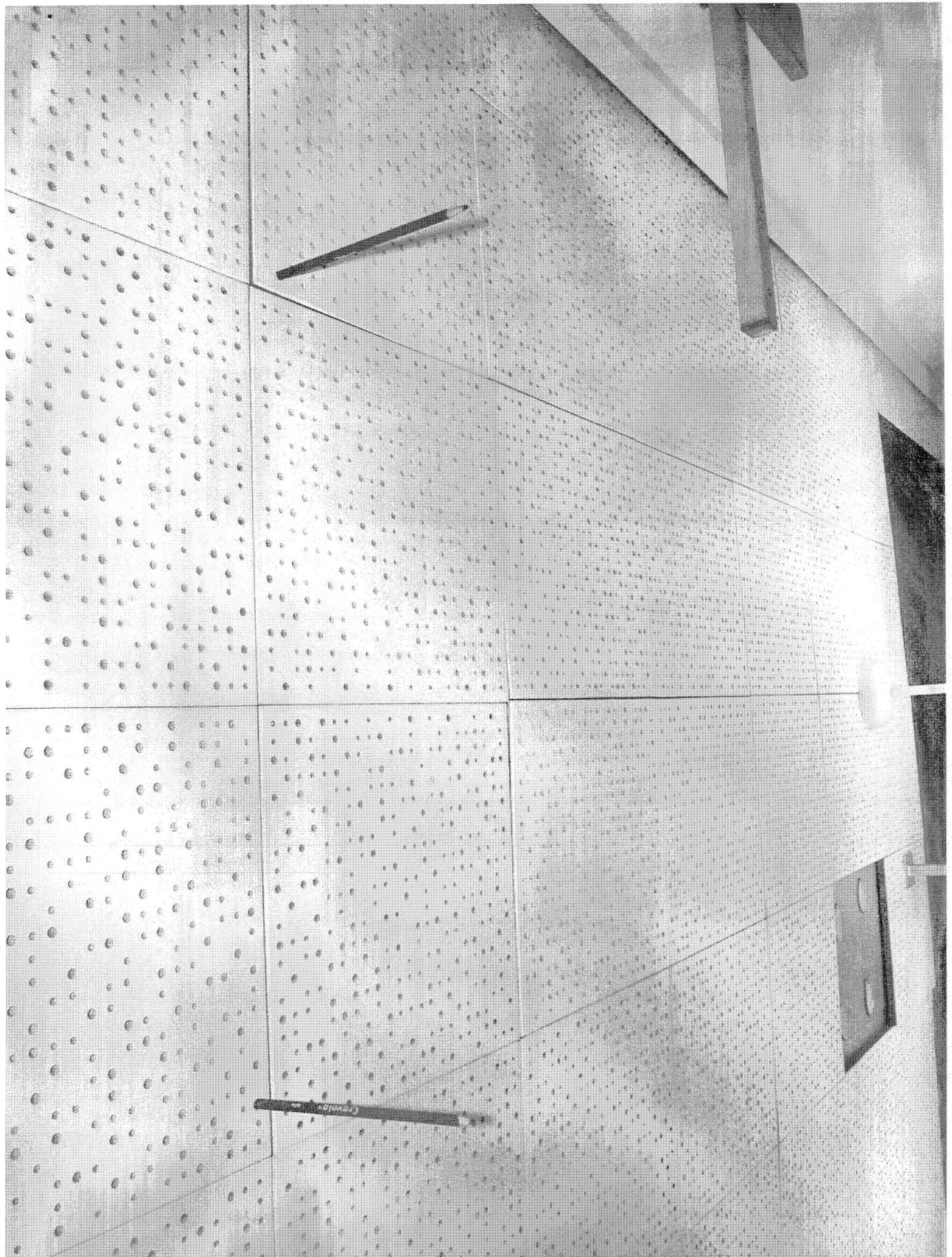


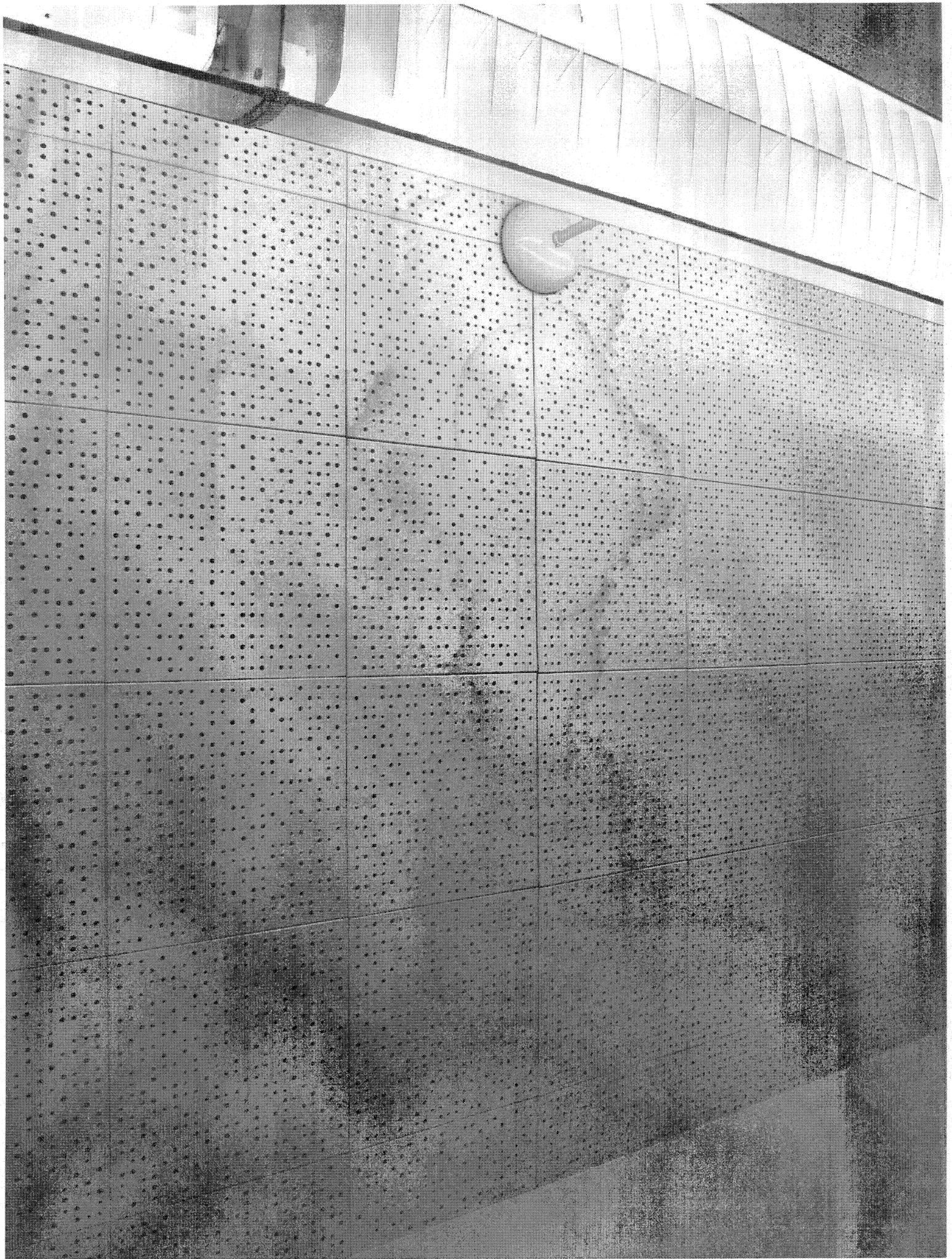


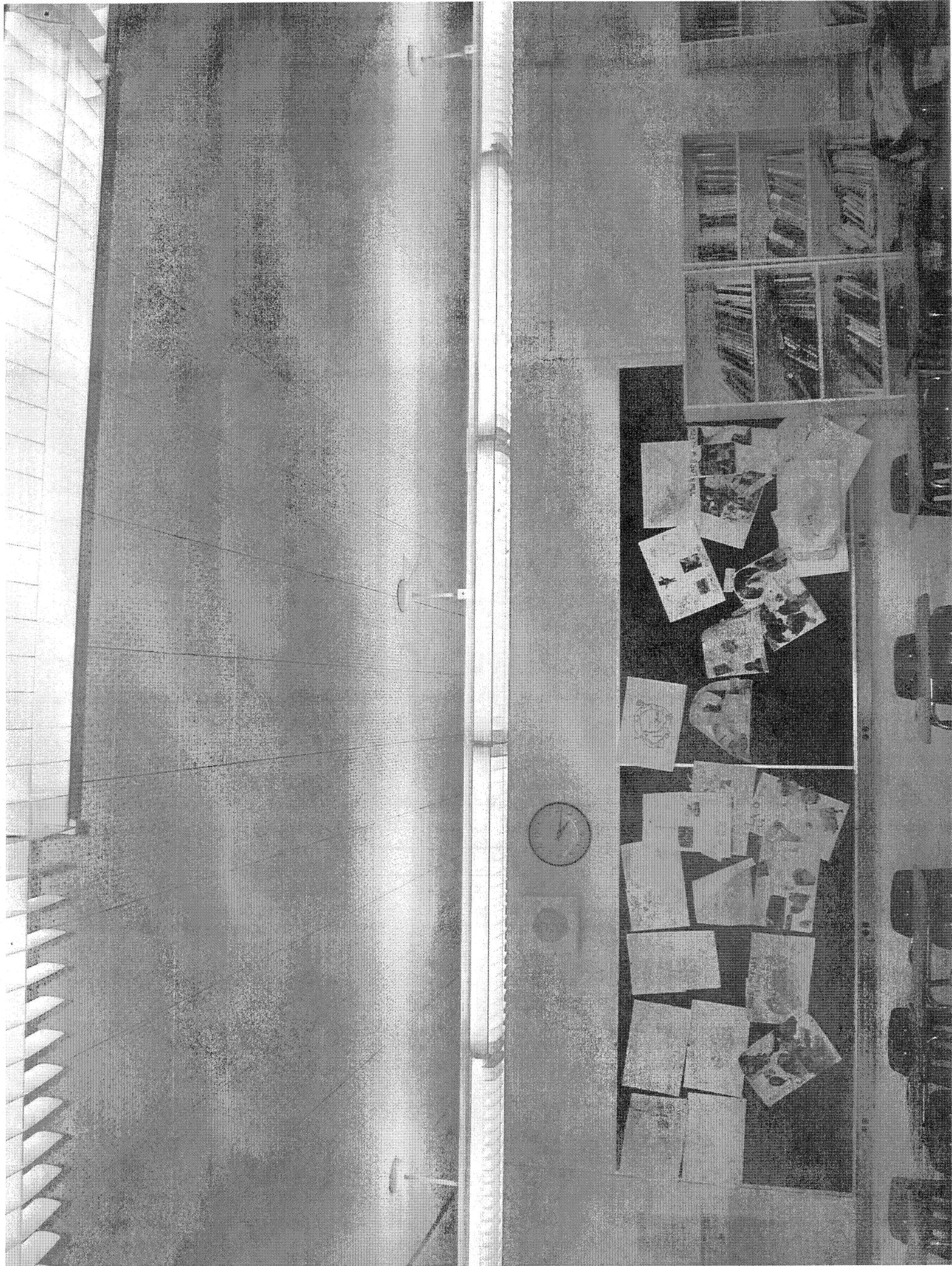












DECLARATION OF SERVICE

On said day below I emailed and deposited in the US Postal Service a true and accurate copy of the Brief of Appellant in Court of Appeals Cause No. 63994-3-I to the following parties:

Patrick B. Reddy  
Emery Reddy, PLLC  
600 Stewart Street, Suite 1100  
Seattle, WA 98101

John C. Montoya  
Law Offices of John C. Montoya, P.L.L.C.  
406 Boston Street  
Seattle, WA 98109

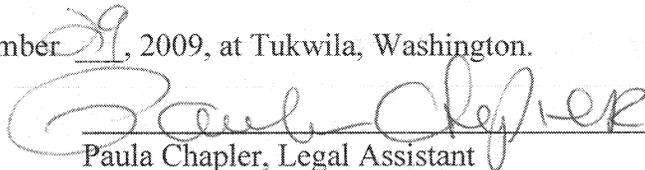
Patricia K. Buchanan  
Patterson Buchanan Fobes Leitch & Kalzer, P.S.  
2112 3<sup>rd</sup> Avenue, Suite 500  
Seattle, WA 98121

Original sent by ABC Legal Messengers for filing with:  
Court of Appeals, Division I  
Clerk's Office  
600 University Street,  
Seattle, WA 98101

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2009 DEC 30 PM 2:53

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

DATED: December 29, 2009, at Tukwila, Washington.

  
Paula Chapler, Legal Assistant  
Talmadge/Fitzpatrick