Draft Minutes
Forensic Science Board Meeting
October 14, 2009
Department of Forensic Science Central Laboratory, Classroom 1

Board Members Present
Steven Benjamin
Leah Bush, M.D.
Dale Carpenter, Ph.D.
Colonel W. Steven Flaherty
Jo Ann Given
Katya Herndon (Designee for Karl Hade)
Kristen Howard (Designee for Senator Howell and Senator Stolle)
Alan Katz (Designee for Attorney General Mims)
Sheriff A.A. Lippa Jr.
Senator Henry L. Marsh II
Raymond F. Morrogh
Elizabeth Russell

Board Member Absent
Leonard Cooke
Delegate William R. Janis (Designee for Delegate Albo)
Robert Jensen

Legal Counsel for the Forensic Science Board
Amy Dillworth

Staff Members Present
Wanda Adkins, Office Manager
Henry Bosman, Senior Accountant
Jeffrey Ban, Central Laboratory Director
Dave Barron Ph.D., Director or Technical Services
Donna Carter, Finance Manager
Guinevere Cassidy, Legal Assistant
Leslie Ellis, Human Resources Director
Gail Jaspen, Chief Deputy Director
Bradford Jenkins, Biology Program Manager
Alka Lohmann, Training and Calibration Program Manager
Marsha Sinclair-Kelly, Procurement and Support Services Manager
Pete Marone, Director, Department of Forensic Science
Stephanie Merritt, Department Counsel
Elizabeth Mirza, Grants Administration/Policy Analyst
Steven Sigel, Deputy Director
Lisa Schiermeier-Wood, Section Supervisor, Forensic Biology

Call to Order by Chairman Raymond Morrogh

Chairman Morrogh called the meeting to order at 10:05 a.m. Chairman Morrogh welcomed new Forensic Science Board ("Board") Member Jo Ann Given. She is the Scientific Advisory Committee ("SAC") Member appointed by the SAC Chairman to sit on the Board.

Adoption of Agenda

Chairman Morrogh asked if there were any additions or changes to the draft agenda. There were none. Col. Flaherty moved that the draft agenda be adopted as written with no revisions. Mr. Benjamin seconded the motion, which passed by unanimous vote of the Board.

Approval of Draft Minutes of August 12, 2009 Meeting

Chairman Morrogh asked if there were any additions or changes to the draft minutes from the August 12, 2009 Board meeting. Discussion by the Board ensued regarding typographical corrections to lines 71, 175, 275 and 281. Mr. Benjamin moved that the minutes from the August 12, 2009 Board meeting with the agreed upon amendments be adopted. Col. Flaherty seconded the motion, which passed by unanimous vote of the Board.

Director's Report

State of the Agency

Regarding facilities, Director Marone informed the Board that the Eastern Lab renovation contract has been awarded and that partial construction has begun on the expansion into the building's 5th floor. The Governor has agreed to the purchase of the land adjacent to the Western Lab for future expansion.

Regarding workload/backlog, Director Marone informed the Board that the Department of Forensic Science ("DFS") remains stable despite adverse working conditions triggered by *Melendez-Diaz v Massachusetts*. Due to the dramatic increase in the number of hours drug chemists spend in court, the Controlled Substances section is experiencing a higher turnaround time. DFS drug chemists were on the road more hours in August 2009 than they were in the preceding eleven months combined

Discussion by the Board ensued regarding the increase of examiners called to testify, the new notice statute, and co-operative efforts made or being worked toward to assist all parties regarding this increase in court appearances.

Further discussion by the Board ensued regarding the DNA data bank backlog. Director Marone informed the Board that the data base currently has a 9,800 case backlog of which 8,500 are over 30 days. The database receives approximately 500 samples per month.

Regarding grants, Director Marone informed the Board that the following grants were awarded:
FY09 Solving Cold Cases with DNA, $490,960 to review and investigate violent crime cold cases and to locate and analyze biological evidence associated with these cases.
FY09 Forensic DNA Backlog Reduction Program, $950,167 to reduce the case backlog and to increase the DNA analysis capacity in the Forensic Biology Section.

FY09 Convicted Offender and/or Arrestee DNA Backlog Reduction Program, $171,579 to reduce the current backlog in the DNA data bank.
2010 Highway Safety (DMV) Program, $136,469 to provide reimbursement of travel costs for law enforcement officers traveling to Richmond for breath alcohol training.
FY09 Paul Coverdell National Forensic Science Improvement Grant, $164,951 to renovate laboratory and office space in the Central Lab.

Regarding the National Institute of Justice ("NIJ") grant and the Post-Conviction DNA Notification and Testing Program ("PC-DNA"), Director Marone informed the Board that DFS is working with NIJ to expand the testing criteria from murder, rape and non-negligent manslaughter to other crimes against persons. Currently, general funds are being used to test PC-DNA cases that meet the State criteria but do not meet the NIJ criteria.

Discussion by the Board ensued.

Regarding resources and budget outlook, Director Marone introduced Deputy Director Steven Sigel who informed the Board that DFS has implemented the FY2010 budget reduction plan. The reduction plan includes holding open positions, reducing expenditures with wage employees, discontinuing discretionary travel, discontinuing discretionary scientific and IT equipment purchases, and deferring 2010 contracts to 2011.

Old Business

Post Conviction DNA Notification and Testing Program

Notification Subcommittee Chair, Kristen Howard informed the Board regarding the efforts of the Subcommittee. The last of the Pro Bono Attorney/Volunteer training classes was being held that day in Blacksburg. Other training classes were held in Richmond, Charlottesville, Virginia Beach, Williamsburg, and McLean. There has been a good response to the training with approximately 60 Pro Bono Attorneys having signed up to participate in the PC-DNA Notification Program. The training class has been approved by the Virginia State Bar for Continuing Legal Education Credit and been developed into a DVD recorded format. The Confidentiality and Waiver forms are finalized and approved by the Attorney General's Office and are being signed by the Pro Bono Attorney/Volunteers.

Ms. Howard directed the Board's attention to the Subcommittee's report in the Board's meeting packet and asked that they consider using the report as a template for the subcommittee to use to generate the Board's required December report to the Legislature. Ms. Given moved that the Notification Subcommittee draft the December report to the Legislature with cooperation and input from DFS that would then be reviewed by the Board. Ms. Russell seconded the motion which passed by unanimous vote of the Board.

Regarding notification and testing updates, Chief Deputy Director Gail Jaspen informed the Board that the notification numbers remained essentially the same because the Department's focus has shifted to testing while the notification process has been reassigned to the Notification Subcommittee. At this point, testing is being conducted and Certificates of Analysis are being issued. DFS is also working with and responding to convicted suspects' attorneys' discovery requests. Ms. Jaspen informed the Board that to date, the total number of case files found with

evidence suitable for DNA testing is 3,054, of which 2,208 cases contain a named suspect and 800 cases contain a named suspect known to have been convicted in the case. Of these, 829 cases have been sent to the contracting laboratory for DNA testing. Of these, 747 are felony convictions. Of the 747 cases, 638 cases meet the NIJ grant criteria (homicide, rape and non-negligent manslaughter); 105 cases meet the State criteria (other violent crimes against a person); and in 4 cases, NIJ conviction confirmation is pending. Preliminary case results have returned in 312 cases. The final completed case results were returned in 288 cases and 371 cases wait contactor testing. Certificates of Analysis have been completed and mailed in 182 cases. The following are the case test results regarding listed suspects meeting NIJ criteria: 24 convicted suspects were not indicated/eliminated; 70 convicted suspects were not eliminated; known samples are needed for 14 convicted suspects; and there are 70 convicted suspects whose cases have insufficient scientific data upon which to draw a conclusion. The following are the case test results regarding listed suspects who do not meet NIJ criteria: 15 convicted suspects were not indicated/eliminated; 8 convicted suspects were not eliminated; known samples are needed for 40 convicted suspects; and there are 18 convicted suspects whose cases have insufficient scientific data upon which to draw a conclusion. Regarding the reporting to the Board of the testing data in the future, Ms. Jaspen encouraged the Board to consider and request the types of data that would be most useful to them. Ms. Jaspen offered to work with Board members regarding any desired modifications to the reporting of testing data.

Discussion by the Board ensued regarding the terms "eliminated" and "not eliminated." The Board was informed that the terms are not indicative of the guilt or innocence of the convicted suspect. The Board was further informed that the original Certificate of Analysis is sent to the investigating agency and a copy is sent to the Commonwealth's Attorney of the jurisdiction of the case. Further discussion by the Board ensued.

Approval of Final Regulations for Obtaining Information from the DNA Data Bank and Procedures for Verification and Authorization of Persons Requesting Information from the DNA Data Bank, 6 VAC 40-60

DFS Department Counsel Stephanie Merritt informed the Board that the public comment period for the proposed DNA Data Bank Regulations has expired. The proposed regulation was submitted to the Regulatory Town Hall at the direction of the Board in June 2007.

Discussion by the Board ensued regarding the language of the proposed regulation. Mr. Benjamin moved that the Board delay consideration of the proposed regulation to the Board's January meeting and that the proposed regulation be reviewed by the Attorney General's office regarding statutory construction issues. Col. Flaherty seconded the motion which passed by majority vote of the Board.

New Business

Approval of Annual Report Pursuant to Va Code § 9.1-1110.B

Ms. Jaspen directed the Board's attention to the proposed draft of the Annual Report pursuant to Virginia Code § 9.1-1110 (B) ("November Report") in the Board's meeting packet. Discussion by the Board ensued and the following amendments to the proposed draft were agreed upon by the members of the Board:

Lines 23 – 25: The SAC reviewed the Department's protocols for the mitochondrial DNA testing program and found them to be complete and appropriate. The unit went online in December 2008, and obtained its first mitochondrial DNA hit in the spring of 2009.
Line 134: In 4 cases sent for testing, confirmation of suspect convictions remain pending
Line 136: Certificates of Analysis have been issued in 182 cases
Lines 174 – 181: DFS has reported to the Board that no Federal funds have been used in violation of this Special Condition, or for any reimbursement, testing or retesting of any work on NIJ-eligible cases for which state funds were used, paid, or available. To the extent that the testing of any cases may be charged to the federal grant in error, DFS will adjust its receipt of grant reimbursement through reconciliation. Such reconciliation with the grantor is a common procedure, designed to ensure that grant funds are properly used.
Lines 227 – 228: A total of seven training sessions has been conducted at various locations around the Commonwealth.
Lines 240 – 242: The Board agreed that Notification Subcommittee Chair Howard and Ms. Jaspen could work out report language that would express completion of reporting requirements consistent with SB 1391.
Lines 327 – 333: To achieve the Governor's spending reductions, DFS has continued the previously implemented strategies of holding positions open, reducing expenses for wage employees, and delaying the purchase of scientific (GC/MS instruments) and IT equipment. The delay in the purchase of the GC/MS instruments was accomplished with no detriment to laboratory capabilities since DFS extended the normal service life of existing instruments through one-time upgrades to their computer and software systems.
Lines 456 – 458: The final regulation was presented to the Board at its October 2009 meeting. The Board has deferred consideration of the final regulation until its January 2010 meeting.
Lines 509 – 512: {bullet point removed}

Mr. Benjamin moved to approve the November Report with the addition of the agreed upon amendments. Col. Flaherty seconded the motion which passed by unanimous vote of the Board.

Discussion by the Board ensued regarding the $1.5 million of state money spent in the PC-DNA project. Mr. Benjamin moved that DFS make a report of the spending breakdown of the $1.5 million. Discussion by the Board ensued regarding the audit conducted by the Department of Accounts. Mr. Benjamin withdrew his motion.

Mr. Benjamin moved that DFS provide a copy of the results of the audit of the $1.5 million to the members of the Board who wish to receive it. The motion was seconded by Senator Marsh and passed by unanimous vote of the Board.

<u>2009 Special Session and Continuing Impact of *Melendez-Diaz*</u>
Director Marone informed the Board that DFS is working with the Department of Planning and Budget in addressing the budget issues resulting from the impact of *Melendez-Diaz*. Some of the budgetary issues consist of travel, overtime and providing additional training for some examiners. The training would qualify these examiners to appear and testify in court. Discussion by the Board ensued regarding current staff levels and the need for more examiners in specific disciplines, i.e., toxicology.

Plan for Systematic Review of all DFS Protocols

Chairman of the Scientific Advisory Committee, Dr. Dale Carpenter informed the Board that he and Director Marone discussed the process of reviewing DFS protocols. It was decided that the SAC would review the protocols of each discipline one at a time. For each discipline a subcommittee would be formed comprised of no more than three individuals. One of the three would be an expert in the subject matter and one a quality control person. The SAC and DFS are ready to move forward with the review.

Public Comment

None

Next Board Meeting

The following 2010 Board meeting dates and times were set by the Board:
Wednesday, January 6, 2010, 9:00 a.m.
Wednesday, May 12, 2010, 9:00 a.m.
Wednesday, August 11, 2010, 9:00 a.m.
Wednesday, October 13, 2010, 9:00 a.m.

Adjournment

Chairman Morrogh asked if there was a motion to adjourn. Col. Flaherty moved that the Board meeting adjourn which was seconded by Ms. Russell and passed by unanimous vote of the Board. The Board meeting adjourned at 12:07 p.m.