

**MINUTES (approved)**  
**Forensic Science Board Meeting**  
**May 10, 2006 at 10:00 a.m.**  
**DFS Central Laboratory, Classroom 1**

Board Members Present:

Mr. Steven Benjamin  
Mr. Joseph Bono  
Ms. Linda Carne (Designee for Ms. Linda Fairstein)  
Mr. Leonard Cooke  
Dr. Marcella Fierro  
Colonel Steven Flaherty  
Mr. Karl Hade  
Sheriff F. W. Howard, Vice-Chair  
Mr. Alan Katz (Designee for Attorney General Robert McDonnell)  
Ms. Demris Lee  
Mr. Stewart Petoe (Designee for Senator Kenneth Stolle)  
Ms. Elizabeth Russell  
Mr. Randolph Sengel, Chair

Department Staff Members Present:

Ms. Wanda Adkins, Office Manager  
Mr. Jeff Ban, DNA Section Chief  
Dr. Dave Barron, Central Laboratory Director  
Dr. Paul Ferrara, Director  
Ms. Katya Herndon, Counsel  
Ms. Linda Jackson, Forensic Scientist Supervisor, Controlled Substances Section  
Ms. Meghan Kish, Legal Assistant/Board Secretary  
Mr. Ron Layne, Director of Administration and Finance  
Mr. Pete Marone, Director of Technical Services  
Mr. Dave Martin, Controlled Substances Section Chief  
Mr. Jim Pickelman, Firearms Section Chief  
Ms. Susan Scholl, Eastern Laboratory Director  
Mr. Steve Sigel, Deputy Director  
Ms. Amy Wong, Northern Laboratory Director

Call To Order

The meeting was called to order by Mr. Sengel. Mr. Sengel introduced Stewart Petoe, in attendance as the designee for Senator Stolle, and Alan Katz, in attendance as the designee for Attorney General McDonnell. He also introduced and appointed Meghan Kish as Secretary for the Board, replacing Charlie Oates.

### Adoption of Agenda

Mr. Sengel asked if there were any amendments to the draft agenda, and there were none. The agenda was adopted unanimously.

### Approval of Minutes

No amendments to the draft minutes from the February 8, 2006 meeting were suggested. They were adopted as final minutes unanimously.

### Chairman's Report

In lieu of a chairman's report, Mr. Sengel referred the Board to materials detailing the status of laboratory facility projects, Department staffing, backlogs, contacts between the Department and its user agencies, and open and closed grants. Mr. Sengel asked for comments or questions; there were none.

### Subcommittee Report- Recommendations for Suggested Changes to DNA and Drug Submission Protocols

Mr. Sengel reported that the Subcommittee, consisting of Mr. Sengel, Colonel Flaherty, and Mr. Bono, met in Fredericksburg on April 19, 2006 to discuss the comments received in response to the suggested protocols for submission of DNA and drug evidence.

The Subcommittee reviewed the many comments received, the majority from law enforcement, and some also from prosecutors and defense attorneys. The Subcommittee made revisions that reflected what most law enforcement agencies and others who submitted comments would deem acceptable. The Subcommittee recognized the importance of having law enforcement agencies invested in the process of formulating the protocols. In light of the changes made to the suggested protocols, the Subcommittee recommended that the Board resend the protocols out for additional feedback.

Referring to DNA Submission Protocol #1, Mr. Benjamin expressed concern over having the DNA examiner who is involved in the presubmission conference also conduct the DNA analysis in that particular case. He recommended including language that would specify that the examiner conducting the analysis not be the one who took part in the presubmission conference. He indicated he believed doing so would eliminate any possibility of even inadvertent examiner bias.

There was general discussion regarding maintaining examiner neutrality and objectivity while allowing enough flexibility to ensure that appropriate testing be conducted. Mr. Sengel concluded the discussion by stating that the consensus of the Subcommittee was that they were still in the beginning stages and that developing effective and acceptable protocols would be a long term process.

## Scientific Advisory Committee Reports

Mr. Bono reported that he would summarize in the least technical terms possible the Scientific Advisory Committee's conclusions regarding alternative DNA platforms and the elimination of the use of random samples.

Mr. Bono informed the Board that the Committee endorsed the Department's continued evaluation of the micro-capillary array electrophoresis ( $\mu$ CAE) technology in conjunction with Dr. Richard Mathies of the University of California at Berkeley. The draft minutes from the February Committee meeting reflect this. Mr. Bono contacted the four DNA members of the Committee and three of the four agreed that continuing this evaluation was a good idea. Mr. Bono explained that the FMBio, the technology currently used by the Department, is not amenable to automation.  $\mu$ CAE, in comparison to FMBio and current capillary electrophoresis technology, provides higher throughput, less time required to complete analyses, comparable instrument costs, and similar or better sensitivity. Mr. Bono notified the Board that a scientific paper by Dr. Mathies on  $\mu$ CAE was submitted to the Journal of Forensic Sciences, the official journal of the American Academy of Forensic Science, and will be published in July, 2006. Mr. Bono stated that the  $\mu$ CAE technology has been validated and used in clinical and medical research applications since 1992. The technology would be completely validated and endorsed by the appropriate agencies prior to adoption by the Department for use on casework.

Mr. Benjamin inquired as to the names of the four DNA members from the Committee who provided input for the presentation. Mr. Bono indicated that Ms. Demris Lee, Dr. Fred Bieber, and Dr. Dan Krane provided written responses and that he spoke with Dr. Arthur Eisenberg over the phone. Mr. Benjamin requested a copy of the written responses.

Mr. Bono next reported to the Board on the use of random samples, a practice discontinued for use in casework by the Department in January 2005. He explained that the Department has always conformed, and is currently conforming, to the FBI Quality Assurance Standards for forensic DNA testing laboratories, which are established by federal law and apply to all DNA databank participating laboratories. The use of random samples exceeded the controls required by the FBI standards. The elimination of random control samples from casework in no way impacts the interpretation of results by DFS laboratories. Mr. Bono noted that at the February 2006 Committee meeting, following a detailed presentation by Jeff Ban, the elimination of random control samples was discussed and given consensus support by the Committee. He assured the Board that positive control DNA samples with known profiles were being used and would continue to be used to ensure accuracy in the interpretation of results. Random samples added no additional information to interpretation of results, were never required, and merely duplicated the information provided by the positive control samples.

Mr. Benjamin voiced concerns regarding the removal of the random samples. Mr. Benjamin explained that the Department had always been a leader, and felt it unwise to abandon an extra measure of reliability simply because it was not required. General

discussion regarding the benefits of eliminating versus retaining the use of random samples followed.

Mr. Sengel concluded the discussion by noting that the Department has already discontinued the process of using random samples, and that the Committee considered the process and did not make a recommendation that it be re-implemented.

Mr. Benjamin made a motion that the Board have the Department re-implement the use of random samples. The motion failed for want of a second.

### Regulations

Mr. Sengel discussed three sets of regulations:

1. Proposed regulations for public participation in the formulation and promulgation of regulations.
2. Proposed regulations for the approval of marijuana field tests for detection of marijuana plant material. Mr. Sengel noted that, during the last General Assembly, Code § 19.2-188.1 was amended to allow law enforcement officers to testify at trial to the results of marijuana field tests, which are approved as accurate and reliable by the Department of Forensic Science in accordance with regulations adopted by the Department. These proposed regulations were developed to fulfill that mandate. Mr. Sengel noted an amendment to the proposed regulation provided by the Department that clarified that each field test must react both correctly and consistently to be approved.
3. Proposed amendments to the regulations for the approval of field tests for the detection of drugs. Mr. Sengel explained that the proposed amendments are technical; they simply correct the code section referenced in the regulation that will change on July 1, 2006 (all references to § 19.2-188.1 were changed to § 19.2-188.1(A)).

There was a motion to approve all three proposals. The motion passed unanimously. Mr. Hade and Mr. Benjamin abstained.

### Grants

Deputy Director Sigel requested approval by the Board for the Department to apply for two grants through the U.S. Department of Justice Paul Coverdell Forensic Science Improvement Grants Program. A memorandum summarizing the two grants was provided to the Board. Mr. Bono moved that the Board approve the applications. The motion passed unanimously.

Mr. Sengel advised the Board that the General Assembly passed an amendment to § 9.1-1101, effective July 1, 2006, which authorizes the Board to delegate or assign the authority to approve Department grant applications to the Chair of the Board who may do

so with the concurrence of the Vice-Chair and in consultation with the Director. There was a motion to grant the Chair such authority. The motion passed unanimously.

#### Request for Specific Case Review

Mr. Sengel pointed out that Betty Lane DesPortes and Dr. William Thompson submitted a request to have the Committee review two specific cases. In accordance with the policy adopted by the Board, Mr. Sengel and Mr. Bono as Chair of the Scientific Advisory Committee reviewed the request and responded by letter indicating that the request for review in one case was not within the purview of the Committee. However, for the second case, Leon Winston, Ms. DesPortes was advised that she would have the opportunity to present her request to the Board.

Mr. Benjamin introduced Ms. DesPortes, his law partner. Although his involvement in the matter was not prohibited by the Conflict of Interest Act, Mr. Benjamin opted to abstain from the proceedings.

Ms. DesPortes explained that she and Dr. William Thompson, a professor in the Department of Criminology, Law & Society at the University of California Irvine, had reviewed the DNA evidence in the capital murder case against Leon Winston analyzed by one of the Department of Forensic Science's DNA examiners. Based upon their review, Ms. DesPortes and Dr. Thompson had concerns that the DNA examiner deviated from laboratory protocol when interpreting an internal laboratory control that was used at the time of the analysis, known as a random sample. Ms. DesPortes stated that the DNA examiner's case file notes showed an incomplete DNA profile was obtained for two different random samples, yet the examiner substituted results from another test to complete the DNA profile in both situations; thereby violating laboratory protocol and good scientific practices. Mr. Sengel asked Ms. Demris Lee, a member of the audit team commissioned by Governor Mark Warner and selected by Judge Robert Humphreys, who had reviewed the case file involving Leon Winston to comment on the concerns addressed by Ms. DesPortes. Ms. Lee stated that based upon her review and the other members of the audit team the DNA examiner did not deviate from laboratory protocol and the method in which the DNA examiner used the random samples was scientifically valid. The topic was discussed by the Board at length.

Colonel Flaherty stated that he was satisfied that previous reviews were sufficient and moved that the Board decline Ms. DesPortes' request to have the Committee further investigate the case. The motion was seconded and passed by a majority vote of 7-3.

Board Members voting "Aye" were Mr. Bono, Ms. Carne, Mr. Cooke, Colonel Flaherty, Sheriff Howard, Mr. Katz, and Ms. Lee.

Board Members voting "No" were Dr. Fierro, Mr. Petoe, and Ms. Russell.

Mr. Hade and Mr. Benjamin abstained.

Mr. Benjamin renewed his previous motion that the Board require the Department to reinstate the use of random samples. Mr. Sengel ruled the motion out of order, due to the fact that it failed previously.

#### Election of Chair and Vice-Chair

Mr. Sengel advised the Board that his term as Chair was set to expire on July 1, 2006, and that the election of Chair and Vice-Chair was placed on the agenda so that there would not be any lapse between the end of one term and the beginning of the next.

Mr. Bono nominated Mr. Sengel for the position of Chair. The nomination was seconded. No objections were offered, and Mr. Sengel was re-elected to the position unanimously, term beginning July 1, 2006.

Colonel Flaherty nominated Sheriff Howard for the position of Vice-Chair. Sheriff Howard, citing other obligations, declined the nomination.

No other nominations were made. Colonel Flaherty moved that Sheriff Howard continue as Vice-Chair until the August meeting, when the Board can take up the issue again. The motion passed unanimously.

#### New Business

No new business.

#### Public Comment

No member of the public elected to address the Board.

#### Next Meeting

Mr. Sengel reminded the Board that the next meeting will be held on August 9, 2006.

#### Motion to Adjourn

The meeting adjourned at 12:06 p.m.