

REPORT TO THE PUBLIC DEFENDER COMMISSION

William F. Hooks, Chief Public Defender

June 29, 2016

The following is a quarterly Status Report on activities in Program 1, and activities which involve both Programs 1 and 4.

ELIGIBILITY DETERMINATIONS

The process by which OPD determines whether clients are financially eligible for public defense services is an issue of considerable interest for courts, legislators and other stakeholders in the justice system. Recently, an applicant whom we determined was ineligible asked the Montana Supreme Court to review our decision. In *Durand v. Montana Thirteenth Judicial District Court and Office of the State Public Defender*, OP 16-0294, the Court considered our response to the applicant's petition and upheld the decision regarding eligibility.

This is a good case study of how our regional staff apply statutes and OPD policy to factual situations, and make decisions regarding financial eligibility of clients.

Factual Background of *Durand* Case. After felony charges of perjury and tampering with physical evidence were filed against Darlene Durand in the 13th Judicial District Court, she retained private counsel. Approximately 18 months later, Ms. Durand submitted a financial eligibility application to the Billings OPD office. Our eligibility specialist reviewed the financial material Ms. Durand provided, and informed her that she did not qualify for a public defender "due to the equity in [her] property."¹ Therefore, we did not assign a public defender to take over the case from the private attorney Ms. Durand had retained earlier.

Ms. Durand asked the 13th Judicial District Court to hold a hearing and consider OPD's decision. A Minute Entry of that hearing shows that an OPD representative advised the Court that Ms. Durand did not qualify financially "due to her ownership of property and the assets on the property." The court then took testimony from Ms. Durand. She testified she felt she could not afford to take out a loan and make

¹ Ms. Durand included a copy of OPD's letter regarding eligibility in her filing with the Montana Supreme Court.

payments, that she was in jeopardy of losing her property due to back taxes, that she could not sell her home or property, and that her income had declined by \$1,000 from the prior year. The district court declined to order OPD to assign counsel.

Ms. Durand then filed a petition with the Montana Supreme Court, asking that it exercise supervisory control, reverse the district court's decision, and direct that a public defender be assigned to represent Ms. Durand. Ms. Durand alleged in her court papers that she received SNAP benefits and Social Security benefits, the property she owned was in tax arrears, and her income was minimal. She also argued that the statutory process for determining eligibility raised state-wide issues of whether the constitutional right to counsel was being infringed.

Standards for Determining Financial Eligibility.

Sections 46-8-101 and 47-1-111 of the Montana Code Annotated (MCA) codify the right of poor people to representation by a public defender. In a typical case, a person accused of criminal conduct is advised at the initial appearance of the right to counsel. If that person asks that counsel be appointed, the court orders OPD to assign counsel pending determination of eligibility.

Title 47 of the Code assigns to OPD the responsibility to determine the financial eligibility of applicants. An applicant who requests representation by a public defender shall provide a detailed financial statement and sign an affidavit on a form prescribed by the Public Defender Commission. OPD requires that the applicant provide detailed information about his or her household, monthly income and expenses, and assets. If the applicant owns real estate, he or she must list its location, the value of the property, the amount of any mortgage, and the equity in the property.

Sec. 47-1-111(3), MCA set out two standards for determining eligibility. Under the first standard, an applicant is eligible if his or her gross household income is at or less than 133% of federal poverty guidelines.² OPD has an internal policy, Policy 105, by which we may consider certain applicants qualified for representation under special circumstances, including "presumptive eligibility." In some instances, OPD may waive application requirements. "Presumptive eligibility" includes cases in which the applicant is a current verified or documented recipient of a state or federally administered public assistance program such as TANF, SNAP or SSI/SSDI.

² The term "gross household income" is defined in §15-30-2337, MCA.

If OPD determines that an applicant is not eligible for services under this first income-based standard, OPD then considers eligibility under the second step, which requires an analysis of “substantial hardship.” A person may qualify under this standard if we determine that “the disposable income and assets of the applicant and the members of the applicant's household are insufficient to retain competent private counsel without substantial hardship to the applicant or the members of the applicant's household.” Our training manual lists several criteria to consider, including asset liquidity, the severity of the crime, whether the client is incarcerated, and the rates of private counsel in the locality.

If OPD determines that a person is not eligible, Title 47 of the Code requires us to file a motion to rescind appointment so that the court's order may be rescinded. The court may hold a hearing on our motion, consider evidence and testimony from the client, and either grant our motion and let us out of the case, or deny the motion and require that we continue to provide representation.

OPD's Response in Support of the Eligibility Decision.

In our response to the Court, we articulated the two-step process, and how we use our internal policies to help inform the decision on eligibility. We emphasized that our eligibility decision on Ms. Durand's application was made under the “substantial hardship” standard. Our regional office staff concluded initially that Ms. Durand did not qualify under the first, income-based standard. Her receipt of SNAP or SSI benefits did not make her eligible under the first statutory standard, as receipt of public benefits is an internal agency consideration. Thus, Ms. Durand did not qualify under the first, income-based standard.

Staff then considered eligibility under the second standard, and based on the information Ms. Durand supplied, we concluded that the equity in property was sufficient for her to retain competent private counsel to defend her on the two criminal charges, without substantial hardship.

The Court's Decision.

The Court's decision to deny Ms. Durand's request for relief reflects some important considerations.

First, this case gave us an opportunity to explain to the Court how we make eligibility decisions, and the Court's analysis adopted this explanation. Second, the Court agreed with our assertion that whether an applicant for public defender services

has the financial means to hire private counsel is a question of fact. This suggests that any review of a decision that a client is ineligible for public defender services will be made on a fact-specific, case-by-case basis. If the Court had concluded that the issue was not a factual issue, it might have used the case as a vehicle to consider sweeping changes to the process.

This case also highlights the work and time that OPD and courts devote to the eligibility determination process. Our staff reviewed the application and financial information, a decision was made by the regional deputy, and the applicant was notified of the denial of services. The district court scheduled and held a hearing on Ms. Durand's request, considered her testimony and evidence, and denied her request.

The Task Force on OPD Operations will consider legislation that would transfer the responsibility for making eligibility decisions to some other entity. We would free up significant time and resources if we are relieved of the responsibilities for making eligibility decisions under Title 47.

ELIGIBILITY REPORTS

In May, we provided to the Task Force on OPD Operations a report on the number of applications in which the client was found eligible for services, by region and by basis for eligibility: income-based (133% of federal poverty level); substantial hardship; and, presumptive eligibility. The report covered the period from July 1, 2015 through April 30, 2016. This report is part of the Strategic Plan, Program 1, Goal 1.

We also provided a report for the time period from October 1, 2015 through April 30, 2016 on results on our motions to rescind orders to appoint counsel, by region and by the basis for the courts' rulings:

- Motion to rescind granted based on client's non-compliance with OPD policy;
- Motion to rescind granted based on client's ineligibility on financial grounds;
- Motion to rescind denied on the merits;
- Reappointed by Court – court orders client to provide financial information and reappoints OPD;
- Reappointed internal – client provides information before court rules on a pending motion to rescind;
- No action reported – no action or disposition reported on motion to rescind.

This report is part of the Strategic Plan, Program 1, Goal 1.

CENTRAL OFFICE

Central office staff have a number of duties to perform at the end of each fiscal year. Attached to this status report is a two-page outline which sets out the duties staff have been working on.

OPD must report by September 30 of each year a number of data sets, including the number of cases closed in the prior fiscal year. In Program 1, the regional offices use case closing forms to record the data, and this information is compiled by the central office staff. The fiscal year ends on June 30, so central office staff devote time and attention to wrapping up case closing information.

The Legislative Audit Division routinely audits state agencies for compliance with statutory requirements. OPD is undergoing a compliance audit, and auditors have met with management and staff and have visited several regions.

TREATMENT COURTS

Montana has 26 drug courts, which include adult, family, co-occurring, veteran, juvenile, and driving under the influence (DUI) courts. The number of drug courts has increased in the past several years. The model for these courts has shifted, from a model in which participants are diverted from the criminal system to a drug court and given an opportunity to avoid a conviction, to a model in which defendants are convicted and required to enroll in and complete a drug court program as a condition of sentence.

OPD is tasked with the responsibility for assigning counsel to represent participants in most of these courts. We staff these courts with FTE attorneys or with contract attorneys. In a limited number of courts, the court itself assigns and pays counsel. As the number of courts increases, our responsibilities and burdens likewise increase. The Commission last considered OPD's role in drug courts in 2012. Program 1 would benefit from a discussion with the Commission on the role OPD should play in these courts. If the Commission determines that we should continue to be involved, a discussion regarding practice standards should follow.

**ATTACHMENT A
OFFICE OF THE STATE PUBLIC DEFENDER
FY 2016 - ACCOUNTING CLOSING/OPENING NEW FISCAL YEAR CHECKLIST (Final Closing is July 25, 2016) and REPORTING ITEMS**

<u>No.</u>	<u>Checklist Item</u>	<u>Complete? Yes / No</u>	<u>Est. Complete Date</u>	<u>Actual Complete Date</u>
1	Request Personal Services Contingency funds, do BCD, and make entries.	Yes	7/6/2016	
2	Move General Fund Expenses to State Special Revenue	No	7/20/2016	
3	Lockdown copy of Justware Data Base for reporting (Marsha will assure all cases are opened and closed)	No	6/30/2016	
4	Check budget system for Revenue Estimates - make any necessary adjustments	No	7/20/2016	
5	Record revenues as either current or deferred (AR closes 7/12)	No	7/12/2016	
6	Record receivables	No	7/15/2016	
7	Record allowance for doubtful accounts	No	7/15/2016	
8	Reconcile fund balance to cash receipts and close cash (AR closes 7/12)	No	7/12/2016	
9	Record and close fixed assets as appropriate (AM closes 7/19)	No	7/19/2016	
10	Sell Stip by	N/A	6/29/2016	
11	Close Prepaid account to fund balance	No	7/15/2016	
12	Payroll accrual for FY 2016 for Prog 1, 2, 3 and 4	No	7/20/2016	
13	Close AP - delete any vouchers unpaid by July 15, 2016 (put unpaid vouchers on accrual)	No	7/15/2016	
14	Finalize Prog 1 contractor accruals (Month of Service send by 7/1) (re-send by 7/16; ret by 7/18)	No	7/22/2016	
15	Finalize Prog 2 contractor accruals (Month of Service send by 7/1) (re-send by 7/16; ret by 7/18)	No	7/22/2016	
16	Finalize Prog 3 contractor accruals (Month of Service send by 7/1) (re-send by 7/16; ret by 7/18)	No	7/22/2016	
17	Finalize other misc. Prog 1, 2, 3 and 4 accruals	No	7/22/2016	
18	Close travel claims	No	7/20/2016	
19	Close procards	No	7/15/2016	
20	Accomplish BCD's: (Must be to OBPP by NOON on July 21, 2016)		6/25/2016	

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21	Clear any Open Items 1. Close FY 14 B Accruals	Yes	7/22/2016	6/22/2016
22	Go through a process to verify our expenditure authority in each program and for each subclass by expenditure code	No	7/22/2016	
23	Report single audit items		N/A	
24	CAFR Reporting (Lease Schedules due to State Accounting by 7/15/2016)	No	7/15/2016	
25	Certification Process for Open and Closed Cases	No	7/10/2016	
26	Net Case Report (to LFC by 9/30/2016)	No	9/30/2016	
27	Case Duration Report (to LFC by 9/30/2016)	No	9/30/2016	
28	Assessment and Collection Report (LFC by 9/30/2016)	No	9/30/2016	
29	Governor's Report (To Commission in Nov for Review) issue by Dec 30, 2016 - Training - Staffing - Opened Cases - Case costs by region by court	No	12/30/2016	
30	Accommodation Tax - now only for federal funds -Email sent to Susan Roggee sent. We do not have federal funds	Yes	N/A	6/21/2016
31	Final Field Report (these reports are no longer used by the Chief PD A/O FY2015)		N/A	
32	HUD Listing update	Yes	7/1/2016	6/27/2016