

MONTANA PUBLIC DEFENDER COMMISSION

CONFERENCE CALL

Public Location: Helena Regional Office
139 North Last Chance Gulch, Helena, MT 59601

March 19, 2015

MINUTES

(Approved at the October 2, 2015 Meeting)

Commissioners Present

Fritz Gillespie, (Chair), Helena; Chuck Petaja, Helena; Margaret Novak, Chester; Brian Gallik, Bozeman; Ann Sherwood, Pablo; Terry Jessee, Billings; Bonnie Olson, Marion; Roy Brown, Billings; Mike Metzger, Billings

Commissioners Absent

Ken Olson, Great Falls; Majel Russell, Billings

Staff Members Present

Bill Hooks, Chief Public Defender; Wade Zolynski, Chief Appellate Defender; Kristina Neal, Conflict Coordinator; Harry Freebourn, Administrative Director; Wendy Johnson, Contract Manager; Jenny Kaleczyc, Region 4 (Helena) Deputy Public Defender

Interested Parties

Scott Crichton, Executive Director, American Civil Liberties Union of Montana (ACLU); Jim Taylor, Legal Director, ACLU

1. Call to Order

Chairman Fritz Gillespie called the meeting of the Public Defender Commission to order at 11:05 a.m.

2. Approve Minutes of January 29, 2015 Meeting (*Action Item)

Commissioner Gallik moved to adopt the minutes of the January 29, 2015 meeting as drafted. Commissioner Brown seconded and the motion carried.

3. FY 2015 Financial and Operating Status

Chairman Gillespie noted that the financial status report will set the background for the rest of the meeting, which will entail considering contingency plans to be enacted if the agency doesn't get adequate funding in HB 3 (the supplemental appropriations bill for the current fiscal year) and HB 2 (the general appropriations bill for FY 16 and 17).

Administrative Director Harry Freebourn presented a fact sheet in question and answer format regarding OPD's financial picture and anticipated funding shortfall. The fact sheet can be used in discussions with legislators. In response to Commissioner Novak's question, Mr. Freebourn said that the quick answer to how OPD went so far over budget in FY 15 is that the agency experienced a major inflow of cases in FY 12 and FY 13, in the range of 15% for those two years. The OPD law firm went from 27,000

cases per year to 32,000 cases per year, and remains at that level. Mr. Freebourn will update the fact sheet to include that information.

Currently HB 3 is awaiting executive action in the House Appropriations Committee. The transmittal date for appropriation bills is March 31, and if HB 3 fails the contingency plan would need to be implemented immediately to generate \$1.7 million in savings by the end of FY 15. The current funding in HB 2 is about \$8.5 million short for the biennium. The contingency plan could be implemented late in FY 17 if additional funding is not provided as the bill moves forward.

Chairman Gillespie noted that OPD's budget has been designated as one-time-only funding. That means that OPD won't have a base budget entering the next legislative session in 2017; the agency will have to justify every single expenditure. This ties in with LC 2432, the proposal to create a task force to study OPD during the interim.

4. Contingency Plans Regarding Potential Budget Shortfall (*Action Item)

Chief Hooks said that given the financial context Mr. Freebourn provided, the agency cannot wait indefinitely to implement a contingency plan for the anticipated FY 15 shortfall if HB 3 fails. The biggest expenditures are in contract costs and personal services, making them the two best targets for potential savings. He considers cutting contractor costs to be the far better solution.

Chief Hooks proposes that OPD decline to appoint counsel in misdemeanors for any case where jail time is not mandatory on conviction, beginning no later than March 31, and ending on June 30. If jail time is mandatory upon conviction, OPD would accept the appointment, but in cases where jail time is a possibility but is rarely imposed, the appointment would be refused. A draft of this plan has been circulated to the judges in the courts of limited jurisdiction; some judges are sympathetic to OPD's dilemma.

There is the possibility of expanding the plan to include treatment courts if the projected savings are insufficient, since treatment court representation is a statutory and not a constitutional requirement. If necessary, furloughing full-time employees would be the last resort.

Commissioner Sherwood said that she understands how Chief Hooks is approaching the problem, but wants it to be said that pulling out of the courts of limited jurisdiction will result in people taking plea agreements to get out of jail and suffering consequences years down the road. Chief Hooks agreed that the impact of implementing the plan will potentially cause harm to people OPD should be representing, and he is not proposing this happily.

Commissioner Novak moved to adopt the contingency plan no later than March 31 if the supplemental appropriation bill fails. Commissioner Jessee seconded and Chairman Gillespie invited discussion.

Commissioner Petaja asked how much could be saved in 90 days. Chief Hooks replied that it would probably be less than \$1.7 million. It is hard to estimate, because by refusing the misdemeanors, there will be contractor savings for all types of cases. FTE attorneys will be able to work more DN and felony cases when their misdemeanor caseload is reduced instead of contracting for them.

There was an extensive discussion regarding possible alternatives to and consequences of the proposal, including refusing DN cases; the possibility that OPD would be expected to continue the plan indefinitely as a cost-saving measure; the potential for a lawsuit; the harm to poor people, especially in terms of

creating felonies because of pleading to stacking offenses; backlash from the courts; Title 47 versus Title 17 obligations, and the question of individual liability for commissioners and managers if OPD exceeds its appropriation.

Commissioner Novak amended her motion to clarify that furlough as well as case refusal are to be approved as part of the contingency plan. Commissioner Jessee seconded. Chairman Gillespie invited public comment before discussion on the amendment.

ACLU Legal Director Jim Taylor said that he understands the dilemma, but he believes that declining misdemeanors where jail time won't be imposed offends the constitution unless the courts only give fines and not suspended sentences. He doubts that the limited court judges would limit sentencing to fines, and believes a better solution is to refuse all contract cases, including conflict cases, DNs, and felonies. This will shift the burden to the state to provide counsel another way. Mr. Taylor strongly encouraged the agency not to implement a furlough because that would have an immediate effect on all cases, not only those of the people furloughed. Finally, Mr. Taylor said that the ACLU is still anxious to meet with OPD regarding their proposal for a pilot data project.

Commissioner Novak withdrew her motion and the amendment. Chairman Gillespie restated the motion: Beginning at a time to be determined by the agency, OPD will refuse to appoint attorneys in all cases requiring a contract attorney, including mandatory minimums in misdemeanors, DNs and felonies. Commissioner Jessee seconded. Commissioner Petaja moved to amend the motion to exclude misdemeanor offenses with a mandatory minimum and all felonies. Commissioner Gallik seconded.

Mr. Taylor asked to make additional public comment. He wondered what the plan would be if this proposal doesn't generate adequate savings—refusing felonies or furlough? Chairman Gillespie said that there should be a sense of the savings by May 1 and the plan may need to be retooled then.

Chief Hooks explained the issues surrounding DN cases. The right to counsel for parents in terminations is beyond question based on recent decisions by the Montana Supreme Court. If an FTE attorney in Program 1 represents the mom, the kid(s) and dad(s) have to be conflicted out—usually to a contract attorney. If OPD suspends contract cases, either an FTE from another region would have to be assigned, or the court would have to assign outside attorneys. Refusing all DN cases would anger the district judges, and would hurt the families by causing delays affecting reunification.

Contract Manager Wendy Johnson noted that contractors have 45 days to submit claims, which are paid up to 30 days following receipt. Even if contractors are not appointed in new cases, OPD will be paying on already active cases for that long. Any savings will materialize well down the road. Chief Hooks agreed that suspending contract cases is not the best solution.

Commissioner Bonnie Olson believes that the most fiscally responsible decision is to go back to the original proposal. She said the original recommendation is more logical and impacts fewer people. Cases are considered misdemeanors for a reason and you have to weigh the value of that. The motion on the table would be catastrophic for DN cases, and she will not support it.

Chairman Gillespie asked for a roll call vote on the motion, and it failed 7-2.

Commissioner Bonnie Olson made a new motion to adopt Chief Hooks' original recommendation regarding misdemeanors, without including the proposal for furloughs at this time. Commissioner Jessee

seconded. The motion carried 8-1 on a roll call vote. OPD staff will determine when to implement the contingency plan, but no later than March 31.

5. Strategic Planning

A. *Appoint New Committee Members*

Chairman Gillespie asked commissioners Bonnie Olson, Roy Brown and Margaret Novak to join the Strategic Planning Committee. There was consensus regarding increasing the size of the Committee. Commissioner Petaja welcomed the broad experience of the new members, and asked to be removed from the Committee since he will not be seeking reappointment when his term expires in July. Chairman Gillespie would like to have another attorney on the Committee, and Commissioner Gallik volunteered. Commissioner Novak thanked Commissioner Petaja for his service and expressed her disappointment that he won't continue. Commissioner Petaja said that after six years on the Commission he is ready to look to retirement. Commissioner Bonnie Olson was asked to co-chair the Committee with current chair Commissioner Ken Olson, who still has a very active law practice, and she agreed.

B. *Charge to Committee*

The goal of the Strategic Planning Committee will be to develop a business plan that will look five to ten years out. Chairman Gillespie believes that most of the information needed for assessing trends, resources, and needs already exists in the annual report to the Governor, Supreme Court and Legislature. The task will be to condense that information, project future requirements, and assess alternative means of meeting the needs of each program and region. The Committee will meet in early April to develop an action plan.

Chairman Gillespie asked the Holistic Defense Committee to be involved in developing the business plan and to look for better ways to fulfill the mission in a fiscally responsible way.

6. Public Comment

There was no additional public comment.

7. Old Business/New Business

A. *Approve Contingency Plans (*Action Item)*

Action was previously taken under Item 4. However, Mr. Freebourn said that the contingency plan the Commission approved will not provide the full \$1.7 million in savings needed by June 30. The agency currently spends \$900,000 per month in contract costs, and it would need to save two-thirds of that amount (\$600,000 per month) to meet the target. If HB 3 fails, the Commission may have to meet again to discuss furloughs.

8. Set Future Commission Meeting Dates

The next regular meeting will be scheduled following the legislative session.

9. Adjourn

The meeting adjourned at 1:25 p.m.