

MONTANA PUBLIC DEFENDER COMMISSION

MINUTES

Yellowstone County Detention Center
3165 King Avenue East
Billings, Montana 59101

April 23, 2010

(APPROVED AT THE JUNE 17, 2010 MEETING)

Call to Order

The Montana Public Defender Commission meeting was called to order by Chairman Mike Sherwood at 8:36 a.m.

Commissioners Present

Mike Sherwood, Missoula; Terry Jessee, Billings; Charles Petaja, Helena; Richard (Fritz) Gillespie, Helena; Caroline Fleming, Miles City; Majel Russell, Billings; Kenneth Olson, Great Falls; Tara Veazey, Helena

Commissioners Absent

Jennifer Hensley, Helena; William Snell, Billings; James Taylor, Missoula

Interested Persons

Scott Crichton, American Civil Liberties Union of Montana (ACLU); Michael R. Butz, Ph.D., Aspen Practice, P.C.; James Siegman, Assistant Public Defender, OPD Region 9 (Billings); Gary Quigg, Legal Secretary, OPD Region 9 (Billings); Moira D'Alton, Assistant Public Defender, OPD Region 9 (Billings)

Approval of Minutes (*Action Item)

Commissioner Gillespie moved to adopt the minutes of the February 5, 2010 meeting with a correction to the date. Commissioner Veazey seconded. The motion carried.

Public Defender Program Report

Chief Public Defender Report (Exhibit 1)

Chief Public Defender Randi Hood reported that in February and March much of her time was spent in Billings on the Covington case. She expressed gratitude to Administrative Director Harry Freebourn, Training Coordinator Eric Olson, and Contract Manager Larry Murphy for supporting the agency during her absence. Chief Hood's caseload is currently at three, all of which are near resolution. Sentencing in the Covington case is scheduled for June 4, there is a sentencing scheduled for April 30 in a Helena felony case, and a first offense DUI should be resolved April 26.

Chief Hood reported that she attended the National Symposium on Indigent Defense in Washington, D.C. She attended breakout sessions dealing with mobilizing support for public defenders, contract supervision and others, and returned with a number of websites for other public defender offices, which she shared with Mr. Olson.

The management training conducted in December identified five long-term goals for the agency and Chief Hood appointed a team to address each goal. The goals are: 1) Improve OPD's information gathering process; 2) Establish better communications with the public; 3) Identify and improve agency structural problems; 4) Expand the agency training program; and 5) Increase recruitment and retention. Chief Hood explained that since these goals are similar in many respects to the

recommendations identified in the American University (AU) report she would like to see the teams work with the Commission's committees assigned to address each of the recommendations.

Performance evaluations for the regional deputy public defenders, training officer and contract manager are complete. Attorney evaluations are complete in all offices except one, and all that remains is to finish discussing the evaluations with the attorneys in that office.

Chief Hood held a Regional Deputy Public Defender meeting in Helena April 15. She reported that caseloads, budget, morale, mentoring and other issues were discussed.

An orientation program is being developed to help the agency provide an initial orientation to new employees. Key areas have been identified, deadlines have been set for scripts and a filming schedule will be established soon.

Chief Hood said that as a result of legislative concerns regarding OPD's indigency determination procedures she is implementing an indigency project team. The goal of the project is to develop a uniform method to determine indigency according to statute and policy.

Major Crimes Unit

Chief Hood said that Chairman Sherwood asked her about the major crimes unit (MCU) at the last Commission meeting. The MCU is functioning exactly as planned, and she will email a summary of the financial results to date to the Commission. Chairman Sherwood said he didn't think people had any idea of how cases are assigned to the MCU or how costs are allocated. Chief Hood explained that Regional Deputy Public Defenders make referrals to the MCU based on the individual circumstances of the case. Mr. Freebourn explained the MCU budget to the Commission.

Involuntary Commitment Checklist

Brian Smith presented the draft Involuntary Commitment (DI) Checklist (exhibit 2) and said it was a guide to assist in obtaining client information. Chief Hood said the ultimate goal of the checklist was to provide a one-page reminder to make sure all the information is covered. Commissioner Fleming said she appreciates the checklists over a questionnaire.

Case Counting and the Case Weighting System

Chairman Sherwood expressed concern about the Case Weighting System (CWS) being totally accurate. Mr. Freebourn advised that both case counting and the CWS would be discussed in a formal presentation to be made by Mr. Smith and asked if he should proceed with that presentation? Chairman Sherwood declined and said that he only needed a quick briefing at this time. Mr. Freebourn said that he and Chief Hood met with officials from the Supreme Court Administrator's Office about case counting. As a result of that meeting, OPD is confident that it is counting cases in line with the way that district courts issue them, as the district courts have a uniform system of issuing a case. However, the courts of limited jurisdiction do not have a standard way of issuing a case, and OPD offices are opening cases as they come in from those courts. Mr. Freebourn said that all offices are opening cases in a timely manner, but some offices need to be prompted to close cases as it is not the most pressing priority. Chief Hood has offered to provide assistance to any office that gets behind in closing cases.

Mr. Smith has prepared a presentation on a process that he is undertaking to understand what types of information are really needed by agency stakeholders, including information that the Commission needs to monitor the agency's activities. The goal is to avoid taxing agency resources by capturing data for some unidentified purpose, while still providing necessary information to the Commission, legislature and others. He was not able to present his prepared presentation on case counting and the CWS due to time constraints. In regard to the CWS, he said the staff that track the cases and apply the weights in the field need to have a source document so that the agency can audit the information.

Chief Hood stressed that the OPD has expended a lot of time and resources ensuring that all the information coming out of the case management system on opening and closing cases is accurate and reliable. Chief Hood agreed with Commissioner Veazey's comment that the AU report states that if the data is not accurate it will cause problems in obtaining adequate funding. She asked the Commission for guidance on what additional information it wants from the system.

Commissioner Veazey said at the bare minimum the Commission needs the number of cases opened and cases closed. Other data needed is the age of cases, the method (trial, plea), the nature of the disposition (guilty, not guilty), the type of case, and nature of the services provided. She went on to say that she felt that the Central Office needs to more aggressively encourage attorneys to comply with the system information requirements. Chief Hood and Mr. Smith will determine which attorneys are not in compliance and institute a disciplinary process if they do not conform.

Mr. Freebourn described the information that the legislature has requested so far. Title 47 requires tracking and reporting on new cases, but this count may not be a good indicator of whether people are productive or overworked. The legislature has also asked for net cases by fiscal year, case duration report by type of case, and an assessment and collection report by year. All reporting has been provided to the legislature for FY 2009.

Chairman Sherwood set aside the rest of the discussion until after lunch to make time for the liaisons.

Commission Liaisons

FTE Staff and Investigators-Laura Bailey

Ms. Bailey reported that she has not received any input lately.

Appellate - Lisa Korchinski

Ms. Korchinski discussed the American University report's use of anonymous complaints in its assessment of the Montana public defender system. She asked if the Commission had considered whether the AU report would be admissible in court, and suggested that if there is a question about its viability as an admissible document in court, the Commission should carefully consider whether major changes to the system should be made based upon anonymous and anecdotal information, particularly when the information may be used to tarnish the public reputation of OPD employees.

Referring to Chairman Sherwood's letter of April 20 and the comments concerning contract attorneys, Ms. Korchinski said that if there is not a grievance process for contractors in place, one should be developed beginning with the appropriate regional managers who are first apprised of those complaints. If it is already in place, it should be followed.

She said there is a continued concern about the distinction between the public right to know and Commission activities, and the employee right to privacy. Another area of concern is the Commission's support for raising the hourly rate for contract attorneys, which could be demoralizing to the ranks of full time employees and possibly cause people to leave the agency in favor of private practice.

Chairman Sherwood asked about the issues related to not preserving the record by not making timely objections and whether the Appellate Defender Office (ADO) could or should involve themselves in a procedural class on protecting the records. Ms. Korchinski responded that there have been meetings in the past on how to create a record and how to strengthen records and said that she has noticed better records coming into the office. This was the end of Ms. Korchinski's report.

The Commission engaged in a lengthy discussion about the contract attorney rate, as well as a continuing discussion of anonymous complaints.

Chief Hood reported that Mr. Murphy received a letter from one contract attorney who said that she has been in contact with 54 other contract attorneys and would like to be the liaison. The contractor in question provided a number of questions and concerns from contract attorneys, many of which have very straight forward answers. Mr. Murphy suggested answering the ones he could and sending the rest of them that are not policy questions to Chairman Sherwood. Chairman Sherwood agreed that Mr. Murphy could handle it that way. No decision was made to recognize the liaison, however.

FTE Attorneys - Laura Simonson (via teleconference)

Chairman Sherwood said he realized Ms. Simonson did not have time to respond to his April 20 letter, but asked that she respond in writing so that it can be posted to the website prior to the next meeting.

Ms. Simonson said she hadn't prepared anything partly because she did not understand from the first meeting that it would be her responsibility to find out the current status of things. She thought bringing these matters to the PDC was her only role and was not aware she was supposed to be doing follow up. She thought that most issues would more appropriately be raised at a regional level.

Timm Twardoski, Executive Director of the American Federation of State, County and Municipal Employees, Montana (AFSCME) said there is a lot of frustration because the liaison program was put together without any guidelines or ground rules as to what is going to happen, i.e., how to handle responses. He suggested a conference call with a few of the Commission members, administration and the executive board to discuss how the liaison process should work.

Anonymous complaints and their validity were discussed, and Commissioner Fleming said the liaison in effect brings the concerns to the table so anonymity is not an issue—the liaison is the representative. Commissioner Petaja pointed out that most issues should go through the Labor Management Committee first. Commissioner Fleming agreed saying the Commission deals with the overall oversight of the system, and she suggested using caution as to what was handled at the table.

Chairman Sherwood asked Ms. Simonson if there were any concerns about the limitations being placed on lawyers and their ability to represent their clients by the mental health protocol. Ms. Simonson said some of the problems lie with non-communication between the regional attorney and/or the contract attorney and then getting approvals done. One of the biggest problems is that people feel they're being penalized by their regional attorney and that's why they are not getting the approvals they feel they need. They want to have access to expert witnesses in a timely manner. There have also been some problems where the regional attorney or the managing attorney gave consent for expert fees under \$200 or less but then when it came time to pay the bills the attorneys were told they were only going to get a flat witness fee of \$10 and not the amount previously agreed upon. Chairman Sherwood asked if an attorney would feel the matter was closed or would s/he go on to the regional deputy or to OPD Central if a regional manager denied approval for a mental health evaluation? Ms. Simonson said the regional deputies are supposed to have the ability to make that approval but sometimes they may be reluctant to do it because someone down the road might decide that they shouldn't have signed off on it.

Chief Hood said that OPD Mental Health Consultant Dr. Laura Wendlandt and Mr. Olson had a short presentation that should clear up many of the questions and explain the procedure regarding the mental health protocol.

Public Comment

Dr. Michael Butz, clinical forensic psychologist in Billings, read the letter he wrote in response to Commissioner Sherwood's April 20 letter into the record (exhibit 3).

Mental Health Protocol

Dr. Wendlandt addressed the Commission and said in the interest of time said she would not give her presentation. She discussed the issues of delay, and asked for specific instances. If the problem is systemic she suggested modifying or rectifying the protocol. She asked if the appropriate chain of command was enacted i.e., managing attorney, regional attorney, Central Office. She then gave an overview of the protocol procedure. Chairman Sherwood invited Ms. Simonson to send him a written response to Dr. Wendlandt's discussion. Dr. Wendlandt told Ms. Simonson that if a specific issue was detrimental to a specific case she really wanted to discuss it to find out what happened and how it happened. Ms. Simonson said she would talk with those people and request that conversation. Chairman Sherwood thanked Dr. Wendlandt for her time and said he hopes any remaining issues can be resolved.

Public Comment

Jim Siegman, public defender in the Billings office, addressed the Commission with concerns regarding the resource retention rate in OPD. He suggested maximizing the use of interns as a cost-saving measure. Finally, he expressed concern about transparency saying without raising privacy issues when people leave under less than honorable circumstances the OPD should communicate to others so they don't make the same mistakes. He thanked the Commission for coming to Billings and providing the opportunity to raise questions and concerns.

Appellate Defender Report (Exhibit 4)

Chief Appellate Defender Joslyn Hunt reported that she had oral argument on the conflict issue as it applies to the appellate office. The court was very engaged and complimented the ADO, noting the impressive work the office has been submitting. Colin Stevens did a very good job presenting his side of the issue.

The ADO's caseload grew exponentially in February having taken in 20 cases (exhibit 5). Noteworthy is the fact that the ADO's base is still growing each month, even though in March they closed nine cases.

Chief Hunt drafted a letter to Chief Justice McGrath regarding the cost saving measures introduced at the last Commission meeting (using regular paper instead of bond and not having to pay to make copies of transcripts). She has also contacted Assistant Attorney General Mark Mattioli who is discussing the proposal with others. An update will be forthcoming.

Sample evaluation forms for managers have been reviewed. Chief Hunt will work with Commissioner Fleming to develop a form to be used for the Commission's evaluation of her work performance.

In response to Commissioner Petaja's question at the last meeting about the percentages of cases that involve revocations, Chief Hunt presented a rough breakdown of the appellate cases by case types (exhibit 6). Noteworthy is the fact that a large percentage of the cases involve appeals from plea deals.

The ADO posted an invitation to students on PTLaw.net to volunteer for an internship in the Appellate office. There have been six responses already. Chief Hunt is reviewing them.

The possibility of an ADO evaluation by the Supreme Court was discussed with the ADO team/staff. Overall, they welcomed the idea but there were some concerns about the process/procedure of the evaluation. Chief Hunt invited liaison Lisa Korchinski to provide additional information and insight. Ms. Korchinski presented the issues, beginning with the fact that an evaluation from the Supreme Court is likely to become public information. The ADO is a small office and such an evaluation could violate the right to privacy. Also, unless the Attorney General's office is also evaluated, there is a potential to hurt

clients. There must be parity in the standard of evaluation, and it should be conducted by all of the justices, not solely Chief Justice McGrath.

Budget and Finance Report

Current Year Budget

Mr. Freebourn presented the Budget and Finance Report. He said during this fiscal year OPD was funded with about \$20 million in general fund appropriations, the agency's main source of funding. Mr. Freebourn presented a letter (exhibit 7) asking Budget Director David Ewer to allow the agency to transfer up to \$800,000 from next fiscal year to this fiscal year, which was approved. He discussed a memo from the Governor (exhibit 8), listing the budget cuts imposed on other agencies; OPD was excluded from that process. The agency must make every effort to cut the \$800,000 borrowed for this fiscal year from expenditures planned for next fiscal and try to mitigate again another potential funding shortfall that may be at least \$800,000 or more than this year.

2013 Biennium Executive Planning Process (Exhibit 9)

Mr. Freebourn said that all state agencies are required to go through an executive planning process (EPP). The Commission's duty is to review and approve the strategic plan and budget proposals as submitted by the Chief Public Defender and the Administrative Director. He explained the planning process and funding history and presented key dates in the process. The Commission will approve the final budget proposals for submission to the Office of Budget and Program Planning by August.

Mr. Freebourn discussed the financial and caseload trends in the report. Between FY 07 and FY 08 caseloads grew 4%, and between FY 08 and FY 09 by 7%. Current estimates show that caseloads are flat compared to last fiscal year.

The steps in the EPP budget proposal process were described as follows: Step 1, the base budget; Step 2, other EPP items; Step 3, decision packages; Step 4, funding; Step 5, executive sets targets; Step 6, executive sends a budget for the biennium to the legislature; Step 7, the legislature meets to review and approve or adjust the executive's budget; and Step 8, the legislature approves the supplemental funding for the prior biennium.

Mr. Freebourn presented OPD's 2013 biennium decision packages. He explained that these are placeholders until more refined numbers and budget items are developed. He asked the Commission if they had any changes, recommendations or additions and reminded the Commission that any recommendations made that affect funding for either this year or next are part of a supplemental process and not part of the budget submission. Mr. Freebourn and Chief Hood asked the Commission if the Budget Committee could give the agency guidance as to the priorities of the decision packages by the next Commission meeting but this idea was not advanced by the Commission. He suggested putting decision packages 1-16 in the system as placeholders.

The Commission approved decision packages 1, 2, 3, 4, 5, 7, 9 and 15 as drafted.

Decision Package 6, operations manager, was not approved. Commissioner Gillespie moved to drop this item from the decision package. Discussion on the motion resulted in (1) the Commission deleted the specific decision package for the operations manager, (2) they directed that this position be combined with the decision package that is asking for new FTE to allow managers to "just manage," (3) Chief Hood stated that during the interim she will use two of her Regional Deputies to help her oversee the operations of all other regions (one is located east of the divide and one is located west of the divide), and (4) Mr. Freebourn committed to help out in any way that he could. Commissioner Russell seconded the motion. The motion carried with one opposed.

Regarding Decision Package 8, increase contract attorney hourly rate, Chairman Sherwood moved to change the rate to \$75/hr with a COLA adjustment in the second fiscal year. The motion was seconded by Commissioner Petaja. The motion carried unanimously.

The remaining decision packages were not approved at this time.

Public Comment

Gary Quigg, legal secretary from the Billings office, presented a letter written by Billings public defender Ann-Marie Simeon in which she addressed concerns about high case loads (exhibit 10). He also presented a letter from Violet Kober, a legal secretary who works primarily with Billings Municipal Court with concerns regarding case load and salaries (exhibit 11).

Assistant Public Defender Moira D'Alton (Billings) discussed the heavy workload in Region 9 and expressed a need for more FTEs. She also explained that because of a high turnover in personnel, the Billings office didn't know they were supposed to be turning CWS numbers over to Butte. Commissioner Fleming asked if there was a freeze point when an office was operating at full capacity with as many cases as it could handle, and suggested that perhaps Billings is at that saturation point.

Scott Crichton, American Civil Liberties Union of Montana (ACLU), expressed concern and confusion at the lack of progress the Commission is making on the AU recommendations, especially the decision to eliminate the operations manager position from the decision packages and the lack of progress on evaluations. He said the ACLU is seriously concerned about the fate of this model. The stipulated agreement that Brian Morris negotiated between the state and ACLU was very clear that they put the lawsuit in abeyance as long as the new system conforms to caseload standards, staff support, and all the things the Commission is still struggling with. He was disappointed that much of the agenda wasn't addressed. He was also disappointed that Mr. Smith was not able to give his presentation outlining specific steps that need to be taken to get the data needed, and suggested that the Commission would benefit from the use of a timekeeper.

Fee Schedule

Chief Hood requested that the Commission grant her authority to pay outside of the fee structure for contract attorneys under extraordinary circumstances, particularly in the case of specialty courts (exhibit 12). The Commission tabled the discussion until the next meeting.

Specialty Courts

The presentation on specialty courts was tabled due to time constraints. Commissioner Veazey did comment that she felt that due to budget constraints, OPD should not be doing any work that is not statutorily or constitutionally required. Commissioner Petaja said that any involvement in specialty courts will have to be written into a supplemental package and it has to be lot of money.

Chief's Evaluation

Commissioner Sherwood asked about the progress of Chief Hood's evaluation. Commissioner Fleming said the job description is nearing completion and when it is complete the evaluation will be written. The job profile needs to be approved by the Commission. Mr. Freebourn said he will email the evaluation form to the Commission. The evaluation will be set for the next meeting.

Chairman Sherwood plans to attend the May 13 District Court Judges meeting at which he has been given 11 minutes to ask them how they will give a third party assessment of Chief Hood. He has also had contact from district court, lower court, and Supreme Court judges all agreeing to do an evaluation of the Commission, and they are waiting for the methodology. Commissioner Petaja said they would like to do the assessment in a joint committee rather than individual judges doing evaluations. Chairman Sherwood assigned Commissioner Petaja to set up the method of evaluation.

Other Items

Chairman Sherwood apologized to Mr. Smith and asked him to give his presentation at the next meeting.

Chairman Sherwood requested a two-day Commission meeting and it was scheduled for June 3-4 in Helena. Commissioner Veazey said future Commission meetings need to better reflect the agenda and the time assigned to each agenda item.

Commissioner Petaja commented that the committee assignments reflected on the Gantt chart result in duplication of effort.

The meeting adjourned at 4:00 p.m.