

# MONTANA PUBLIC DEFENDER COMMISSION

State Capitol, Room 137, Helena, MT

August 1, 2014

## MINUTES

*(Approved at the October 31, 2014 Meeting)*

### Commissioners Present

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

### Commissioners Absent

Ken Olson, Great Falls; Chris Daem, Billings; Majel Russell, Billings; Roy Brown, 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; Peter Ohman, Training Coordinator; Carleen Green, Accountant; Brenda Ingersoll, Accountant; Matt McKittrick, Regional Deputy Public Defender (RDPD), Great Falls; Kaydee Snipes, RDPD, Havre; Jenny Kaleczyc, RDPD, Helena; Laura Schultz, Office Manager, Appellate Office

### Liaisons

Eileen Larkin, liaison for non-management appellate staff and attorneys; Cathy Huston, liaison for support staff and investigators

### Interested Parties

Scott Crichton, Executive Director, American Civil Liberties Union of Montana (ACLU); Brent Doig, Office of Budget and Program Planning

#### 1. Call to Order

Chairman Fritz Gillespie called the meeting of the Public Defender Commission to order at 9:00 a.m.

#### 2. Introductions

Chairman Gillespie introduced two commissioners. Dr. Michael Metzger from Billings is attending his first "in-person" meeting. The Commission's newest member is Bonnie Olson from Marion, near Kalispell.

#### 3. Minutes of April 25, 2014 Meeting (\*Action Item)

Commissioner Gallik moved to adopt the minutes of the April 25, 2014 meeting as drafted. Commissioner Petaja seconded and the motion carried.

#### 4. Commission Liaison/Executive Board Reports

Support staff and investigator liaison Cathy Huston gave highlights of her written report. The Support Staff training was well-received. Four achievement awards were presented at the training, and a new Support Staff Employee of the Month program has been launched. Ms. Huston said it is important to let support staff know they are valuable. They are hoping for a wage increase in the next session and some staff are willing to testify about how hard it is to survive on current wages.

The investigators intend to pursue the firearms bill again this session. Ms. Huston said that the changes Havre Probation and Parole have made to improve safety for their officers, who work under conditions similar to OPD investigators, will be another healthy argument for the bill. Chairman Gillespie offered to do what he can to prevent the bill from being amended as it was last session, causing it to fail. Ms. Huston thanked him for the support.

Commissioner Gallik said that he would speak to his local legislators regarding the wage issue, and invited Ms. Huston to contact him with other ideas for advancing that decision package. Chairman Gillespie supported having support staff testify and said that the first meeting before Subcommittee D will be the most important.

Appellate liaison Eileen Larkin represents both attorneys and support staff. Ms. Larkin read her written report regarding the workload in the Appellate office and invited questions. Office Manager Laura Schultz is present to provide details regarding support staff workload. Chairman Gillespie asked Chief Appellate Defender Wade Zolynski to give his report before exploring issues related to the Appellate office.

## **5. Commission Questions/Comments on Submitted Reports**

### **A. Chief Appellate Defender Report**

Chief Zolynski said that the workload in his office is unsustainable, and without changes Ms. Larkin and other bright, experienced attorneys will leave. He detailed the caseload increase and the compounding effect of previous years' increases that are in his written report. Turnover continues to be high, he has limited funds for contract services, and his attorneys exceed the recommended case weights. They are requesting and obtaining far more extensions, slowing the appellate process. Chief Zolynski has taken action to make the office more efficient, and plans to work with other interested parties to obtain additional resources.

Chief Zolynski's written report includes a long list of reversals despite the challenges the office is facing. Most significant are the Plouffe decision (regarding treatment court drug test results), and the Oldhorn decision.

The Commission explored ideas for reducing the appellate caseload and getting information out to the Legislature and the public. Chief Zolynski will attend a National Association for Public Defense conference in Kentucky regarding "Leadership and Public Defense Workload." He counsels clients who wish to appeal individually and is reconsidering how the office handles Anders briefs. His business plan includes engaging others to illustrate the impact the workload has on the Court, victims, parents and children in addition to the clients.

Chairman Gillespie said that there are no emergency funds available to relieve the current crisis. He plans to work with Chief Zolynski and the appellate staff to look closely at the program, as he did for Program 1. He is interested in whether Westlaw is improving the brief-formatting process, as well as whether support staff should be formatting contractor briefs.

Commissioner Petaja wanted Ms. Larkin to know that support staff wages are a very high priority this session. Chief Zolynski said that since there is no right to a speedy appeal, it's more difficult to show that what's occurring is a violation of someone's constitutional rights. He needs to pursue all avenues with the Governor, the Supreme Court and the Legislature before he says we can do no more, but he is getting close.

*B. Conflict Coordinator Report*

Conflict Coordinator Kristina Neal gave a brief overview of her role for the benefit of the new members. When there are co-defendants, or when the local office already represents someone in another case creating a conflict, the local office refers the case to her. She then takes over supervising the case and assigns it to another office, her single FTE attorney, or a contractor. She also supervises pre-approvals and billing for conflict cases.

Last year Ms. Neal appointed almost 5,000 cases, a slight increase from FY 13. She averages 20 appointments a day, about a third of them youth in need of care matters. The local office will represent the custodial parent (the most time-intensive) and she appoints attorneys for the child and any other parent(s).

Ms. Neal works closely with Contract Manager Wendy Johnson because she assigns so many cases to contract attorneys. However, now that she has her own program, there will be no more comingling of budgets.

*C. Chief Public Defender Report*

Chief Public Defender Bill Hooks introduced the new RDPD in Havre, Kaydee Snipes. Her region is about the size of West Virginia, and is staffed with one support staff, one investigator, three attorneys and a diminishing contractor pool. Ms. Snipes will also supervise the Glasgow office, which is about to become a reality. The new office will also be a great benefit to the Glendive region which is staggering under the Bakken boom.

Chief Hooks said that in Program 1 support staff are being paid at the same 2006 markets as when the agency was created. Getting them to a living wage is a critical priority. He has been meeting with support staff around the state and is hearing a lot about people working two jobs to make ends meet. Ms. Huston is correct that many OPD support staff would qualify for public defender services, and that needs to be remedied. Chief Hooks is part of the Support Staff Employee of the Month selection committee, and the nominations confirm that we have an effective, productive staff who deserve fair wages.

*i. ACLU Information Request*

The agency has had an ongoing dialog with the ACLU for some time. They've interviewed staff, attorneys, and investigators in three regions as well as requesting large amounts of data. The agency has done its best to provide the requested information. Chief Hooks is expecting the ACLU to present a pilot project in the near future as a result of these discussions. Chairman Gillespie expanded on the pilot project. Since OPD doesn't have the resources to implement the ACLU's recommendations in all 11 regions, the idea is to adopt the best practice standard in one region to generate data to take to the Legislature, with a goal of funding adequate resources to implement the best practice system-wide. ACLU Executive Director Scott Crichton said the proposal is still in the draft stage, but they will propose that OPD collect data that the ACLU thinks is essential to making a case to the Legislature regarding the agency's chronic underfunding. The ACLU has been an advocate of funding for the public defender system since the beginning, and they intend this project to be helpful, although it might also be seen as burdensome given the agency's existing workload.

ii. Treatment Courts

Treatment courts are having a large impact on Program 1. Judges still expect OPD to provide the defense component of the treatment team, despite the legislative change made in the last session. Although these courts can benefit OPD clients, with a time frame of 12-18 months for successful completion, serving them is a resource burden. Both time spent on individual cases and time spent staffing the team put demands on limited resources. In the past the Commission directed the agency to serve only diversionary treatment courts. Current analysis shows that the number of courts are increasing and more are being shifted from a pre-plea model to a post-plea or conviction model where treatment court is a condition of sentence. Chief Hooks will continue to look at this issue closely and will report again at the next meeting.

Commissioner Sherwood asked if there would be a policy decision restricting clients' participation in certain treatment courts. Chief Hooks said that there could be many approaches, including limiting involvement to pre-plea courts, using contract attorneys under a flat fee model if that legislation succeeds, and developing a standard to clarify the defense attorney's ethical duties in treatment court. The non-adversarial setting creates some real conflict for public defenders.

Commissioner Petaja's recollection is that the Commission voted to refuse involvement in DUI courts, and he wondered if that changed at some point. Chairman Gillespie said that the Commission has gone round and round on this at several meetings in the past and it is time to revisit it. It will be on the agenda for the next meeting for further discussion.

iii. Revised Rate for Eastern Montana Cases (**\*Action Item**)

Due to a variety of factors, the Commission previously authorized a premium rate for the contractors in the two Sidney death penalty cases, above the usual hourly rate of \$120 per hour for capital cases. Because neither case is considered to be a viable death penalty case at this time, the Commission is being asked to restore the normal rates for these cases effective May 20, 2014—\$120 per hour for attorneys, and \$46 per hour for the investigators.

Commissioner Novak moved to approve restoring the normal capital case rate. Commissioner Petaja seconded and the motion carried.

D. *Contract Manager Report*

Contract Manager Wendy Johnson is responsible for all contract attorneys, investigators and mental health providers. The number of contractors in every area continues to increase. The staggered attorney MOU process discussed in February has been implemented. The MOUs for investigators and mental health providers are being amended; they will also run on the two-year cycle following approval.

Other changes to processes and procedures include revisions to the Education and Experience and "How to Become a Contractor" forms. All of the contractor information has now been entered into the case management system, making it easier to assign contract cases and find experts. Closing forms are being entered on a daily basis. Ms. Johnson is developing an RFP for an on-line billing system to improve efficiency for both the contractors and the agency.

Commissioner Petaja chairs the Contracts Committee and he is excited by the changes Ms. Johnson has been making. Commissioner Bonnie Olson said that from her experience in the court system, it is important to let others know about these improvements.

i. Limiting the Number of Contract Attorneys (\*Action Item)

Ms. Johnson presented proposed changes to Policy 130, Contract Counsel. The revisions would allow the Contract Manager, in conjunction with the Conflict Coordinator and the Regional Deputies, to limit the number of attorneys with an MOU in a specific region. If the pool is adequate in a certain region and/or practice area, a waiting list would be established. In regions such as Missoula, where there are more contract attorneys than available cases (except for conflicts), the excess number of contractors creates logistical problems both for the Contract Manager and the regional deputy; even if the contractor is not assigned OPD cases, a biennial proficiency determination is still required.

Chairman Gillespie asked if Ms. Johnson had received any comments on the proposed policy change. Some Regional Deputies are in favor because they have a hard time supervising large pools of attorneys. There has been no response from the contract attorneys.

There was discussion regarding the proposed policy language and whether or not specific numeric goals or a formula should be established. Commissioner Petaja noted that the statute requires limiting the number of contract attorneys so that all can be meaningfully evaluated. The way the policy is written, it would give Ms. Johnson, Ms. Neal and the Regional Deputies the discretion to determine the limit region by region and by area of practice rather than statewide, which would be a liability in some regions. Current MOUs would not be terminated in an area that had reached maximum capacity, but the number would come down through attrition, and prospective contractors would go on a waiting list.

Commissioner Sherwood moved to approve the changes to Policy 130 as drafted. Commissioner Petaja seconded and the motion carried.

E. *Training Report*

Training Coordinator Peter Ohman discussed preliminary agenda topics for the upcoming investigator training and the annual conference in October. There are plans for a joint training with the Montana Association of Criminal Defense Lawyers in December, and a spring training on sexual abuse of children. Chairman Gillespie noticed that former Commissioner Dan Donovan and John Rhodes made the cover of the May issue of the National Association of Criminal Defense Lawyers *Champion* magazine regarding the rights of sex offenders.

Commissioner Novak is particularly interested in what will happen regarding immigration in the upcoming session. Mr. Ohman said that compared to other states Montana doesn't have many immigration cases, but he is keeping track of new developments. One of OPD's contract attorneys practices immigration law, so that is a good resource.

**F. Financial and Operating Status**

Administrative Director Harry Freebourn introduced himself to the new members. He supports the Commission and provides non-legal services (facility management, accounting, budgeting) to the three program managers, allowing them to focus on legal matters.

**i. Set Up Program 3: Operating and Financial Structure**

As Ms. Neal mentioned, prior to FY 14 she reported directly to the Commission, but she was spending funds from Programs 1 and 2. The new conflict program, Program 3, will be the second largest financial program, and the structure will mirror Programs 1 and 2, with cost centers for 11 regions, the MCU and the appellate. Three FTE were transferred from Program 1 to Program 3, and contract funds of \$4.2 million from Program 1 and \$70,000 from Program 2 were transferred for FY 14. The new structure will provide greater financial and operating control and improved reporting.

**ii. Preliminary Financial and Operating Report for FY 2014**

Mr. Freebourn presented the draft FY 14 operating report. Preliminary results show the agency expended \$29.7 million in FY 14, which was \$2.6 million more than appropriated. He went through the financial graphs in some detail.

Case counts for Program 1 show an overall 1% decrease from the prior year—fewer district court cases, but more cases in the courts of limited jurisdiction. Program 2 had a 5% increase. There will be more detailed charts for the next meeting, including case durations, and case counts and expenditures by region.

**iii. Mitigation Plan**

A mitigation plan is required to show how the agency will “repay” the funds transferred from FY 15 to FY 14 and bring FY 15 into balance. Mr. Freebourn said that there is no reason to expect that the FY 15 expenditures will be less than FY 14, so the combined deficit is expected to be approximately \$6 million--\$2.6 million over the appropriation, plus the \$1.6 million transfer, plus the full-year cost of modified positions that only worked part of the year in FY 14. The agency will be in conversation with the budget office on how to cover the shortfall; the mitigation plan is expected to identify at what point the system will be shut down.

**6. Public Comment**

Mr. Crichton said that they will do everything they can in the next session to help provide OPD with appropriate resources. One way to show that funding OPD is in the public interest is through education and engaging people locally. They plan to screen the film *Gideon's Army* in several locations this fall as a way to educate communities on the value of public defense. The ACLU will also ask the State Bar as an organization to support OPD funding through a resolution.

Other current ACLU projects related to public defense include defending privacy rights and abolishing capital punishment. Their litigation on lethal injection is expected to go to court soon.

## **7. Committee Reports**

### **A. Strategic Planning**

#### **i. Goals and Objectives (\*Action Item)**

Commissioner Petaja reported for Committee Chair Ken Olson. The Strategic Planning Committee met on July 18 to review goals and objectives for all three programs for the 2017 biennium. The proposed goals and objectives for Programs 1 and 2 are unchanged from the previous biennium, and the new goals and objectives for Program 3 are based on those. Commissioner Petaja gave an overview of the eight goals each program has in common, which were originally developed over the course of many meetings. The Committee's recommendation is that the Commission adopt these goals and objectives for the 2017 biennium. Commissioner Petaja moved to adopt the goals and objectives for Programs 1, 2, and 3 as presented. Commissioner Novak seconded and the motion carried.

### **B. Contracts Process**

Commissioner Petaja chairs the Contracts Process Committee. He is very impressed with what Ms. Johnson has accomplished in her short tenure, including changes to the MOU and streamlining billing and communication by requiring contract attorneys to provide an email address. The staggered MOU system will help in scheduling proficiency determinations, and the policy change approved earlier will ensure that evaluations are conducted only for people who are being assigned cases. Since a substantial portion of OPD's budget involves contract attorneys it is important to keep close tabs on them and make sure that they are effectively delivering services.

The sense at the Legislature is that they prefer contractors instead of FTE to curb growth in government, despite the fact that FTE are more cost-effective. The differential in FY 13 was approximately \$20 per hour including employee benefits. It will be recalculated for the FY 14 Governor's Report to reflect the increase to the contract attorney hourly rate (now at \$62 per hour) and a new requirement that the agency pay an additional 6% to the Public Employees' Retirement System (PERS) for any contractor who retired from PERS.

### **C. Eligibility and Cost Recovery**

Chairman Gillespie chairs the Eligibility and Cost Recovery Committee. Chief Hooks reported on behalf of the Committee. Discussion of proposed legislative changes to the eligibility determination process will be discussed under Item 9.

Chief Hooks recapped the results of the Legislative Audit Division's performance audit, which focused on compliance with statute, policy and procedure in the areas of contracting and eligibility determination. A number of recommendations were made in both areas and the agency is working hard to implement them. There is a new one-page application for services form, including a presumptive eligibility feature. It is resulting in more completed forms and better information to ensure that the determinations are being made correctly and uniformly. Training on the new form was part of the annual support staff conference and there is a training manual available online. The agency disagrees with the audit recommendation to change the practice involving the regional deputy's role in determining eligibility. A statutory change will be proposed to address the issue.

## **8. Budget Issues—Executive Planning Process for 2017 Biennium**

The revised budget priority document reflects the exact numbers that went into the Governor's budget system (MBARS). Priorities 1-4 are just to continuing doing business at the current level. All one-time costs

have been removed. The Commission's highest priority for new items is number 5, salaries for support staff. The change reflects the actual 2014 markets now that they are known. Most support staff are currently being paid at the 2006 markets, and their turnover rate is 20%. Attorney turnover is down to 9%, primarily due to the adoption of the career ladder; new market rates for attorneys are not yet available.

## **9. Legislative Issues**

### *A. Status of Potential OPD Legislation for 2015 Session*

Chief Hooks reviewed the legislative proposals, some of which were offered in one or more earlier legislative sessions. Ten proposals were submitted to the Governor's office for approval, and five were authorized for submission to the Law and Justice Interim Committee (LJIC). These include involving the regional deputy in the eligibility determination process, defining a household for purposes of eligibility determination, clarifying the courts' role in the eligibility process, suspending payment of public defender fees during periods of incarceration, and allowing flat fee contracts for non-adversarial situations such as servicing treatment courts. Four items are still in development, including the investigator firearm bill, and if approved by the executive they will be submitted at the September LJIC meeting.

### *B. LC 130 (Webb), Generally Revise Laws and Functions of the OPD*

Several bill drafts of interest are appearing in the legislative pipeline, although they are just placeholders so far. Senator Roger Webb has requested LC 130 to generally revise the laws and functions of OPD. Other bills that could impact OPD include LC 114 to revise laws related to child abuse and neglect (requested by Representative Kim Dudik), and LC 279 (requested by Senator Tom Facey) to revise death penalty laws.

Commissioner Petaja asked about the deadline for bills. Agency bills must be submitted by September (at the final LJIC meeting of the interim), but legislators can request bills well into the session. Commissioner Petaja would like to see a change to the statutes which permit the state to petition a court to revoke a person's suspended or probationary sentence for a violation of an administrative rule imposed by probation/parole. He would advocate for a statute which would permit revocation of a sentence only when a new offense is committed. Chairman Gillespie noted that this would require coordination through the Governor's office since it would involve the Department of Corrections and it is too late to submit a proposal for this session. Commissioner Bonnie Olson said that the Montana Peace Officers Association might be supportive of legislation along those lines; the jails are full and diverting clients into community programs would address that problem.

### *C. Law and Justice Interim Committee*

The agency presented five bills at the June meeting, which were approved for drafting. The LJIC did not offer to sponsor any of OPD's proposals.

### *D. Legislative Timeline*

OPD will be asked to provide reports on death penalty costs and agency turnover at the next Legislative Finance Committee meeting.

## **10. Public Comment**

There was no additional public comment.

**11. Old Business/New Business (\*Action Items)**

The agenda for the next meeting will include performance evaluation for Chief Hooks, Chief Zolynski and Ms. Neal. Since Mr. Freebourn supports all three programs, the Commission will evaluate him as well.

Chairman Gillespie provided an update on the status of the Judge Substitution Petition before the Supreme Court. He worked with Chief Hooks and Chief Zolynski to develop a response in opposition to the proposal. A mediation including OPD, the State Bar, the County Attorneys' Association, and several judges has been suggested but not yet scheduled.

*A. Election of Officers (\*Action Item)*

Commissioner Petaja moved to retain Fritz Gillespie as Chair and Ken Olson as Vice-Chair. Commissioner Gallik seconded and the motion carried unanimously.

Commissioner Novak spoke on behalf of the Commission. She is in awe of the work Chairman Gillespie devotes to the agency as well as the level of expertise he brings.

*B. Goals and Objectives (\*Action Item)*

*C. Eastern Montana Case Rate (\*Action Item)*

*D. Limiting the Number of Contract Attorneys (\*Action Item)*

Action was taken on Items B, C, and D earlier in the meeting.

*E. Set Future Commission Meeting Dates*

A Meet-o-matic will be circulated for October 31 or November 3. Possible locations are Helena, Billings and Missoula. Members can indicate their location preference in the comments.

**12. Adjourn**

The meeting adjourned at 3:10 p.m.