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TO: Montana Public Defender Commission

FROM: William F. Hooks, Chief Public Defender

RE: Report to the Commission

Salary and Workforce Developments.

Bargaining Units Pay Adjustments. MEA-MFT filed an unfair labor practice (ULP) against the Department of Corrections for failing to maintain the “status quo” by keeping pay progression salary schedules in place during the period of contract negotiations. In April 2012, a hearings officer found that DOC should maintain the status quo during contract negotiations. State Human Resources Division personnel advised OPD that “while AFSCME was not part of the ULP finding, the facts in this case were similar enough to predict the hearings officer would rule the same. We believed it was in everyone’s best interest to continue paying the matrices’ incremental adjustments to avoid inevitable litigation. We did so at the bargaining table.”

As noted, we accomplished this through contract negotiations and meetings with the leadership of AFSCME. On April 27, 2012, OPD and AFSCME agreed on terms to avoid a potential ULP and completed negotiations for the July 1, 2011 – June 30, 2013 contracts. The bargaining units affirmed the contracts on May 15, 2012. As part of the contracts, OPD will keep in place the pay progression salary schedules for the Attorney Bargaining Unit and the Administrative/investigator Bargaining Unit for FY 2012, beginning October 1, 2011, and FY 2013, beginning October 2, 2012. We agreed to make retroactive payments to the pay period that included October 1, 2011.

Some union employees are at or above their targeted pay rate. Thus, not all employees received a pay increase. OPD and AFSCME agreed to a contract reopener in September, 2012 to see if further pay adjustments for the administrative group are warranted and affordable.

Movement within pay ladders. The former contract with the Attorney Bargaining Unit provided that attorneys who are licensed, in good standing, and have more than five years of relevant experience could be moved from Schedule A to Schedule B, at the discretion of the Chief Public Defender. Relevant considerations for the Chief included the complexity of cases assigned, level of expertise, and years of service with OPD. A separate category with a higher salary range was in place for attorneys who had at least seven years of experience, and who moved to Schedule B based on experience in homicide cases. Thus, an attorney with at least seven years of experience who was moved to Schedule B would earn a salary of \$61,464. An attorney with the same years of experience who moved to the Schedule B “homicide” range would earn \$62,679.

During negotiations, I offered to modify and expand the higher Schedule B classification beyond experience gained solely in homicide cases. My goal is to develop appropriate factors which will recognize the broad variety of tasks and cases our attorneys handle. Attorneys who perform at the highest ethical and professional levels, and who have demonstrated a commitment to the mission of OPD, should have an opportunity to request that he or she be compensated accordingly. The final decision will be reserved for the Chief Public Defender.

Non-union work force. We recognize that our non-union work force has made significant contributions to the agency and our clients during difficult times. Once OPD restarted the bargaining unit pay matrices after ratification of new contracts with our union employees, we sought and obtained appropriate approval to adjust certain non-union employee pay. Many of our full time non-union employees received a five percent pay adjustment, retroactively to October 1, 2011. This adjustment is only for FY 2012. No decision or approval has been reached at this time on making any other adjustments.

OPD did not receive approval to adjust pay levels for exempt employees. This category includes the Chief Public Defender, the Chief Appellate Defender, the Administrative Director, the Contract Manager/MCU Supervisor, the Training Coordinator, and all Regional Deputy Public Defenders. As a consequence of the pay adjustments, we are faced with situations in which certain managers within OPD earn approximately the same, or slightly less, than those they supervise.

Employee Turnover. OPD continues to lose employees to other jobs at a significant and troubling rate. In FY 2012, we lost 31 staff attorneys (over one-fourth of this workforce) in Program 1. More than three-quarters of those who left had less than 5 years of experience, and slightly less than one-half of those who left OPD cited low pay and high workload as the reason. Our support staff turnover was slightly more than one-quarter of the work force, and just less than one-half of those who left cited workload and pay as the reasons. We lost about one-fifth of our investigator work force, with pay and workload cited as reasons by a quarter of those who left. Region 4, based in Helena, is illustrative of the problems we have with employee retention. In the past six months, Region 4 has lost its Regional Deputy, staff attorneys, an investigator, and support staff. Many of these employees have taken jobs with other state agencies, which offer higher pay and less work. Staff turnover leads to inefficiencies due to the need for training and supervising incoming employees, delays in resolving cases, and pay-outs for accrued benefits. OPD paid slightly more than \$200,000 in payouts of leave balances to employees who left in FY 2012. These types of payments are a non-funded item to the agency and thus serve to divert funds from our mission.

Salary Survey. Our current salary structure is based on a 2006 salary rate, by which the mid-point for salaries for attorneys was \$58,762. This amount is the base salary for an attorney with at least five years of experience. This amount also is the maximum salary an attorney can earn under Schedule A. Barb Kain, our HR officer, recently completed work with a labor-management committee on a survey of salary information for attorneys who work in municipal, county and state government in Montana. According to the survey, the average salary in 2012 is \$67,792. If this market survey is used, an attorney with at least five years of experience could earn that amount as a base salary. Additional data is provided in the separate pay data report.

Job Survey. We have retained Communication and Management Services, LLC (CMS), a Helena company, to conduct a comprehensive study of position classifications and compensation. A prior intra-office desk audit of administrative jobs conducted by Diane Stenerson and Robin Haux demonstrated that in many areas, the tasks actually performed by support staff differed from the job

descriptions and positions adopted in the agency's early days. We determined there is a need to conduct an in-depth analysis of the job descriptions for staff in Programs 1 and 2. Assigning this analysis to our staff would have resulted in undue stress, as they were also working on issues related to bargaining unit pay adjustments, salary issues, and end-of-fiscal-year reports, in addition to daily tasks. Further, managers with the agency worked on the initial job descriptions and classifications, and I concluded a fresh perspective would be beneficial. Therefore, I determined that an independent entity should be retained. We issued a formal solicitation inquiry, and entered into a contract with CMS. CMS has developed a questionnaire which has gone out to agency employees, and representatives with CMS will interview some of our employees. We hope to have results from the study in late fall.

New Case Information. OPD experienced a significant rise in the number of new cases filed in FY 2012. In the district courts, 11,322 new cases were filed. This is 1,335 more than in the prior year. In the lower courts, 19,560 new cases were opened, an increase of 1,883 from the prior year. The total number of new cases filed statewide – 30,882 – represents a net increase of 11.6% over the prior year. This increase is more than double than the agency's five-year average increase of about 4%.

Dependent-neglect (DN) cases filed in district courts account for much of the district court case increases. In FY 2012, OPD had to assign counsel in over 700 new DN cases. Regions 2, 3, 4 and 6 were particularly hard-hit with increased DN cases.

Several regions had to deal with significant increases in the number of new cases filed in courts of limited jurisdiction. For example, when comparing FY 11 to FY 12: Missoula Municipal Court had 729 more new cases, Great Falls Municipal Court had 368 more new cases, and lower courts in Region 9 had an increase of approximately 500 more new cases.

Case Weight Information. . The Sixth Amendment to the U.S. Constitution, and Article II, § 24 of the Montana Constitution guarantee the right to the assistance of counsel to persons charged with a felony offense. The right to counsel also applies to persons charged with a misdemeanor for which jail time could be imposed upon conviction. The agency is responsible for assigning counsel to represent those persons who are charged with a criminal offense and who cannot afford counsel. The agency also has a statutory duty to assign counsel in a variety of other cases in which there is no constitutional right to counsel. In sum, the agency assigns counsel in criminal prosecutions, appeals, proceedings to review sentences, and youth court proceedings. We also assign counsel for children, parents, guardians or guardians ad litem or court advocates in civil "abuse or neglect" proceedings, in guardianship or conservatorship proceedings, and in proceedings regarding involuntary commitments. The challenge for the agency is to provide competent representation for our clients in the face of ever-increasing case filings, and to define the point at which the workload becomes excessive.

Over the years, various caseload standards have been developed. In 1973, the National Advisory Commission on Criminal Justice Standards & Goals, Task Force on Courts, provided advisory recommended caseloads for public defenders. Standard 13.12 provides:

the caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.

The Montana Public Defender Commission has determined that caseload levels are the single biggest predictor of the quality of public defense representation, but the Commission has not set specific limits on caseloads.

In considering maximum caseload standards, it is inherently difficult to compare the work required for different types of cases. Each case is so individually different, that it is nearly impossible to set rigid numerical objectives. Also, physical and geographical factors can influence an office's caseload capacity as well. An office which from a single location in a geographically large jurisdictional area is required to serve numerous distant scattered courts has a lower caseload capacity per attorney than an office in a geographically small jurisdiction or one in which all of the courts, the jail, and the public defender's office are housed in a single building.

Public Defender Commission Standards, Standard V.1.A. The Commission offered suggested caseloads:

- a. 50 felony cases (excluding those in which the death penalty is being sought) per attorney at any one point in time;
- b. 100 misdemeanor cases per attorney at one point in time;
- c. 80 juvenile offender cases per attorney at any one point in time;
- d. 20 dependent and neglect cases per attorney at any one time;
- e. 30 civil commitment cases per attorney at any one time;
- f. 7 appeals to the Montana Supreme Court per attorney per year at any one time;
- g. 7 postconviction matters per attorney at one time; or
- h. 4 petitions for certiorari or to the United States Supreme Court per attorney at any one point in time.

A labor-management committee developed a case-weighting system in early 2007, and the new system was implemented state-wide in 2008. In 2010, the committee revised the system by defining more specific case categories. The committee reviewed hours recorded by attorneys for various types of cases, and developed a "unit-based" value for various kinds of misdemeanor and felony cases. The case weight system required daily tracking of case assignments, generation of summary reports, and monitoring of each attorney's monthly case rates by supervising attorneys. More recently, the committee, chaired by Courtney Nolan, revised the case weight system. The committee changed the value from a "unit-based" value to an hourly value, and amended the time in which counsel could reasonably be expected to resolve the various types of felony and misdemeanor cases.

A case-weight system which accounts for workload is more valid than a system based solely on case numbers. Yet, the value of a case-weight system depends in large part on the validity and accuracy of the estimates of time necessary to complete representation of a given type of case in an effective manner. In other words, if adequate representation was not provided, there is a risk that a case-weight system based on the cases studied might in effect institutionalize substandard practice.

One concern is whether the attorneys are adequately supported by administrative, paralegal and investigative staff. The American Bar Association (ABA) recommends that "[n]ational caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a

more accurate measurement.” ABA Ten Principles of a Public Defense Delivery System, Commentary to Principle 5. The Indiana Public Defender Commission has standards for indigent defense services in non-capital cases, which include consideration of the adequacy of support staff. For example, an adequate ration of support staff to attorneys in felony cases should be 1 paralegal, 1 investigator, and 1 secretary for 4 attorneys in felony cases. Caseloads are reduced for offices which do not maintain the proper support staff-attorney ratios.

Consideration of the availability of support staff should be included in any assessment of work load standards for the agency. For example, slightly more than 4,500 cases were opened in FY 2012 in Region 1, which is comprised of 20 courts from Libby to Polson, in an area of 12, 967 square miles. Only two investigators are on staff in Region 1 to assist with these cases. Just over 3,000 new cases were filed in Region 4, and only one investigator is available.

The nature of the various regions also must be a consideration. In terms of work load limits, a one-size-fits-all approach would be inadequate. Region 10 had slightly more than 600 new cases in FY 2012, and an investigator is on staff. However, the region, based in Glendive, is over 15,000 square miles in size, and staff in Region 10 drove over 35,000 miles in FY 2012.

In 2009, the ABA adopted Eight Guidelines of Public Defense Related to Excessive Workloads. These Guidelines followed a Formal Opinion issued in 2006 by the ABA Standing Committee on Ethics and Professional Responsibility, concerning the obligations of lawyers and supervisors who provide indigent defense representation and who are faced with potential excessive caseloads. Guideline 1 requires the Public Defense Provider to determine whether the performance obligations of lawyers who represent indigent clients are being fulfilled. These objectives include whether sufficient time is devoted to interviewing and counseling clients; pretrial release of incarcerated clients is sought; necessary investigations are conducted; sufficient legal research is undertaken; sufficient preparations are made for pretrial hearings and trials; and sufficient preparations are made for hearings at which clients are sentenced. The performance obligations are substantively similar to duties of trial counsel set forth by the Commission in Standards VI.D.1 – 32.

Guidelines 2, 3 and 4 require that the Public Defense Provider has a supervision program that continuously monitors the workloads of its lawyers to assure that all essential tasks on behalf of clients, such as those specified in Guideline 1, are performed; that the Provider train lawyers in the professional and ethical responsibilities of representing clients, including the duty of lawyers to inform appropriate persons within the Public Defense Provider program when they believe their workload is unreasonable; and that managers determine whether excessive lawyer workloads are present. Similarly, the case-weight system and the Commission’s Standards require tracking and monitoring of case assignments by managers.

Guideline 5 mandates that the Provider consider taking prompt actions to avoid workloads that either are or are about to become excessive. These actions include:

- Providing additional resources to assist the affected lawyers;
- Curtailing new case assignments to the affected lawyers;
- Reassigning cases to different lawyers within the defense program, with court approval, if necessary;
- Arranging for some cases to be assigned to private lawyers in return for reasonable compensation for their services;

- Urging prosecutors not to initiate criminal prosecutions when civil remedies are adequate to address conduct and public safety does not require prosecution;
- Seeking emergency resources to deal with excessive workloads or exemptions from funding reductions;
- Negotiating formal and informal arrangements with courts or other appointing authorities respecting case assignments; and
- Notifying courts or other appointing authorities that the Provider is unavailable to accept additional appointments.

PDC Standard V.1.B. provides the initial process to follow when excessive caseloads are involved:

Whenever the Chief Public Defender determines, in the exercise of his or her best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will, by reason of their excessive size and complexity, interfere with the rendering of quality representation, or the breach of professional obligations, the Chief Public Defender is required to inform the Montana Public Defender Commission, which in turn will inform the Law and Justice Interim Committee, the Legislative Finance Committee, and the Office of Budget and Program Planning and shall take all reasonable steps to alleviate the situation.

Recommendations. For each region, there is some point beyond which the work load becomes excessive. Going forward, we will implement and adjust, as necessary, the revised case weight system, and work with managers and supervising attorneys to track case weights. It also will be important to continue to develop organizational practices so that the regions operate as efficiently as possible. When possible, cases or tasks may need to be reassigned in the face of heavy workloads.

We will also monitor the types and numbers of cases filed in the regions, and assess the personnel needs required to competently handle the cases filed. The availability of competent private attorneys who have agreed to accept cases, including conflict cases, and factors specific to each region, such as geographic size and the number of courts served, are important factors to consider.

We need to ascertain the means by which we provide notice to the courts that the work load in a region is excessive. We also may need to identify any steps to take prior to requesting that a court cease ordering OPD to assign cases for a period of time.

Capital Case Update. Section 47-1-202(g), MCA directs the Chief Public Defender to “establish policies and procedures for assigning counsel in capital cases that are consistent with standards issued by the Montana supreme court for counsel for indigent persons in capital cases[.]” Standard V.I.B. provides specific qualifications for lead counsel in death penalty cases:

- a. Death penalty representation. Each attorney acting as lead counsel in a death penalty case shall meet the standards for competency of counsel for indigent persons in death penalty cases adopted by the Montana Supreme Court, and those set forth in the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003);

Montana's Standards for Competency of Counsel for Indigent Persons in Death Penalty Cases mandate that the appointing authority be satisfied that "[t]he nature and volume of the work load of both appointed counsel is such that they will have the ability to spend the time necessary to defend a capital case." These standards also require that counsel be familiar with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. The ABA Guidelines similarly demand that counsel, and the agency responsible for assigning counsel and resources in a capital case, recognize the need to alleviate workload demands in order to permit counsel to devote complete focus on the capital case.

We are responsible for the representation of two persons for whom the state has filed notice of its intent to seek imposition of the death penalty upon conviction. These cases present likely conflicts, so we have bifurcated our management of the cases. Kristina Neal, OPD's Conflict Coordinator, is the case coordinator for one of our clients. The defense team includes an OPD staff attorney. Eric Olson, OPD's Training Coordinator, is the case coordinator for the other client. Originally, staff attorneys from the Major Crimes Unit were assigned to this case. After meeting with members of the team, and reviewing the caseload demands in their MCU cases, I concluded that it was asking too much of counsel to carry full MCU caseloads and also be responsible for representation in a capital case. I directed Eric to reassign the case. We now have qualified private counsel assigned to represent the client.

Performance Audit. The Legislative Audit Division conducted an audit of agency compliance with statutes, standards and policies in the areas of contract management and indigency determinations, for FY 2011. The auditors examined records and conducted interviews in several regions, and issued a report in which several weaknesses were identified. We have taken steps to remedy our contract management system. We also are working on a project to develop a "best practices" model for indigency determinations, and develop a position for a trainer to help the indigency specialists in the regions.

Organizational Structure. Eric Olson has led a team in devising a series of "best practices" for use by administrative staff throughout the regions, with the goal being uniform application of the most efficient office practices in each office. We are working to implement these practices and to reinforce the need for such uniformity.

Management Update. I have met with management and staff with Disability Rights Montana, an advocacy group for persons with disabilities; with management of the State Bar of Montana; and with Mike Larson, the coordinator for the Lawyers Assistance Program.

I will participate in a presentation at the Montana State Bar convention on September 21, and I will address the Montana Judges' Association convention on October 11. I attended a course in Helena, designed for agency administrators, bureau chiefs and directors, on project management and organization. I have become a member of the National Legal Aid and Defender Association (NLADA). I was unable to attend a conference sponsored by NLADA, but Jenny Kaleczyc, Region 4 Deputy Defender, attended in my stead.