

MONTANA PUBLIC DEFENDER COMMISSION

University of Montana School of Law

Missoula, MT

October 18, 2013

MINUTES

(Approved at the February 24, 2014 Meeting)

Commissioners Present

Ann Sherwood, Pablo; Charles Petaja, Helena; Richard (Fritz) Gillespie, Helena; Brian Gallik, Bozeman (via phone); Kenneth Olson, Great Falls

Commissioners Absent

Christopher Daem, Billings; Margaret Novak, Chester; Majel Russell, Billings; Michael Metzger, Billings

Staff Members Present

William Hooks, Chief Public Defender; Wade Zolynski, Chief Appellate Defender; Kristina Neal, Conflict Coordinator; Harry Freebourn, Administrative Director; Eric Olson, Training Coordinator; Larry Murphy, Contract Manager; Tom Schoenleben, Regional Deputy Public Defender, Havre; Jenny Kaleczyc, Regional Deputy Public Defender, Helena

Liaisons

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

Interested Persons

University of Montana School of Law Dean Irma Russell; David Rice, Director, Criminal Defense Clinic; Ed Sheehy and Brian Smith, OPD staff attorneys; Brent Doig, Budget Analyst, Office of Budget and Program Planning (OBPP); Greg DeWitt and Scot Conrady, Legislative Fiscal Division; Jim Taylor, Legal Director, American Civil Liberties Union of Montana (ACLU)

1. Call to Order

The Montana Public Defender Commission meeting was called to order by Chairman Fritz Gillespie at 8:15 a.m. Chairman Gillespie announced that the scope of the Executive Session would be expanded to include three items: performance evaluations, a complaint, and litigation strategy in Region 4. He has determined that the demands of individual privacy clearly exceed the merits of public disclosure in each instance.

2. Performance Evaluations and Pay Adjustments (Process Overview)

The Personnel Committee sent evaluation forms to certain contractors and people within the agency requesting peer/subordinate evaluations of each of the Commission's direct reports (Chief Public Defender Bill Hooks, Chief Appellate Defender Wade Zolynski, and Conflict Coordinator Kristina Neal). In addition, Commission members were asked to evaluate the performance of each individual's statutory duties. The Personnel Committee then met with each individual in a closed

session. The committee will share their recommendations with the full Commission and invite further discussion during the upcoming Executive Session.

A. Public Comment

Chairman Gillespie invited public comment regarding the performance evaluations, but there was none.

*B. Executive Session (closed) (*Action Item)*

Chairman Gillespie closed the meeting to meet with each of the direct reports individually, and to discuss the complaint and litigation strategy in Region 4. He reconvened the open meeting at 9:55 a.m. Commissioner Petaja, chair of the Personnel Committee, gave the confidential committee file to office staff to be sealed and stored in the Central Services office.

Pay parity with the prosecution has always been a concern, and the new attorney pay plan has created salary compression for managers. In response, the Commission decided to increase salaries as follows: Chief Hooks to \$100,000; Chief Zolynski to \$90,000; and Ms. Neal to \$80,000 annually. They also elected to increase Administrative Director Harry Freebourn's salary to \$92,000 after looking at comparables for his position.

Chairman Gillespie introduced law school Dean Irma Russell, who welcomed the Commission and thanked them for holding the meeting at the law school and for their public service; and David Rice, who welcomed the Commission on behalf of the faculty. Mr. Rice is a former prosecutor and district court judge, and is currently directing the criminal law clinic. He has watched the agency since its inception, and wished them the best in their honorable work, which is an important part of Montana's criminal justice system. Chairman Gillespie said that he is always interested in different opinions on how to further the agency's mission, and welcomes observations, especially from a former district judge no longer constrained by the robe.

3. Minutes of July 15, 2013 Meeting (*Action Item)

Commissioner Sherwood moved to approve the minutes as drafted. Commissioner Olson seconded and the motion carried.

4. Commission Liaison/Executive Board Reports

Appellate liaison Eileen Larkin had nothing to report, having received no comments or suggestions from any attorneys or staff.

Support staff and investigator liaison Cathy Huston reviewed her written report. In response to a question from the chair, she said that all of the current investigators have a law enforcement background except for one. She doesn't know how many of them carry a concealed weapon permit. Chairman Gillespie said that they will make another run at the legislation to allow OPD investigators to carry on the job in the next session.

5. Commission Questions/Comments on Submitted Reports

A. Overview of Consolidated Operating Plans

Mr. Freebourn gave a brief overview of the operating plans, which will guide the use of the final legislative appropriation. Although the agency received only 8 of the 37 FTE requested, it did get \$1.8 million to be used for contract services. Vacancy savings could be a problem area, because of the appropriation made to fund the attorney pay ladder. The attorney contract has been negotiated

and implemented, and so far the turnover has slowed, which was the goal. However it means the vacancy savings goal might not be met. The final operating plans for the remainder of the biennium will be in place before the next meeting.

B. Chief Appellate Defender Report/Operating Plan

Chief Zolynski reported that the new appellate pay plan was implemented October 1. The imminent pay increase kept a number of attorneys in place who were ready to leave. There was only one attorney resignation in the last quarter, and no support staff turnover. The appellate office adopted the same pay plan as the trial division, with Attorney 1, 2 and 3 designations. Koan Mercer and Eileen Larkin have been assigned Attorney 3 status and will assume some administrative duties.

There has been a 15% increase in caseloads for the first quarter over the first quarter of FY 13. If the increase continues at that level, it would equate to 1.5 attorney FTE worth of work for the year under the appellate case weighting system (CWS). Five of nine attorneys are currently above the recommended number of units, and Chief Zolynski is trying to even out the case weights throughout the office.

Chairman Gillespie asked if the office is being more successful on appeal than in the past. Chief Zolynski said it feels like they have, but he isn't sure because he doesn't have a good way to track outcome data in the case management system. The Dugan and Yarlott decisions were both significant successes. Chairman Gillespie also feels progress is being made, even though the office isn't going to win a lot appeals. Commissioner Petaja said that he appreciates way the appeals for the last quarter were broken down and categorized. He asked if it is correct that about 30% of appeals are civil. Chief Zolynski replied that is true; they are seeing an increase in DNs as they come out of the trial division.

Chairman Gillespie asked Chief Zolynski to comment on the availability of contract attorneys to do appellate work. Chief Zolynski and Ms. Neal have been able to increase the available pool of contractors, but appellate work is very specialized and requires a lot of mentoring. It also creates stress for the support staff because contractors don't always know how to format briefs or cite correctly. Chairman Gillespie noted that contractors are free to accept or refuse cases offered to them and are not simply available at any time.

C. Chief Public Defender Report/Operating Plan

Chief Hooks reported on the projects he has been working on for the last few months. Negotiations are complete and collective bargaining agreements have been ratified for both bargaining units. He described the new attorney pay plan in detail. It is designed to improve retention by eliminating the pay freeze at year five and creating a pay ladder. The new Attorney 3 designation is discretionary based on regional needs and the ability to pay. Unlike the previous B-Homicide designation, it is not exclusive to specific case types, but based on the difficulty and complexity of the workload and the attorney's value to the agency. Commissioner Petaja said that it was a pleasure to be involved in collective bargaining this year, having some money to work with for a change.

Chief Hooks is cautiously optimistic that turnover problems will be abated by the new pay structure, but the caseload issue remains and that pressure may continue to contribute to excess turnover. He is still working on a pay plan for managers to address the compression issue and to approach parity with county attorneys.

There was discussion regarding parity of resources, particularly related to the number of law enforcement resources available to county attorneys compared to OPD's few investigators. Commissioner Sherwood said that it seems that parity in resources (including investigators) would impact jail populations, which has fiscal implications. Chief Hooks agreed—minimizing prison sentences and jail time not only benefits OPD clients, but results in better stewardship of public funds. There was general agreement that the system works best when everyone has sufficient resources and is on equal footing.

The second project is the operation plan. Every region makes a plausible argument that they need more resources, and Chief Hooks is looking at case trends and systemic issues. Arrests are increasing in the four counties in the Bakken area, and although the numbers aren't dramatically high yet, they are expected to grow. An office in Glasgow is planned to address the anticipated increase as well as high caseloads in Region 6 (Havre). Other regions may also see staff increases, as well as the contract and training departments.

The Legislative Audit Division is being kept informed of the progress on the issues raised in the performance audit related to eligibility determination. The revised application form that the Commission approved will be rolled out on a trial basis in two regions. Chris Thomas and Commissioner Gallik are developing policy and training procedures. In addition, a request for proposals has been issued to determine if the agency could contract out the application process, freeing support staff to provide more attorney support, especially in the smaller regions.

Chief Hooks introduced Tom Schoenleben, the new regional deputy public defender in Havre. Mr. Schoenleben commented on the demands in his region—a small staff, very few contract attorneys, and high caseloads. An office in Glasgow will help absorb the pressure and cut down on travel time. They've had a large increase in DN cases (triple in one county), but Mr. Schoenleben said that although it could be related to an increase in drug cases, he doesn't really think circumstances have changed, it is instead a shift in focus.

D. Conflict Coordinator Report/Operating Plan

Ms. Neal said that her case numbers are staying fairly consistent, about 1,000 per quarter. A staff attorney has been hired to work conflict cases in the Great Falls region due to the dearth of contract attorneys there. It had an instant effect in being able to assign counsel. This will also be a pilot program to see if FTE conflict attorneys will work in other areas with a limited number of contractors available. She concurs with Chief Hooks that the Bakken will become a difficult area. Although some drug cases go to federal courts, big drug busts there with multiple defendants will tax OPD resources.

Commissioner Petaja asked about DN appointments, which appear to be almost one out of three cases. Ms. Neal said that there are multiple conflict appointments in DNs because the trial division only represents one person, leaving her to appoint at least two conflict attorneys. She also confirmed that DN cases remain open longer, and generally cost more.

*i. Final Standard for Stand-by Counsel (*Action Item)*

The new standard for standby counsel has been revised based on suggestions made at the last Commission meeting and is presented for approval. Action will be taken later in the meeting.

E. Contract Manager Report

Contract Manager Larry Murphy is developing a proposed policy change to incorporate the computer-based standards verification process that has been in use for some time. He said that he has had a large influx of contract attorney applications since the bar results were released. If the applicant works for a firm, he talks to the supervisor about mentoring. If they don't, he encourages them to find someone to shadow. When they are qualified, he sends the MOU. There are currently 234 MOUs on file, but not all of those contractors are presently taking cases.

F. Training Report

Training Coordinator Eric Olson invited questions on his written report summarizing activity since April. Mr. Olson is attending his last Commission meeting as an OPD employee and Chairman Gillespie thanked him on behalf of the Commission for his dedication to OPD for the last seven years. The chair acknowledged the challenges Mr. Olson overcame in presenting excellent programming with limited resources.

G. Financial and Operating Status

Mr. Freebourn presented information as of June 30, 2013. He noted that the system is now handling over 4,000 more cases than in the previous biennium. New charts have been developed beginning on page 12 of the report to show case numbers and locations, costs, and duration. There was a dramatic increase in DN cases between FY 11 and FY 12, with a more modest increase in FY 13. Case duration is also increasing. The June 30 net case snapshot for the two fiscal years shows the increase in the number of active cases in FY 13.

6. Public Comment

Jim Taylor, ACLU Montana legal director, congratulated the Commission and Chief Hooks on the attorney salary increases. He also applauded the pay raises given to senior management earlier in the day.

Mr. Taylor would like to see the Commission adopt standards for revocations, which are an important area of practice that were overlooked when the original Standards were drafted.

Cathy Huston, support staff and investigator liaison, said that there was an oversight in her written report. Pay increases for their bargaining unit will now be based on individual employee anniversary dates instead of a uniform date of October 1. Ms. Huston also advocated for parity in support staff wages as well as for attorneys, especially in the appellate office and in central services. Some of those employees have been with the agency for a long time. The Commission agreed.

Dave Rice, director of the UM School of Law Criminal Defense Clinic, has monitored the Commission since it was established. He was glad to hear about the salary increases also and hopes it will inspire more of their graduates to work for OPD. This meeting has been very interesting and shows how much work is being done to make the system work. The growing pains have been worth the effort, and he thanked the Commission for meeting at the law school.

Chairman Gillespie announced that the Innocence Project will have an open house in this meeting room tonight from 5-7 p.m. There will be a presentation at 5:45 and they will present some awards.

7. Update on Ethical Caseloads and Refusal of Appointments

Chief Hooks and Region 4 (Helena) Deputy Public Defender Jenny Kaleczyc gave a brief overview and status report on the filings in the Helena courts of limited jurisdiction to halt new case inflows.

The motions were filed on September 5, supported by briefs and affidavits. A week ago, Judge Swingley denied the motion prior to the scheduled hearing, finding that the court did not have the authority to cease appointing public defenders. Chief Hooks is considering the next steps, which could include an appeal, refiling in district court, or going to the Supreme Court. He is confident that the agency is using appropriate measures to demonstrate that the level of representation required by the OPD Standards is not being provided in the Helena region. He will continue to work on solutions to the Region 4 problems while the litigation proceeds.

Chairman Gillespie invited Mr. Taylor to comment as one of the architects of the OPD Standards. Mr. Taylor remarked that the Standards were based on ABA standards and were crafted to be more than a lofty goal, but rather something that could actually be implemented in Montana.

Ms. Kaleczyc said that Region 4 staff attorneys are worried about their credibility and the risk of losing their licenses. They need some short-term relief while the systemic issues are addressed so that they can provide effective representation for their clients. It helps knowing the Commission is behind them in their efforts.

8. Committee Reports

A. Contracts Process

i. New Contract Attorney Rate (***Action Item**)

Commissioner Petaja, Contracts Process Committee chair, presented a recommendation for an increase to the contract attorney hourly rate. The rate has been \$60 per hour since OPD inception in 2006, and probably much earlier. During several meetings, the committee developed a method for weighting various comparable rates and applying discounts and established a target rate of \$88 per hour.

The Legislature appropriated a 2% increase for contract services for the biennium. The Committee recommends implementing a \$2 per hour increase beginning January 1, 2014, which would be within the appropriation. Commissioner Petaja also recommends that the Commission discuss including an escalator clause to continue moving the rate towards the target.

Commissioner Petaja moved to increase the contract attorney rate to \$62 per hour commencing January 1, 2014, through June 30, 2015. Commissioner Olson seconded. He said that this is a starting point to get the rate to a fair level in the future while recognizing practical realities, including the legislative funding process. Chairman Gillespie said that any escalator will have to be part of a decision package for the next legislative session. It is important to have a rate that is attractive enough to continue to recruit contract attorneys to relieve FTE case overloads and to handle conflict cases. The Commission will continue to devote effort to getting the best qualified contractors possible by advocating for funding fair rates of compensation.

The motion carried unanimously. Commissioner Petaja was pleased at the increase, the result of a four-year effort.

9. Governor's Report (*Action Item)

The Commission's report to the Governor, Legislature and Supreme Court is required by Title 47. Chairman Gillespie has been reviewing the report, and he made some changes to the assessment narrative to reflect the reporting difficulties to be discussed next. A nomination to replace Commissioner Fleming has not been provided by the speaker of the house, although her term expired in 2011. All of the required reports that are included are as of June 30, 2013. Mr. Freebourn summarized comparisons to the prior fiscal year. Action was deferred until later in the meeting.

10. Cost Recovery Exception (*Action Item)

Mr. Freebourn provided background on the history of public defender fee assessments and collections. In the past OPD recorded individual accounts receivable and applied payments to the receivable. However, now that the clerks of court are collecting payments and depositing it to the OPD special revenue account via the Department of Revenue, payment information is provided only in summary, making it impossible to apply the payments to individual receivables. In addition, OPD has no way of knowing if a client has obtained relief from the court due to a change in circumstances, making it untenable to initiate collection action.

Given these circumstances, the staff is asking the Commission to approve a resolution that 1) recognizes that the agency is unable to comply with state accounting policy; and 2) prohibits referring clients to collection. Chairman Gillespie said that while he doesn't think the Commission has the authority to oppose state policy, no amount of work will provide the information needed to track the individual accounts receivable. He will continue to work on getting an exception to state policy through administrative or legislative avenues. Commissioner Petaja moved to adopt the resolution and Commissioner Olson seconded. The motion carried with four in favor and one abstention.

Chairman Gillespie asked Greg DeWitt, legislative fiscal analyst, if he had any sense of how the agency might proceed. Mr. DeWitt did not, but suggested that the resolution be included in next year's report to the Legislative Finance Committee to explain why the agency is non-compliant.

11. Public Comment

There was no additional public comment.

12. Old Business/New Business (*Action Items)

A. Review Committee Purposes/Appointments

Chairman Gillespie will review the current committee memberships and integrate the new member into the committees.

B. Administrative Rule Review

Each agency is required to review its rules biennially. Commissioner Petaja was asked to conduct the review in conjunction with staff. Once needed changes are identified, the Commission will review and approve proposed changes before the rule-changing process continues. Chairman Gillespie would like to see the eligibility process formalized in administrative rule, which has the full force of law, instead of just as policy. Commissioner Gallik will assist with the eligibility piece. Other suggestions for rule changes include modifying the organizational rule to reflect statutory changes, and adding a rule regarding fee collections.

*C. Pay Adjustments for Direct Reports (*Action Item)*

Action taken in Executive Session was documented in the public meeting. Commissioner Petaja moved to adopt the following salary adjustments as previously approved in the closed session: Chief Hooks to \$100,000; Chief Zolynski to \$90,000; Ms. Neal to \$80,000; Mr. Freebourn to \$92,000 annually. Commissioner Sherwood seconded and the motion carried unanimously.

*D. Final Standard for Stand-by Counsel (*Action Item)*

The proposed changes are intended to emphasize that the pro se defendant is in charge of their own defense, and that stand-by counsel is appointed for the benefit of the court. Commissioner Sherwood made a motion to change the language in section 1.E. from "Help to ensure . . ." to "Advise the defendant regarding basic rules of courtroom protocol and procedure." Commissioner Petaja seconded and the motion to amend carried. Commissioner Petaja moved to adopt the standard as amended. Commissioner Olson seconded and the motion carried.

*E. New Contract Attorney Rate (*Action Item)*

Previously approved under item 8. A. i.

*F. Governor's Report (*Action Item)*

Commissioner Petaja moved to adopt the report as drafted. Commissioner Olson seconded and the motion carried. Chairman Gillespie will sign the cover letter.

*G. Cost Recovery Exception Resolution (*Action Item)*

Previously approved under item 10.

13. Set Future Commission Meeting Dates

Meetings will be more frequent next year in preparation for the 2015 Legislative session. The first draft of the budget will be due to the Governor's office in May. Chairman Gillespie would like to have two meetings to work on the budget and decision packages before then—one in mid-February and one in mid-April. He expressed his appreciation for the help and guidance that Mr. Doig and Mr. DeWitt provide to the agency.

14. Adjourn

Commissioner Sherwood moved to adjourn at 2:30 p.m. Commissioner Olson seconded and the motion carried.