

# MONTANA PUBLIC DEFENDER COMMISSION

State Capitol, Room 152

Helena, MT

October 31, 2014

## MINUTES

*(Approved at the December 30, 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; Ken Olson, Great Falls; Terry Jessee, Billings

### Commissioners Absent

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; Matt McKittrick, Regional Deputy Public Defender (RDPD), Great Falls; Jenny Kaleczyc, RDPD, Helena; James Reavis, Assistant Appellate Defender; Chris Abbott, Assistant Public Defender

### Liaisons

Kristen Larson was present on behalf of the non-management appellate staff and attorneys

### Interested Parties

Niki Zupanic, Public Policy Director, American Civil Liberties Union of Montana (ACLU); Beth Brenneman, Disability Rights Montana; Greg DeWitt, Legislative Fiscal Division; Greg Martin, State Office of Labor Relations

### 1. Call to Order

Chairman Fritz Gillespie called the meeting of the Public Defender Commission to order at 8:05 a.m.

### 2. Performance Evaluations and Pay Adjustments (Process Overview)

Personnel Committee Chair Petaja reviewed the performance evaluation process for the Chief Public Defender, Chief Appellate Defender, Conflict Coordinator and Administrative Director and presented the Committee's recommendation to the Commission. The evaluation process consists of three parts—written subordinate/peer evaluations which will remain confidential, a self-evaluation, and individual interviews with each manager. The overall evaluations were graded on a five point Likert scale, and the Committee recommended a rating of 5 ("very good") for all four positions. They will leave salary discussions to the full Commission.

Commissioner Petaja asked that Commissioner Jessee be reappointed to the Committee and it was agreed by acclamation.

Commissioner Novak moved to accept the Personnel Committee report. Commissioner Gallik seconded and the motion carried.

#### A. Public Comment

There was no public comment.

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

Chairman Gillespie closed the meeting at 8:15 a.m., stating “The following portion of the meeting relates to matters of individual privacy. As Commission Chairman, I have determined that the demands of individual privacy clearly exceed the merits of public disclosure. As such, this portion of the meeting will be closed.”

The open meeting was reconvened at 10:50 a.m. by Vice-Chair Ken Olson.

**3. Minutes of August 1, 2014 Meeting (\*Action Item)**

Commissioner Gallik moved to adopt the minutes of the August 1, 2014 meeting as drafted. Commissioner Sherwood seconded and the motion carried.

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

Assistant Appellate Defender Kristen Larson presented the Appellate Liaison report, prepared with the assistance of Koan Mercer. Commissioner Petaja commented that with DN cases representing 35% of the appellate caseload catastrophe is looming.

Support Staff/Investigator Liaison Cathy Huston was unable to attend the meeting but also submitted a written report. Chief Public Defender Bill Hooks emphasized on her behalf everyone’s concern regarding support staff wages. He also informed the Commission that he will continue to look for a way to advance the investigator weapons bill.

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

*A. Chief Appellate Defender Report*

Chief Appellate Defender Wade Zolynski provided a detailed written report. New cases have continued to increase; the increase is actually 38% over the last three fiscal years, not 42% as noted in his report, but that doesn’t make him feel any better. DN cases are increasing significantly.

Turnover continues to be a problem and exit interviews confirm that workload and pay issues are the main reasons people leave. He is starting to get pressure from the Supreme Court and the Attorney General’s office regarding the length of time it takes to process cases. Chief Justice McGrath’s letter to the Governor’s budget office outlines the same problems Chief Zolynski has identified and how those problems impact the entire justice system.

Commissioner Ken Olson congratulated Eileen Larkin for being recognized as appellate defender of the year. He thanked Chief Zolynski and the rest of the staff for the successes noted in Chief Zolynski’s report. Commissioner Novak moved that Chairman Gillespie write Ms. Larkin a letter on behalf of the Commission to congratulate her and thank her for her good work. Commissioner Metzger seconded and the motion carried.

**i. Motion to Refuse Cases (\*Action Item)**

Chief Zolynski provided a one page information sheet regarding his request for the authority to file a motion to cease the assignment of cases to the appellate office when appropriate. He is not yet ready to file a motion, but wanted to give the Commission a chance to discuss the issue before the office is in crisis.

There was discussion regarding some possible scenarios if Chief Zolynski refuses an appeal. Those details would be handled when the motion is written. Ultimately, the office cannot tell a client that they do not have a right to appeal. If the office believes the appeal has no merit and files an Anders brief, the client can respond to the brief and then the court decides if the appeal is dismissed or if the office has to brief the appeal.

Chairman Gillespie resumed the chair.

*B. Conflict Coordinator Report*

Conflict Coordinator Kristina Neal has made 1,240 appointments to date in FY 15. The numbers are very high in Regions 3, 4 and 6 (Great Falls, Helena and Havre, respectively). About 35% of her cases are DN's. Region 9 (Billings) has very few DN cases because they are contracting out both parents and Ms. Neal isn't getting them as conflicts. She hopes that a change in philosophy at the Child and Family Services Division (CFS) could trickle down to OPD and ease some of those DN numbers.

*C. Chief Public Defender Report*

Chief Hooks shares Ms. Neal's optimism regarding changes in the DN field. CFS has a waiver to use federal funds for reunification instead of the current foster care/termination proceedings. He is happy to announce that there are currently no pending capital cases. The bulk of his written report is background on the judge substitution issue to be discussed later.

The Glasgow office is now open and is staffed by a veteran attorney. It will provide great relief both for clients and the Havre attorneys, and will allow for less reliance on contract attorneys. The Valley County Attorney personally thanked Chief Hooks for opening the office.

i. Update on Treatment Courts

Treatment courts are intended to be therapeutic rather than adversarial. They are established locally, have various sources of funding, and can be diversionary or post-conviction. OPD serves these constantly evolving courts using FTE or contract counsel. Contract Manager Wendy Johnson is in the process of surveying the courts to help identify training needs and develop standards, as well as determine whether OPD should terminate involvement with any courts.

Ms. Johnson briefly reviewed the various types of treatment courts. She noted that all of them are very satisfied with OPD's services and said that it's nice to get positive feedback and appreciation even if we may not belong in every court. The public defender's role in the court is to advocate for the client, especially if the client is at risk of being ejected from the program. The public defender is very involved in the proceedings as a member of the team and ensures that due process is being followed. Very few courts write their grant applications with provisions for funding for defense counsel, but there are three in the Glendive area. The consensus is that even post-conviction courts benefit the client. Ms. Johnson and Chief Hooks will continue to gather information and update the Commission.

ii. Region 4 (Helena) Update

Chief Hooks introduced Jenny Kaleczyc, Region 4 (Helena) Deputy Public Defender, and Lisa Benevides, the recently hired social worker in the Helena office. The Helena office was in crisis due to turnover and high caseloads, and adding a social worker as part of the increased staffing has been a great benefit to clients and staff. Commissioner Sherwood is working with the regional office to share her experience with holistic defense, and has introduced them to the Bronx Defenders.

Ms. Benevides works directly with clients and local agencies and is training attorneys on how to communicate with clients with mental health issues. She has developed a referral process and has worked approximately 30 cases in the first two months. Commissioner Sherwood said that Ms. Benevides is already establishing credibility in the community, which will help OPD to be seen in a more positive light as an agency helping to reduce crime. Commission members were very enthusiastic about the social worker program. Chief Hooks hopes to expand it to other regions. Chairman Gillespie asked Ms. Benevides to track the number of veterans she serves.

*D. Contract Manager Report*

Ms. Johnson gave highlights from her written report. The new forms are working well, and she hasn't received any negative feedback on the new provisions of the Memorandum of Understanding. Waiting lists have been implemented in several counties. In Missoula, some contract attorneys are choosing to be active in other areas (such as Powell and Deer Lodge counties) while they are wait-listed in Missoula. The mental health consultant is interested in renewing the contract for another year; he has reduced his other practice to accommodate OPD work. The draft request for proposals has been submitted to state procurement and Ms. Johnson hopes to issue it this fiscal year.

Changes to the proficiency determination process, including an expanded packet of materials, went into effect this month. Ms. Johnson doesn't plan to meet with contractors if there are no red flags, but any remedial action will be discussed in person. Commissioner Gallik suggested that the annual meeting would be a good opportunity to do performance evaluations. Commissioner Bonnie Olson said that instead of just a written report for positive evaluations, a video or voice call to give positive feedback would help to eradicate the stigma of Helena government.

Ms. Johnson's final item was a request for action. She proposed that the Commission combine the two committees that work on contract issues (the Proficiency Determination Committee and the Contracts Process and Approval Committee) into a new Contract Steering Committee. Commissioner Petaja moved to combine the committees. Commissioner Novak seconded and the motion carried. Existing members of both committees will serve on the new Contract Steering Committee.

Commissioner Petaja noted that finding contract attorneys to do OPD work has become less difficult, and he attributes that to the overall reputation of the agency.

*E. Training Report*

Training Coordinator Peter Ohman's written report covered recent training events (investigator conference, boot camp and the annual attorney conference). Future events include a conference on defending sex crimes which will be held over two and a half days in early May. The focus will be on jury selection, DNA, forensics, and interviewing children. Support staff training will be in Billings in late April. The location has an onsite computer lab to train on Microsoft Office applications. The Professional Development Center will assist with management training in Helena in December.

Chairman Gillespie attended both days of the annual meeting and reported that the training was excellent. Mr. Ohman said that they were at maximum capacity at the facility in Missoula. He is planning next year's conference at the GranTree in Bozeman to mark the ten-year anniversary of the conference.

*F. Financial and Operating Status*

i. Final Financial and Operating Report for FY 2014

Administrative Director Harry Freebourn presented the final financial report for FY 14. System growth has stabilized, with a 1% decrease in FY 14, compared to 15% growth over the previous couple of years. The system is still big, with active cases growing by 11.3%.

The assessment and collections report on page 8 will be an audit issue. The agency is no longer receiving detailed information from the courts to record individual assessments and collections.

ii. Draft FY 2015 Financial Projection and Supplemental Request

Mr. Freebourn advised the Commission that the agency will not make it through FY 15 in the black. The estimated supplemental request is now at \$6.3 million. The letters in the meeting packet show why there is a shortfall in each program.

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

The only change to the budget submission since the August Commission meeting is the market adjustment for attorneys. More information will be available when the Governor issues his budget on November 15.

## **7. Public Comment**

There was no public comment.

Chairman Gillespie announced that Brent Doig, the Office of Budget and Program Planning budget analyst who has worked with OPD since the agency launched, is leaving state government. He presented Mr. Doig with a token of appreciation and wished him well on behalf of the agency and the Commission. Chairman Gillespie introduced Amy Sassano, Deputy Budget Director, who will work with OPD through the legislative session.

## **8. Legislative Issues**

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

The Law and Justice Interim Committee approved eight OPD bills for drafting and the process is underway.

### *B. Legislative Update*

The first legislative tracking form is included in the meeting materials. It will track the progress of OPD bills, HB 2 and HB 3 (the budget and supplemental bills), and any other bills with fiscal or program impacts on OPD.

### *C. Interim Activity and Legislative Timeline*

The interim committees are winding down. The budget process is a long one; as mentioned previously, the Governor's budget is due to be released on November 15.

## **9. Substitution of Judges (\*Action Item)**

Chief Hooks recapped the extensive background information on judge substitution included in his written report. This issue will impact the entire justice system. The current substitution rule goes back to the Copper King days, and applies to civil as well as criminal cases. Most judges don't like the rule and some have faulted OPD for the way the rule has been used, specifically in Great Falls and Missoula.

The Montana Judges Association failed in their legislative attempts to abolish or modify the rule, and now they have filed a petition with the Supreme Court asking to modify the rule in several ways. The Court reviewed the responses in opposition to the changes and mandated a mediation group, which includes OPD. Chief Hooks said that a disproportionate focus has been on OPD's alleged abuse of the rule. He disagrees with that assessment, but drafted a policy in response to those accusations. The draft policy has been through several revisions. It implements the Commission's standard that says the decision to substitute a judge is made by the attorney and not by the client. It strives to find the middle ground between the attorney's ability to act independently and monitoring attorney performance. Chief Hooks believes that it is incumbent on the agency's leadership to show that if there is a perceived problem, we are taking steps to fix it. He is not asking for the Commission to take a final vote on the proposed policy today, but invites further discussion.

Chairman Gillespie invited public comment.

Chris Abbott, assistant public defender in the Helena office and member of the union executive board, said that he has been an observer at the mediation sessions. His major concern regarding the proposed policy is that managers have to approve substitutions in certain cases. This would be the only area where a case strategy decision is subject to management approval. He believes there is the potential to erode the fundamental rule of practice related to professional conduct. Lawyers shouldn't have to "conserve" their substitutions to avoid management approval. He also took issue with the phrase "exceptional circumstances" regarding the duty to

consult with the client and suggested different language to reflect the duty to consult as feasible. Finally, the union would prefer that the agency defer adopting a final policy until mediation is complete so that it can reflect the final result of the mediation.

In response to questions from the Commission, Mr. Abbott said that management oversight should be addressed in terms of general management authority regarding performance evaluations rather than being initiated by a specific trigger (i.e., the number of substitutions). He does not support having the client sign the substitution motion because the court cannot be allowed to supervise or interfere with the attorney-client relationship. Commissioners Petaja and Jessee agreed that more information is needed before making a decision.

Region 3 (Great Falls) Deputy Public Defender Matt McKittrick did not get much feedback on the draft policy that he distributed to his attorneys. He agreed that a lawyer cannot exercise independent judgment if they have to get approval from the supervisor for a substitution decision. Any requirement of consultation or approval creates interference. He said there won't be a solution that will satisfy everyone, but the proposed policy provides the framework to give judges evidence that we are taking their concerns seriously.

Virtually everyone except the judges are opposed to the rule changes, including the county attorneys. If mediation fails, the judges' request will go back to the Supreme Court to make a decision.

Commissioner Jessee moved to table the policy decision. Commissioner Petaja seconded and the motion carried. Chairman Gillespie thanked Mr. Abbott and Mr. McKittrick for their comments. The language can be improved to allow management to assist and enhance rather than to interfere in the attorney's work. The mediation group will be informed at their next meeting that the policy is in development.

#### **10. Governor's Report (\*Action Item)**

The Commission's report to the Governor, Legislature and Supreme Court is required by Title 47. Mr. Freebourn reviewed the changes from the last report. The agency statistics and the expenditures by court by case type are not yet complete.

The Commission discussed the case weight report and made suggestions to make it easier to understand. The case weights are extremely high, and were used to develop the request for additional FTE in the decision packages. The agency addressed attorney pay issues in the last legislative session, and will focus on workload in the upcoming session. Mr. Freebourn invited other suggestions for improvement to the report prior to publication.

#### **11. Public Comment**

There was no additional public comment.

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

Commissioner Jessee had an item of new business. He said that the Region 9 (Billings) office is overwhelmed and under-resourced. He would like to look at how resources are allocated throughout the system. It will be added to a future agenda for discussion.

Commissioner Novak asked if the agency has a grant writer. Statutorily, seeking grant funding is part of the training coordinator's job. Chief Hooks is on the Montana Board of Crime Control; he and other members are continuously looking for grant possibilities, but they are hard to come by. Commissioner Sherwood said that from her experience, federal funds are geared toward prosecution and law enforcement; it is very difficult to get funding for public defense.

*A. Review Committee Purposes/Appointments*

i. New committee to address mental health issues

Chairman Gillespie created a new committee focused on holistic defense in response to the enthusiasm generated by the social worker presentation at the annual meeting. He appointed Commissioner Jessee as chair, and Commissioners Metzger and Sherwood as committee members. Chairman Gillespie would like a committee member to accompany Ms. Benevides to the appropriations committee meetings to explain how this type of program supports OPD's core mission in addition to providing a benefit to the community and reducing jail populations.

ii. Proposal to combine contracts committees

Action was taken on this under item 5. D.

*B. Pay Adjustments for Direct Reports (\*Action Item)*

During the executive session, the Commission unanimously approved a 5% pay increase for Chief Hooks, Chief Zolynski and Mr. Freebourn. Ms. Neal will receive a 10% increase.

*C. Motion to Refuse Appellate Cases (\*Action Item)*

Commissioner Jessee moved that Chief Zolynski develop a draft motion for discussion at the next meeting. Commissioner Petaja seconded and the motion carried.

*D. Substitution of Judges (\*Action Item)*

This item was previously tabled.

*E. Governor's Report (\*Action Item)*

Commissioner Jessee moved to authorize Chairman Gillespie to submit the FY 14 Report to the Governor, Supreme Court and Legislature on behalf of the Commission when it is finalized. Commissioner Sherwood seconded and the motion carried.

**13. Set Future Commission Meeting Dates**

Chairman Gillespie would like to meet before or just after the session begins. Commissioner Novak would like to meet in December to look one more time at where the judge substitution issue stands, possibly by conference call.

Chairman Gillespie urged everyone to look at the election results next week and make an effort to reach out to their representatives.

**14. Adjourn**

The meeting adjourned at 4:25 p.m.