

# MONTANA PUBLIC DEFENDER COMMISSION

## CONFERENCE CALL

Public Location: Butte Central Services Office  
44 W. Park, Butte MT 59701

And All Statewide OPD Offices

November 30, 2016

## MINUTES

*(Approved at the January 20, 2017 Meeting)*

### **Commissioners Present**

Ann Sherwood, Pablo (Acting Chair); Brian Gallik, Bozeman; Mark Parker, Billings; Larry Mansch, Missoula; Maylinn Smith, Missoula; Mike Metzger, Billings; Margaret Novak, Chester; Roy Brown, Billings.

### **Commissioners Absent**

Terry Jessee, Billings. Commissioners Fritz Gillespie and Bonnie Olson have resigned.

### **Staff Members Present**

Bill Hooks, Chief Public Defender; Chad Wright, Chief Appellate Defender; Kristina Neal, Conflict Coordinator; Scott Cruse, Chief Administrator; Wendy Johnson, Contract Manager; Peter Ohman, Training Coordinator; Carleen Green, Accounting Supervisor; Marsha Parr, Case Management Support; Cathy Doyle, Administrative Assistant, Lynn MacMillan, Contract Assistant

### **Interested Parties**

Jim Taylor, Legal Director, ACLU Montana; Malissa Williams, Office of Budget and Program Planning; Timm Twardoski, Executive Director, AFSCME Council 9. The following OPD offices joined the call and hosted staff, contract attorneys and other interested persons: Kalispell, Polson, Missoula, Hamilton, Great Falls, Helena, Havre, Billings, Glendive and Miles City.

### **1. Call to Order and Roll Call**

Vice-Chair Ann Sherwood assumed the chair and called the meeting to order at 2:03 p.m. Commissioner Sherwood called the roll and a quorum was established. She acknowledged former Chairman Fritz Gillespie and his service to OPD. He was appointed to the Commission in 2008 and served as chair for the last six and a half years. He was diligent and tireless. The Commission is grateful to his commitment to indigent defense. Commissioner Sherwood also acknowledged Bonnie Olson's hard work on the Commission, and thanked outgoing Chief Administrator Scott Cruse who worked hard with a difficult job.

### **2. Revisit Mitigation Plan (\*Action Item)**

Accounting Supervisor Carleen Green explained the most recent forecast, which includes actual expenditures through October. She noted that the shortfall is currently expected to be approximately \$2.5 million, which is within the range originally estimated in February. The agency will be able to meet payroll, rents and interagency obligations (e.g., IT costs) for the remainder of FY 17 assuming that all contract work ceases on April 15. If the expenditure rate increases, that date could move up to mid-March.

Commissioner Sherwood invited questions. In response to Commissioner Brown, Ms. Green said the cost of hiring the modified FTE to address the case backlog is not included in the estimate. Hopefully the contract costs will go down to cover the increased payroll costs as the mitigation plan proceeds. There are fewer new non-conflict cases being contracted, although contracts for the external conflicts are not decreasing much. Contractors are still working on existing cases, so it will be a while before the savings are realized.

Commissioner Sherwood said that given Ms. Green's report, she would like to discuss maintaining workforce stability. Commissioner Gallik agreed that the FTE need to understand that their jobs are secure. Commissioner Smith moved to amend the mitigation plan to make it a priority to ensure that the in-house workforce remains stable through FY 17. Commissioner Novak seconded and Commissioner Sherwood invited public comment.

Numerous staff members spoke in support of the motion, while expressing concern regarding increased caseloads. Ms. Green wants to make sure that everyone understands that payroll cannot be transferred to operating to cover contract costs. The Commission understands; that is the basis for the motion.

Contract Manager Wendy Johnson absolutely supports protecting the employees, but wonders about the logistics for the contract work force. She can see contractors having concerns about continuing to represent OPD clients and not being paid for their work.

Chief Public Defender Bill Hooks said that he also has concerns about cutting off contractors who are in the middle of a case, but he is open to options. He suggested following the federal system, where contractors would have to wait for payment until after the beginning of the new fiscal year. However, Ms. Green said services performed in FY 17 cannot be paid with FY 18 funds. Ms. Johnson said if contractors incur costs that OPD cannot pay, the individual contractor would have to request supplemental funding from the legislature.

Jim Taylor, ACLU Montana Legal Director, suggested that instead of stopping all contract work in April, a better approach would be to cut off all intake for all case types for both contractors and FTE. This would protect existing clients and make future clients the courts' problem.

Regional Deputy Public Defenders Doug Day (Lewistown/Billings) and Nick Aemisegger (Kalispell) said that they are working the mitigation plan to the best of their ability, and if there is any foot dragging it is not intentional. Mr. Aemisegger said he has had to actively recruit to fill the modified positions. They are willing to help in any way the Commission directs.

Timm Twardoski, AFCME Council 9 Executive Director, said the agency is running out of time to implement the mitigation plan. The FTE cannot continue to maintain the current workload and he is afraid good employees will start to leave. Mr. Twardoski asked who is enforcing the mitigation plan and tracking progress by region. Commissioner Sherwood replied that the Chief Public Defender oversees the regions and the Commission oversees the Chief.

The question was called and the motion passed unanimously.

Commissioner Sherwood initiated a discussion regarding workload. Chief Hooks has drafted letters to the district courts and the courts of limited jurisdiction explaining the mitigation plan. The goal is to provide a consistent message to the judiciary. He suggests that the letters be sent on behalf of the Commission rather than with his signature as just one of the four program managers. Other members suggested that the governor's office and the legislature be included so that all branches of government are aware of the situation.

Commissioner Parker is not comfortable signing a letter that has representations of fact because he doesn't believe the Commission has been provided with reliable information. Commissioner Gallik concurred. Chief Hooks said the letters he drafted explain the mitigation plan and say OPD will try to minimize the impact on the courts. It is just a heads up regarding possible delays, but doesn't include any numbers. That doesn't change Commissioner Parker's opinion. He believes the Commission needs to put someone in charge who can make decisions immediately. Commissioner Brown agreed. Commissioner Smith doesn't think the Commission has the authority to make that kind of appointment. Commissioner Sherwood invited public comment.

Mr. Taylor said that the agency is still bound by statute in developing a mitigation plan, and the Commission can't ignore statutes it doesn't like. He believes it is the Chief Public Defender's job to hire a Chief Administrator, not the Commission's. He said that the FTE attorneys can't maintain the increased caseloads they are facing, and at some point they will leave.

Ms. Kaleczyc reiterated that the regions are ready to do what it takes to implement the mitigation plan. She doesn't have the authority to create a backlog; she has to assign the cases. Thus the mitigation effort is taking a huge toll on staff and ultimately clients.

Representative Ellie Hill is starting her fourth term in the House. A letter like this will have political ramifications on both sides of the aisle. She agreed with Commissioner Parker that the governor's office and the legislature want to see one person representing the agency and she encouraged the Commission to work with Governor Bullock and Speaker Knudsen.

Commissioner Sherwood asked Chief Hooks to speak on the prioritization of cases. Chief Hooks is working on a plan to represent people more consistently across the state due to the upcoming backlog. The prioritization won't be the same in every region, but cases will be triaged based on criteria used in Minnesota—is the client incarcerated, is the right to counsel constitutional or statutory, etc.

Jessica Polan, Assistant Public Defender in Kalispell, chairs the State Bar's Lawyer's Assistance Program. She said criminal defense lawyers have the highest rate of depression and suicide of any profession. Doubling caseloads will affect public defenders, and they need to know when the crisis will end to prevent burnout. Mark Beck, Criminal Investigator in Missoula, said that support staff and investigators are also affected.

Commissioner Sherwood asked staff and management if they can have sufficient information within the next two weeks to establish a timeline for when the cutoff would have to happen. The Commission could then speak with the governor's office before going forward with the letters as Rep. Hill suggested. Mr. Day asked if the "cutoff" refers only to low level cases. It is hard to imagine telling a contractor working on a big felony with a trial scheduled in July to stop working the case in April. Commissioner Sherwood agreed that we need more specific information before discussing timelines. Commissioner Smith asked how much of the new caseload is DN. Ms. Green projects a 3.6% increase in DN cases over last year.

Commissioner Sherwood asked staff to provide hard numbers in two weeks to tell the Commission when the agency will have to stop making appointments, and asked the other members to help out with ideas.

### **3. Future Planning**

#### **A. Interim Chief Administrator (\*Action Item)**

Training Coordinator Peter Ohman is willing to supervise Program 4 (Central Services) on a limited basis following Mr. Cruse's departure. Commissioner Smith moved to appoint Mr. Ohman as the interim program manager, with responsibility for approving time and monitoring the budget. Commissioner Gallik seconded.

Mr. Ohman will not be responsible for enforcing the mitigation plan or going to the legislature on behalf of the agency. Mr. Taylor believes authority to make the appointment belongs to Chief Hooks by statute. However, the agency reorganization creating Program 4 and the co-equal management model were approved by the executive branch and have been implemented. Commissioner Smith amended her motion to add "with the consent of Chief Hooks." Chief Hooks encouraged the Commission to appoint Mr. Ohman. Commissioner Metzger asked what the interim period would be. Commissioner Sherwood replied that it will be until a new chief administrator is hired or another management structure is implemented. The question was called and the motion carried unanimously.

**B. Legislative Session**

The Commission discussed contracting for a communications person or lobbyist to act as a single agency voice at the legislature. There was consensus that there needs to be one consistent message, whether it comes from staff, Commission members or a contractor. There will be further discussion at the next meeting. Mr. Twardoski asked that the agency coordinate legislative activities with AFSCME.

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

Commissioner Sherwood advised that she is not able to assume the chair on an on-going basis because of her professional responsibilities. She invited nominations for officers but there were none. Commissioner Sherwood will continue to act as chair until new officers are elected.

**5. Public Comment**

Mr. Taylor said that the ACLU volunteered their conference line for this call because he believes it is critical to have wide public participation, but they won't do it again. Commissioner Sherwood agreed that public participation is important if the agency can pay those costs. She would also like to afford OPD clients the ability to participate.

James Reavis, Assistant Appellate Defender said it doesn't feel like we have an advocate at the top. He believes that if the Commission were to engage more with staff, they would respond positively; rank and file employees can be a valuable resource, and many people would step up if given the opportunity.

William Boggs, Contract Attorney from Missoula, said that at some point the Commission should hear from contract attorneys. Chair Sherwood asked if a contractor representative would speak at the next meeting, and Noel Larrivee volunteered.

**6. Old Business/New Business**

**A. Revisit Mitigation Plan (\*Action Item)**

This item was acted on previously.

**B. Interim Chief Administrator (\*Action Item)**

This item was acted on previously.

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

This item was deferred to the next meeting.

**D. Other Business**

Another meeting will be scheduled in approximately two weeks.

**7. Adjourn**

Commissioner Parker moved to adjourn. Commissioner Gallik seconded and the motion carried. The meeting adjourned at 4:00 p.m.