

MONTANA PUBLIC DEFENDER COMMISSION

Holiday Inn Downtown, Helena, MT

February 10-11, 2012

Minutes

Approved at the April 13, 2012 Meeting

FRIDAY, FEBRUARY 10

Commissioners Present

Margaret Novak, Chester; Charles Petaja, Helena; Richard (Fritz) Gillespie, Helena; Ann Sherwood, Pablo; Christopher Daem, Billings; Alfred Avignone, Bozeman; Kenneth Olson, Great Falls

Commissioners Absent

William Snell, Billings; Majel Russell, Billings; Caroline Fleming, Miles City. Terry Jessee, Billings, has resigned.

Staff Members Present

David Stenerson, Interim Chief Public Defender; Joslyn Hunt, Chief Appellate Defender; Kristina Neal, Conflict Coordinator; Larry Murphy, Contracts Manager; Harry Freebourn, Administrative Director; Peter Ohman, Regional Deputy Public Defender (RDPD), Bozeman; David Duke, RDPD, Billings; John Putikka, RDPD, Kalispell; Dan Minnis, RDPD, Havre; Jon Moog, RDPD, Helena; Matt McKittrick, RDPD, Great Falls; Doug Day, RDPD, Lewistown; Mori Woods, Investigator Supervisor

Liaisons

Nick Aemisegger, liaison for union attorneys, and Lisa Korchinski, liaison for non-management appellate defender staff and attorneys, were in attendance. Laura Masica, liaison for union support staff and investigators, presented a written report but did not attend.

Interested Persons

Timm Twardoski, Executive Director, American Federation of State, County and Municipal Employees (AFSCME); Niki Zupanic, Public Policy Director, American Civil Liberties Union of Montana (ACLU); Greg DeWitt, Legislative Fiscal Division; Bill Hooks, Chief Public Defender finalist

1. Call to Order

The Montana Public Defender Commission meeting was called to order by Chairman Fritz Gillespie at 1:15 p.m.

2. Approval of Minutes of October 24, 2011 meeting (*Action Item)

Commissioner Avignone moved to adopt the minutes as drafted. Commissioner Olson seconded and the motion carried.

3. Commission Liaisons

Laura Masica, liaison for support staff and investigators, presented a written report. Lisa Korchinski, liaison for non-management appellate defender staff and attorneys distributed her report. She questioned the accuracy of the survey conducted by the attorney liaison and wanted to make it clear that the appellate attorneys chose not to participate in the survey.

Attorney liaison Nick Aemisegger said that he will always make a specific statement if he is including the Appellate office in his reports; otherwise the assumption is that they are excluded. The survey was sent to all staff attorneys along with a copy of the ACLU report, and he was pleased with the response rate.

Mr. Aemisegger also submitted a report that was not posted. Chairman Gillespie concluded that it was a continuation of the personnel matter to be discussed in executive session later in the day and advised Mr. Aemisegger that distribution beyond the Commission members would be inappropriate.

A supplemental report was also prepared and distributed by Mr. Aemisegger. It states that one of the primary concerns of the staff attorneys is that the Commission does not act decisively. He urged the Commission to learn from past problems and hold management accountable when the new chief is selected. The report also included documents related to the issues of substitution of judges and treatment courts.

Chairman Gillespie invited Myshell Uhl to join the team working on the treatment court issue. He said that the Commission is in favor of these courts because they benefit clients, but there are areas that need to be addressed, possibly through legislative action. First is the issue of working within the scope of the agency, which requires an eligibility determination and client representation prior to conviction rather than postconviction. The second issue is the ethical component. The Commission must be fiscally responsible in serving only those identified in statute, and must protect public defenders from ethical violations that might arise as members of "treatment teams." He noted that the Commission must not only be decisive when they take action, but must also be correct.

Finally, Mr. Aemisegger asked if the liaison reports could be moved to the end of the agenda in the future to allow for a more conversational format.

4. Collective Bargaining Update

Commissioner Petaja said that there are no easy answers to the problems, but the bargaining team is making progress. Timm Twardoski, AFSCME Executive Director, agreed that they are close to agreement. The line staff appreciate having a Commission member in attendance. In other news, the pending lawsuit against the legislature has been remanded back to the hearing officer and briefs have been submitted.

5. Commission Questions/Comments on Reports

A. Public Participation Guidelines

B. Appellate Defender Program Report

Chief Appellate Defender Joslyn Hunt submitted a lengthy report to show her operation in more detail than usual. She is recruiting again, and the caseload continues to increase. She elaborated on the turnover she experiences due to the pay disparity with the Attorney General's office and other state agencies. She also confirmed the large increase in DN appeals and noted that it will only get worse as the increases the regional offices are experiencing in DN cases make their way to the appellate arena. These cases are heavy on transcript costs, and create a staffing problem because of the 30-day time frame.

C. Conflict Coordinator Report

Conflict Coordinator Kristina Neal said that she is seeing a huge spike in DN work, especially in Region 3 (Great Falls) where it is almost impossible to find conflict counsel to accommodate the volume. Ms. Neal said that Region 3 is experiencing backlash against some cases from last

summer, and things that used to be resolved informally are now resulting in formal action, increasing caseloads for the prosecution as well. The large increase in contract costs is primarily stemming from the DN situation. Administrative Director Harry Freebourn noted that the regions that do mostly contract work also have DN cases but these don't show on the conflict coordinator report because they would be contracted out anyway.

Chairman Gillespie said that Ms. Neal's time keeping demonstrates that the conflict coordinator is really a full time position. So far she has had very little time to mentor or observe attorneys because of the workload, so there is room to expand the role. Recently the question of who would act as conflict coordinator in Ms. Neal's absence arose. Chairman Gillespie made an executive decision to reassign Contract Manager Larry Murphy to the role, although that is not the optimum solution. He believes the conflict coordinator should be a full time position with support staff and that the Commission needs the ability to make other arrangements for coverage when she is off.

D. Chief Public Defender Report

Interim Chief Public Defender Dave Stenerson provided the Commission with an extensive written report. Not covered in the report is the oil boom population increase in Eastern Montana which may have a severe impact on the agency over time. The agency was able to obtain free VisionNet equipment for the Miles City and Glendive offices that will help reduce travel time in those regions, increasing productivity for FTE and saving windshield time for contractors.

E. Contract Manager Report

Mr. Murphy reviewed the highlights of his written report. In addition, he has been considering ways to encourage contractors to resolve cases since there is no incentive for them to do so under the hourly rate schedule. It might include paying at the conclusion of a case as the federal defenders do (instead of the current practice of paying monthly as the case goes along), or developing soft caps for various case types.

Chairman Gillespie asked if contract attorney evaluations include document evaluation. Mr. Murphy said he asks for motions and briefs, and if the writing indicates a need for training, he refers them to Training Coordinator Eric Olson. In terms of closings, he does a monthly audit to see if the billing and the open/closed status are in sync. However, his focus is on one-on-one meetings and review of complaints, which he maintains on a log with documentation of the resolution.

F. Training Report

Chief Stenerson reported for Mr. Olson. The annual boot camp will be held in February. It offers training for newer attorneys and will focus on voir dire and cross examination this year. The next incarnation of computer training will deal with collateral issues with federal prosecutions. Mr. Olson received a mini-grant to work on the representation standard for children and hopes to have it drafted in April.

Chairman Gillespie said there has been criticism that the training program places too much emphasis on trial skills and not enough on day to day lawyering. He asked how that is being addressed. Chief Stenerson replied that Assistant Public Defender Ed Sheehy is working with Mr. Olson and the regional deputies on a mentoring program. He contacts new attorneys directly, goes to hearings with them, and discusses ways to for them to improve.

G. Great Falls Substitution Issue

Chief Stenerson, Mr. Aemisegger and Region 3 Deputy Public Defender Matt McKittrick have been working on this issue but have not yet reached agreement.

Chairman Gillespie asked how many “special duties” agency staff handle, and how many are mandated by the state. Mr. Freebourn said there are over 20 special teams and appointments, and more than half of those are state-driven. He will update the list for distribution and hopes that it will help explain why the agency has to do certain things that might be considered micromanaging.

6. Strategic Planning Committee Report

Commissioner Olson chairs this committee which also includes Commissioners Snell and Petaja. They’ve met several times, examining the current strategic plan and developing suggested changes to be considered by the full Commission in the future. As a group, they decided to make changes rather than start from scratch.

Certain issues may require consideration by the Legislative and Budget committees, and will be referred to them as appropriate. Some issues under discussion are creating a separate program for the conflict office; how to handle civil cases in general, but especially DN cases (possibly another new program); parity in attorney pay and an increase in contract attorney rates; and caseloads and case caps. The committee noted that the lack of appropriate funding has created a lot of difficulties, and they hope that reorganizing into multiple programs will help to delineate problems and reflect funding that is truly needed to the legislature.

Chairman Gillespie invited Legislative Fiscal Analyst Greg DeWitt to attend the committee meetings and provide assistance to avoid difficulties down the road.

7. Legislative Update

A. Law and Justice Interim Committee

Upcoming meetings are identified in the Legislative Update schedule.

B. Response to the ACLU Report

A draft that addresses each of the 32 AU recommendations and incorporates the ACLU’s comments is in the works. Chairman Gillespie will provide an overview to accompany the specific actions taken in response to each recommendation. He will circulate it to the Commission for review before publishing it in time for the April Law and Justice Interim Committee meeting.

C. Proposed Legislation for 2013 Session

The proposals will be referred to the Legislative Committee for discussion.

8. Budget Issues

A. Current Financial and Operating Status

With the permission of the Governor’ office, 10 modified FTE have been added for FY 12, bringing the total number of FTE to 218.5. One modified position went to the appellate office, and the rest to Program 1 to help address caseload issues. The case growth is currently projected to be 6%. Assessments and collections are also increasing, but the collections are not keeping pace with the increase in assessments. There is a decision package for another FTE to handle the growth in accounts receivable; this doesn’t reflect growth in cash, just in receivables.

Increase in DN Cases (potential financial shortfall)

As mentioned earlier, the agency is experiencing an alarming increase in the number of DN cases, especially in Region 3 (Great Falls). Marilyn Daumiller, Legislative Fiscal Analyst for the Department of Public Health and Human Services, was asked to participate in a discussion of the increase. She has the public assistance program, including Child and Family Services, foster care, and subsidized adoption. The increase in DN cases affects multiple agencies, and she would like to walk forward together to the legislature for ways to address government efficiency and cost control. She is looking at the big picture, including tribal issues, and would like permission from the Commission to work with Mr. Freebourn and visit with the regional deputies to see what is happening in their areas. Chairman Gillespie wants everyone to know that OPD is not dealing with this issue alone. Mr. Freebourn noted that the projected half a million dollar shortfall due to the increase in DN cases will be pretty much impossible to mitigate in other areas of the operation this late in the fiscal year. The agency might have to ask to move funds from next year's appropriation.

B. Executive Planning Process (EPP) for 2015 Biennium

This item will be referred to the Budget Committee. Mr. Freebourn quickly reviewed the timeline for the budgeting process on page 3. Commission members should share their ideas/priorities with the Budget Committee.

9. Committee Membership

The Budget and Legislative committees could use additional members, especially since they are preparing to undertake major projects. Commissioners Sherwood and Avignone volunteered to join the Legislative committee. Commissioners Olson and Daem will join the Budget committee. Chairman Gillespie will back up Commissioner Petaja on the Collective Bargaining committee. Commissioner Avignone will chair the Proficiency Determination for Contract Attorneys committee.

Mr. Freebourn was assigned to form a team to revise the performance evaluation forms for FTE, and he asked for permission to work with the Personnel committee on this. Chairman Gillespie agreed. Chairman Gillespie would also like to see the job descriptions revised, and the new evaluation format should tie to the job description. Chief Stenerson is working with Eric Olson, Mr. Murphy and Human Resource Officer Barb Kain to update the job descriptions.

10. Public Comment

Region 3 (Great Falls) Deputy Public Defender Matt McKittrick was asked by his staff to bring a workplace safety issue to the Commission. They have two separate entries that are open during regular hours and they want to create barriers so that visitors have to be buzzed in. The staff are particularly concerned about mentally ill clients entering the office unfettered and without appointments. They sometimes need to be escorted out of the office.

Region 9 (Billings) Deputy Public Defender David Duke said that attorney turnover due to low pay is a significant problem in his region. He claimed that his three investigators make more than some attorneys, and one doesn't even have a college degree.

Investigator Supervisor Mori Woods replied that the newest hire met the minimum requirements, is the lowest paid investigator in the state and does not make more than any attorney. The other two investigators have been employed by the county and the state for a very long time and it is possible that they are paid more than entry level attorneys.

Mr. Duke said that the agency cannot continue to support specialty courts, despite their popularity, unless the legislature provides additional funding. They are postconviction, so there is no advocacy or legal work being done by the FTE assigned to the six specialty courts in his region. Commissioner Petaja said that the Commission had previously voted not to support DUI courts and asked why two are being served in Billings. Mr. Freebourn said that these two courts were grandfathered in since the office was already involved in them. The two tests for serving specialty courts are that they have to provide a defense purpose and the clients have to qualify for services. There was a lengthy discussion regarding how the various specialty courts operate in different regions. Chairman Gillespie asked what role the public defender plays when the client is sanctioned to two or three days in jail by the treatment court. The public defender may advocate for fewer days in jail, but it is a treatment team decision to jail someone on an informal basis, and the client has waived their rights as part of the treatment court contract, so there is no adversarial component.

Commissioner Petaja made a motion asking Chairman Gillespie to write a letter notifying judges that public defenders will be withdrawn from their courts. Commissioner Avignone asked if this only applies to DUI courts or to all specialty courts. Further discussion ensued regarding whether the action should be across the board or limited to DUI courts, whether or not grandfathering is appropriate, statutory changes that would be required to allow public defenders to serve in postconviction courts, and a time frame for withdrawal. Mr. Freebourn will update the specialty court study that was done some time ago and distribute it to the Commission. The Commission decided to table the issue for now.

Mr. Twardoski offered his assistance as well as that of support staff, attorneys and investigators on the Commission's committees; they have a lot to offer. He also noted that Mr. Duke is losing not only attorneys, but also support staff and investigators. It is parallel in each category, and it is important to look at the problem as a whole.

Region 4 (Helena) Deputy Public Defender Jon Moog advocated for two bumps on the pay ladder—the one that was missed as well as the next one that is due. Mr. Freebourn said that the new salary survey will provide the most current data, and they may use an inflator so that pay isn't continuously lagging.

Assistant Appellate Defenders Lisa Korchinski and Chase Naber distributed a letter asking the Commission to establish a policy against accepting anonymous hearsay which they believe is detrimental to morale. They would also like the ACLU report to be held to this standard, and said that the ACLU should be asked to substantiate the accusations that were made anonymously and anecdotally. Ms. Korchinski's public comment was not made in her role as liaison.

Region 1 (Kalispell) Deputy Public Defender John Putikka said that his region is overloaded with misdemeanor cases. They have also had two major homicides. He denied counsel to one defendant, but that person is asking the judge to overrule the determination. The second was taken by the Major Crime Unit.

Assistant Public Defender Deirdre Caughlan submitted written public comment informing the Commission that Mr. Aemisegger, attorney liaison, does not represent her or most of the other Region 5 attorneys in his report criticizing the Commission and the interim chief.

11. Executive Session (Closed)

Chairman Gillespie closed the meeting closed at 4:50 p.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.”

During the closed session, the Commission endorsed adherence to the provisions of the union contract for vacancy announcements for union positions, and found that the primary position under discussion had been properly noticed before the interviews took place. They concluded that the placement was made with legal authority and the person hired will not be removed. A second position under discussion was not a union position and was also filled appropriately per 39-31-303, MCA.

At the conclusion of the closed session the Commission went into recess until 8:00 a.m. Saturday.

SATURDAY, FEBRUARY 11

Reconvene

Chairman Gillespie reconvened the meeting at 8:15 a.m.

Commissioners Present

Margaret Novak, Chester; Charles Petaja, Helena; Richard (Fritz) Gillespie, Helena; Ann Sherwood, Pablo; Christopher Daem, Billings; Alfred Avignone, Bozeman; Kenneth Olson, Great Falls

Commissioners Absent

William Snell, Billings; Majel Russell, Billings; Caroline Fleming, Miles City. Terry Jessee, Billings, has resigned.

State Human Resource Officers

Rende Mackay and Peggy MacEwen

Interested Persons

Timm Twardoski, Executive Director, American Federation of State, County and Municipal Employees (AFSCME); Niki Zupanic, Public Policy Director, American Civil Liberties Union of Montana (ACLU)

12. Chief Public Defender Interviews

Chairman Gillespie said that each interviewee will be asked the same set of questions and that following the set questions Commission members may ask follow up questions. The members of the public will not be allowed to ask questions, but may make public comment at the conclusion of both interviews. Chairman Gillespie introduced Ms. MacEwen and Ms. Mackay, and thanked them for their help throughout the hiring process. They will document the actual interviews as part of the overall recruitment and selection process.

- A. David E. Stenerson
- B. William F. Hooks

13. Public Comment

Mr. Aemisegger spoke on his own behalf and not as the liaison. He appreciated Mr. Stenerson's regular email communications with all employees during his time as interim. He believes that communication and transparency will go a long way in unifying the agency. He thanked the Commission for their work as volunteers, and especially Chairman Gillespie for the amount of time he spends on the agency. Mr. Aemisegger was surprised by the clarity of Mr. Hooks' vision and found him inspiring. He believes the Commission has two good candidates from which to choose.

Niki Zupanic said that she doesn't envy the decision the Commission is making today. The process has been thoughtful and deliberate and has resulted in two highly qualified and commendable candidates. The ACLU will be happy to work with either as Chief Public Defender. She thanked Mr. Stenerson for stepping up to the plate as the interim chief; he has acquitted himself ably.

John Putikka is attending this meeting as an individual and not as an OPD employee. He has known both candidates for many years, and they are both very qualified individuals. The Commission has a difficult choice. He trusts that either candidate would be able to move the agency forward in a positive direction and he will support either choice.

14. Executive Session (Closed)

Chairman Gillespie closed the meeting, 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."

15. Announce Selection of Chief Public Defender

Chairman Gillespie reviewed the hiring process, which included screening interviews, a review of writing samples and reference checks prior to the interviews. The Commission has selected Mr. Hooks as the new Chief Public Defender. Chairman Gillespie thanked Mr. Stenerson for his service and for his gracious offer of guidance and assistance as needed.

There will be a transition as Mr. Hooks closes his private practice. Chairman Gillespie thanked all who took time the time to participate in the process; it indicates dedication to providing quality public defense to the state.

16. Set future Commission meeting dates

The members will be polled for the next meeting date.

17. Adjourn

The meeting adjourned at 2:50 p.m.