

MONTANA PUBLIC DEFENDER COMMISSION
CONTRACTS PROCESS COMMITTEE MEETING

Goodkind Building
139 North Last Chance Gulch, Helena, MT 59601

July 11, 2013

MINUTES

(Approved at the July 18, 2014 Committee Meeting)

Committee Members Present

Chuck Petaja, Helena

Committee Members Absent

Ken Olson, Great Falls

Agency Team Members Present

Wade Zolynski, Chief Appellate Defender; Bill Hooks, Chief Public Defender; Harry Freebourn, Administrative Director; Larry Murphy, Contract Manager; Kristina Neal, Conflict Coordinator

Interested Parties

Fritz Gillespie, Commission Chair; Niki Zupanic, Public Policy Director, American Civil Liberties Union of Montana

Call to Order

Committee Chair Chuck Petaja called the meeting of the Contracts Process Committee to order at 9:05 a.m.

Approval of Minutes of June 11, 2013 meeting (*Action Item)

Commissioner Petaja moved to approve the minutes as drafted and the motion carried.

Contract Attorney Rate Analysis

Administrative Director Harry Freebourn distributed the rate analysis worksheet he developed for committee input. The objective is to set a target rate for obtaining competent services based on a solid analysis. The resulting rate will be the basis for funding discussions with the governor's office and the legislature. He noted that only attorney rates are under discussion at this point, not investigators or mental health providers.

The rates on the worksheet for other states, federal public defender, private Montana bar and Montana state agency legal services (services provided to other state agencies) are known. How those rates are to be weighted by percentage is for the committee and ultimately the Commission to decide.

The next section on the worksheet is to consider discounts (if any) based on the nature of public defense as a benefit to society, and the State of Montana’s AAA credit rating. The private bar accepts a credit risk with their private clientele, but can be certain that they will be paid on time for OPD cases.

As an example, if the new rate should be most similar to other states’ rates, that rate might be weighted at 50%. For illustration purposes, the calculation could look like this:

Other states	\$65	x 50%	= \$32.50
Federal	\$125	x 25%	= \$31.25
Private bar	\$150	x 20%	= \$30.00
State legal services	\$95.5	x 5%	= <u>\$ 4.78</u>
Subtotal			\$98.53
<i>Less Discounts</i>			
For State credit rating		10%	= \$9.85
For societal benefit (pro bono)		0%	= <u>0</u>
Total			\$88.68

The actual percentages used to weight each area are to be determined by the Commission based on factors such as who the agency competes against for recruiting contractors. The goal is to demonstrate that the resulting blended rate is reasonable based on known factors and sound consideration of possible variables.

Contract Manager Larry Murphy suggested that the committee might want to consider different rates for criminal and civil work, or in-court vs. out-of-court rates. Commissioner Gillespie said that the federal defenders no longer use the in-court/out-of-court rate system. Commissioner Petaja noted that it would be very complex to implement. Other possible considerations discussed were the minimum of \$80 per hour reported by 43% of Montana bar members in private practice, paralegal rates which exceed the current \$60 attorney rates, the current OPD social worker rate of \$75 per hour, and rates for other non-legal services in the community.

Commissioner Petaja stated that now is the time to establish a reasonable contractor rate. The FTE attorneys are finally getting a substantial increase, and the contract attorneys should be next. In addition, the legislature specifically funded an appropriation for contract services in the last session, and he doesn’t favor converting those funds to FTE dollars. Even if the nationwide average is weighted at 80 or 90% and then an escalator is built in, it will be progress. He hopes that a higher rate will improve the agency’s ability to recruit more contract attorneys.

Mr. Freebourn said that the success in securing the FTE attorney pay rate in the recent session was because the data supported the increase. The target contractor rate should be part of the planning for the 2015 session. Once the FY 13 books are closed, operating plans for each program are in place, and contract negotiations are complete, he will know how much will be available to fund a portion of the increased rate in this biennium. Right now he estimates the cost of every \$1 increase to the rate at \$100,000 per year.

Commissioner Gillespie told the Law and Justice Interim Committee at their initial meeting that the agency will continue to be challenged to perform given the appropriation received for the 2015 biennium. One issue will be how the workload is balanced, through the use of contractors or modified FTEs. The legislature did approve a 2% increase in contractor rates for all agencies, but those funds are not restricted. If implemented it would raise the contract attorney rate to \$61.20. Such a meager increase might be considered insulting to some contractors.

Commissioner Gillespie would like to have a proposed rate as an action item at the October Commission meeting. In the meantime, he plans discussions with the governor's office and the Office of Budget and Program Planning to garner support for the new rate. He cautioned that some legislators will try to increase the burden on OPD clients to fund any rate increase.

Commissioner Petaja advocated that the new rate include a built-in escalator to improve the rate setting process in the future. Some states give contractors an increase equal to the annual cost of living increase that FTE get. He would like to meet again to finalize a rate before the October Commission meeting. His goal is to reach the national average of \$65 per hour plus an escalator by FY 15.

Public Comment

There was no public comment.

Old Business/New Business

Commissioner Gillespie said given the large appropriation for contract services and the lack of approval for additional FTE by the legislature, he has discussed contracting for certain non-attorney services with Mr. Freebourn. The agency must be able to document whether or not contracting with the private sector for eligibility determination, accounts receivable collections and other support services are appropriate or feasible. Many legislators do not want to see government grow, and Commissioner Gillespie urged vigilance against proposed reorganization in the next session.

Commission Petaja distributed a 1972 article from the American Journal of Criminal Law which revealed that some of the same problems with public defense existed even then. At that time, he was the second public defender in the state, and they served at the judge's pleasure. The message from the court was, "It is your duty to make sure that when the defendant is convicted, he is convicted properly."

Adjourn

The meeting adjourned at 10:05 a.m.