

COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

September 19, 2017

The monthly meeting of the Committee for Public Counsel Services was held in the Committee's conference room at 40B Bromfield Street, 1st Floor, Boston, MA on Tuesday, September 19, 2017, beginning at 5:36 p.m. R.J. Cinquegrana, Chairman, presiding.

MEMBERS PRESENT: Ms. Alvarado and Ms. Ball
Messrs. Hernando, Kociubes, Rosenfeld, and Ms. Shah
Messrs. Stern and White

TELECONFERENCING: Messrs. Miller and Kennedy and Ms. Tewksbury

1. Minutes of July 19, 2017 Meeting

The minutes of the July 19, 2017 meeting were approved as presented.

2. Lease Approval(s)

A. Boston Office, One Congress Street

Anthony Benedetti, Chief Counsel, sought Committee approval to extend the lease at One Congress Street Boston with Bulfinch Unit A Owner, LLC, to become coterminous with the lease at 44 Bromfield Street, Boston. A two year lease extension from December 16, 2018 through July 18, 2020 was requested. The lease terms are \$44.43/sq. ft. for 17,646 sq. ft. with a total annual rent of \$784,012; the second year is \$45.57/sq. ft. for 17,646 sq. ft. with a total annual rent of \$804,128. The total additional cost to co-term the leases is \$71,819.

MOTION: Mr. White. That the Committee approve the two year lease extension with Bulfinch Unit A Owner, LLC, at One Congress Street Boston for \$44.43/sq. ft. for 17,646 sq. ft. the first year and \$45.57/sq. the second year.

SECOND: Mr. Hernando.

VOTE: Unanimous.

B. Fall River, 1822 Main Street

Mr. Benedetti sought Committee approval to expand and extend the lease at 1822 Main Street, Fall River with Jefferson Realty, LLC, for 12,307 sq. ft. at \$19.25/sq. ft. for an annual rate of \$236,990. The additional 5,530 square feet will provide space for Children and Family Law

(CAFL) and Youth Advocacy Division (YAD) staff located at 54 Front Street in Fall River to relocate to 1822 Main Street, Fall River with the District and Superior staff.

MOTION: Mr. Kociubes. That the Committee approve the request to expand and extend the lease at 1822 Main Street, Fall River with Jefferson Realty, LLC, for 12,307 square feet at \$19.25/sq. ft. for an annual rate of \$236,990.

SECOND: Mr. Hernando.

VOTE: Unanimous.

3. **Ratification of Executive Committee's Approval of Amicus Request(s)**

Randy Gioia, Deputy Chief Counsel, Public Defender Division sought ratification for the following amicus requests that were approved by the Executive Committee:

A. Commonwealth v. Christopher Kennedy, SJC-12345

The Supreme Judicial Court (SJC) issued the following amicus solicitation:

Where a defendant has been charged with a sex offense for which force is not an element of proof, whether the defendant is entitled to an instruction as to honest and reasonable mistake of fact, where the claim of mistake of fact as to consent is at least arguably supported by the evidence.

David Rangaviz, Appeals Unit Staff Attorney, will write the amicus brief for CPCS.

B. Commonwealth v. Rogelio Buckley, SJC-12344

The SJC issued the following amicus solicitation:

Whether or how police authority should be limited when a traffic stop for an observed civil traffic infraction is clearly a pretext to engage in an investigation of other activity.

Staff Attorney Rebecca Kiley will write the amicus brief for CPCS. Discussions were held with the American Civil Liberties Union of Massachusetts (ACLUM) about either collaborating on a single brief or coordinating the filing of two amicus briefs. The ACLUM is potentially interested in seeing if the Cato Institute might sign on.

Both amicus requests were approved by acclamation.

4. **Legal Updates**

A. OAT/Breathalyzer Issue

Nancy T. Bennett, Deputy Chief Counsel, Private Counsel Division provided an update on the Office of Alcohol Testing (OAT). She indicated that this is a case challenging the accuracy of the breathalyzer machines used in Massachusetts. There were over 100 cases consolidated in the district court before Judge Brennan. There was collaboration with defense attorneys to identify lead counsel. The breathalyzer machines are made by an international corporation named Drager. Drager is a multibillion dollar industry that provides breathalyzer machines to countries all over the world. She reported the following:

- The challenge started in 2014
- Extensive discovery was requested from Drager
- Drager vigorously resisted discovery request
- Drager resisted attempts to obtain access to a machine to have independent experts test it for accuracy
- During various hearings, it was elicited that the OAT did not have any protocols to ensure the machines accuracy
- Testimony established that OAT did regular calibrations of the machines and maintained worksheets showing the outcome of the tests
- In March of 2016, OAT was ordered to turn over to the consolidated litigants, all worksheets showing the calibrations of the machines
- The worksheets were studied by experts retained by the defense in preparation for ten days of hearings, beginning in January of 2017
- Experts for Drager testified for the government in support of the machines
- The Court issued a decision in February allowing some motions to dismiss and denying others; litigation continued on the cases that were not dismissed
- Former bar advocate, Tom Workman, filed a public records request to obtain the raw data of the machine calibration testing maintained by OAT
- Attorney Workman received the raw data and noticed that there were missing reports
- At a hearing for one individual in August of 2017, a chemist testified that there were missing reports
- The judge ordered OAT to produce the missing reports immediately
- OAT produced the missing reports and the results showed that the machines failed calibration
- Defense counsel filed a motion to compel all data; the court allowed the motion
- In August, 50,000 pages of new discovery was turned over to defense, including various repair records; 400 missing calibration reports showing 97% failed calibrations
- Next hearing is scheduled for November 15, 2017
- District Attorneys are not currently using breathalyzer information in prosecutions of operating under the influence (OUI) cases
- Dan Bennett, Secretary of Public Safety, is seeking the appointment of a judge to investigate the withholding of information from OAT

B. Commonwealth v. Brangan / Bail Issue

Shira Diner, Supervising Staff Attorney for the Criminal Defense Training Unit, updated the members on Commonwealth v. Brangan / Bail Issue. She reported:

- Two years ago CPCS set out to reduce the impact that cash bail has on indigent clients
- Looking to ensure improvement on bail for clients and to keep current bail statute intact
- A Ch. 211, § 3 petition was filed, arguing the bail statute was constitutional but implementation to poor people had a disproportionate impact on them
- An amicus brief was authored in Brangan v. Commonwealth and it was decided by the Supreme Judicial Court (SJC) on August 25, 2017
- In the Brangan case the court decided the following:
 - Judges will make a decision as to the financial resources the individual defendant has
 - If a judge exceeds amount as to what the individual defendant has, it becomes a de facto detention order and the judge has to make specific findings:
 - confirm financial resources
 - make findings how bail amount was calculated
 - justify why no alternative would be sufficient to ensure the person would return to court
- Embarking on training lawyers on how to shift thinking on bail
- Working on court watch programs and in contact with various administrative offices of the different courts to assist in the implementation of the Brangan decision
- A meeting was held with the Chief Justice of the District Court who indicated judges were undergoing training on this decision

Discussion ensued.

C. CAFL Crisis

Mr. Benedetti mentioned that a recent meeting with the SJC working group was held. Staff has undertaken a number of steps independently, as well as steps suggested by the SJC working group. One suggestion implemented was CPCS having a presence at the new lawyer swearing in with the Supreme Judicial Court Clerk informing them about CPCS private counsel opportunities.

Michael Dsida, Deputy Chief Counsel, Children and Family Law Division, updated the members on the CAFL crisis.

- In Hampden County, there were 70 individuals without attorneys – both parents and children
- Also attorney shortage in Greenfield – approximately 15 individuals without counsel – largely older cases due to attorneys leaving and cases needing reassignment
- In Hampden County, hoping to add additional staff but only five applicants met qualifications; based on various reasons, however, no additional staff were hired
- Looking to hire paralegals
- Court Improvement Grant funds were used to offset the cost and location of training private attorneys and arranged training schedule in central Massachusetts

- Continuing to look at all options to add capacity
- Discussed with counterparts in other divisions to utilize staff more creatively

Mr. Benedetti mentioned that on the criminal side, there have always been challenges with capacity at the superior court level. That challenge continues and the same problem is now occurring in the district courts in western Massachusetts.

Ms. Bennett updated the members that on the criminal side during the first quarter of the new fiscal year in Hampden County there were 30 open duty day slots in the district courts. The bar advocate program is reaching out to all attorneys to accept duty days; unfortunately they are not taking them.

Discussion ensued.

5. Monthly Financial Overview Report

Mr. Lucchetti presented the final FY 2017 monthly financial overview report to the Committee for review.

Mr. Benedetti praised Mr. Lucchetti for estimating the actual spending cost for the year in the projected maintenance request submitted to the Ways and Means Committees at the beginning of the budget process. Several members acknowledged this accomplishment.

Projections for FY 2018 are currently being worked on.

6. Commitments \$10,000 and Over Report

Mr. Lucchetti presented the commitments of \$10,000 and over report to the Committee for review. There are two new commitments that were not previously discussed. They are: 1) TIC Business Consulting for IT consulting services and 2) Officespace Software, Inc. for space planning software.

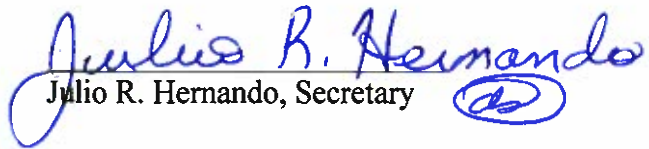
7. Chief Counsel Report

Mr. Benedetti reported that a Chapter 211, § 3 petition is being filed in Bristol County to challenge Sheriff Hogdson who is disregarding the Lunn decision by holding individuals and contacting Immigration and Customs Enforcement (ICE).

Mr. Benedetti concluded the meeting in memory of Terry McParland, a 40 year employee of CPCS, who recently passed after a long battle with cancer. Terry started with the agency in 1977 and worked in various roles throughout her career – Human Resources, IT, Administration and Finance. She was the go-to person and mastered the complicated and byzantine state procurement rules and regulations. She is as much a part of the history of the agency as any attorney.

There being no further business to come before the meeting, the meeting adjourned into Executive Session at approximately 6:30 p.m.

Respectfully submitted,


Julio R. Hernando, Secretary 