COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

November 19, 2014

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, November 19, 2014, beginning at 5:34 p.m. R.J. Cinquegrana, Chairman, presiding.

MEMBERS PRESENT: Messrs. Gosselin, Healy, Hernando, Kennedy, and Kociubes
Messrs. McGuire, Rosenfeld, and Ms. Tewksbury
Messrs. Watkins and White

1. **Approval of October 15, 2014 Minutes**

The minutes of the October 15, 2014 meeting were approved as submitted.

2. **FY 2015 Contract – DCU Center for Annual Conference**

Debra Krupp, Training Coordinator, sought Committee approval to enter into a contract with the DCU Center in Worcester for the annual training conference to be held on May 14, 2015. The proposed contract is for $60,470.80, which covers space rental and includes an estimate for catering and audio-visual rental.

MOTION: **Mr. Watkins. That the Committee approve the contract with the DCU Center in Worcester for the annual training conference to be held on May 14, 2015, for an approximate cost of $60,470.80.**

SECOND: **Mr. McGuire.**

VOTE: **Unanimous.**

3. **Amicus Requests**

Rebecca Kiley, staff attorney, sought Committee approval to submit amicus briefs in three cases. The first case is Commonwealth v. Juan Pagan. The Supreme Judicial Court issued the following amicus request regarding this matter:

Whether the trial judge erred in reducing the verdict from murder in the first degree to murder in the second degree, pursuant to Mass.R.Crim.P.25(b)(2), based on what she perceived to be weak, albeit sufficient, evidence of deliberate premeditation and her consideration of the defendant's youth (sixteen years old at the time of the offense), untreated mental condition (ADHD), developmental immaturity, and family neglect, all of which the judge found caused or contributed to his impulsiveness.

The case raises questions of first impression. Counsel for the juvenile is John Palmer. Oral argument is scheduled for February, 2015.

The second case is Commonwealth v. Michael Jackson. This case involves the issue of duress. An *Amicus* is appropriate in this case because it will provide the Court with a presentation of social and scientific evidence on adolescent development and its impact on proof of duress as well as an analysis of the Massachusetts mandatory statutory scheme as applied to juveniles. Counsel for the juvenile is Emanuel Howard. Oral argument is scheduled for February, 2015.

The final request is regarding the case of Commonwealth v. Dorvil. The Supreme Judicial Court issued the following amicus solicitation:

> *In a prosecution for assault and battery, whether the defendant's spanking of his two year old child was justified in the circumstances as a permissible means of discipline; whether, regardless of the extent of the force used, a parent's use of force can never be justified as proper discipline if the parent acts out of anger, or if, because of age or otherwise, the child lacks the capacity to understand the correction.*

The Court has sent out notice of possible January argument. A staff attorney in the Appeals Unit will prepare the brief.

Mr. Watkins informed the members that the amicus subcommittee has approved all three requests.

MOTION: **Mr. Rosenfeld. That the Committee approve the amicus requests in the matters of Commonwealth v. Juan Pagan, Commonwealth, v. Michael Jackson, and Commonwealth v. Dorvil.**

SECOND: **Mr. McGuire.**

VOTE: **Unanimous.**

4. **Court Cost Vendor Manual**

This matter was postponed to the next meeting.

5. **Bar Advocate Program Contracts for Calendar Year 2015**

Nancy Bennett, Deputy Chief Counsel for the Private Counsel Division, presented the contracts for the bar advocate program for calendar year 2015. She explained the following changes regarding the duties of the programs.

1. They will notify CPCS if they have been unable to assign a case within a specified time frame
2. Specific procedures for verification of liability insurance for panel attorneys
3. Board of Directors will monitor work hours of administrative staff

She also mentioned funding increases on the following items:

1. $780 to cover the increased cost of rental space in Hampden County

2. $2,539.20 to cover potential increased health insurance costs due to an increase in GIC approved HMO rates

The total amount for the contracts with the requested increases is $931,499.33.

MOTION: **Mr. Rosenfeld. That the Committee approve the Bar Advocate Program contract for calendar year 2015, in the amount of $931,499.33.**

SECOND: **Mr. Watkins.**

VOTE: **Unanimous.**

6. **<u>Bar Advocate Contract Provision of Legal Services to Dukes and Nantucket Counties for Calendar Year 2015</u>**

Nancy Bennett, Deputy Chief Counsel for the Private Counsel Division, sought Committee approval for the contract with Attorney Robert Moriarty for provision of legal services to Dukes and Nantucket Counties for calendar year 2015, in the amount of $36,000.

MOTION: **Mr. Rosenfeld. That the Committee approve the contract with Attorney Robert Moriarty for legal services to Dukes and Nantucket Counties for the calendar year in the amount of $36,000.**

SECOND: **Mr. Watkins.**

VOTE: **Unanimous.**

7. **<u>Bar Advocate Supervising Attorney Contracts for Calendar Year 2015</u>**

This matter was postponed to the next meeting.

8. <u>CAFL Counsel Crisis</u>

Michael Dsida, Deputy Chief Counsel for the Children and Family Law Division, presented a brief overview of the CAFL crisis. He began by covering four points. 1) overview of the lawyers role in the CAFL cases; 2) how the crisis began; 3) what staff has done to respond to the crisis; and 4) anticipation of what may occur over the next few months. He assumed that everyone recognizes the critical role that lawyers play in cases in which children are removed from parents by the State. He stressed the decisions to remove children from the home are made at the outset, without a lawyer, without the children or parents present in court.

He stated that DCF filings increased in FY 2012 to FY 2013. The filings increased by 38% from FY 2013 to FY 2014.

He indicated that staff and private attorneys responded to this increase by accepting as many assignments as possible. To add to its case-taking capacity, in the Spring of 2014, CPCS created eight new CAFL staff attorney positions, filled 11 other CAFL staff attorney vacancies and conducted its largest training program. In addition to adding attorney capacity, CPCS took several steps to respond to the counsel crisis. He worked with the Chief Justices of the Juvenile Court to try to change certain assignment and scheduling practices to reduce the likelihood of conflicts and to minimize the amount of waiting time in CAFL cases. He also tried to convince the Legislature to modify the statutory caps on billing to allow for lawyers the ability to bill up to 1800 hours during this crisis.

Despite all these effort, there will likely be a counsel crisis this year. CAFL continues to recruit private attorneys for its panel and will conduct another certification for new attorneys in April 2015, and is exploring other possibilities for adding capacity. Mr. Dsida said that he will keep the Committee informed as the year progresses.

9. **<u>Commitments of $10,000 and Over Report</u>**

The Commitments of $10,000 and Over Report was given to the members for their review.

10. **<u>Monthly Financial Overview Report</u>**

The monthly financial overview report was given to the members for their review.

11. **<u>FY 2016 Budget Request</u>**

Mr. Cinquegrana began the discussion by stating that the staff and the budget subcommittee have accomplished a substantial amount of work on a proposed budget. The proposal includes both a maintenance and expansion component.   He noted that he and the budget subcommittee thought that they would simply review the proposal at this meeting; however, because of the work being done by the Governor's Commission to Study the Salaries of district attorneys and public defenders, it may be appropriate for the members to proceed on the maintenance portion of the proposed budget, but defer any consideration of the expansion until the Commission acts. He indicated that the Commission had been scheduled to meet on November 18, 2014, but because several members were unavailable, the meeting had been postponed. He is hoping that once the Commission meets, they will have made a recommendation which CPCS Committee members can consider as it pertains to the expansion request, when it holds its December Committee meeting. At this point, he was not presuming anything or asking anybody to agree with that plan until the proposal was presented. He then asked Mr. Hernando, Chairman of the Budget Subcommittee, to explain what the subcommittee was recommending.

Mr. Hernando, Chairman of the budget subcommittee gave an executive summary of the budget that the subcommittee proposed. He then turned the discussion over to Mr. Benedetti.

Chief Counsel Benedetti, did a quick overview and informed the members that the staff presented a proposal to the budget subcommittee that attempted to address all on-going issues that the agency has been dealing with and that would allow the agency to perform its job effectively and efficiently.

Ms. Burstein, Chief Financial Officer, then proceeded to go into more detail about the proposed budget request. She explained that the maintenance request, which includes a 3% step increase was produced by reviewing staff caseload estimates, the estimated cost of cases handled by the private bar in the 1510 account, and the staffing plan as it has existed. The total cost of the proposed maintenance budget is $210,865,862. Ms. Burstein explained that the estimated cost of the requested staff salary increase portion of the budget proposal is $14,175,586. The third component of the budget proposal is an increase in the hourly rate paid to private assigned counsel. The new rates would increase the rate by $5/hour in District Court and CHINS/CRA and increase the rate by $10/hour in Murder cases, Superior Court cases, Mental Health cases, CAFL Care and Protection cases, and sex offender registry cases. The estimated cost of this hourly rate increase is $18,296,260. The final item, requesting an increase in the mileage reimbursement for staff from $.30/mile to $.45/mile, for next fiscal year would cost an estimated $275,000. The total cost of the proposed fiscal year 2016 budget request is $239,481,346.

Mr. Cinquegrana shared his thoughts on the work of the Salary Commission and his reason for requesting that the Committee consider postponing its vote on the expansion portion of the budget until after the Commission submits its report in mid-December. He indicated that the Commission is considering a $15,000 starting salary adjustment increase. He stated that, at this point, the Commission is still discussing the implementation issue. The Commission has been considering a sliding, gradually reduced scale of increases for current staff or possibly a $15,000 increase across the board. He noted that the Commission is not discussing the rates for the private bar.

Mr. Benedetti said that the private bar hourly rate issue was raised at the initial meeting, but a review of the Governor's Executive Order indicated that it was not part of the mandate so the matter has not been discussed again.

Mr. Cinquegrana opened the topic up for discussion.

Mr. Healy made a motion that the budget be considered beyond the maintenance and include the expansion portion, but with a significantly higher rate for the private bar. He proposed a motion to increase the private bar hourly rates by the following: District Court - $75/hour; CAFL - $80/hour; Appeals and Superior Court - $100/hour; MH - $80/hour; murder cases - $150/hour; juvenile cases - $75/hour; and CHINS cases - $75/hour. He stated that what he is proposing is far below what the federal government pays its private counsel for cases. He went on to state that he feels a fiduciary duty is owed to the private bar to propose a rate that is at least somewhat akin to a living wage so they can pay for overhead and make a living off the cases that they take. He mentioned that the MBA Blue Ribbon Commission, in its report, had proposed rates higher than what he is proposing. He also indicated his belief that the board owes a duty to the constituents that it represents to present a budget that would provide a living wage.

Mr. Rosenfeld seconded Mr. Healy's motion, stating that the Committee has always recommended a budget that it thought was appropriate for the needs of the agency.

Mr. White stated that he believes that the budget subcommittee took into account, not only the issue that Mr. Healy had raised, but also its fiduciary responsibility to run a good agency. He stated that the proposal was thoughtful as to what is needed to maintain agency operations at the appropriate level. He agreed with everyone who expressed support for a substantial private bar hourly rate increase, but stated that the Committee must present a budget that is indicative of what can be reasonably achieved.

Discussion ensued.

MOTION: **Mr. Healy. That the Committee approve the budget subcommittees' proposed budget with an amendment to increase the private counsel rates to district court cases at $75/hr.; CAFL cases at $80/hr.; appeals and superior court cases at $100/hr.; mental health cases at $80/hr.; murder cases at $150/hr. juvenile and CHINS cases at $75/hr.**

SECOND: **Mr. Rosenfeld.**

VOTE: **3 in favor; 8 opposed. The motion does not carry.**

Mr. Kennedy then proposed a motion to approve the maintenance portion of the budget, but postpone consideration of the expansion portion of the budget request until after the Salary Commission had submitted its report. He indicated that the Governor has announced $329M in cuts for this fiscal year and he feels that the Committee should be mindful of this when deciding on a budget proposal.

Mr. Cinquegrana solicited views on this motion.

Mr. Hernando indicated that he did not think it was necessary to defer the requests for a CAFL staff increase or the mileage increase for staff. He stressed that the CAFL increase is absolutely necessary due to the dramatic increase in DCF filings. He agreed with the across the board staff salary increase of $15,000. He also agreed with Mr. Kennedy's position as to deferring the request for a staff salary increase pending the report from the Salary Commission in order to decide whether the increase should be over the course of three fiscal years or all in the next fiscal year. His view on the private bar increase is that the request should be as the subcommittee recommended.

Mr. Watkins agreed with Mr. Healy with respect to the private bar rates. He indicated that ten years ago the Legislative Commission recommended an increase in the hourly rates over several years, but only the first year was implemented. With respect to the increase for staff, he is opposed to deferring that portion of the proposed budget request.

Mr. McGuire indicated that the personnel subcommittee met last week to discuss ways to address employee morale aside from an increase in salary. In anticipation of that meeting, he took it upon himself to talk to some staff in the public defender division. He found that the primary reason that agency morale is so low is because of the salary. There is a perception within the public defender division that the board and the management team do not care about the staff who do the difficult work. Based on this feedback, he feels now is the time to show them that the board understands their concerns and is speaking for them.

Mr. Kennedy stressed that now, when the Governing is seeking cuts of $329M in the current fiscal year, is not the appropriate time to be seeking a $15,000 increase for staff.

Ms. Tewksbury indicated that the board should move forward with the proposed budget or nothing at all. She agreed that $329M in cuts is significant, but that it is spread across all state government. She stressed that if the board postponed moving forward on the expansion portion of the budget, it may send the message that that the agency can make it on a maintenance budget even with all the issues of retention. She feels this is significant and could damage the agency.

Ms. Burstein mentioned as an operational point that there is a lot of work that goes into the Office of the Administration and Finance (ANF) building the maintenance budget and that it would be a challenge for ANF to build a budget for CPCS without CPCS submitting, at a minimum, a maintenance budget request. It would not necessarily reflect well on the agency.

Discussion ensued.

MOTION: **Mr. Kennedy. That the Committee approve the maintenance portion of the proposed budget submitted by the budget subcommittee, which includes the 3% COLA increase for staff, but defer a vote on the remaining expansion portion of the budget, which contains the following four items:**

mileage increase from $.30 to $.45; a CAFL staff attorney expansion; increase in the hourly rate paid to private assigned counsel; and increase in staff compensation.

SECOND: **Mr. Gosselin.**

VOTE: **3 in favor; 7 opposed. The motion does not carry.**

Mr. Cinquegrana asked if anyone had another motion.

MOTION: **Mr. Kociubes. That the Committee approve the adoption of the subcommittee's budget as presented, which includes a maintenance request of $210,865,862 and, an expansion request in the amount of $28,615,484 that includes a mileage increase from $.30 to $.45; a CAFL staff attorney expansion; an increase in the hourly rate paid to private assigned counsel; and an increase in staff compensation. The total requested amount for fiscal year 2016 would be $239,481,346.**

SECOND: **Mr. Watkins.**

VOTE: **8 in favor; 2 opposed. The motion carries.**

Mr. Gosselin requested that when staff submits the budget to ANF, a letter be included so that they are aware that the board is conscious of the $329M in cuts for this fiscal year, are mindful of the work of the Salary Commission, and will take all of that information into account and amend the request at the December meeting, if necessary. He also requested a similar message be sent to the staff and the private bar informing them of the decision at this meeting and the reasons for the votes to allow transparency into the process.

There being no further business, the Committee adjourned at 7:10 p.m.

Respectfully submitted,

Joseph L. Kociubes
Secretary