

COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

FEBRUARY 25, 2020

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, February 25, 2020, beginning at 5:36, p.m. R.J. Cinquegrana, Chairman, presiding.

MEMBERS PRESENT: Mr. Hernando, Ms. Petropoulos, Mr. Rosenfeld,
Ms. Shan and Messrs. Stern and White

TELECONFERENCING: Messrs. Healy, Kociubes and Miller

The record will reflect that there are five members present in the room, four of which are members of the Executive Committee. As a result, the meeting proceeded as a meeting of the Executive Committee, witnessed by the other members of the full Committee.

Chief Counsel Anthony Benedetti and Chairman Cinquegrana, acknowledged and thanked two long-time departing members, Mr. Hernando and Mr. Rosenfeld.

Mr. Hernando was appointed by the SJC in 2011. He has been extremely supportive of the agency. He has been witness to the challenges the agency has faced and has been a big supporter of increased salaries for CPCS attorneys and all staff as well as a strong advocate of increased rates for the private bar. He has been a valuable member of the Executive Committee and several subcommittees. His commitment and dedication to the Committee will be sorely missed.

Mr. Hernando thanked everyone for all the hard work they do. He stated that it has been very obvious to him how dedicated and how hard all staff work from the staff attorneys, social workers, investigators to the support staff and managers.

Mr. Rosenfeld was appointed by the SJC in 2006. He has been an incredible supporter of the agency – staff, salaries, and private bar rates. He also has been a valued member of the Executive Committee, serving as Vice-Chair at one time. He helped guide the Executive Committee and full Committee on the direction of the agency. His prior position as Chair of the Bar Counsel has been invaluable to the agency as well as his historical knowledge as one of the original Massachusetts Defenders and as the first Chief Counsel of CPCS.

Mr. Rosenfeld will be presented with the Gideon Award at the annual awards ceremony on May 14, 2020.

1. **Minutes of January 16, 2020 Meeting**

The minutes of the January 16, 2020 meeting were approved as presented.

2. **Amicus Request(s)**

a. Commonwealth v. Harding, SJC-12875

Nancy Dolberg, Appeals Attorney sought Committee approval to file an amicus brief in the case of Commonwealth v. Harding, SJC-12875. The Supreme Judicial Court (SJC) sought the following amicus solicitations:

Whether the defendant, a sex offender subject to registration with the Sex Offender Registry Board, was obligated to register his customers' home address as a place of employment, where the defendant performed services there as a home-improvement contractor but maintained a workshop at his home in another town.

Whether the defendant violated the probation condition that he not "work, volunteer, [or] reside with children under 16 years old" by working on-site at his customers' residence while the owners' infant child was present, where the defendant had no contact with the child.

The amicus brief will attack the statute as to vagueness as applied to those in this situation and the burden that complying with the statute puts on individuals who are trying to obtain certain types of employment.

MOTION: Mr. Rosenfeld. That the Committee approve the filing of an amicus brief in the case of Commonwealth v. Harding, SJC-12875.

SECOND: Mr. White.

VOTE: Unanimous.

b. Adoption of Jermani H., SJC-12880

Ann Narris, Staff Counsel with the Children and Family Law Division, sought Committee approval to file an amicus brief in Adoption of Jermani H., SJC-12880. The SJC sought the following amicus solicitation:

Whether, in a proceeding concerning the care and protection of a child, the mother's domestic violence counselor was wrongly allowed to testify to the mother's confidential communications, where such communications are privileged under G. L. c. 233, § 20K; whether the mother waived the privilege by signing releases allowing her domestic violence counselor to communicate with two named DCF social workers involved with her case.

The issue in this case is whether or not signing a limited release for social workers to speak to domestic violence counselor on a case pierces the privilege allowing the Department of Children and Family (DCF) attorney to call the therapist as a witness. The brief will explain to the SJC that a ruling in support of the privilege will benefit all parents and children in child welfare cases. It will allow parents to work with domestic violence counselors without fear that their private communications will be admitted against them in termination proceedings. It will also allow DCF workers to confer with counselors (if a release is signed) in order to better assess the parents' needs and help them access additional services.

MOTION: Mr. White. That the Committee approve the filing of an amicus Brief in the Adoption of Jermani H., SJC-12880.

SECOND: Mr. Hernando.

VOTE: Unanimous.

c. Commonwealth v. D.R., DAR-27318

Marlies Spanjaard, Director of Education Advocacy, sought Committee approval to file an amicus letter in support of the juvenile's application for direct appellate review (DAR) and if granted to file an amicus brief in the case of Commonwealth v. D.R., DAR-27318.

The letter will point out that Massachusetts is one of three states that criminalizes all sexual intercourse between individuals under sixteen and would urge the court to address the constitutional challenges left open in Commonwealth v. Wilbur W., 479 Mass. 397 (2018).

If the DAR is allowed the substantive brief would 1) urge the court to find that the statutory rape statute is unconstitutional as applied to youths under 16 engaging in consensual sex, where both are members of the party that the statute is meant to protect and 2) would argue the current strict liability enforcement leaves it up to police and prosecutors to decide who is the victim and who is the rapist in the case.

MOTION: Mr. Rosenfeld. That the Committee approve the filing of an Amicus letter in support of a juvenile's application for direct appellate review and if granted to file an amicus brief in the case of Commonwealth v. D.R., DAR-27318.

SECOND: Mr. White.

VOTE: Unanimous.

d. Matter of J.P., SJC-12872

Mark Larsen, Director of the Mental Health Litigation Division, sought Committee approval to file an amicus brief in the Matter of J.P., SJC-12872.

The SJC took the case *sua sponte* and immediately issued an amicus solicitation on the following issues:

In an involuntary civil commitment case, whether for the purposes of the second prong of the definition of “likelihood of serious harm” G.L. c. 123, section 1, the requirement that “others are placed in reasonable fear of violent behavior and serious physical harm to them” is objective or subjective in nature, and whether, for the purposes of the third prong definition of “likelihood of serious harm” homelessness is a factor which may support a “very substantial risk of harm.”

The issues the brief will focus on are: 1) when used as evidence justifying civil commitment, is the standard for determining whether others are placed in “reasonable fear” of violence an objective or a subjective one and 2) whether homelessness in and of itself presents a very substantial risk of physical harm as to justify civil commitment.

CPCS will be joined in its amicus brief by the Mental Health Legal Advisors Committee, Disability Law Center and the Center for Public Representation.

MOTION: Mr. White. That the Committee approve filing of an amicus Brief in the Matter of J.P., SJC-12872.

SECOND: Mr. Rosenfeld.

VOTE: Unanimous.

3. Lease Approvals

a. Worcester Location

Kevin Lucchetti, Chief Financial Officer sought Committee approval for a ten year lease at 18 Chestnut Street, Worcester with Chestnut Street Properties, LLC for a location to house the following divisions: Public Defender, Youth Advocacy, Mental Health, and Children and Family Law. The annual rental rate is \$491,795 (fixed for the duration of the lease) for 20,500 sq. ft. at \$23.99/sq. ft.

MOTION: Mr. Hernando. That the Committee approve the ten year lease Located at 18 Chestnut Street, Worcester with Chestnut Street Properties, LLC for an annual rental of \$291,795 for 20,500 sq. ft. at 23.99/sq. ft.

SECOND: Mr. White.

VOTE: Unanimous.

b. Malden Location

Mr. Lucchetti, sought Committee approval for a ten year lease at 6 Pleasant Street, Malden with RD Management, LLC. This move would consolidate both the Somerville and Malden locations into one unified office. The average annual rental rate is \$400,070 for 9,320 sq. ft. at \$40.58/sq. ft.

MOTION: Mr. Hernando. That the Committee approve a ten year lease at 6 Pleasant Street, Malden for an average annual rental rate of \$400,070 for 9,320 sq. ft. at \$40.58/sq. ft.

SECOND: Mr. White.

VOTE: Unanimous.

4. Monthly Financial Overview Report

Mr. Lucchetti presented the monthly financial overview report to the Committee for review. As mentioned in previous meetings, he anticipated the total spending in line-item 0321-1510 (private bar line) would be approximately \$168-170M. As a result he adjusted the forecast to reflect that change. The current deficit for all line items is approximately \$25M.

The Governor has filed a supplemental bill of approximately \$17.9M.

5. Commitments \$10,000 and Over Report

Mr. Lucchetti presented the monthly commitments of \$10,000 and over report to the Committee for review. There were no new commitments that have not been previously approved.

6. Counsel Crisis Report and Update

Mr. Benedetti informed the members that the agency received \$750,000 in a supplemental appropriation to hire staff in areas where counsel is needed, primarily in Western Massachusetts. The plan is to hire approximately 16 attorneys; offers have been made to seven attorneys already.

The increase in the annual billing cap to 2,000 hours has helped to alleviate counsel issues in all major practice areas.

CAFL

- The emergency rate of \$75/hr. has dramatically improved the situation in Hampden County.

- Berkshire County has been having difficulty in reassigning cases when an attorney withdraws from a case.
- Staff is reaching out to attorneys in Hampden County requesting them to take assignments in Berkshire County.

Adult Criminal

- The duty day incentive in Hampden County continues to be effective in getting attorneys for coverage.
- Worcester County has approximately 14 individuals in need of counsel as a result of the Souza Baranowski indictments.

Youthful Offender (YAD)

- The only challenge YAD is currently facing is with the GCL panel (parole for children). The panel is relatively small and there is a possibility staff may request from the Committee an increase in the annual billing cap for this particular panel at a future meeting.

7. Souza-Baranowski Litigation Update

Randy Gioia, Deputy Chief Counsel for the Public Defender Division, provided the following update:

- On January 10, 2020, approximately 23 people incarcerated at Souza Baranowski Correctional Center (SBCC) allegedly participated in an attack on four guards.
- Following that incident 700 people incarcerated at SBCC who had no role in the attack were adversely impacted by the department of corrections.
- Visits were stopped with attorneys for two weeks. Phone calls were stopped, initially for one week, then stopped again.
- Contact to the Executive Office of Public Safety (EOPPS) by CPCS and the Massachusetts Association of Criminal Defense Attorneys (MACDL) to inquire about the lock-down. Despite inquiries, reports from attorneys indicating they could not contact their clients.
- On January 31, 2020, CPCS joined with MACDL and two other incarcerated individuals to file a suit for declaratory injunctive relief against EOPPS and the Department of Corrections (DOC) and the Superintendent at SBCC.
- The case was assigned to Superior Court Judge, Beverly Cannone and a three day hearing was held for a temporary restraining order. During the hearing the Superintendent of SBCC testified stating that they implemented the lock-down to restore security and the protocol was based on a secret policy which cannot be revealed publicly. Also testifying was the Director of Field Operations for DOC and two incarcerated individuals. DOC testified that they received information that there would be another attack on the guards.
- DOC was violating the constitutional rights of clients of CPCS which impeded our mandate to provide counsel to people who cannot afford counsel or entitled to counsel. They also amended the code of Mass. Regulations without going the Administrative Procedures Act.

- The Plaintiffs are asking for the following:
 - Legal papers to be returned to all incarcerated individuals
 - DOC permit paperwork in an individuals' cell
 - The Superintendent must seek permission of the court before they can suspend visits for more than 48 hours with attorneys and telephone calls for more than 24 hours
- Staff continues to receive reports from individuals incarcerated at SBCC and lawyers who represented individuals at SBCC that are being denied access to counsel and the courts. Some people are not being brought to court when they should be and they are taking legal paperwork from people when they return from court and not returning it. They are not giving people access to the law library and curtailing attorney/client phone calls.
- One individual testified that he was placed in a cell that was blocked from camera views. He alleged that he was beaten by the tactical force and tased numerous times. After testifying, he learned that he was the subject of a disciplinary hearing and his matter was being referred to the district attorneys' office. This individual's attorney has requested the Attorney General's office to investigate the matter.

Discussion ensued.

8. **Chief Counsel Report**

Mr. Benedetti provided the following information:

FY 2021 Budget

- Mr. Benedetti informed the members that the Governor's budget was released. The Governor underfunded the agency in line-item 0321-1500.
- The Joint Committee on Ways and Means Hearing is scheduled for March 16, 2020. At this hearing the Chief Counsel will testify on the Committee's budget proposal.
- Staff are meeting with Representatives and Senators advocating for the budget proposal.
- The House Budget will be released mid-April and the Senate will release their budget sometime in late May.

9. **Executive Session**

At this point, question came on the Committee going into Executive Session for purposes of discussing a lease issue.

MOTION: Mr. Hernando. That the Committee move into Executive Session.

SECOND: Mr. White.

VOTE: Unanimous.

Roll Call Vote was taken with every member voting in the affirmative.

The meeting adjourned into Executive Session at approximately 6:33 p.m.

The meeting returned to Open Session at approximately 7:05 p.m.

Upon return to Open Session the Committee authorized staff to proceed with the Boston lease as discussed in Executive Session.

The minutes will also reflect that upon the arrival of Mr. Stern and Ms. Shah at approximately, 6:10, there was a quorum of the full Committee present at the meeting.

MOTION: Mr. Rosenfeld. That ratify the three amicus recommendations the Executive Committee approved – Commonwealth v. Harding, SJC-12875; In Re: Adoption of Jermani H., SJC-12880; Commonwealth v. D.R., DAR-27318; and In Re: J.P., SJC-12872 as well as the two lease approvals for the Malden and Worcester Offices.

SECOND: Mr. White.

VOTE: Unanimous.

There being no further business to come before the Committee, the meeting adjourned at approximately 7:07 p.m.

Respectfully submitted,

/s/ *Julio R. Hernando*

Julio R. Hernando