

COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

MAY 16, 2018

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 Wednesday, May 16, 2018, beginning at 5:40, p.m. R.J. Cinquegrana, Chairman, presiding.

MEMBERS PRESENT: Mses. Alvarado and Ball, Messrs. Miller and Rosenfeld
Ms. Shah and Mr. White

TELECONFERENCING: Mr. Kennedy

1. **Minutes of April 10, 2018 Meeting**

The minutes of the April 10, 2018 meeting were approved as presented.

2. **Juvenile Supervising Attorney Contracts**

Helen Fremont, Trial Panel Oversight Attorney with the Youth Advocacy Division (YAD), sought Committee approval for the Fiscal Year (FY) 2019 Juvenile Supervising Attorney Contracts. The Juvenile Supervising Attorneys (JSAs) provide training, performance evaluations, mentoring, complaint referral and investigation, and other oversight of private attorneys handling delinquency and youthful offender assignments through the bar advocate programs. The contract is identical in substance to the contract used in FY 2018. An increase to one of the JSA contracts (the contract in Hampshire County) by 2.5 hours per week was requested and would result in a total increase of \$7,800 for FY 2019. The total cost of all 17 Juvenile JSA contracts in FY 2019 would be \$319,800.

MOTION: Mr. Rosenfeld. That the Committee approve the 17 Juvenile Supervising Attorney Contracts for FY 2019 as presented in the amount of \$319,800.

SECOND: Mr. White.

VOTE: Unanimous.

3. Bar Advocate Contracts

A. FY 2019 Bar Advocate Program Contracts

Carol Beck, Director of Criminal Trial Support, sought Committee approval for the bar advocate contracts for FY 2019. The terms of the contract are identical in terms from the previous year. A salary adjustment for bar advocate program employees retroactive to January 1, 2018 was requested in the total amount of \$11,424.21. For FY 2019, the following increases were requested:

1. Annualization of the raises equivalent to increase staff received (\$22,848.42).
2. Increases in health insurance supplement from the previous fiscal year (\$3,464.79).
3. Anticipated increases in health insurance during FY 2019 (estimated \$4,000).

The total amount for FY 2019 is \$1,060,102.90.

MOTION: Ms. Ball. That the Committee approve the FY 2019 Bar Advocate contracts as presented in the amount of \$1,060,102.90 and the salary adjustment for the bar advocate program employees retroactive to January 1, 2018 in the amount of \$11,424.21.

SECOND: Mr. Rosenfeld.

VOTE: Unanimous.

B. FY 2019 Supervising Attorney Contracts

Ms. Beck sought Committee approval for the supervising attorney contracts for FY 2019. The terms of the contract are identical to the terms from the previous year. The total hours worked by the Supervising Attorneys are equivalent to approximately 8 ½ full time positions statewide for the supervision of approximately 1,600 attorneys handling 110,000 criminal cases. This level of supervision allows for a performance evaluation of each panel attorney once approximately every two years. The total cost of the proposed contracts is \$1,054,560.

MOTION: Mr. White. That the Committee approve the FY 2019 Supervising Attorney contracts as presented in the amount of \$1,054,560.

SECOND: Ms. Shah.

VOTE: Unanimous.

C. FY 2019 Contract for Provision of Legal Services for
Dukes and Nantucket Counties

Ms. Beck sought Committee approval to enter into a contract with Attorney Robert Moriarty for the provision of legal services to Dukes and Nantucket Counties. The terms of the contract are identical to last year. The total cost of the contract is \$36,000.

MOTION: Mr. Miller. That the Committee approve the FY 2019 Contract with Attorney Robert Moriarty for the provision of legal services to Dukes and Nantucket Counties as presented in the amount of \$36,000.

SECOND: Ms. Alvarado.

VOTE: Unanimous.

4. Amicus Request(s)

A. Commonwealth v. Odgren, SJC-11573

Joshua Dohan, Director, Youth Advocacy Division, sought Committee approval to file an amicus brief in the case of Commonwealth v. Odgren, SJC-11573. There are two issues presented on appeal that implicate juvenile justice concerns:

1. Over objection, the judge read to the jury two SJC Model Jury Instructions on Homicide that the jury could infer malice from the defendant's intentional use of a dangerous weapon and that the jury could infer that the defendant intended the natural and probable consequences of his actions.
2. The trial judge denied a motion to suppress the jail recordings of the defendant's telephone calls and visits with his parents and others over the seven and a half month period of time that he was held pre-trial at a Department of Youth Services facility.

MOTION: Mr. Rosenfeld. That the Committee approve the request to submit an amicus brief in the case of Commonwealth v. Odgren, SJC-11573.

SECOND: Mr. Miller.

VOTE: Unanimous.

B. Commonwealth v. Gabriel M., A Juvenile, DAR-26078

Mr. Dohan sought Committee approval to submit a letter in support of the application for Direct Appellate Review in the case of Commonwealth v. Gabriel M., A Juvenile, DAR-26078. The case raises the following question: For the purposes of utilizing an "interested adult" during

interrogation of a juvenile, does the Commonwealth bear the burden of showing that the adult was sufficiently interested? If so, what must be shown by the Commonwealth?

The review will clarify the issue as to who bears the burden of proving whether the adult was in fact an interested adult.

MOTION: **Ms. Shah. That the Committee approve the submission of a letter in support of the Direct Appellate Review in the case of Commonwealth v. Gabriel M., A Juvenile, DAR-26078.**

SECOND: **Mr. Rosenfeld.**

VOTE: **Unanimous.**

5. Monthly Financial Overview Report

Kevin Lucchetti, Chief Financial Officer, presented the monthly financial overview report to the Committee for review. The agency had received \$42M from the Administration and Finance (ANF) reserve account (1599-1690 caseload and deficiency reserve) prior to May 15, 2018 and received an additional \$9.5M from the reserve account yesterday on May 15th. There remains a current deficit of approximately \$18.3M and CPCS expects further allotments from the reserve.

The run out date for the 0321-1520 (vendor payments) and 0321-1510 (private counsel payments) line items is expected to be sometime in late June or early July.

6. Commitments \$10,000 and Over Report

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

7. FY 2019 Obligations over \$25,000 for Preapproval

Mr. Lucchetti sought Committee approval on anticipated expenditures expected to exceed \$25,000 for FY 2019. The expenditures presented were broken down by 1) category; 2) vendor; 3) 2018 estimated cost; 4) 2019 estimated cost; and 5) notes/purpose.

The procurement policy allows the Chief Financial Officer to seek pre-approval from the Committee on an annual basis for obligations over \$25,000 during the course of the fiscal year. The majority of the vendors presented are routine and used regularly.

Discussion ensued regarding the procurement rules and regulations, and presentation of the preapproval and commitments reports. Based on the discussion it was requested that future

preapproval requests be revised to more clearly reflect the amount requested and the reasons for the expenditures for the fiscal year and to highlight new vendors on the list.

It was requested that the staff review the procurement rules with the intent of proposing changes to better inform the committee with the information it needs and to possibly increase the reporting threshold amount higher than \$10,000.

MOTION: Mr. White. That the Committee approve the list of all anticipated expenditures over \$25,000 for FY 2018 as presented (see list attached).

SECOND: Ms. Shah.

VOTE: 6 for; 1 opposed – motion carries.

8. FY 2019 Budget Update

Mr. Lucchetti informed the members that the Senate Ways and Means (SWM) budget was released on May 10, 2018. The Ways & Means proposed an overall budget of \$193.2M for all accounts compared to the final House version of \$189.7M. The principal difference between the two budgets is the line item language of the 0321-1500 account and how funds for salary adjustments are structured. The SWM included a separate line item appropriation for attorney raises in the amount of \$3M.

Lisa Hewitt, General Counsel, provided additional highlights of the SWM budget:

- A corrective provision, which adds “DD” to the “AA” expense authorization to be paid out of the 0321-1506 line, has been requested.
- An amendment has been filed to allow for a waiver of the annual billing cap.
- Several amendments have been filed regarding the Sex Offender Registry to include Level 1 offenders on the internet.
- An amendment has been filed by Senator Michael Barrett to abolish the Chapter 211D legal fee for every client.
- Several amendments have been filed to revise and expand the Wiretap statute.
- Both the House and Senate have proposed increasing the Superior Court rate to \$68/hour and the Mental Health rate to \$53/hour.

There was no provision in either the House or the Senate to extend the emergency language allowing CPCS to increase the hourly rate to \$75/hour in Children and Family Law Care and Protection cases in Hampden County.

9. **Chief Counsel Report**

Anthony Benedetti, Chief Counsel, updated the members on the following items:

- CPCS Annual Conference – approximately 1,100 attended (combination of staff, private attorneys, investigators, social workers). The keynote speaker was Dr. Ruth Potee whose expertise is in substance abuse issues and is currently the Medical Director for the Franklin County House of Corrections. Nancy Bennett was presented the Thurgood Marshall Award.
- Oral arguments before the Single Justice of the Supreme Judicial Court (SJC) on the Immigration and Customs Enforcement (ICE) Petition for Writ of Protection pursuant to G.L. c. 211, §3 is scheduled for May 18, 2018. The Attorney General has not filed an appearance in the matter.
- Attorney Amy Karp, Children and Family Law's Training Director, was selected to receive the 2018 American Bar Association (ABA) Mark Hardin Award. The award is presented to an individual who has shown achievement and commitment to legal scholarship and systems change in the field of child welfare.
- Larry Tipton, Attorney-in-Charge of the Norfolk County Superior Court office, has been nominated and will be inducted into the American College of Trial Lawyers, an organization which recognizes only the most experienced, skilled and talented trial lawyers in the country.

10. **Other Matters**

Farak Drug Lab

Randy Gioia, Deputy Chief Counsel for the Public Defender Division, provided an update on the Farak/Amherst drug lab matter. The case is running on two tracks – Single Justice of the Supreme Judicial Court (SJC) and the Full Bench of the SJC. The Attorney General and District Attorney are agreeing to have all cases in which Chemist Farak signed the drug certificates, dismissed with prejudice. Justice Carhart is overseeing the logistics of the dismissal of these cases.

Oral argument on the full bench matter was held on May 8, 2018. The issue is whether the SJC should dismiss with prejudice all drug convictions arising from the Amherst Lab during Farak's tenure – not just the cases on which she signed the drug certificates. The other issue is whether there should be monetary sanctions against the Attorney General for the behavior of two former ADAs in this case, as a deterrent, including issuing standing orders.

Children and Family Law (CAFL) Update

Michael Dsida, Deputy Chief Counsel for CAFL, gave a status update on CAFL statewide:

- Hampden County – attorneys are taking cases at the \$75/hour rate. When the hourly rate reverts back to \$55/hour in July, there is concern that lawyers will stop taking cases, and

the number of parents and children without counsel will grow by the summer, and the problem will be worse than before.

- Trainings have occurred with an additional training scheduled for the fall.
- Problems are starting to occur in Franklin and Greenfield Counties with getting lawyers assigned to cases. There are approximately 7-8 individuals presently without counsel.
- Berkshire County is also having significant problems assigning lawyers to cases. The court has decided to not assign counsel for non-custodial parents until they appear in court.
- CAFL is filling staff positions in Springfield.
- Mr. Dsida will be speaking at upcoming swearing in ceremonies.
- Staff are working with Western New England Law School to develop a program to help recruit new lawyers.

Youth Advocacy Division (YAD) and Adult Criminal Update

Priscilla Duffy, Acting Deputy Chief Counsel for the Private Counsel Division, provided an update on the capacity challenges facing YAD and the adult criminal division.

YAD

- Many private juvenile bar panelists have reported that they will be hitting the billable hour cap limit which will prohibit them from taking additional cases.
- Staff, in anticipation of this occurring, have held back from taking duty days with the understanding they would take more duty days at the end of the year to fill the gap.
- In Springfield, staff cannot absorb all of the new cases from the extra duty days. To address this problem, staff are taking the extra duty days and handling the cases as “bail only” cases. These cases will then need to be reassigned to the private bar beginning July 1st when the private bar has new hours and can take new cases.

Adult Criminal

- Staff side – Hampden and Worcester Counties continue to have difficulty assigning counsel. Looking for private attorneys to pick up slack.
- Some clients are being held approximately five to ten days in custody without counsel.
- Hampden and Middlesex Counties are having issues in district court in terms of duty day coverage. Fewer attorneys available for duty days.
- Attempting to internally address the problem by possibly moving staff from one location to another.
- Hampden County attorneys are leaving the practice because they cannot afford to continue to do the work and there are fewer new attorneys joining the panels.

Mental Health Update

Mark Larsen, Director of the Mental Health Division, updated the members on issues in the Mental Health area:

- The cap on annual billable hours has been an issue, especially for those attorneys who reach 1,350 hours, and are not able to take any new assignments.
- There has been a 25% decrease in the number of attorneys on the panel in the past five years and a 30% increase in the number of cases that need assignment.
- Currently there are ten attorneys who cannot accept any new cases because of the 1,350 cap. Another 17 are on the verge of reaching the limit on the billable hours for accepting new cases. A few attorneys have accepted new cases knowing they will not get paid because they have reached their billable hours cap.
- The MH Unit has increased the number of trainings to bring additional attorneys on to the panel.

Discussion ensued about providing to our funders the following information for all the practice areas: 1) a history of the number of attorneys on each panel throughout the years; 2) what are the numbers now; 3) of attorneys on panels, how many are billing and at what amount; and 4) how many trainings have been completed to add attorneys to the panels versus how many attorneys have left the panel?

Also discussed was providing statistics to illustrate the crisis that results from the limited billable hours.

Compensation Hearing Update

The following thoughts and impressions were provided by the Committee members who attended the compensation hearings in Taunton, Springfield and Boston. Present at the various hearings were: Messrs. Cinquegrana, Miller, Hernando, Rosenfeld, and White. Also present were Ms. Ball, Alvarado, and Shah.

- There was a sense that a crisis will occur within weeks/months in the availability of counsel across the practice areas.
- Two to three years ago, there was no issue regarding the number of attorneys on the panels as there is today.
- Eleven individuals spoke representing all counties, except Berkshire, and represented all practice areas.
- There has been a downward change in the number of attorneys remaining on various panels in the past two years because of the billable hours cap and hourly rates of compensation.
- The agency must plan for the time when there will be a shortage of attorneys available to accept new cases.
- One attorney spoke personally about the need for competent counsel to be assigned.

Discussion ensued regarding the attrition rate of attorneys on the panels and the hourly rate issue.

There being no further business to come before the meeting, the meeting adjourned into Executive Session at approximately 7:34 p.m. and returned to open session at approximately 8:06 p.m.

Upon return to open session, Chairman Cinquegrana affirmed the following motion made during Executive Session.

MOTION: Mr. Rosenfeld. To adopt the new Personnel Policies as presented and remove any and all references to appendices.

SECOND: Mr. White.

VOTE: Unanimous.

There being no further business to come before the meeting, the Committee adjourned at approximately 8:07 p.m.

Respectfully submitted,

/s/ R. J. Cinquegrana

R. J. Cinquegrana, Chairman