

COMMITTEE FOR PUBLIC COUNSEL SERVICES

MINUTES OF MEETING

November 20, 2019

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, November 20, 2019, beginning at 5:38 p.m. R. J. Cinquegrana, Chairman, presiding.

MEMBERS PRESENT: Messes Ball and Craven; Messrs. Kociubes, and Miller, Messrs. Rosenfeld and White

TELECONFERENCING: Mr. Hernando

Mr. Cinquegrana opened the meeting by reminding everyone present that no third party recordings of the proceedings are allowed.

1. **Minutes of October 17, 2019 Meeting**

The minutes of the October 17, 2019 meeting were approved as presented.

2. **Minutes of October 28, 2019 Special Meeting**

The minutes of the October 28, 2019 Special Meeting were approved as presented.

3. **Amicus Request(s)**

a. **Doe No. 36870 v. Sex Offender Registry Board**, No. 18-P-509, FAR No. 27130

Due to the timeframe on the case, R. Scott Miller, Appellate Attorney, previously sought and received approval from the Executive Committee to file an amicus letter in support of the defendant's application for further appellate review. It was presented for information purposes only for the full Committee.

The issue in the case is whether a sex offense conviction in another jurisdiction is a like violation to a sex offense in Massachusetts.

- b. Department of Revenue, Child Support Enforcement Division & Radelis Polanco v. Joshua Grullon, SJC-12784

Andrew Cohen, Director of Appellate Panel, Children and Family Law Division (CAFL) sought Committee approval to submit an amicus letter in support of the defendant's brief in the above case. The issue in the case concerns the right to counsel for indigent litigants facing possible incarceration in civil contempt actions. The amicus letter would highlight that it is only indigent civil contemnors who are given the right to counsel and it is only civil indigent contemnors facing incarceration and not any other penalty. The Committee will not weigh in as to the right to counsel in civil contempt proceedings generally.

MOTION: **Mr. Rosenfeld. That the Committee approve the filing of an amicus letter in the matter of Department of Revenue, Child Support Enforcement Division & Radelis Polanco v. Joshua Grullon, SJC-12784.**

SECOND: **Mr. Kociubes.**

VOTE: **Unanimous.**

- c. Commonwealth v. Tykorie Evelyn, SJC-12808

Rebecca Kiley, Attorney-in-Charge, Public Defender Division Appeals Unit, sought Committee approval to submit an amicus brief in the above case. The case is before the Supreme Judicial Court (SJC) on interlocutory review of the denial of the defendant's motion to suppress. The SJC issued the following amicus solicitation:

1. Whether, in all the circumstances of the case involving a street encounter between police officers and the defendant (a 17-year-old African-American male), a seizure of the defendant occurred when a police officer exited his vehicle in pursuit of him after attempting to speak with him; and whether the moment of seizure should be determined from the perspective of a reasonable African-American boy. See *Commonwealth v. Matta* [, 483 Mass. 357 (2019)]).
2. Whether the defendant's behavior gave rise to reasonable suspicion that he was engaged in any crime when he was seized, where he was in the vicinity of a reported shooting and assumed a "bladed" stance (i.e., turned his body so as to keep one side further away from the police), and where the defendant's expert witness testified that to date, there was no research showing that a "bladed" stance is a reliable indicator that a person is concealing a weapon.
3. Whether the motion judge properly rejected expert testimony concerning "stereotype threat," i.e., a person exhibiting certain behaviors or discomfort due to fear of being stereotyped in a negative way rather than due to consciousness of guilt.

There are many other organizations interested in submitting an amicus brief in this case. Ms. Kiley has had conversations with many of them to discuss coordinating an amicus effort. The

Juvenile Law Center and LDF are primarily interested in the first issue. The firm of Foley Hoag has agreed to write an amicus brief on behalf of CPCS, Massachusetts Association of Criminal Defense Lawyers, the New England Innocence Project and the American Civil Liberties of Massachusetts, that will focus on issues two and three.

MOTION: Ms. Ball. That the Committee approve the filing of an amicus brief in the case of Commonwealth v. Evelyn, SJC-12808.

SECOND: Mr. Kociubes.

VOTE: Unanimous.

d. Commonwealth v. Lewis, 18-P-765

Nancy Caplan, Attorney-in-Charge, Drug Lab Crisis Litigation Unit, sought Committee approval to submit an amicus letter in support of a petition for Further Appellate Review in the above case. Mr. Lewis' case involved drug charges for which Annie Dookhan was involved and also a drug charge that did not involve her. The SJC decided two cases that dealt with the multitude of drug convictions tainted by former state drug lab chemists Annie Dookhan and Sonja Farak – Bridgeman v. District Attorney for the Suffolk Dist., and Committee for Public Counsel Services v. Attorney General. Neither case deals with defendants simultaneously pleading guilty to other charges. In Lewis, the Appeals Court failed to look at the interrelatedness between the tainted Dookhan charges and the non-Dookhan drug conviction.

In our amicus letter, we will propose that the SJC adopt a standard requiring motion judges to examine, in the plea context, the relationship between the tainted charge(s) and the conviction(s) in issue to determine whether those conviction(s) were ancillary to the tainted charge(s). The standard that will be proposed will further indicate that where a motion judge finds that the tainted charge(s) drove the guilty plea, vacatur of ancillary convictions is required.

The amicus letter will urge the SJC to grant further appellate review in order to address this issue.

MOTION: Mr. Miller. That the Committee approve the submission of an amicus letter in the matter of Commonwealth v. Lewis, 18-P-765.

SECOND: Ms. Craven.

VOTE: Unanimous.

Chief Counsel Anthony Benedetti acknowledged and thanked Ms. Caplan for work dealing with the drug lab crisis and her leadership role as head of the Drug Lab Unit.

e. Impounded Case, SJC-12827

Joshua Dohan, Director, Youth Advocacy Division, sought Committee approval to submit an amicus brief in the above case. The SJC issued the following amicus solicitation:

“Whether the Superior Court abused its discretion in granting a preliminary injunction to allow a student to return to high school after she was suspended for 112 days for possessing marijuana; including, whether the Superior Court erred in determining that a superintendent does not have the authority to designate another school administrator to conduct an appeal hearing and render a decision on an appeal of a long-term suspension or expulsion under G. L. c. 71, s. 37H.”

The amicus brief would address two issues: 1) it would outline how the harsh punishment is inappropriate given the recent changes in Massachusetts around the use and distribution of marijuana; and 2) it would present an opportunity for the SJC to interpret the statute and cement the necessary the necessary due process protections available to students who have long term suspensions or expelled by a principal.

MOTION: Mr. Kociubes. That the Committee approve the filing of an Amicus brief in the matter of Impounded Case, SJC-12827.

SECOND: Mr. Miller.

VOTE: Unanimous.

4. Staff Attrition Report

Lisa Bacon, Human Resources Director, provided an update on staff attrition to the Committee. She reported through November of this fiscal year, attrition has dramatically decreased with only 19 employees having left for a 2.7% rate. Some of the highlights of her report were:

- Retirements have steadily increased since fiscal year 2016.
- The January 2019 raises appear to have helped in reducing attrition. Before raises were announced on October 24, 2018, 12 of the 29 employees who left indicated pay was the primary or secondary reason for leaving; of the employees who left after that date, only seven cited pay as a reason.
- The unification of the public defender division and the change to a one attorney salary scale seems to have also helped contribute to a reduction in attrition.
- Many of the employees who leave CPCS go to work as public defenders for other state agencies or federal agencies. Some leave to go into private practice with some continuing to represent indigent clients on bar advocate panels.
- Attrition also occurs in a consistent pattern every year, with most employee departures taking place in the first and fourth quarters of the fiscal year

5. Chief Counsel Report

Counsel Shortage Report

Beverly Chorbajian, Staff Counsel with the Criminal Trial Support Unit with the Private Counsel Division, provided the following information on private counsel shortages around the state:

All counties are being impacted with the counsel shortage, but the three dealing with the biggest challenges are: Hampden, Worcester and Franklin.

- In Hampden County there are three clients in superior court without counsel. All district court clients are being represented.
- Duty days are covered for the month of November. There are currently open duty days in December, January, and February in the various courts in Hampden County.
- The emergency duty day rate expires on November 30, 2019. Staff is likely to extend the duty rate into the new year.
- There is a collateral consequence to the emergency rate. It impacts Franklin, Worcester and Hampshire counties because attorneys in those counties travel to Hampden county to take cases instead of taking cases in their own county.
- Worcester County has one client held without counsel.
- Franklin County has only ten attorneys that take district court cases and eight who take superior court cases. Most of the superior court certified attorneys have been taking cases in Hampden County. As a result these attorney's caseloads are getting too high to take additional Franklin cases.

Michael Dsida, Deputy Chief Counsel for the Children and Family Law Division (CAFL) provided the following information about the significant shortage of attorneys in Care & Protection (C&P) cases in Western Massachusetts

- In Worcester County, as of November 20, 2019, there are 41 individuals awaiting counsel. In many cases, counsel has not been assigned for the 72 hour hearing. Those cases are being continued several times for counsel to be assigned. Some cases have been awaiting counsel for one month or longer.
- There has been a 25% increase in C&P cases filed by the Department of Children and Family (DCF) since FY 2019 in Worcester County. It is unknown at this point what the reason is for the increase.
- In Hampden County there has been a 17% decrease in the number of filings; however, as of November 8, 2019, there are 18 individuals waiting for counsel to be assigned.
- In Berkshire County, there has been a 29% decrease in the number of filings; however, as of November 7, 2019, there are 35 individuals waiting for counsel to be assigned.
- In Berkshire County, the court was employing a new method of assigning counsel by automatically assigning counsel to cases without informing counsel. Mr. Dsida discussed the situation with the First Justice and requested that CPCS be appointed first. The First Justice indicated that the private attorneys can inform the court they cannot accept the assignment.

- Between Worcester, Hampden, and Berkshire county, there are a total of 94 individuals without counsel. It is anticipated that the problem will continue.
- Staff plan on requesting approval to pay attorneys at the higher emergency rate at the December Committee meeting, if not before.

Mr. Cinquegrana requested the following information: 1) a recap of when the numbers first started to increase; 2) what were the unrepresented numbers at that point; and 3) a plan of what will be done.

Discussion ensued.

6. Monthly Financial Overview Report

Kevin Lucchetti, Chief Financial Officer, presented the monthly financial overview report to the Committee for review. There is a projected deficiency of approximately \$20M in line item 0321-1510 (private counsel payment). It is expected that this amount may increase before the end of the fiscal year.

7. Commitments \$10,000 and Over Report

Mr. Lucchetti presented the commitments of \$10,000 and over report to the Committee for review. There was one new commitment that had not been previously discussed or approved – Freshworks, Inc., an IT Help Desk Tool.

8. Executive Session

At this point in the meeting, Mr. Cinquegrana informed the members that they would be adjourning into Executive Session to discuss: 1) FY 2020 salary proposal for managers and directors and 2) the salary of the Chief Counsel. At the conclusion of the Executive Session the meeting will return to Open Session.

The meeting adjourned into Executive Session at approximately 6:51 p.m.

The meeting returned to Open Session at approximately 7:04 p.m.

FY 2020 Salary Proposal

Daniel Saroff, Chief Information Officer, presented the FY 2020 Salary Proposal to the Committee for their approval. Approval from the Committee is only needed for CPCS managers pursuant to the line item language in the FY 2020 budget.

Mr. Saroff proceeded to brief the Committee on the salary proposal.

The FY 2020 salary increases for attorneys and attorney managers involves:

- COLA increase of \$1,000
- Step increase between \$1,000 and \$1,500
- Attorneys receive increase between \$2,000 and \$2,500, unless capped. Capped attorneys only receive the COLA

The FY 2020 salary increases for non-attorneys involves:

- Further rationalization of step scales
- \$1,000 COLA increase and step progression
- Steps are consistent within groups and vary between groups

MOTION: Mr. Kociubes. That the Committee approve the FY 2020 salary proposal for attorney managers and non-attorney managers as presented.

SECOND: Mr. Rosenfeld.

VOTE: Unanimous.

MOTION: Mr. Rosenfeld. That the Committee approve the FY 2020 salary proposals for the Senior Management Team as presented.

SECOND: Ms. Craven.

VOTE: Unanimous.

With regard to the recent statutory change in the salaries of the Commonwealth's District Attorneys, the following motion was made:

MOTION: Mr. Rosenfeld. That the Committee approve the adoption of the Chief Counsel's salary to a level equivalent to the District Attorney's salary, retroactive to July 1, 2019.

SECOND: Ms. Craven.

VOTE: Unanimous.

FY 2021 Maintenance Budget Proposal

Mr. Hernando, chairman of the budget subcommittee, informed the members that the subcommittee met and came to a unanimous recommendation for a maintenance budget

proposal. A second meeting of the subcommittee is scheduled for December to continue the discussion around three initiatives primarily dealing with the private counsel portion of the budget. The subcommittee will present in December to the full Committee the full initiative proposal for their review and a vote.

Mr. Lucchetti presented the maintenance budget request for fiscal year 2021. The total maintenance request is \$265M, which is 3.5% higher than FY 2020. The maintenance request for the three major line-items are:

- 0321-1500 – funding included to annualize full payroll including current vacant positions; annualization of FY 2020 salary increase and funding for FY 2021 COLA. The total requested increase is \$5.43M over FY 2020 estimated spending
 - Increase of \$5.43M over FY 2020 estimated spending.
- 0321-1510 – funding requested based on assumption of 1.1% caseload growth and estimated cost per case of \$735. The total requested increase is \$3.12M over FY 2020 estimated spending.
- 0321-1520 – funding requested based on analysis of average cost per expert type. The total requested increase is \$321K over FY 2020 estimated spending.

MOTION: Mr. Rosenfeld. That the Committee approve the FY 2021 maintenance budget proposal as submitted.

SECOND: Ms. Ball.

VOTE: Unanimous.

Mr. Benedetti thanked everyone for all of their hard work in producing the budget proposal.

There being no further business to come before the meeting, the Committee adjourned at approximately 7:30 p.m.

Respectfully submitted,

/s/ *Joseph L. Kociubes*

Joseph L. Kociubes, Vice-Chairman