

The Virginia Indigent Defense Commission
Commission Meeting
1604 Santa Rosa Road
Richmond VA 23229
March 11, 2010

This meeting was called to order at 11:50 am by Judge Alan Rosenblatt, Chair. Other Commission members present were Kristen Howard, Chris Anderson, Steve Benjamin, Jo-Ann Wallace, Karl Hade, Judge Hanson, and Maria Jankowski. Administrative staff included Executive Director, Dave Johnson; Deputy Director, DJ Geiger; Training Director, Carlos Hopkins; and Administrative Assistant, Diane Pearson.

With eight Commission members present quorum requirements have been met.

The first order of business is to approve the agenda.

Mr. Benjamin moved to approve the meeting agenda. Ms. Jankowski seconded the motion. The motion carried.

The next item is to approve the December 3, 2009 meeting minutes.

Judge Hanson made a motion to approve the minutes. Mr. Benjamin seconded the motion. The motion carried unanimously.

The September 9th meeting has been rescheduled for September 23, 2010 at 11:00 am.

The next order of business is the proposed policy changes. Ms. Geiger reported that we have recently made a change to and are using the DHRM (Department of Human Resource Management) personnel management information system (PMIS), which allows us to more efficiently process personnel actions. When an employee leaves employment some processes are programmed automatically in PMIS as provided by DHRM policies. We are proposing a change in our severance policy to accommodate the DHRM policy and the automatic generation of a date that the PMIS system requires. This is the only change to the policy.

Judge Hanson made a motion to amend the policies and procedures to change the severance policy to coordinate with DHRM and the automatic generation of a date required by the PMIS system. Ms. Wallace seconded the motion. The motion carried.

The next item on the agenda is the budget.

Ms. Geiger said that we have received all of the proposed amendments to former Governor Kaine's budget proposal for the House and the Senate as approved for fiscal years 2011 and 2012 and provided a summary in the binders of each of the major items

that directly affect our general appropriation funding. The retirement amendments were not included because it would be hard to give a concise summary of all of those proposals.

They have proposed new offices for Chesterfield, Henrico, and Prince William in the Governor's budget. The Senate has kept the offices in the budget along with the money. The House has removed it and put the funds back into the criminal fund. Governor Kaine's proposal maintained our \$43 million plus, and the House maintained that as well but the Senate reduces that by \$1 million. That is in addition to the judicial reversion that is already there. Right now our judicial reversion, which is becoming permanent, is \$544,000 each year. As a judicial reversion they do not reduce our initial appropriation but they say we have to give back that money at the end of the year. That would remain in all of these proposals so anything that is proposed would be in addition to the \$544,000 cut. If the Senate version goes through it would be \$1.5 million that we would be reduced by each year

There was discussion about the budget for this year and next.

Ms. Geiger continued with the judicial reduction for waiver of jail and misdemeanor cases. The Senate provided this in budget language; they reduced the criminal fund fairly significantly each year and also reduced our budget which is part of that \$1 million. The language in the Senate version calls on the VIDC, the Commonwealth Attorneys, and the courts to try and come up with a process for reducing the number of cases in which indigent counsel is required due to the waiver of jail in misdemeanor cases.

Mr. Johnson said that this was the proposal that was put forward by the prosecutors and was a reaction to their budgets being slashed. Their proposal was to waive jail time on some misdemeanors and that way the court would not need to appoint counsel. They came up with a number to reduce the criminal fund \$6 million this year and \$9 million next year. The Senate version reduces our budget by \$1 million because of fewer misdemeanors. Mr. Johnson believes the latest version backs down on this monetary amount. The sure way to do this is to take the misdemeanors that aren't worthy of jail time and make them Class 3 misdemeanors. There are many issues associated with this that are being hashed out. The prosecutor's proposal on this is, if we save all this money use it to restore the budgets of the prosecutors.

Ms. Geiger said that while the Senate provided that in its amendments to the budget, the House introduced a bill at the request of the Governor which contained those provisions. The House version of the budget did not have an adjustment for that particular legislation. We can expect there will be some adjustments made for whatever version they approve.

The House has stricken all furlough days from all versions of the budget. The Senate has maintained Governor Kaine's proposal which has one furlough day in the current fiscal year which will be the Friday before Memorial Day and three furlough days for each of the next two years for a total of six furlough days, three in each year of the budget for all state employees. While this has no direct impact on our appropriation, it will require a pay cut.

Ms. Geiger continued with court appointed waiver fees. She said that the Senate version of the budget reduces by \$600,000 this current fiscal year and strips all of the funding for the waivers, \$4.2 million each year, from the budget. The House has left all of the funding in tact.

Education and public safety are the last two areas that the House and Senate are still working on. They have missed their deadlines and it does not look like the General Assembly will finish on Saturday unless something happens quickly.

There was discussion about a bonus. Along with the three furlough days, the Senate proposed for December 2011 a three percent bonus for all state employees and funded it. The House did not fund it. There is a potential for the three percent bonus if that is not stripped this year or next year, but it may be contingent upon money available.

With regard to the court appointed fee waiver funds, Mr. Hade said that the total budget is \$4.2 million per fiscal year. We have reached \$3.6 million in waivers. Because of the Senate proposal to remove \$600,000 in the current year we are sitting on the ones coming in to see what happens with the budget in the current fiscal year. If that is restored we will go back to paying the waivers we have on hand until we spend the \$4.2 million for FY10, which we had predicted would run out in mid May.

There was discussion regarding the House and Senate being so far apart on the budget issues. Mr. Hade said that last year both the House and the Senate created the reversion account and let us work together with various agencies that are listed in the judicial department to come up with each agency's contribution. This year the House stayed with that plan, they added \$2 million to the reversion amount. The Senate went through each one of those departments and picked numbers themselves and that's where that additional \$1 million number came from or why approach seems different this year.

Mr. Johnson reported that we know we are going to have \$544,000 before anything else happens. The Senate version as it stands now would be quite a bit more. The House version as it stands now would be less but still a large amount. We do not know what the figure is yet.

We are trying to come up with savings without layoffs. A couple years ago our capital offices each got two new positions as part of the money that was put into the system. We had three of the capital offices keep positions open; the other office had filled all

positions. We will continue to keep those three positions open. We gave the offices the option of whether to keep an attorney position or an investigator/mitigation specialist position open. The Arlington office positions have already been removed from Arlington, but we have kept them vacant in order to generate the money we paid last year. Arlington was originally staffed with 14 ½ positions for attorneys and moved to 14, this has brought them down to 12. This is still above what their staffing should be, and that generated \$455,000 which was used in large part to get to that \$544,000 last year and must continue the next two years.

The Arlington office (out of 25 offices) is the 25th busiest by a wide margin. It has the lowest caseload by a large margin. Next in line is Fairfax with one position open which will remain open for the next two years.

Matt Foley is the new Public Defender in the Arlington office. One of the positions that was open was Matt's former Deputy position. Arlington will have ten attorneys which is still up from where they should be but will get them closer to where they need to be.

The Northern Virginia Capital office has an opening for an investigator/sentencing mitigation specialist.

The Norfolk office has a position open and has been open for a while and is a position that is not needed at this point.

The Administrative office has a position that has been open about two years. We have kept this open since the budgeting troubles started. It has been difficult because we also made the decision to eliminate Bonnie Farrish's position. This gets us to \$847,000. The problem with the Senate version of the budget is that this only gets us half way there.

Again, these are positions that are vacant and have been vacant and Mr. Johnson has spoken to all the Public Defenders who are involved.

Ms. Geiger said that we got to the \$544,000 by making cuts. We didn't have the annual conference, we cut mileage and training, and tried to carve out as much as we could. These vacant positions are generating the \$544,000, and we know it is a continuing reduction.

Fiscal year 2011 estimated budget. Assuming the \$43,132,492 is our starting point, it is always adjusted a little bit depending what is done with health care and other benefits. Generally we start out a little lower than that but this is the amount that is in our appropriation from the General Assembly. We have 540 allocated positions in the budget and the cost of that includes benefits. The rent is an estimate. We have taken the best information we have from current leases with escalations and then estimating what we think the new lease amount will be for any office that is either in a renewal

year or may be moving, we did not include moving costs or the costs for new carpet or paint if the lease is being renewed.

Mr. Johnson explained that we went to the DGS (Department of General Services) system of negotiating our leases. They try to negotiate the least expensive lease in terms of rent. That means options once a part of the lease like paint and carpet are not there anymore. This allows them to say they saved the state money but when the time comes, we have to pay for carpet or paint in the offices and this is not budgeted. We have no control over it.

Ms. Geiger continued with contract services. We have taken the FY2010 amount and adopted it, knowing that the cost may go up for some things; there may be some shifting around. We think this is a good estimate to start with, with the proviso that if we run into a big problem with equipment breaking or voice mail systems crashing that number may go up but we think this is a good starting point. Contract services will be \$2.2 million, supplies \$239,000. The Continuous charges category includes workers compensation, general liability insurance. Some of our leases do not have utilities included, and this covers that as well.

We have an aging telephone system. We have replaced some systems in offices as needed. There are two components, (1) the phone system and (2) the voice mail system. We have had some problems with failure of voice mail systems. It is an item we have identified but in order to replace the current systems, without a state contract in place, we would need to procure via bids and proposals so we have no idea of what the costs might be for these items. This is a procurement item we have not taken up yet. That could go up or we could be pleasantly surprised and it could stay the same.

If we reduce these general areas it leaves a balance of about \$535,000. There are several items we identified that were not budgeted items previously and are fairly significant. Unemployment compensation will cost about \$73,000 this year, as opposed to about \$3000 to \$5000 a quarter previously so that is a significant increase. Our annual leave payouts have been significantly higher this year and any estimated severance pay is going to be an added cost.

There was discussion regarding the higher cost of severance pay and unemployment. People are out of work longer.

When someone files for unemployment, they get twenty six weeks paid by the state. There are two federal extensions and there is a third extension now that comes back to the state and can be a significant amount of money.

Ms. Geiger said that there are two known scenarios based on the currently proposed budget reductions. The first is the possible reductions in the Senate version of the budget: \$544,000 and the \$1 million which leaves us with a deficit of \$1.2 million. We

will get into the turnover and vacancy but we are not generating the turnover and vacancy that we budgeted and this continues to drop. The three furlough days are not included. The second scenario is possible reductions with the House version of the budget: \$544,000 continuing reduction and \$400,000 depending what the court will work with us on, this could be \$300,000 or \$500,000 depends what the House comes back with. This leaves us with a deficit of \$400,000. Again, turnover and vacancy might be an option but we can no longer rely on turnover and vacancy to budget, even with the hiring delay.

Mr. Johnson said that we budgeted turnover and vacancy over the years because we have always had it. The trend over the last few months has been running \$30,000 to \$40,000 short each month of what is budgeted. There is no reason to expect our turnover and vacancy to change in the next year. This is leading us to some tough decisions. Our spending is down this year, the Public Defenders have done a really good job of paying attention to spending. There is not a huge chunk of our budget that is discretionary spending.

Mr. Johnson reported that because of our situation with turnover and vacancy we are not going to be able to continue to fund the Appellate Office. That office is funded from turnover and vacancy and was started as a pilot program several years ago. The Appellate office does exceptional work; they are a valuable resource to the system and handle approximately ten percent of the appeals in the system. We are hoping to continue to give the public defender offices some of those resources in a different way. The Appellate office was doing all the appeals for our Franklin and Winchester office and doing a lot for the Portsmouth office.

There was discussion about turnover and vacancy and how the Appellate office was set up. The Appellate office has always been funded differently than the Public Defender offices.

Mr. Johnson said one of the things we would like to do is hire an appellate coordinator to travel to all of the offices and make sure the appeals are being done correctly and make sure the procedures are set up correctly. Every office has done some appeals. This coordinator would be a training resource and would work out of the administrative office. We are also hoping to have a Brief bank that could be maintained.

There was discussion about the coordinator being responsible for novel appeals.

The appellate office has leased space for three more years at \$27,000 per year. We will ask DGS to find another tenant.

There was discussion about the great quality of work that comes out of the appellate office. Mr. Johnson said that either we will have a state-wide appellate system which

would do all the work for all the offices or we need to elevate the level of work in the offices.

The appellate office currently has four positions which equal about eight positions in the field because we have to pay for the office and equipment and the positions tend to be at a higher level. So the equivalent of authorized positions to keep the appellate office open would be about eight positions from the field.

There was further discussion about keeping two appellate attorneys to use as a resource to carry on the work. This is a major step backward and is decreasing a significant asset. This is definitely a move in the wrong direction.

Mr. Anderson suggested tabling this decision for a reasonable or appropriate amount of time to see if there is an alternative that has not been considered here today.

Regarding the appellate counsel position Ms. Geiger said that, in 2007 we received additional positions for the appellate office. We took a half time senior appellate defender and made it a full time appellate defender II. So part of that funding was appropriated. In 2008 we did the same thing; we took the full time appellate defender II and elevated it to a full time senior appellate defender. A portion of that money was from an appropriated fund. Added together that amount is \$38,000 which was from appropriated funds. To get to the appellate counsel position, depending how it is classified, a senior attorney level is a total cost of about \$85,000 so we would need to find about \$47,000. That includes benefits. If that position is to be a deputy level the total cost is about \$95,500 then we would have to find about \$56,000. If a second position is needed, the cost goes up. Two senior level positions would be about \$170,000. It is easier to find that than it is to find \$610,000.

Mr. Johnson added that these two positions would be without a support staff.

Judge Hanson made a motion to temporarily table the decision with regard to the appellate positions and in order to recognize and study all aspects of the issue and to empower the Budget Committee to make a decision and meet prior to the demise of the Appellate Office. Mr. Benjamin seconded the motion. The motion carried.

Mr. Benjamin said that he always wanted the public defenders to be better and more knowledgeable about appellate issues and is concerned that they are being insulated from the process by the existence of the appellate office's expertise. They rely on the appellate office as a crutch and do not focus enough on the appellate strategy.

Ms. Chittom said that in ninety nine percent of the cases, if a trial lawyer makes the right arguments and does what he/she is supposed to be doing there is no need for an appellate office. She thinks what the Commission needs is some unit that would actually audit the performance of the trial lawyers and address the weaknesses. Except for some

strange issue that arises from time to time, just being a good trial lawyer will adequately preserve the issues for appeal.

Mr. Benjamin said that in the private defense community there are some lawyers who are well known, and do tremendous trial work but never have an appeal. Not because there are not errors, it is because they are not objecting. He is worried about public defenders who never get appeals because they are always pleading guilty when perhaps they should not.

There was further discussion on appeals.

Judge Hanson moved that the Virginia Indigent Defense Commission convene in closed session to discuss personnel issues pursuant to the personnel exemption contained in §2.2-3711(A) (1) of the Code of Virginia.

This meeting will be attended only by members of the Commission, however, pursuant to §2.2-3712(F) of the Code of Virginia, the Commission also requests the attendance of the Executive Director and the Deputy Director because it is reasonable to believe that their presence will aid the Commission in its consideration of the matters which are the subject of the closed session.

Mr. Benjamin seconded the motion. The motion carried.

After reconvening into open session, Judge Hanson moved for a roll-call vote asking that each member certify that to the best of his or her knowledge, during closed session the Commission heard, discussed, or considered only public business matters that were lawfully exempted from open meeting requirements under the Freedom of Information Act.

Each Commission member so certified.

Ms. Jankowski moved that the Commission delegate to the Budget Committee of the Commission the authority to address any additional cuts that may arise in addition to addressing the Appellate Defender Office issue. Mr. Benjamin seconded the motion. The motion carried.

Mr. Johnson said that we have provided the APA (Auditor of Public Accounts) with the information they requested. We will provide you with the results. The Annual Public Defender training conference has been cancelled for budgetary reasons. The Chief Justice's training is coming up. We sent a large number of our defenders to the criminal law seminar. We will have programs available on DVD and live programs here. We had capital, investigator, and sentencing advocate trainings planned for May and June. Those have been moved to after the first of the year, which will probably be July or August. We did trainings in January for the public defenders and office managers.

We are currently in the process of reviewing the Standards of Practice and Enforcement. We have a draft of changes to be sent to the advisory committee. Ms. Geiger said that most of the legislative bill work is done, many things died under the weight of the cost which made it easier to keep track of some things.

Senate Bill 248 which was the third attempt to get ex parte hearings in capital cases for expert witnesses. This is actually on the House floor right now and made it out of House Courts this year by a wide margin. Hopefully if it gets passed it will move on to the Governor.

House Bill 1216 is a bill we submitted. A couple years ago legislation was passed that allowed localities to provide a supplement to public defender offices. We were going to have that money flow through us. When we finally got a locality that showed interest in paying us, it brought up all kinds of retirement implications and other things that would end up costing us money. So the legislation says that the locality can supplement our public defender office, we do not want to be involved, just pay them directly. This bill was passed. This is a voluntary supplement. No one had a problem with it. Hopefully it will be on its way to the Governor as well.

The third item is a joint resolution. We are going to receive a letter asking us to study the possibility of a public defender office in Montgomery County. We will be working with the Supreme Court and Karl Hade to try to get some information and provide recommendations. We will see what the letter says when it comes.

Mr. Benjamin said that everyone should thank DJ and Carlos for all of their help during the General Assembly session. They helped review bills as they came in through Senate Courts and were invaluable.

He added that we have one small additional arsenal in what we can do through the Department of Forensic Science. This provides express authorization where authorization did not exist for defense lawyers to make ex parte application for Department of Forensic Science examination in any particular case. Because of the restrictions on data base information, the department was not authorized to run a comparison to take an evidentiary sample of DNA and run through their data bank. The bill that has come through and has passed permits that now.

He said that the Chief Justice's Program is going to be a very substantive program. This will be very good for all defenders to attend.

Ms. Wallace said that she was pleased to see our Chairman and Executive Director at the National Symposium on Indigent Defense that was held by the Department of Justice. Soon after there was an announcement of creation of an office in the Justice Department that will deal with rule of law issues, access to justice, including indigent

defense, and court administration. We have a line up of national leadership that has been more open and supportive of the right of counsel than we have had in a while. She believes it is important for jurisdictions to make their voices heard in terms of requests for support from the federal government to help the states fulfill their right to counsel. There are a lot of people looking at potential legislation down the line to hopefully equalize and create more balance in the system. The federal government provides a lot of money to law enforcement and prosecution. It is a constitutional right for federal support for indigent defense. She will keep the Commission apprised of opportunities.

A caseload study presentation was conducted by the National Center for State Courts.

There was no official adjournment. The quorum was lost during the caseload presentation, prior to adjournment.

Respectfully Submitted:

Approved By:

Diane Z. Pearson, Administrative Assistant

David J. Johnson, Executive Director