

**The Virginia Indigent Defense Commission
Commission Meeting
1604 Santa Rosa Road, Suite 239
Richmond, VA 23229
December 15, 2008**

Vice chair, Judge Alan Rosenblatt called the meeting to order at 11:00 am. After welcoming everyone he offered his sympathy for the loss of Chairman, Professor Robert Shepherd, who passed away last week. Judge Rosenblatt said that Professor Shepherd was a real believer in the Indigent Defense Commission and in indigent defense, but his true love was juvenile defense. He was a wonderful person who gave himself to the legal community.

Other Commission members in attendance were Judge Edward Hanson, Jo-Ann Wallace, David Walker, Carmen Williams, James Towey, designee for David Albo; David Lett, Maria Jankowski, Karl Hade, and Chris Anderson. Administrative staff included, Executive Director, David Johnson; Deputy Director, DJ Geiger; Director of Budget and Finance, Bryan Aud; Human Resources Manager, Amy Williams; Bonnie Farrish, Diane Pearson, and Guy Horsley, Special Assistant Attorney General.

Quorum requirements have been met.

The first item on the agenda is to approve today's meeting agenda.

Mr. Walker made a motion to approve the agenda, Ms. Williams seconded the motion. The motion carried.

The next item on the agenda is to approve the September 18, 2008 meeting minutes.

Mr. Anderson moved to approve the minutes. Mr. Towey seconded the motion. The motion carried.

The next item on the agenda is the proposed meeting dates for 2009.

There was discussion regarding the time of the meetings. The conclusion was that 11:00 works well for everyone.

The meeting dates for 2009 are:

March 5th
June 4th
September 10th
December 3rd

Mr. Johnson asked the Commission to designate Judge Rosenblatt as acting chair through the end of June 2009. In the normal course of business that would be when we will be electing officers.

Mr. Walker made a motion to designate Judge Rosenblatt as acting chair. Ms. Jankowski seconded the motion. The motion carried.

The next order of business is the Budget and Finance update.

Mr. Johnson reported that there is a budget and finance report in the binder. He explained that the FY09 General Fund appropriation is \$43,132,492. Bryan Aud who is our Director of Budget and

Finance has been giving us figures as we go with Bonnie Farrish's help which has put us in a better position to predict where we are.

If you look at the first quarter expenditures, we spent just under \$12 million. In October there is about \$3.5 million. The central appropriation adjustment, \$228,000 is the result basically of not getting the two percent raise that was originally there. The health and benefits that are associated with that need to be backed out. November expenditures, you see the \$3.5 million and our remaining appropriation for the year.

Below are the FY09 Turnover and Vacancy Savings which is very important to us because it is one of the ways in which we generate money to pay for things we otherwise could not afford.

If you look at the average monthly personnel costs of \$3.1 million, I think that shows you how lean an agency we are. November is \$3.5 million. Almost all of what we spend is on personnel and personnel associated costs and if you add rent into that there is not a whole lot we are spending that is not going to paying our employees, paying their benefits, and paying the rent.

Average monthly turnover and vacancy savings is \$187,000. That may continue to slow with the economy being what it is. If you look below that the \$167,000 is what we budget every year, knowing that we are going to have that turnover and vacancy. You will recall when I first became Executive Director we internally raised salaries in the middle of the year. We did that under the advice of the Auditor of Public Accounts to use some of this money. Also when we get raises we tend to get shorted because it's based on a snapshot of the salaries in one particular two week period. That \$167,000 is money we need every month to meet our payroll. The average savings being generated by turnover and vacancy is a little over \$20,000.

Looking down the sheet at the operating funds, there is a little better news. The average monthly expenses outside of personnel are \$156,000. If you look at the bolded number, \$46,000 that is currently what we are not spending. Part of that is intentional because we are trying to spend less in every way we can which is important because it is generating savings for us. You combine those two, the average monthly personnel savings and the average monthly operating savings is about \$66,000 a month. Moving down a page, if we continue that for a year we will come out with just about \$800,000 in savings, however, we have that \$228,000 that is being subtracted because we are not getting the two percent raise.

The \$450,000 we advised you of at the last meeting is what we presented as our proposed voluntary spending cut to Department of Planning and Budget. That brings us down at the end of the year to a razor thin margin of about \$119,000. Putting that in historical perspective, last year, which was a low year, that figure was about \$1.5 million. We had one year where it was \$7 million and another where it was \$5 million. We are getting as lean as we can get.

On December 10th we instituted a sixty day hiring delay across the system. This basically means when we have an opening we need to wait sixty days to fill the position. We did that for a couple reasons. When we have an employee who leaves who has been with us several years, if that person leaves on the 9th and their replacement starts on the 10th, it is not a wash because we pay that employee who is leaving for their unpaid leave. In a recent case it was \$6,000. That sixty day delay is going to help us pay those employees and hopefully make sure we generate the money we need.

Mr. Johnson went on to say that he discussed this with the Public Defenders and they all understood the need for this. We had agreed to honor offers that had previously been accepted.

The Supreme Court had already instituted a ninety day delay some time ago by purposes of comparison. We thought we would try sixty days and see how it goes. Again, because of the way Mr. Aud is doing this, as the year goes, instead of waiting until the end of the year to see where we stand we have a much better idea of what our cash position is.

There was discussion about the sixty day delay which can be adjusted to ninety if need be.

The next page is a request from Delegate Lingamfelter who is looking at the publishing costs of every agency. We put together a package of every publication over a hundred copies that we have done in the last year. For us it was three items. Our policies and procedures employee handbook, our certification training book that goes to all new attorneys, and our annual training conference manual. They also wanted to see the purchase orders.

The good news is for all three contracts we used VCE, Virginia Correctional Enterprises which is another state agency. The total cost was about \$9,000. For two of these we will not have printing costs. We are not having our annual conference, we had to cancel that; and the policies and procedures handbook will be posted on line now through the Knowledge Center for all employees to have access electronically.

The certification book is provided at the training, we are required by statute to provide to new lawyers. It's printed on both sides of the page. I think they will like what they see as far as what we have already done.

The next item on the agenda is the policies and procedures update.

Ms. Geiger reported that she met with Mr. Walker this morning to go over some changes.

Chapter 11

All of the changes that are proposed for this chapter are a direct result of the IT security standards for the state. We are requiring additional documentation to bring an employee on, to get them computer access, clarifying that there is no expectation of privacy; and we are going to be required to do audits of our IT systems and processes so we will need access to the data they generate while they are state employees.

We also get into what is sensitive data and where the data can be stored and regulations on zip drives and thumb drives. Also email and forwarding to external accounts is addressed. All of these changes are driven by the IT security standards at the state level.

Chapter 1 - Overview and General Information

Basically we incorporated Chapters 14 and 15, which were the legislative and media policies, into Chapter 1.0 which says that the Commission is supervisory; they make all the decisions on policy. That way we can eliminate those two chapters.

We deleted the orientation language that was in Section 1.3 because that is now handled by our HR Department. Twice a month we have an orientation where we are giving specific information to new employees, eliminating the need for that policy.

Mr. Johnson added that we hire on the 10th and 25th of each month, and Ms. Williams conducts a telephone conference which lasts a couple hours for all new employees from their remote offices. She takes them through all the things they need to know and answers any questions they might have. This is something we needed to do and is a positive change.

Section 1.4 Field Office Personnel

Ms. Geiger continued with the field office personnel. We clarified that all personnel records are now kept in the administrative office. With Amy Williams coming on board, we have streamlined this. HR has done a great job getting those personnel records in order, and we have changed the policy to reflect it. We have also provided for proper disposal of the personnel files in accordance with the Library of Virginia and the document retention rules.

Chapter 2 - Professionalism

We have greatly expanded the standards of employee and professional conduct. What we really wanted to do is highlight their responsibilities as far as what we expect them to do in their roles with us. This is all moving toward more professional conduct.

Section 2.0 Standards of Employee and Professional Conduct

We have added sub-section E. We initially moved that from Chapter 12 which was employee identification. Chapter 12 was initially drafted and approved based on some complaints we had gotten about our investigators misleading witnesses as to who they were working for. They would flash their ID which has the Commonwealth seal and the assumption on the witnesses' part was that they were working for Commonwealth Attorneys.

We have incorporated this into Section 2.0 under Paragraph E; however Mr. Walker doesn't believe that it is necessary to draft it that way.

Mr. Walker said that essentially what this means is that an attorney must tell the witness who he is and who he represents. The Commonwealth has a duty to encourage their witnesses to talk to the defense attorney. The complaints were that the Commonwealth's attorneys were upset because their witnesses were talking to the defense attorneys or the investigators. Mr. Walker believes that one ought to be able to talk to a potential witness without telling them who they are and what they do and what case they are working on.

There was discussion about attorneys and investigators talking to witnesses and displaying a badge which could be misleading to the witness. This normally wouldn't be a concern unless the attorneys or investigators are intentionally trying to mislead the witness.

Ms. Geiger suggested using the language "no employee shall intentionally mislead any witness".

There was discussion about defining "mislead".

It was decided to leave the current language as it was proposed and to discuss it during a committee meeting at a later date.

Section 2.2 Dress Code

The suggestion is that we remove "with or" from the last sentence. It would read "If an employee fails to comply with any such dress code established, the Public Defender may require the employee to leave the premises until appropriately dressed, without pay for time missed, at the Public Defender's discretion."

Section 2.3 Case Assignment and Client Contact

The proposal is to add under C. iii a requirement for attorneys to see clients within 48 hours of trial.

Mr. Johnson suggested carrying this over so he can discuss with the public defenders at a meeting in January.

Section 2.5 Professional Organizations

Requirement for the local bar memberships to be authorized by the public defender and the public defender would need to contact the local bar for a discount. The attorney would request reimbursement.

Mr. Johnson added that some local bar associations are really good and some are not. His understanding is that dues are being paid for some assistant public defenders who are not going to the meetings. Mr. Johnson wants to give Public Defenders the discretion to determine if it's worthwhile. He would like the public defenders to put some thought into deciding which organizations are worthwhile for the assistants to join or continue memberships. This goes along

with trying to make some budget cuts and budget reductions. If it is a good bar association we will pay for the membership. The public defenders will be required to make a little effort for that to happen.

Ms. Geiger said that for the administrative staff, which doesn't have a lot of memberships, it would be up to Mr. Johnson whether or not to approve those, depending on whether they are determined to be beneficial.

Section 2.6 Personal Conflicts of Interest

The proposal is in paragraph C to strike in the last sentence "or the appearance thereof".

It was agreed to strike "or the appearance thereof"

Chapter 3 – Employment Practices

The only changes are that we clarified that each employee will be notified at the time they are hired that they are at will employees.

Chapter 4 – Hours of Work and Holidays

We clarified that part time employees must work a minimum of twenty hours per week regardless of the pay period. We were finding that as hours accumulated through the year there were employees that ended up not working the full twenty hour week. This has negative effects on VRS and a couple other things.

Mr. Johnson added that there are 4.3 weeks in a month so if you're thinking about it in terms of a week you are shorting yourself and that causes problems with VRS.

Section 4.1 Inclement Weather and Emergency Closure Policy

The proposal is in the third paragraph strike "employees already on leave will not be charged leave."

There was discussion that this was just for annual leave and not sick leave and the fairness of already being on leave and having to use leave when there is inclement weather or some other reason the office would be closed.

No decision was reached and this also will be referred to the committee.

In the fourth paragraph change the "may" to "shall" in the sentence reading "due to inclement weather or emergency may be granted alternative... Also strike "as determined by the Public Defender and leave in accordance with the leave policy."

Chapter 5 – Compensation

This chapter is mostly clarifications. Clarifying that the temporary pay if we have an acting Public Defender begins the first full pay period and ends the pay period they end service. This clarifies that wage and hourly employees are not entitled to benefits of full and part time employees. Require employees not participating in direct deposit to utilize the EPPI card. Clarifies use of Payline is required for earning statements. This clarifies for employees who have transitioned from long term disability into long term working disability how they are paid and by whom.

Chapter 6 – Leave Policies

We have defined our leave year which is January 10th to January 9th of each year. We have also clarified that an employee cannot use leave until it has been accrued or credited.

Section 6.0 VSDP Sick Leave

This is for full and part time salaried employees who are active in VRS. We clarified the accrual based on the total months of service including active in a state position, leave for military service and leave resulting from a lay-off or a temporary reduction.

Section 6.1 Traditional Sick Leave

Clarified there is no limit on the amount of sick leave that may be carried over each leave year, which is standard for the state. We also clarified when traditional sick leave can be used and how much can be used particularly with the death of an immediate family member.

Section 6.2 Family Medical Leave Act (FMLA)

We clarify in this section the eligibility, use, and the employee's responsibilities. We clarified that it is twelve work weeks, sixty work days, or four hundred and eighty hours of unpaid leave to cover the absences. We have added military use for FMLA which is in accordance with the more recent updates to the law. This talks about the twenty six work weeks of leave for a member of the armed forces undergoing medical treatment, recuperation, or therapy, or other out-patient service for serious injury or illness. The eligibility is for full time employees on a rolling calendar year and what the uses are for it.

In the handout that each of you has is an amended page 47. Paragraph G is the new language we have added. We discovered that some employees are using FMLA when they feel like they need it and this can lead to abuses or requiring us to hold a position open longer than we normally would. Employees use annual leave and then FMLA when they feel they need it and then jump back and it extends that time or use of FMLA a lot longer. Because they are using FMLA we can not fill the position with someone else. Ms. Williams has done some research and determined that it is not the employee who determines when a FMLA eligible instance is occurring, it is the employer. What we have done is added language that basically says that it is the employers' responsibility to designate leave, whether it is annual leave or unpaid leave, as FMLA qualifying and notify the employee of that.

Once we have knowledge of a FMLA qualified event or determination we have to designate it as FMLA, there is no choice on our part. If we do not learn of the FMLA qualifying event until leave has started, we still have the responsibility of determining whether there is a qualifying event and designating it as FMLA from the time it started.

We needed to add clarification because we have had a couple situations where employees tried to manipulate the system to use FMLA when they feel like they want to use it rather than to use it for a qualified event. They think it is another form of leave as opposed to a status.

Section 6.3 Workers Compensation

We added some definitions for clarifications of eligibility and what happens during the first period of when you have been injured.

Section 6.5 Family and Personal leave

We just clarified eligibility and when it can be used.

Section 6.6 Annual Leave

We clarified accrual, use, and the employee's responsibilities. We made it the employee's responsibility to know their correct balance. We have had several employees who were not keeping track of their unused balances. Because we use payroll services, the employee adopts whatever balances payroll services has for them at the time without actually accounting for their own leave. Some employees have fallen into leave without pay status because of it. We are doing leave audits to make sure we are giving them the right information but ultimately we are making it the employee's responsibility. We also are emphasizing the accrual and that you cannot take leave until you have earned it.

Section 6.9 Administrative Leave

This is based on an incident we had. We have added that where a supervisor is requiring you to seek some kind of help or assistance and you are having an initial meeting for a covered service

from the employee assistance program, it will count as administrative leave for that first meeting. We are requiring the necessary documentation to verify the use.

It is the employee's responsibility to notify when administrative leave is being utilized and provide required documentation.

We also added that in a situation where it is deemed appropriate by the Executive Director, an employee can be placed on administrative leave not to exceed two weeks in length.

We did have a situation where Mr. Johnson placed an employee on administrative leave for safety reasons.

Section 6.10 Community Service Leave

We clarify which organizations are actually those we believe an employee should use this leave to participate with, that must be approved by the Public Defender or the Executive Director and that the leave does not carry over.

Paragraph B I – insert the word “legal” in the last sentence so it reads “the employee may have ‘legal’ custody.”

Section 6.12 Military Leave

Ms. Williams has done a lot of research on this and determined what we needed to provide. Basically it provides for leave with pay, what they are entitled to, the fact their benefits are not affected, and what happens with their annual leave.

There is military bank leave that can be carried forward.

There is some language on reinstatement. Just as a point of information that extends for to up to five years. This could be a hardship depending on the number of people we have in military service at the same time but it is a requirement that we do not have the authority to change. There are some things they need to do for proper reinstatement but they do have to be reinstated.

Section 6.13 Leave Without Pay

This is actually another item that we need a little guidance on as far as policy. This is not a type of leave, it is a status effective when you actually do not have leave and are working without getting paid. Employees have been allowed to come off of leave without pay, to work for a day the day before a holiday, get paid for the holiday and return to leave without pay.

The proposal that is being put forward is that we require instead of letting them keep some leave aside to get paid on the holiday is to say in order to get into the leave without pay status you must deplete all other leave. It does not mean that you can use sick leave where you would be required to use annual leave. If you have depleted annual leave and that is the only appropriate leave available to you, you are on leave without pay and you have met the requirement.

The concern that we have had from the budget and finance department is that this creates work and transactions for them. In the event that someone goes on leave without pay, that has to be calculated and if it is not caught in time then we become debt collectors. If it can be caught in time it creates a hassle because we have to contact the Department of Accounts to get payments stopped and it causes some reconciliation work and additional transactions on the fiscal side of the house.

This has been causing a leave nightmare because putting people on and off leave has not been calculated properly and we have ended up with people's leave balances being all out of whack. It causes fiscal a hardship because in the event there are a lot of people who go into leave without

pay status, it causes extra transactions, extra work for them. Errors in leave balances cause a need for leave audits and reconciliation on the HR side so there is work either way.

The policy is whether or not you want employees to be able to go back and forth and get paid for holidays that maybe they wouldn't have enough leave to get paid for or whether you want to accommodate the employee in that situation.

Ms. Geiger said that she went on the Supreme Court's website to see if they had a similar situation. The Supreme Court requires people to drain their leave. She spoke with John Rickman, Fiscal Director for the Supreme Court who said that there are not a lot of people each year that it happens with, when it does it is kind of an inconvenience. If it is an employee still working for the court, they can make a payment schedule to get that money back. There is a reliance on the HR department to notify them ahead of time when it happens. There is also a reliance on the HR department to know when the deadlines are for certifying payroll so it can be caught if need be, but he said that it really doesn't happen that often. People generally do not do that, they come back when they are supposed to, and do not go into the leave without pay status.

Chapter 7 – Benefits

There are a lot of benefits available and they will be provided in a handbook. This is one of the proposals that Ms. Williams had. We really want to focus on just policies in the policy manual and give the employees a handbook that explains many of the other benefits, several of which we do not administer.

No changes to Chapter 8 or Chapter 9

Chapter 12 – Emergency Preparedness

This was formerly Chapter 13.

This is part of the IT security standard and also a part of the Commonwealth emergency preparedness plan. We are required to adopt continuity of operations plans and we shared these with the Commission at the last meeting.

We developed plans for each office on how to continue operations in the event of an emergency and we have inserted that language here. In any emergency situation where the Commission determines action is necessary beyond the COOP plan for the offices, they may adopt plans to address the additional needs.

Chapter 10 – Reimbursement to Employees

We mainly reformatted this chapter.

Section 10.0 Reimbursement Generally

We clarified that we are focusing on economy, prudence, and necessity rather than comfort, convenience, and taste and want to get that foremost in their minds.

Section 10.1 Certification of Accuracy and Legitimacy

We clarify and make more prominent that when a Public Defender and an employee sign the travel vouchers or request for reimbursement that it is legitimate and accurate.

Section 10.3 General Reimbursement Requirements

We require them to follow all the rules and meet all of the time lines in order that their reimbursement is processed and they get reimbursement paid to them.

Section 10.4 Expenses Authorized by Court Order

In order to avoid some hardship on people we have actually given them permission to get reimbursement up front. This is mostly occurring in capital cases. We are requiring the capital

offices to file monthly when they have expenses for reimbursement in order to get that reimbursement in a more timely manner.

Mr. Johnson explained that in a capital case if we get reimbursed after July 1 for expenses that we paid out before July 1, we effectively lose the money. We need to get reimbursed in the same fiscal year if at all possible. In capital cases the statute provides the ability to get reimbursed as the case progresses so we will require them to do that.

We are requiring the employee to make sure all the necessary paper work gets filed to make sure the reimbursement does come in if we have paid it ahead of time. There are times when there is a court order issued and the court will come back and say the reimbursement should not have been that much. The employee can request reimbursement but it is subject to funding.

Section 10.5 Expenses Denied by Court Order

These are expenses that are initially denied by the court completely. We separated the two and show that there is a difference. There is one that the court has authorized for which you have the order; and the other is where you have asked for it and you have an order denying it. Generally we will not have funds for this but we are allowing a mechanism that they would have to follow for the request.

Section 10.7 Conference Registration Fees

We added an exception. Where a registration fee is \$250 or less, the Executive Director could wave the prepayment requirement if there is a demonstrated hardship. This came up with a course that was announced six months ahead of time but filled up immediately. The people who wanted to take it but couldn't get in the course because it was full, or they had to pay out of their own pocket and then wait six months to get reimbursed.

Mr. Johnson added that this was a case where we needed the people to take the course. It was a situation of pay in advance and we will reimburse it in six months, or give us the ability to pay it in advance. This seemed to be the fair thing to do since we were requiring them to go.

Section 10.8 Lodging

We note that the current lodging rates are in the CAPP manual. We require employees to not only look at the government rate but also look at other sources, such as AAA, AARP, Travelocity, and Expedia.

Section 10.9 Meals

Two years ago we went from requiring receipts for every meal to a flat rate. We are going back to requiring receipts for meals. This is more accurate for purposes of auditing. We are maintaining those flat rates as the maximums.

Section 10.11 Mileage

This is probably the most complicated because we are introducing an Enterprise Rent-A-Car program. The state is moving from the centralized fleet of cars to Enterprise because of cost and the ability to maintain cars and the ability to have cars available throughout the state rather than a centralized garage.

The requirement is to calculate the trip and if it costs more to use your personal car than to get a rental car you need to get the rental car. You can choose to use your own car but then you will get the fleet rate of reimbursement which is a reduced rate. If you were going to the annual conference, for instance, you would be expected to car pool. You can choose not to car pool but you will be reimbursed at a reduced rate.

If there is a state car in your office you must use the state car. If you choose not to, you get the reduced rate of reimbursement.

Mr. Johnson added that the rate of reimbursement is \$.585 going down to \$.55 because the federal government reduced their rate. This is something we have to do because we have offices far away. We will pay \$300-\$400 in mileage reimbursement, and the cost of a rental car with gas would be less than half that.

Section 10.17 Car Rentals

Again, if your office has a state car you must use it if it is available, if not, rent a car. All else failing you can still get reimbursed for using your own vehicle at a reduced rate.

Mr. Walker made a motion to approve the proposed amendments to the policy and procedure manual as amended and with the exceptions of the add-on's that will be looked at by the Policy and Procedure Committee at a later date. Judge Hanson seconded the motion. The motion carried.

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, the Deputy Director, and Guy Horsley, Special Assistant Attorney General 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. Towey 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 the 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 and were identified in the motion by which the closed session was convened.

All members so certified.

Mr. Walker made a motion to instruct the Executive Director in the event that the General Assembly requires more budget cuts from this agency to come up with a plan for additional budget cuts in line with what we discussed up to \$850,000. Mr. Anderson seconded the motion. The motion carried.

There was no further business.

Judge Hanson made a motion to adjourn. Mr. Anderson seconded the motion. The motion carried.

The meeting adjourned at 12:30 pm.

Respectfully Submitted:

Approved By:

Diane Z. Pearson, Administrative Assistant

David J. Johnson, Executive Director