

## **The Virginia Indigent Defense Commission**

Commission Meeting  
1604 Santa Rosa Road, Suite 200  
Richmond VA 23229  
September 25, 2018

Judge Alan Rosenblatt (ret.) called the meeting to order at 11:05 am. Other Commission members in attendance were Professor John Douglass, Carolyn Grady, Kristen Howard, Professor Henry (Hank) Chambers, Jim Hingeley, Steve Benjamin, Guy Horsley, Karl Hade, Delegate Chris Collins and David Walker. Members not in attendance were Senator Richard Stuart, Judge Edward Hanson, and Carmen Williams. Administrative staff included Executive Director, David Johnson; Deputy Director, Maria Jankowski; and Office Manager, Diane Zubke.

Quorum requirements have been met.

The first two orders of business are approval of the agenda and minutes.

Mr. Benjamin made a motion to approve the agenda and June meeting minutes. Mr. Walker seconded the motion. The motion carried.

The next order of business is scheduling.

Mr. Johnson said the proposed dates for 2019 are Tuesdays:

March 19<sup>th</sup>  
June 18<sup>th</sup>  
September 17<sup>th</sup>  
December 10<sup>th</sup>

Mr. Benjamin made a motion approving the proposed 2019 meeting dates. Ms. Grady seconded the motion. The motion carried.

Mr. Johnson said for those of you on the Personnel Committee we need to schedule a meeting. All of you are welcome to attend. Professor Douglass is the chair and is proposing November 13<sup>th</sup> at 11:00. This meeting is when we review evaluations.

Mr. Johnson has visited a majority of the offices and has met with several public defenders here and will meet with the remaining at the annual conference.

Delegate Collins joined the meeting.

It was determined to schedule the Personnel Committee meeting November 19<sup>th</sup> at 11:00.

The next item on the agenda is the budget update.

Ms. Jankowski said in the meeting materials is the close of FY18 that closed June 30<sup>th</sup>. There is nothing significant to report for FY19, the mid-year check-in will be the December meeting.

The two spreadsheets are the exact same information in two different formats. The first is the various service areas; the second is a year trend for the entire agency. We closed out with a carryforward of \$136,132. We just learned at the end of last week that money has been returned to us from the state.

We prepaid some items that helped us reduce our carry forward increasing the likely hood we would get it back.

In light of that we have some expenditure requests.

The first is a position here in the administrative office. We have 546 employees in the agency with five IT positions. We have a director, a network engineer, an infrastructure engineer, a system guru, and a help desk support person. These folks do a lot and cover the entire state.

Mr. Johnson added and we now have a computer refresh coming up.

Ms. Jankowski said the title of this position is information technology support specialist and would pay up to \$50,000 and means it will cost us approximately \$65,000 annually, when we factor in benefits. This is not a high level position. We would ask to create this position; it is unallocated so it would be the money we have due to turnover and vacancy savings and responsible spending.

Mr. Hingeley made a motion approving to create an IT support specialist II position. Ms. Howard seconded the motion. The motion carried.

The next is a senior trial attorney position. Ms. Jankowski said this is not a new position; we would like to reclassify one (1) APD II to a senior trial attorney. The cost is approximately \$11,000 because the salary goes up and there are some attenuated benefits but their primary benefits do not change.

Mr. Johnson added we would like to have one senior trial attorney for each office. This is a reclassification not a new position.

There was discussion regarding the senior trial attorney position.

Ms. Howard moved for the Commission to reclassify one assistant public defender II position to a senior trial attorney position. This will make the total number of authorized senior trial attorneys twenty five. One allocated to each public defender office. This is not the creation of a new position but a reclassification of an existing position. Ms. Grady seconded the motion. The motion carried.

The next is a decision package DPB (Department of Planning and Budget) meeting. Mr. Johnson said we try to meet every year with our analyst at DPB; that meeting is scheduled tomorrow. Basically the meeting is to discuss our needs. Usually meeting with DPB regarding a decision package is a good thing, it is asking for an amendment to the existing budget. We are just letting you know we will be meeting with them to talk money.

The next is retention bonuses. Mr. Johnson said when the Budget Committee met in April they approved retention bonuses. It has been quite a while since we have been able to do this. The idea is for folks who have been with us for two years and are doing well are given the opportunity to receive the bonus after signing an agreement stating if they are not with us for another year they are required to pay it back.

This was approved but there wasn't a budget. We prepaid some items to preserve the money. The proposal is to do this in November. It is a three percent retention bonus for people who have been with us at least two years, are doing well, and agreed in the stipulation they are going to stay. We have done retention bonuses a couple times in the past and the retention piece is what makes it acceptable.

Ms. Grady moved for the Commission to authorize the awarding of retention bonus to any employee who has been employed with the Commission for two (2) years, has at least obtained a rating of meets expectations, and agrees to a retention period of one year from the awarding of the bonus and signs and returns the retention bonus agreement, not to exceed \$3500. Mr. Hingeley seconded the motion. The motion carried.

There was discussion regarding the retention bonus.

Mr. Johnson said this is a one-time bonus. Our hope is the revenues stay where they are so in June there will be the two percent raise as well as the state's plan for merit. After that we are hoping to have our own system.

The next is a retention bonus for Mr. Johnson who does not have a performance evaluation.

Ms. Grady made a motion for Mr. Johnson to receive the retention bonus. Mr. Horsley seconded the motion. The motion carried.

The next item on the agenda is the annual report.

Ms. Jankowski said in the draft in meeting materials is what we are proposing would be the VIDC's annual report. We have some statutory obligations so the vast majority of those numbered paragraphs track exactly to our enabling statute. Kudos to Jennifer Gilmore, our Certification and Compliance Attorney, Alison Powers, our Training and Enforcement Attorney, and Jacob Lubetkin, our Policy Analyst who

contributed significantly to this report. Jacob went through every state and checked on what they pay their court appointed private lawyers.

We do not have the lowest hourly rate for our attorneys but we have some of the lowest caps.

There was discussion regarding court appointed attorney fees and capital fees.

Ms. Jankowski said the list of certified attorneys in the annual report is inclusive of our attorneys. Our people have to meet all of the same standards.

There was discussion regarding compensation for appellate counsel.

Ms. Jankowski said Catherine French Zagurskie, our chief appellate counsel, reached out to the courts last year to get this information. She talked to the clerks and staff attorneys to compile all of this. The addition of this information was driven by Catherine and her concern about the low pay for court appointed attorneys in appeals.

The second appendix to the annual report is a fifty state chart we have to produce every year.

There was discussion regarding the Supreme Court and Court of Appeals on court appointed compensation for appeals.

Judge Rosenblatt asked for approval of the annual report. All approved.

The next order of business is position reallocations.

Mr. Horsley moved that the Commission grant to the Executive Director the discretion to reallocate the following positions to other offices: sentencing advocate I from Hampton, assistant public defender I from Norfolk, and a secretary from Franklin. Mr. Benjamin seconded the motion. The motion carried.

Mr. Johnson said we track workloads in the offices and if we see a pattern over a period of years either demographics or an office has gotten much busier, we ask the Commission to reallocate positions.

Our Hampton office has fourteen lawyers, they have two mitigation specialists. We have another office with twenty five lawyers and one mitigation specialist. We would like to reallocate the one (I).

We are also reallocating an attorney from Norfolk and a secretary from Franklin.

There was discussion regarding the time frame of notification to the employees who are in these positions.

The next item on the agenda is the parental leave policy.

Ms. Jankowski said the proposed parental leave policy in the meeting materials is coming because the Governor in July issued an executive order granting paid parental leave to all eligible state employees. We are not an executive branch agency so we started to do our homework. We reached out to the legislative branch agencies, the Supreme Court, and all the other independent agencies. To date, many agencies in the legislative branch and almost all of the independent agencies we talked to adopted some form of it.

Our version is before you which, highlighted are changes and clarifications. An example is the executive order required at least 30 days' notice; we are suggesting 45 days' notice because of court schedules and dockets to cover. Alternatively, some areas the executive order said "the agency shall decide". It specifically required the agency to come up with its own policy.

One of the areas we departed from the executive order is we spelled out that one must exhaust this before one can use annual leave. We also specified that a person cannot go into leave without pay status.

Mr. Johnson said the fiscal impact for us is it will cause annual leave balances to grow and when people leave we have to pay out their annual leave and that is unbudgeted money. So there is some limited language in there.

Ms. Jankowski said we pay out between \$200,000 and \$300,000 a year in annual leave but have never had a year of more than \$290,000. Whatever amount of annual leave a person has accumulated they get that paid to them when they leave. The point of this was to address the concerns of the person who now does not have to use their annual leave to go on parental leave because they get eight weeks paid parental leave.

This is trying to address the situation of people going out on leave and planning not to return and then we have to pay out their annual leave.

Mr. Johnson said our offices are populated with young attorneys who are having families and this makes us a more attractive place to work.

Ms. Jankowski said this gives folks who are adopting, parental leave. This gives something to people who did not previously have it.

There was discussion regarding parental leave.

Ms. Jankowski said an employee has to qualify under FMLA, so in addition to being here a year, you have to work a requisite number of hours. Both of these must be met.

Mr. Johnson added that the 320 hours of the Governor's executive order is rather generous. The last paragraph protects the interest we are concerned with.

Ms. Jankowski said the other thing that is distinctive about our parental leave policy as it is proposed is we require the employee to use this parental leave first, the executive order does not. That is different in that what most people will have to do if it is a woman who gave birth will have to use the parental leave to supplement her VSDP. Most people on VSDP, particularly if they have only been with the state for a few years, do not qualify for one hundred percent pay. If you have been with us for just a few years you only get sixty percent in the first six weeks of VSDP. This will allow employees to supplement so they can get paid at one hundred percent.

There was discussion regarding who pays for this.

Ms. Jankowski said the argument is that if a person would have otherwise been in another leave status, they were going to get paid anyway. The issue is this affords them the ability to not have to use their family personal or annual leave so they can bank that and when they leave that is a bigger check we have to write. That is the only financial cost we could say definitively.

The way that VSDP works is someone who gets hurt must go out on sick leave then transition into VSDP. If a parent who is out sick before the child was born, parental leave does not cover that because parental leave is for bonding with the child so the child has to exist to trigger parental leave.

There was further discussion regarding parental leave.

Eligibility happens if you meet all of the other criteria, the moment the child is born, so from that moment you must take that time within six months. You cannot wait five and a half months and then start.

Under limitations it should read "Parental leave shall be taken in its entirety within six months..."

There was discussion regarding leave without pay status.

Mr. Hingeley made a motion to accept the parental leave policy as adopted with the adjustments suggested: under limitations add "in its entirety" within (6) months... and strike the last sentence on the first page. In the paragraph what is provided, strike out (8) 40 hours a week and (8) 20 hours a week. Delegate Collins seconded the motion. The motion carried.

The next order of business is the harassment policy.

Ms. Jankowski said the updated draft is in the meeting materials and every reference to the word complaint had not been replaced with allegation. We do not have a complaint process, we have a grievance process. So as not to cause any confusion we

have replaced every reference to complaint with allegation. She tried to capture as much as possible what federal law mandates.

Mr. Horsley suggested taking out “employees with” in the first paragraph, to replace “employees” with anyone, and to replace “aid in the investigation of” with participate in.

#### Under Prohibited Conduct

##### Retaliation:

VIDC forbids any form of retaliation directed against anyone who either alleges harassment or who participates in any investigation concerning harassment.

Mr. Walker moved to adopt the harassment policy with the amendments as articulated by Mr. Horsley. Mr. Hingeley seconded the motion. The motion carried.

The next item on the agenda was the training update.

Mr. Johnson said we have a lot of training going on as usual. The big one coming up is October 23-24, our annual conference. So far four Commission members will be attending, Steve Benjamin, Jim Hingeley, Carmen Williams, and Professor Chambers.

If anyone else is interested in attending please let us know. It is in Williamsburg this year.

Mr. Johnson said all of the public defender offices have received the introductory immigration training. All new public defenders now receive three hour introductory training at the end of boot camp. Ashley Shapiro, our immigration attorney, has presented at the public defender conference and late day lectures in 2017 and 2018. She also presented at a criminal immigration conference in January. She has consulted on 960 cases in our system in about a year and a half.

He thanked the Commission for helping us to fill this need.

Ms. Jankowski added Ms. Shapiro went through six weeks of training. She has written a law review article for the University of Richmond on immigration, she served on a University of Richmond panel that did a symposium on immigration, and she has done some other writing and publishing. She is also one of the presenters for certification training. This is a drop in the bucket of what she is doing.

Mr. Johnson said there is a newspaper article in the meeting materials about Troy Strickland who was one of our investigators in Halifax. He drowned this summer while successfully saving someone else in the Outer Banks.

There was discussion regarding jury trials.

There was no further business.

A motion was made and seconded to adjourn. The motion carried.

The meeting adjourned at 12:55pm.

Respectfully Submitted:

Approved By:

---

Diane D. Zubke, Office Manager

---

David J. Johnson, Executive Director