

GEORGIA PUBLIC DEFENDER STANDARDS COUNCIL

Minutes of Regular Meeting

January 23, 2009

***Official Transcript Available for Review at Central Office*

The regular meeting of the Georgia Public Defender Standards Council was held on January 23, 2009 at the University of Georgia School of Law, Athens, Georgia.

Council members present were Wilson DuBose (Chairman), Stephen Tillman (Vice-Chairman), David Dunn (Secretary), Lee Morris, Wyc Orr, Don Oliver, Jerry Word, Mike Berg, Ron Cross, Melvin Davis, Dr. Paul Kurtz, Tony Thaw and The Honorable Willie Lockette. Bill Rumer participated by teleconference.

CALL TO ORDER

Council Chairman C. Wilson DuBose declared a quorum and called the meeting to order at 12:15 p.m. Mr. DuBose thanked Dr. Paul Kurtz for arranging the meeting and the University of Georgia Law School for hosting the Council.

APPROVAL OF MINUTES

Motion was made by Lee Morris to approve the minutes of the December 5, 2008 regular Council meeting. The minutes were then seconded and approved unanimously.

PUBLIC COMMENT

Chairman DuBose introduced attorneys Kevin Gough and Ron Harrison from Brunswick and noted that they wanted to speak with the Council. Mr. Gough began by giving the Council background information on the *Harold Kinlaw* case, a Glynn County death penalty case that he and Mr. Harrison took to trial. Mr. Gough explained that they had submitted an original budget of \$176,000 to handle the *Kinlaw* case, but understood the budget amount was subject to change based on extenuating circumstances. He related that the GPDSC ultimately paid \$150,000 into the registry of the court, but the attorneys felt they would end up needing more than that amount. He also mentioned that Glynn County would be paying 25 percent of the costs over \$150,000. Mr. Gough concluded his presentation with a recitation of the total amount he contends is owed on the *Kinlaw* case: \$24,000 for Mr. Gough and \$16,530 for Mr. Harrison, together with \$500 for a mitigation expert and other expenses, all of which total \$41,163.62.

After Mr. Gough completed his remarks, the Council moved into a discussion of this request for additional funds. It was decided to consider the request of Mr. Gough and Mr. Harrison in the subsequent budget discussion already scheduled as an action item.

ACTION ITEMS

The two topics for discussion were the FY 2009 and FY 2010 budgets. Sarah Haskin began by elucidating for the Council the specifics of the funding cuts reflected in the 2009 budget. She explained that the 11.7 percent reduction indicated in the governor's budget includes savings from state health benefits and cost-of-living adjustments; the actual cut to programs for 2009 is still at six percent. In reference to Program 1, Ms. Haskin stated that GPDSC was holding \$410,643 in unpaid capital bills, including those from the *Kinlaw* case previously discussed by Mr. Gough. If those bills were to be paid, the entire Program 1 would have a total of \$209,589 remaining. The bills being held include those for outside counsel and experts, as well as experts for in-house capital defender cases.

Director Mack Crawford added that there are five death penalty cases with hearings set between now and July 1, 2009, with one of those cases being the *Ledford* case in Paulding County. Mr. Crawford went on to explain that the *Ledford* case is set for trial on April 13, and it involves a \$265,000 liability for fees. In addition, he estimated for the Council that the liability for those cases with upcoming hearings would be just under \$400,000, with only \$209,589 left to pay for those cases.

Georgia Capital Defender Interim Director Jerry Word brought up the point that the attorneys in his offices are carrying from five to nine death penalty cases each. The case load is particularly heavy in the Macon area, and for that reason Mr. Word requested to be able to hire an attorney for the Macon office to lower that case load.

Dr. Paul Kurtz responded to these reports by summarizing what he termed a difficult situation: GPDSC has more expenses than it has money, so the question is how to resolve the situation. Dr. Kurtz suggested there were two general approaches to take: 1) wait until the end of the year, figure up all the bills and pay pro rata shares or 2) pay bills for work done when it's done. Dr. Kurtz then moved that GPDSC "pay the bills that are sitting on our desk" even though it is clear the remaining \$209,000 would not get the agency through the rest of the year. Jerry Word seconded the motion.

At this point, a lengthy discussion ensued. Wyc Orr began it by seeking the number of capital cases for which there are unpaid bills. Ms. Haskin responded there were 21. Mr. Orr then wanted to know how many of those were in pre-trial status. Ms. Haskin responded there were 10. He was particularly concerned about making a distinction between those defendants in pre-trial confinement and those whose cases were in post-trial convicted confinement because he felt there was a greater urgency for counsel in those cases delayed by unpaid bills. For that reason, he expressed a concern for those "sitting in pre-trial confinement who are having their liberties deprived and their rights affected by the fact that bills are not being paid."

Other members then voiced opinions at this point concerning whether to go ahead and pay all bills or to focus on paying bills for those cases in a pre-trial posture. Tony Thaw suggested that GPDSC should "pay our bills." He added that "we're never going to get more money from the state until we've expended all of our money." Chairman DuBose agreed with Mr. Thaw, noting that he respectfully disagreed with Mr. Orr's position and thought the agency needed to pay its bills.

After some additional discussion about the Program 1 budget and other matters, Mike Berg called the question as to the motion made by Dr. Kurtz. The motion carried 12 to 1. Chairman DuBose instructed the staff to go ahead carry out that directive.

The Council members then turned to budget matters for Program 2 in fiscal year 2009. Ms. Haskin introduced the discussion by explaining that Program 2 included the Public Defender and Conflict Defender offices, as well as experts and interpreters. She announced that GPDSC has \$602,000 available to pay the non-capital bills for the remainder of this fiscal year. Then she turned the discussion over to Larry Schneider, Conflicts Director, for further explanation of the non-capital budget situation. He told the Council that he had received approximately \$90,000 in bills during the first two weeks in January, but he can spend only \$45,000. Finding himself in the position of having to reduce those bills by one-half, he asked the Council “to tell [him] exactly what you think [he] should do with them.”

Don Oliver asked Mr. Schneider for clarification as to how he has been handling those bills, specifically whether he was just paying percentages that would result in “reasonable approved attorneys’ fees that are still laying out there unpaid.”

Mr. Schneider clarified his methodology as follows: first, he imposed a cap on bills, for example, up to \$5,000 for a trial, up to \$1,000 for a felony plea and \$500 for misdemeanors. In that way, he explained, he thought enough money would be saved to stay within the budget.

Mr. Oliver than inquired whether these attorneys “started a case with the understanding that was their cap.”

Mr. Schneider replied that most of them started cases a year or more ago in the belief they would get the full \$45/\$60 an hour rates. However, he explained, that “the money is not available to pay those.”

Mr. Oliver next queried Mr. Schneider as to whether there was any reason that [Mr. Schneider] shouldn’t go through these bills and vet them” to determine whether the number of hours billed was reasonable.

Mr. Schneider responded that he did not see how anyone could determine whether the amount of time spent on, for example, was reasonable. He said he considered it a judgment that could be made only by local attorneys with experience in the various regions of the state.

Mr. Oliver suggested that the CPDs in the various circuits could help Mr. Schneider to review the bills from a local standpoint.

At that point Chairman DuBose recognized GPDSC’s counsel, DeBraé Kennedy of the Attorney General’s office. Ms. Kennedy went back to Mr. Oliver’s original question as to whether Mr. Schneider’s method was the same as what Director Crawford had suggested for the capital bills. Ms. Kennedy explained that it was not the same in the following manner: what Mr. Crawford proposed is partial payment where an attorney could still come back and seek the rest of the payment owed. She went on to contrast that approach with Mr. Schneider’s, in which any payments made were considered payments in full. She noted that the agency has been subject to several lawsuits regarding this approach, in addition to notices that subsequent lawsuits will be filed.

Mr. Schneider then moved on to an explanation of the difficulty of paying bills that go back as far as 2005. He further clarified his approach by explicating the new procedure of staying within the budget so as not to have any bills carried over from previous budget years “to haunt out next fiscal year’s budget.”

Lee Morris then asked what the various columns signified in the conflict report document Mr. Schneider prepared for the Council. He wanted to ascertain whether Mr. Schneider was paying people, for example, 64 percent of a bill, and if so, were those attorneys satisfied?

Mr. Schneider replied that the 64 percent figure was correct, adding that some attorneys were satisfied with what they received and others were not.

Stephen Tillman then asked Mr. Schneider in his role as the “guru” of conflicts what his recommendation would be for handling these conflict bills.

Mr. Schneider said he would recommend continuing to handle the bills as he is currently doing, and that by so doing the agency would be caught up on its conflict bills by July 1, 2009.

Director Crawford added that these non-capital cases presented great difficulties in determining the agency’s liability for those cases. He explained that there has been no tracking system to track these bills to know what they are.

Returning to his narrative, Mr. Schneider clarified the basis upon which he determined the caps he determined for conflict bills. He pointed out that he had been in the public defender “business” for more than 30 years, going back to the days of the GIDC. Back in the “GIDC days,” he received all the bills every year from the DeKalb Court Administrator so that he could review them, add them up and send them to the GIDC. From this experience he said he had gained the knowledge that enabled him to analyze what constituted reasonable fees.

Mr. Oliver next emphasized that he had no problem with Mr. Schneider or whoever is in his position cutting whatever was necessary to stay within the budget. However, Mr. Oliver stressed, he did have a problem with contracting with people on the basis of paying them \$45/\$60 an hour on cases and then arbitrarily saying later that these attorneys cannot be paid that contracted amount “because the legislature didn’t appropriate us enough money.” Mr. Oliver declared that position to be legally and morally indefensible.

David Dunn then added what he described as a “little bit of history” to this discussion of conflict payments. He said that two years ago when the CPDs were told of the crisis in the conflict system, they were asked to assist in dealing with the situation. In response, he said, the CPDs ratcheted back the number of conflicts they were declaring and attempted to handle as many as possible in house. However, he emphasized, there are a lot of questions about those cases being handled in house. He also questioned what was being done about the “bulge” of case resulting from the audit done by the CPDs and from the letters sent to private attorneys that they had to send in bills immediately in order to receive payment on them.

Mr. Oliver then made a motion that Mr. Schneider, or someone, review the bills for reasonableness and then move forward and pay all the reasonable bills. He added that “when we run out of money, we need to go ask for some more money, but it is absolutely indefensible for us to contract with these people” and then come back and not pay them. Dr. Kurtz seconded.

In speaking about the motion he seconded, Dr. Kurtz contended that one of the great problems with the old system was the artificial caps. Now, he maintained, the problem of caps was further

compounded by the fact that attorneys were not being made aware of the caps. Dr. Kurtz added that system in which caps “are being imposed retrospectively seems to [him] to be outrageous.”

Mr. Oliver, on the other hand, defended the use of caps, but contended that the problem arises with not informing attorneys of these caps up front.

Differing with Mr. Oliver, Chairman DuBose insisted that the use of caps did not necessarily satisfy our constitutional requirements. He also asked Mr. Oliver if his motion was retrospective in nature; specifically, whether it would apply any bills that the agency had previously cut.

Mr. Oliver replied in the affirmative.

Dr. Kurtz called the question, but Ms. Kennedy asked for some clarification of the motion before calling the question. She asked about the motion being retroactive back to when the agency started or not.

Mr. Oliver explained, as to the cases upon which bills had been paid, that if any attorney objected and asked to be paid their contracted-for fee, then the agency needed to go back and “deal[] with them as we contracted to deal with them.” He added that he was not “suggesting that we go back and arbitrarily pay everything in the past, but anything that comes in from this point forward and anybody that has objected to being arbitrarily paid in the past, we need to properly deal with them as the contractor.”

Mr. Crawford interjected his concern about there still being no guidelines for the billing from attorneys for conflict cases. He brought up the South Carolina voucher system information that had been given to the Council in the past as an example of guidelines that could be considered.

Returning to the motion on the floor, Chairman DuBose made a motion to amend the motion to say that GPDSC does go back and pay those bills that have been arbitrarily cut after the amount has been approved.

Judge Willie Lockette then sought clarification to make sure the motion was not “talking about paying for those hours that [Mr. Schneider] thought were not reasonable.”

Mr. Orr inquired as to whether there were people in these non-capital cases whose cases are being “stayed at the moment because of an impasse by these decisions.” He also expressed concerns about paying attorneys to defend the GPDSC “while we don’t have money to pay lawyers who are actually defending the innocent and accused.”

Director Crawford recommended, as he had in the Program 1 discussion, that the agency continue to pay bills on a percentage basis and allow the attorneys affected to reserve their rights to raise claims against the agency.

Before voting on the motion, Chairman DuBose asked Mr. Oliver to restate his motion.

Mr. Oliver stated that his motion was “that we go back and review these cases and anything that comes in from this point forward we pay as we had contracted to pay, whether it’s Larry of whomever reviewing them and making whatever cuts he wants to make as to reasonableness and that sort of thing. But once that’s done and the numbers of hours have been determined to be reasonable, that we pay. My motion was that we also do that on anybody that we’ve cut in the past arbitrarily and they have come back and appealed or objected.” He then noted that Chairman DuBose had made the amendment to his motion that the agency go ahead and make that review with all the prior bills, not just those to which the attorneys had objected to their final

fee payment. Mr. Oliver affirmed that he had initially accepted that amendment, but now he preferred that it be voted upon separately.

Chairman DuBose then started to put his motion to amend Mr. Oliver's motion to a vote, but Stephen Tillman pointed out it needed a second. Hearing no second, Chairman DuBose said there would be no further discussion of his motion to amend.

Dr. Kurtz then sought further information from Mr. Schneider as to the arbitrariness of the guidelines for paying conflict bills.

Mr. Oliver then added to his motion the condition that the review of past bills be limited to anyone who appeals or makes a protest in 75 days from the date of this Council meeting.

Chairman DuBose then called the question. The motion passed by a vote of 7 to 6.

The next item on the agenda under Action Items was a discussion of the fiscal year 2010 budget. However, Chairman DuBose expressed a preference to first obtain the staff's recommendation for "what we need to go to the General Assembly for 2009."

To his request, Ms. Haskin went ahead to the third item listed under Action Items, the agency's needs as proposed by the Council. She did suggest, though, that the Council first quickly go through the Governor's recommendations for FY 2010. She further suggested that Budget Director Marques Smith first give a succinct overview of the Governor's 2010 recommendations and that the Council take up the FY 2009 supplemental requests at the same time.

Mr. Smith explained that the overall reduction in state funds for FY 2010 was 13.7 percent in actual cuts. The COLA adjustment was 10 percent because the state is reducing it from 22.165 percent to 17.856 percent in 2010, and they also eliminated a COLA adjustment in the FY 09 amended. Mr. Smith added that the clerks and sheriffs fund was now down to \$1.4 million.

Ms. Haskin reminded the Council members that the Governor's Office of Planning and Budget (OPB) appropriates funds by program. She announced that in Program 1 the initial appropriation with a six percent cut was \$2,276,000. Ms. Haskin noted that within Program 1 five positions had been transferred from the Central Office to the Georgia Capital Defender (GCD). That transfer leaves 17 central staff members. Also, within Program 1, the agency was asking for \$600,000 in additional funds for the GCD to add additional staff and to provide training.

Mr. Tillman inquired as to the effect of the proposed bill on seeking a sentence of life without parole without having to first seek the death penalty. He wondered if it would mean an increased burden on the Circuit Public Defender offices.

Mr. Word replied that he believes it will be a wash.

The discussion moved on to the budget needs of the various divisions under Program 1. Ms. Haskin began with the Mental Health Advocacy Division, with Sabrina Rhinehart as director. She noted that the division had lost staff over the past three years and wanted to replace those staff members. Ms. Haskin next discussed the Training Division, headed by Trish McCann. Chairman DuBose pointed out that training is mandated by statute. In reference to the Appellate Division, Ms. Haskin called on Jimonique Rodgers, director, to describe the problems called by the *Garland* decision regarding claims of ineffectiveness of counsel.

In regard to Program 2, Ms. Haskin explained that the salaries in the CPD offices are statutorily set. She noted, however, that there are policy questions for the Council in regard to Program 2. The first is the question of pay parity between the district attorneys and public defenders. The second is the provision of public defenders for juvenile court.

The next discussion item concerned the CPDs' needs for expert funds. CPD Michael Parham gave an example of having to continue a case for inability to pay a forensic accountant. To help alleviate these kinds of situations, Mr. Oliver suggested the staff ask each CPD for the bare minimum amount needed for experts. Mr. Oliver made a motion that the CPDs have this information ready for staff by 10 a.m. on Monday, February 2, 2009. The motion was seconded by Mr. Tillman. The motion carried.

EXECUTIVE SESSION

The Council did not go in executive session.

The Council meeting was adjourned at 4:50 p.m.

The date for next regular meeting will be February 2, 2009 at the GPDSC offices.

These minutes are respectfully submitted and adopted this _____, 2009.

David Dunn, Secretary