

**Members**

Barnes H. Ellis, Chair  
Shaun S. McCrea, Vice-Chair  
Henry H. Lazenby, Jr.  
John R. Potter  
Per A. Ramfjord  
Janet C. Stevens  
Honorable Elizabeth Welch



**Ex-Officio Member**

Chief Justice Thomas Balmer

**Executive Director**

Nancy Cozine

**PUBLIC DEFENSE SERVICES COMMISSION**

Friday, October 23, 2015  
12:30 p.m. – 4:30 p.m.  
Sunriver Resort  
17600 Center Drive  
Sunriver, Oregon, 97707

**MEETING AGENDA**

- |   |                                     |
|---|-------------------------------------|
| 1. <b>Action Item:</b> Approval of minutes - PDSC meeting held on September 17, 2015<br><i>(Attachment 1)</i>           | Chair Ellis                         |
| 2. Regional Reports   | Geoff Guilfooy<br>Contractors       |
| 3. Implementing Caseload & Workload Standards   | Norm Lefstein                       |
| 4. Oregon & National Developments<br><i>(Attachment 2)</i>  | Paul Levy                           |
| 5. Representation in Juvenile Delinquency Cases   | Amy Miller                          |
| 6. <b>Action Item:</b> Approval of 2016-17 Statewide Contracts<br><i>(Attachment 3)</i>                                 | Caroline Meyer                      |
| 7. <b>Action Item:</b> Approval of 2016-17 Death Penalty Contracts<br><i>(Attachment 4)</i>                             | Caroline Meyer                      |
| 8. <b>Action Item:</b> Approval of Personnel Rules changes and AFSCME Contract<br><i>(Attachments 5a, 5b and 5c)</i>    | Commission                          |
| 9. <b>Action Item:</b> Approval of 2015-17 Compensation Plan<br><i>(Attachment 6)</i>                                   | Cynthia Gregory<br>Angelique Bowers |
| 10. <b>Action Item:</b> Approval of 2016 PDSC Meeting Schedule<br><i>(Attachment 7)</i>                                 | Paul Levy                           |
| 11. Washington County Service Delivery Review Report - Commission Discussion & Recommendations<br><i>(Attachment 8)</i> | Commission                          |

***Please note: The meeting location is accessible to persons with disabilities. Please make requests for an interpreter for the hearing impaired, or other accommodation for persons with disabilities, at least 48 hours before the meeting, to Ashley Kinney at (503) 378-2677.***

***Next meeting: December 10, 2015, 10 a.m. – 2 p.m., at Mercy Corps, 45 SW Ankeny St., Portland, OR 97204. Meeting dates, times, and locations are subject to change; future meeting dates are posted at:***  
***<http://www.oregon.gov/OPDS/PDSCagendas.page>***

# Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Thursday, September 17, 2015  
10:00 a.m. – 2:00 p.m.  
Hillsboro Civic Center  
150 E Main St.  
Hillsboro, Oregon 97123

MEMBERS PRESENT: Barnes Ellis  
John Potter  
Chip Lazenby  
Per Ramsfjord  
Hon. Elizabeth Welch

STAFF PRESENT: Nancy Cozine  
Paul Levy  
Amy Miller  
Caroline Meyer  
Billy Strehlow  
Angelique Bowers  
Ernest Lannet  
Cynthia Gregory

---

---

The meeting was called to order at 10:00 a.m.

**Agenda Item No. 1 Approval of minutes—PDSC meeting held on July 30, 2015**

**MOTION:** John Potter moved to approve the minutes; Chip Lazenby seconded the motion; hearing no objection the motion carried: **VOTE:** 5-0

**Agenda Item No. 2 Washington County Service Delivery Review**

Chair Ellis introduced the Commission's hearing on the Service Delivery Review by explaining that the Commission's primary interest is to learn whether it is contracting with the right number and type of public defense providers in the county and whether those providers are performing well.

District Attorney Robert Hermann was invited to speak first. He expressed appreciation for the opportunity to have shared his observations of how things were working in the county with PDSC staff prior to preparation of the draft report. He said that his office and the public defense community work together very well in a number of areas, including the administrative efforts needed to simply make the system work efficiently, the county's drug court, and the Early Case Resolution (ECR) program. He estimated that 20% to 30% of all criminal cases filed in the county are resolved in the ECR program. He emphasized that it is not a "rocket docket," and that attorneys can postpone resolution if additional time is required to investigate the case and consult with a client about the benefits of resolving a case through

ECR. He had particular praise for the work of MPD, and its director, Gregg Scholl, in the drug court, which focuses on high risk offenders who may face substantial prison sentences.

Mr. Hermann said the public defense community was also working well with a new protocol for pre-trial conferences. The new protocol seeks to make the conferences more meaningful events where cases can be resolved in advance of the scheduled trial date and without resorting to trial. He did have one main “gripe” about MPD, although he said it was “nobody’s fault.” In a number of murder cases, he said, MPD has needed to withdraw when the cases were nearing trial because new witnesses, mainly other defendants awaiting trial in jail with whom MPD’s clients have talked about their cases, were identified by the state. Because these new witnesses were former clients of MPD, the firm has needed to withdraw from representation, causing delay in resolving the murder cases.

Another area of concern in the past, Mr. Hermann said, was the high rate of turnover at MPD, with the attendant reshuffling of caseloads at the firm, which caused significant delay in resolving cases. But this has improved dramatically, he said.

Asked about the concern with the shackling of juveniles for transport to and from, and during, court hearings, Mr. Hermann said he had not thought too much about the issue until reading a draft of the service delivery report, but he had to agree it’s a concerning practice. He promised to raise the concern with others in his office and with the Sheriff.

Mr. Hermann said that he sees the need for more attention, planning, and resources in the area of mental health as key to diverting people from the criminal justice system or avoiding their contact with it entirely. He hopes that the defense community will be able to devote attention and resources to this area.

Commissioner Lazenby noted that Washington County is said to be the most diverse county in the State of Oregon, and he said the conversation ongoing now about over representation of minorities in the juvenile justice system will soon take place in the context of the entire justice system. He asked whether the DA’s office itself reflected the diversity of the community it serves. Mr. Hermann didn’t have data available to answer the question, but identified a number of attorneys and staff who were from minority communities. He also estimated that about 60% of the attorneys were men.

Penny Belt, with the Washington County Juvenile Department, told the Commission that both referrals to the department and delinquency petition filings had decreased in recent years. In 2012, she said, there were almost 3,200 referrals, whereas in 2014 there were fewer than 2,500 referrals. Of those referrals in 2014, which she said were the result of about 1,500 youth, only 212 of them were actually adjudicated, with the remainder handled through diversions or formal accountability agreements or in some other non-court manner. She said the average length of stay in detention is about seven days, but that number also reflects the inclusion of Measure 11 youth, who are now detained in the juvenile detention facility rather than the county jail and have much longer lengths of stay in detention.

Ms. Belt said that under a previous presiding juvenile court judge, her department developed specific criteria for when youth may be shackled. She also clarified that her department, not the Sheriff, is primarily responsible for the transportation of youth to and from court. She said in recent years her department has not been following those criteria, but until one defense attorney spoke to her about it the defense bar had not been raising any objections to the practice.

Ms. Belt concluded by saying that she wished that both defense attorneys and deputy district attorneys would do a better job of keeping the juvenile department “in the loop” on cases. Defense attorneys could also do a better job of communicating with the families of their clients, she said.

In response to questions from Commissioner Lazenby, Ms. Belt said it is very clear that there is minority over-representation in the county's juvenile justice system. She said that in addition to the Latino and African American populations, her department is having more frequent contact with the Somali community and, to some extent, with Russian families.

Karen James spoke to the Commission about her group, founded by parents of adults in the criminal justice system with mental illnesses, which seeks to improve conditions and services for persons in the criminal justice system with mental illness. They have focused their efforts on the Department of Corrections but have also meet with the Washington County Sheriff's Office to talk about concerns. More recently, the group has sent a letter to Presiding Judge Charles Bailey. Locally, the group is concerned that persons in jail with mental illness are not receiving appropriate attention and resources, and that insufficient planning is occurring to transition them back into the community. Ms. James is especially concerned that some public defense attorneys are neglecting their clients with mental illness. She thinks better training and awareness of how to represent clients with mental illness will lead to better advocacy and outcomes.

Judge Charles Bailey has been the Presiding Judge in Washington County since January, 2015. Before he became a judge nine years ago, he was a deputy district attorney for about 10 years. He said a number of things have changed significantly, and for the better, since the 2014 OPDS Washington County Peer Review report. At the time of the report, "affidavits" for change of judge were a major cause of tension and difficulty, and that is no longer the case, which he sees as a "credit to the defense bar." He said that turnover at MPD, which was a source of delay and difficulty in case management, has improved significantly. And thanks in large part to the "re-engineering" process facilitated by the National Center on State Courts, judges are more engaged in managing pre-trial conferences, so that Washington County's unusually high trial rate, noted in the 2014 peer review report, has come down.

He said that overall he is very pleased with the public defense providers in the county, and with how PDSC has addressed concerns when they arise. He expressed concern, though, about compensation for the non-public defender contractors, which he said should be on an equal par with the public defender offices. The Chair clarified that this is being addressed thanks to a legislative funding package specifically for that purpose. Judge Bailey also communicated a concern from Judge Raines that the Commission continue to assure the presence of a viable non-contract private bar in juvenile cases, where they are needed for conflict cases. He also said that he shared the concern of Ms. James, that better attention and resources are needed to appropriately handle persons with mental health issues who come into contact with the criminal justice system.

Judge Bailey also expressed satisfaction with the courtroom work at the Law Enforcement Center, where MPD handles most of the arraignments in criminal cases and also handles, along with the consortium, the ECR program. He also expressed appreciation that he can call PDSC staff when necessary to address concerns that might arise with public defense providers in the county.

Judge Richardo Menchaca is the presiding juvenile court judge, who works in the small juvenile services building along with Referee Michele Rini. He said that he is trying to take inspiration from Judge Bailey and do a better job of managing the juvenile docket, which is very busy and needs to be run efficiently. He appreciates the great job of all of the juvenile defense providers, and echoed other comments about the need for a non-contract private bar presence within juvenile court. He also appreciates being able to contact PDSC staff when needed.

Regarding shackles, Judge Menchaca said he did not realize it was an issue until reading a draft of the service delivery report. He believes that shackles are used when appropriate

security concerns have been identified and trusts the juvenile court staff to make decisions about when they are necessary. He said the juvenile court is a small, crowded building where it's necessary to keep a close watch on security issues. Chair Ellis pointed out that his assumptions about the appropriate use of shackles may be unwarranted if they are being used indiscriminately. PDSC Commissioner Welch, who was the presiding juvenile court judge in Multnomah County, shared her philosophy about shackles in the courtroom, which is that they will not be used unless she approves it based upon appropriate concerns. Judge Menchaca said that during his entire tenure on the bench he has yet to have a defense attorney or deputy district attorney express concerns about shackles. He reiterated that security is a paramount concern, especially since a number of juvenile court cases concern gang-involved youth.

Asked about over-representation of minorities in juvenile court, Judge Menchaca said that as an Hispanic judge, who experienced racial bias growing up, he will not allow racial intolerance in his courtroom. But he acknowledged that over-representation occurs in both the criminal and juvenile justice systems. He is very proud, though, of the juvenile "gang court," which seeks to avoid commitment of high-risk youth to the Oregon Youth Authority's correctional facilities. Commissioner Lazenby said that the issue of over-representation is likely to demand increased attention of every justice system partner and will require a concerted effort in order to see improvement.

Sandy Berger, the field manager for the Citizens Review Board in Washington County, told the Commission that she sees a real benefit in those cases where attorneys are present at CRB reviews. She has the benefit of having previously worked as the CRB field manager in Klamath County, where the public defense providers employ case managers to work closely with parents and children, and those case managers appeared for the attorneys at CRB hearings and were able to provide valuable information. She thought that system worked very well. But in Washington County, when attorneys cannot appear at CRB hearings they send legal assistants, who mainly take notes and only occasionally relay information from attorneys about their clients. She thinks outcomes would improve if attorneys were consistently present at the hearings, especially since parents may be under significant stress and not able to express themselves well on their own.

Lynn Travis is the program director and program attorney for the CASA program in Washington County, which advocates for the best interests of children in juvenile dependency cases. She told the Commission that there is a need to "shift the locus of advocacy" with the advent of managed health care. Under the Oregon Health Plan, all Coordinated Care Organizations (CCOs) are now required to provide wraparound services for most children in foster care. Whereas in the past, she said, most advocacy focused on services provided by the Department of Human Services, now critical decisions will be made at CCO staffings. Thus, advocacy concerning visitations, transitions home, and transitions out of more restrictive levels of care will need to occur at these CCO staffings in order to achieve better outcomes for children.

Gregg Scholl, the director of MPD's Washington County office, told the Commission that the county is a very good place to be a criminal defense attorney in part because it can also be a difficult place to practice criminal defense. He said that the high rate of turnover that his office had experienced has improved significantly, in part because of a new policy negotiated with the union representing MPD employees concerning when transfers can occur between MPD's Hillsboro and Portland offices. But he also said that he thinks the Hillsboro office is seen now as a very good place to work, in part because of a new training regimen for new lawyers. The office has also developed a strong commitment to zealous advocacy, which fulfills the classic public defender ethic of challenging authority. But he insists that this be done professionally and with purpose.

He emphasized that he has an excellent working relationship with District Attorney Hermann, and that the office has good relationships with the Sheriff, with the jail command staff, with

community corrections, and even with the county's administrator. In addition, the office has a seat on the local Public Safety Coordinating Council, on the OCDLA Board of Directors, on the Supplemental Local Rules Committee, and the Oregon State Bar's Criminal Law Executive Committee. He also appreciates that because the office can be relied upon for good work, OPDS will call on it to undertake representation in cases in other counties, in addition to the work they do around the state in aggravated murder cases.

Mr. Scholl also praised the county's drug court. He said that graduates of the program have paid around \$120,000 in restitution, and the 90% of them are now employed, many full-time. He also praised the attorneys in the juvenile section of his office, calling one of them the person most knowledgeable about the juvenile code in the state, and saying another is considered a model juvenile court defense attorney.

He also addressed the concerns about "affidavits." He said his office has never had a policy that lawyers should file them when assigned to certain judges. In fact, he says, new lawyers are trained to see for themselves whether a judge can be fair, even ones that have been historically difficult in criminal defense cases. He thinks this has contributed to the decrease in the use of affidavits, but so too has the fact that judges have changed their own behavior and lawyers are now more comfortable having their clients appear before them.

Lane Borg, the executive director of MPD, also addressed the affidavit issue, and said he thinks the controversy died down in part because, after a judge filed a bar complaints against an MPD attorney concerning the practice, the Oregon State Bar wrote a comprehensive opinion finding no misconduct on the part of the MPD attorney.

Both Mr. Borg and Mr. Scholl addressed a question from Chair Ellis about how MPD operates now with two offices. They both expressed satisfaction with having most administrative functions located in Portland, especially since key administrators, including Mr. Borg, the training director, and others, are usually present in the Hillsboro office at least once a week. Lane Borg also noted that the size of the Hillsboro office has grown steadily and dramatically, so that it is foreseeable that each office will eventually have about the same number of employees.

Mr. Borg also addressed the turnover issue and the attendant reshuffling of caseloads that District Attorney Hermann said had been a problem but was much improved. He said that the problem wasn't primarily that lawyers were moving from Hillsboro to Portland, and simply abandoning their Hillsboro clients. He said that there had been a great many new hires into the Hillsboro office and that some of those attorneys simply didn't perform well and left the firm entirely.

He also addressed Mr. Hermann's complaint that MPD has needed to withdraw from a number of murder and aggravated murder cases because of conflicts of interest. He said that it was his belief that these conflicts were created by the DA's office through intentionally targeting current or former MPD clients to become informants, thereby requiring that MPD withdraw from the cases. In one instance, MPD insisted that the state had no real intention of calling the informant as a witness, which the state denied. Yet when the case did come to trial, with different attorneys, in fact the state did not call the witness. He said that MPD is now more vigilant when it appears that the state might be creating a conflict simply to have the firm removed from a case. Mr. Borg also made clear that he was not accusing Mr. Hermann of misconduct, saying that he is an honorable and good man. But Mr. Borg said the same cannot be said for some of the deputy district attorneys in Washington County.

In response to a question from Commissioner Lazenby about the diversity of the attorneys in the Washington County office, Gregg Scholl that three or four of the 20 attorneys employed by the firm are minorities. He said there is more diversity among the support staff. Ellen Johnson, who is appointed by the Washington County Commissioners to the MPD Board of

Directors and serves as the chair of the board, said that overall five percent of the entire firm's attorneys are African American and about one to two percent are Hispanic, which she said mirrors the population of the Oregon State Bar. She said that the MPD board is in the process of examining both the firm and the broader justice system through an equity lens.

Rob Harris, the executive director of the Oregon Defense Attorney Consortium (ODAC), began his appearance before the Commission with praise for the work of Gregg Scholl and MPD for leadership in the county's criminal justice system. In response to a question from Chair Ellis, he described a number of ODAC members who formerly were MPD attorneys. He said he looks for good experienced attorneys to bring into ODAC, who need to also be good at managing their own businesses and workloads, especially since ODAC is appointed to some of the most serious cases, other than murder, that can be brought. He said that ODAC is losing two very experienced attorneys, one to retirement and to other to focus more on federal appointed work. But he has recruited some good attorneys in recent years, whom he described to the Commission. He also manages his own 11-attorney law firm, which is a part of ODAC. New lawyers in that firm do some public defense representation, with the opportunity to also work in other areas of the law involving litigation.

The chair asked how the consortium handles concerns about attorney performance. Mr. Harris described one recent instance where he was able to find a more appropriate caseload for one attorney, and said that the membership of another attorney was terminated. Most of Mr. Harris's time, in connection with consortium matters, is devoted to administration and providing some limited coverage, although he expects in the next year to handle a number of major felony cases in order to remain fully acquainted with the issues facing other ODAC members in their criminal defense representation.

In response to a question from Commissioner Potter, Mr. Harris said that he does not have any immediate plans for retirement, but he is preparing for long-range transitions both by bringing younger attorneys into ODAC who may have an interest in taking over his administrative responsibilities, and by bringing a minority shareholder into his firm who can eventually become its managing owner.

Ron Ridehalgh heads a one of the law firms that contracts with PDSC. The chair noted that the draft service delivery had good comments about the work of his firm. Mr. Ridehalgh said he appreciated those comments. At this point, the Commission was running late on its agenda, so it quickly moved on to the remaining invited guests.

Grant Burton is the managing attorney at the Hillsboro Law Group. He too complimented MPD as the "vanguard" of public defense in the county, but he said that his firm also provides a place for talented attorneys who may wish to practice both criminal defense and work in other practice areas. In fact, because his firm has a broad multi-area practice, it is not dependent upon public defense to remain viable, which provides flexibility in contracting with PDSC. He said that the firm will continue to contract for public defense work only if the terms are fair and work for the firm. For instance, he said, the firm needs to be paid enough to afford to adequately pay a felony-qualified attorney.

Mr. Burton also noted, following up on earlier comments, that he believes race to be a clear factor in criminal justice outcomes in the county. He said that more data is needed in order to determine causation.

Nate Law appeared before the Commission for the Karpstein and Verhulst firm, which contracts to handle, along with MPD, the bulk of juvenile dependency cases, along with some lesser criminal cases. He said that Greg Karpstein is transitioning management of the firm to himself and Jake Griffith, another younger attorney. They both are excited about providing new leadership for the firm. He also addressed the shackling issue, saying he was alarmed to hear Judge Menchaca say that defense attorneys were not raising concerns with him. In fact,

according to Mr. Law, he has been working behind the scenes with the juvenile department on this issue. But he sees now that much more work remains.

The chair then invited Louise Palmer, with the Brindle and McCaslin and Lee firm, to speak to the Commission. When she did not respond, the chair noted for the record that she had been previously invited to attend the meeting and address the Commission.

**Agenda Item No. 3 PDSC Compliance with Best Practices**

The Commission then reviewed a report showing the date and manner in which it complied with the Best Practices for Boards and Commissions. Upon **MOTION** by Per Ramfjord, and a second by John Potter, the Commission **VOTED** 5-0 to approve the compliance report.

**Agenda Item No. 4 Annual Performance Progress Report**

The Commission then reviewed the Annual Performance Progress Report showing the agency's performance on five Key Performance Measures. The report was to be filed shortly after the meeting.

**Agenda Item No. 5 OPDS Monthly Report**

Because the meeting was behind schedule, and needed to move to a new location for the rest of its agenda, the monthly report was tabled, with the exception of a short mention by Ernie Lannet, Chief Defender, about the unexpected death of long-time Appellate Division attorney Robin Jones. He invited commissioners to a memorial reception for her scheduled on September 30, 2015.

**Agenda Item No. 6 Executive Session**

The chair then announced that the Commission would move into executive session for the purpose of both receiving an update concerning ongoing union contract negotiations, and to receive a report on submissions for contracts to perform public defense services in death penalty cases. In open session, the chair read the required statutory announcement prior to the meeting. Ms. Cozine also made clear, in open session, that the executive session would be held in a nearby location, and that the Commission would return to open session at that location and then adjourn the public meeting, as announced on the agenda for the meeting.

**Meeting Adjourned**

Following the close of the executive session, the Commission returned to its public meeting. **MOTION:** John Potter moved to adjourn the meeting, which was seconded by Per Ramfjord. The Commission then **VOTED** 4-0 to adjourn.

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, September 17, 2015  
10:00 a.m. – 2:00 p.m.  
Hillsboro Civic Center  
150 E Main St.  
Hillsboro, Oregon 97123

MEMBERS PRESENT: Barnes Ellis  
John Potter  
Chip Lazenby  
Per Ramsfjord  
Hon. Elizabeth Welch

STAFF PRESENT: Nancy Cozine  
Paul Levy  
Amy Miller  
Caroline Meyer  
Billy Strehlow  
Angelique Bowers  
Ernest Lannet  
Cynthia Gregory

---

---

The meeting was called to order at 10:00 a.m.

**Agenda Item No. 1 Approval of July 30 Minutes**

0:53 Chair Ellis Is it on now? Okay. Is there a motion to adopt the minutes? **MOTION:** John Potter moved to approve the minutes; Chip Lazenby seconded the motion; hearing no objection the motion carried: **VOTE:** 5-0

**Agenda Item No. 2 Washington County Service Delivery Review**

1:07 Chair Ellis The most important part of today's meeting is the Washington County Service Delivery Review and I think most of you that are here know that the Commission has tried hard to meet around the state, get input from the communities that we serve and there are two things that we do. One is at the staff level in using other providers we do specific agency reviews. The second thing is what we are doing today which is the Commission trying to make sure we get the right balance of providers and that the providers that we are dealing with are performing at a level that we hope and expect they will. It's that second type of review that we are engaged in and I know there are quite a number of people, signed up anyway, to share with us their thinking. Let me start with District Attorney Hermann. What we'd like is for you to share with us from your perspective. Obviously you interact with the defense community a lot and you are a part of the broader criminal justice system here. Your thoughts on how it's going?

2:48 DA Hermann Thank you very much Chair and Members of the Commission. I realized that I'm not sure if I've ever appeared before this body.

3:06 Chair Ellis We are usually more informal. I feel like we are on a throne up here.

3:09 DA Hermann Well, let me start by saying that my office very much appreciated the opportunity to sit down with Nancy [Cozine] and John Potter and Caroline Meyer a couple months ago to talk specifically about our observations, things that we saw and any concerns we might have had, all the positives. I see that those in a very large part made their way into the report. That was probably a couple hours of discussion and we very much appreciate that and we thought that it was very productive. I don't have the luxury of listening to others talk to figure out how they approach this in terms of their comments so hopefully I will be somewhat on the mark in terms of my observations. First of all, you should know, and I'm not sure if it's exactly in the report and I may repeat some things that are in the report but, from the administrative side of the services that are being provided in this county, which as you all know what's extremely important in the efficiencies and operations is how staff interact with each other in terms of supporting the lawyers if you will. I can say that our administrative staff had nothing but positives to say about their interactions with all the providers here in Washington County administratively and that is in the nature of the work we do and the demands upon the people that work in those positions. That's a pretty good result because it's not always easy, so that is something certainly to emphasize on behalf of all the providers. I would also say in reviewing the report without repeating it, the positives that have been identified in the report, I don't take issue with any of them and there are a lot of positives in terms of the relationships so I won't repeat those either. I'd emphasize in terms of the services provided, there are a few programs in Washington County that I think work extremely well and the first is an Early Case Resolution program. I recognize that being on the prosecution side and being an adversarial system, we don't always agree with the defense side and their theories and view of the world and when we started this Early Case Resolution program there were some significant concerns back in the beginning. The program has worked extremely well. I think the safe guards are in place and I think the attorneys involved from the defense side have raised issues, so it's not a rocket docket. It's not a 'move the case along without thought and consideration.' It results, I haven't seen the recent statistics, but 20-30% of all the cases filed get resolved in the Early Case Resolution program.

6:26 Chair Ellis Let me ask on that; at least in one of the counties that we visited there was a big issue on the Early Case Resolution piece that the defense community thought that they didn't get discovery sufficient to do their job in counseling the defendant. What happens here on discovery in those ECR cases?

6:56 DA Hermann Well, I'm sure the defense will be better suited to correct me if I'm wrong, but when we began the program we adjusted. We identify those cases up front and I think by and large the discovery is provided almost immediately for those attorneys.

7:18 Chair Ellis So the full police report and so on are provided?

7:22 DA Hermann Yes, and I think that usually when we hear that there are problems it's my understanding that that is working very well. There's a new system for police reports. I don't know if the metro area is using it. I just heard some laments this morning from some of my attorneys because there are numerous pages and it is a little more complicated, but it seems to be working quite well in that regard and that program can be attorney specific and the Metro Public Defenders have someone assigned to it. There was a time, quite frankly and it's been a number of years ago, where everything got moved on or many cases got moved on and there wasn't a lot of filtering at the beginning and as a result some defendants ended up pleading to more than they would have if they had resolved initially, but it seems to be working very smoothly and well. Another program that I think demonstrates a kind of difference between the straight adversarial process but works extremely well in this county is the drug court. Gregg Scholl

himself staffs that from the public defender's office. That court, I believe you'll hear from them, but if you talk to the criminal justice commission that court is pointed out as a model court in the state. There have been 166 graduates over the years, it's high end property offenders that are involved with drug problems. It's saved, just in terms of raw numbers, millions and millions and millions of dollars of prison months where offenders were sentenced to, we're looking at 40 or 50 or 60 months. I think the largest we are looking at is 90-110 months in property offenses, folks that successfully completed that program. A lot of credit goes to the MPD and their staffing and work in that program and again I think that all parties will agree that it is very well balanced. The proper advocacy is in place and the clients are being very well served by the end results and the successes that come out of that court. So those are just two of the positives that I would highlight that make a big difference in our county. We have, as the report indicates, a new system that deals with, I don't know if it's a problem everywhere but I've been here over 40 years and it's been a problem since I started, and that is pretrial conferences and the ability to attempt to resolve cases in a meaningful way before the trial date comes. There have been different ideations of that over the years and I think we are all hopeful there is a new system in place. It is kind of like in a murder case where there are constant conferences with the judge so the feet are kind of kept to the fire if you will, and that's painful for both sides initially but we are hopeful that that will be of assistance to both parties in resolving cases so cases don't get strung out and failure to appear occur and a lot of issues are created. We will see how that all works out but that has already made a difference in terms of getting resolvable cases resolved prior to the actual trial dates. Again, I would emphasize the positives that are stated in the report and there are many of them. I think, and I kind of lose track and I can't remember testifying here before that doesn't mean I didn't seven or eight years ago, but being here many years I've lost track of just how many years this has been but our attorneys have all noted that, we had a couple of attorneys that met with your group earlier, there have been clear improvements in the last 2-3 years in terms of working relationships and how things are being handled. I emphasize all those positives and I have a few things on my gripe list that I think are fair to point out. One of them is, and this is nobody's fault but it is the reality of the public defenders handling murder cases, is the problem with conflicts and I know Gregg Scholl has been down in Eugene in Lane County trying a case, but from the prosecutors perspective and the victims perspective murder cases take a long time to get results and by reality the public defenders represent a lot of people over the years...

13:07 Chair Ellis

Are the conflicts primarily witnesses?

13:10 DA Hermann

Witnesses, yes. Sometimes those are hard to develop and hard to discover over time and sometimes they're not actual conflicts. One of the most practical issues that we've seen that have resulted in cases being reassigned to other attorneys and ordinate delays are just the nature of the world. If you're in jail for a long time often you speak to other people and those other people then have information that the state would like to use in the course of the trial and those other people are represented by the public defender's office.

13:51 Chair Ellis

So, the conflict you just described is one that doesn't exist at the arraignment but over time it may develop because of jailhouse conversation?

14:02 DA Hermann

Yes, who they represented before will exist at arraignment if its actually a conflict and it may take some time to figure that out with a large case but the last one that I meant is something that may develop and we've had some that have developed close to the eve of trial where all of a sudden someone comes forward with information and those always have all sorts of issues to them. It's just simply something that I guess I raise because it causes delay and raises frustration.

14:37 Chair Ellis

MPD is subject ethically to the unit rule so if the office has represented somebody even though the particular lawyer in the case is not conflicted, that is a conflict under State bar ethics.

14:55 DA Hermann To be honest with you, I know that there's a way that those are parsed out. I am not that familiar with them and I know that they work very carefully because I had a case where I know they were getting advice and they were working very carefully and diligently on assessing whether it was actually a conflict that would interfere with their representation. No complaints about that, it's really just the observation that the reality is it becomes difficult with...

15:26 Chair Ellis Let me ask, do you feel that at the inception phase MPD does a good job of identifying conflicts so we don't go down the track of investing in them and defending a case and after a lot of time and effort has gone into it and cost from our point of view, conflicts emerged that should've been detected sooner. Do you feel that's happening?

15:55 DA Hermann No, quite frankly. I think it's just a practical issue that the PD's has no control over other than wishing that their clients wouldn't speak to anyone else in the jail. I think they assess them as quickly as they are available. Murder cases take a while by nature so it isn't like some other cases where you need to make the assessment within the week. It's not a criticism of what they do or how they assess them. I think they work very hard to figure that all out, it's just kind of the practical reality of because they represent so many people and many of the people in the jail are their clients, if one of them has information on another...

16:53 Chair Ellis Give me some sense of the magnitude of the problem. How often has this occurred in a way that has required them to recuse?

17:05 DA Hermann I would say two or three murder cases in the last couple of years.

17:10 Chair Ellis Okay, that's significant.

17:12 DA Hermann Which for us is a big deal. It's an inherent problem for the PD's with the people they have in the jail.

17:31 Chair Ellis I should know this but I don't, what's the default when they have to withdraw, who covers?

17:40 DA Hermann They go to Nancy's shop I think and a new set of lawyers are assigned to take over the case. That obviously by necessity creates, you're not completely starting over but they're starting over. You may be a year into the case or ten months or a year and a half and you start over.

18:05 Chair Ellis But you don't think there's an issue at intake at the very beginning because that's one we could address?

18:16 DA Hermann No, I don't and it's not a fault it's just a practical problem. The other main problem that we spoke with the group about, and my attorneys tell me it's changed and again in perspective of time I think it's changed recently, had to do with how turnover of attorneys resulted in delay. It was primarily when attorneys left from the public defender's office and went to Multnomah County or they stay within the office, their caseloads typically turned over to somebody else and a lot of those were Measure 11 cases. Again, from our perspective somebody sat an extra four or six months because a brand new attorney had to take over the case. Our simple solution sitting where we do without any ability to understand all the ramifications was that at least in some of those cases, we would hope the attorneys working for the same agency would retain the case, come back out here and try it when it was set rather than have them start over.

20:00 Chair Ellis I saw that in the report and we'll get a chance to talk to Mr. Borg who is the MPD ED, but I did see that. There seemed more turnover at MPD than you might normally expect because it is a dual office.

20:23 DA Hermann As I said, over time my sense is that it has improved dramatically in the last year or more. It seems to be less of a problem. It was just something that was clearly delaying cases and I know from the jail perspective in terms of the jail beds, people were sitting there longer.

20:48 Chair Ellis Give me a sense, how large is your office, how many lawyers?

20:52 DA Hermann Forty lawyers.

20:54 Chair Ellis Okay, and 40 all involved in the criminal side?

20:58 DA Hermann No, three in child support, two in juvenile and me, and some would say that I'm not in the court very often.

21:06 Chair Ellis Do you experience a fair amount of turnover also?

21:12 DA Hermann Not too much, maybe one a year or every other year.

21:20 Chair Ellis Which is not much.

21:22 DA Hermann We are different in the sense that we try to maintain our case, unlike the defense attorney, there is not a handing a file over at the last minute as we have. Obviously there are different issues that the defense has to deal with than what we have to deal with so we are a little more fungible in the sense of we have attorneys that pick up cases at the last minute and try them, whereas the defense doesn't typically have that ability.

22:01 Chair Ellis One issue that the report commented on was juvenile offenders in shackles in the court room. Do you have any comment on that?

22:12 DA Hermann I don't really, no I don't. I haven't been involved in that. I know what the issue is and it seems to be, I can't really speak about, I can't really disagree with the analysis that there needs to be a basis for shackling.

22:45 Chair Ellis You're probably in a position to be more persuasive with the sheriff than the defense community is. Would it be possible for you to work on that issue?

23:00 DA Hermann Yes, I will certainly talk to my lawyers and like I said, to me it gets down to the guidelines for shackles much like an adult offender shackled in the courtroom. There are pretty specific appellate court rules of when that is appropriate and when that isn't. So, yes I was kind of unaware of the issue until I read the report, quite frankly.

23:28 Chair Ellis Other than the issues you've raised which are the conflicts in the murder cases that develop over time and the in the MPD office, are there any other parts of the system on the defense side that are causing delay?

23:51 DA Hermann I don't think so. As I said, the other area where delay occurs which can be caused by both sides as well as the judiciary is the system that we are working on now. We've identified that it is with pretrial conferences and case management. There's a work in progress and I think all the parties have a stake in improving their contact with client, getting discovery and offers over from our end, returning phone calls to the defense and judges being involved in the resolution. So, I am optimistic that it is being addressed. The only other thing that I would say moving forward from a defense perspective, and I don't have a magic wand on how this would occur, I believe that there needs to be a significant focus on resources to deal with defendants with mental health issues. We are fortunate that the county has become very active in terms of mental health response teams where they've got clinicians paired with a couple deputy sheriffs in cars. In the jail they're working towards a diversion program, if you will, when somebody comes into the jail working with those individuals and tying up with mental

health resources. The aid and assist problem is pretty big in terms of cases that are initially identified as aid and assist. So, there's a lot of work being done. The laws are a little weak; they're not sufficient enough for me. The diversion statute is pretty limited and I've tried to get some leverage. Ironically, maybe because I'm the prosecutor and I'm asking to change the statute, but I'm trying to get my end to change the diversion statute that broadens it so the DA's can let people in the diversion statute with assaultive behavior conduct that is typically prohibited from being diverted but is very central to the mental health issues that we deal with among defendants. So I guess what I am saying from a resource standpoint, if the defense bar is equipped with the resources to get into those cases a little deeper beyond just the advocacy piece, the guilty not guilty piece, from my perspective these are not cases where we have difficulty proving a criminal case. The problem is what are the resources to avoid going to a criminal case and having them not returned? So, I don't have a magic bullet but I guess the thought is that resources to the defense where they can devote some more work with these available teams to find resources so we can keep these folks from returning or keep them out of the system in the first place is really a target area. It's difficult. I recognize there are a lot of issues, there are legal issues with aid and assist, if you can't aid and assist then you can't very well do much with them, but I say moving forward I see that as a real big emphasis in this county. It is with my office and I think it would be helpful to the defense if they were geared to be able to work with us, kind of the front end not the traditional advocacy issues, not the adversarial issues. I think there is some real benefit to defendants that can be gained that way and to the system as a whole.

28:25 Chair Ellis

Questions to DA Hermann?

28:31 J. Potter

Bob, as you know this commission goes all around the state and we take a look at all the service delivery systems, we end up with snapshots and we put them together in some sort of mosaic. You're in a unique position here in Washington County I believe, that your whole career has been here in Washington County. You've got 40 years of experience, 16 as the DA. My question is if you had the magic wand and you could change the service delivery system here in the mix, what would you do?

29:06 DA Hermann

That's a good one. I've seen it evolved. I actually like the delivery system. I do think, kind of in line with my last comment, if there were more resources to focus on prevention or diversion, not legal diversion I think that would be of value. I think we'd get a lot accomplished. We've seen it with drug courts, the typical non-adversarial approach if you will to some things. There are a lot of good solutions that work for everybody. I like the broad base where there's, I call it ODAC, that Harris group, it's really helpful to have a broad base. I actually really like the delivery service here; I think it serves us well.

30:18 P. Ramfjord

You talked a little bit about this evolving process that you are working on in regard to pretrial conferences to try to improve the resolution of cases before the day before trial. I guess I am a little bit curious as to what exactly is going on in that process, what the role of the defense bar is in that process, whether you are doing anything to measure your success in that goal and whether there is anything else that this commission could do to encourage that process working more efficiently?

30:57 DA Hermann

It's really the process is making pretrial conferences meaningful and as I said before it really involves all the parties. One of the problems in the past is that the defense has not met with their client until they show up at the pretrial conference and that may be, I'm sure there are a variety of reasons, but I'm sure in large part it's because the client is not showing up at the attorney's office in advance. The DA may not have gotten the offer or the discovery, but may not have gotten the offer to the defense prior to the pretrial conference. The judge may, and they have literally had 80 cases set within a two hour frame before a judge, so the likelihood of getting much resolved if it is not resolved by the parties is not likely. So, the attempt here is to force these conferences and not just have one and say 'well we can't reach any agreement, its set for trial,' and there's a case management that follows. So, the attempt is to get people to

change their approach in practices and it seems to be, in measuring the success, it seems to be there are less cases being set for trial, you know last minute decisions and quite frankly with the policy and practice that varies from county to county we basically say 'look, once you get the offer and reject it, the second offer isn't as good,' and historically we have seen from our perspective people plead to multiple charges but could've had one if it could've been resolved at an earlier stage. The success will be kind of in the eyes of the beholders in some ways in terms of the parties involved, but really it requires more court involvement. What the Commission can do, you hear from all the other people involved and as time goes on the judges will have a perspective about how that is working and it will tend to weed out those that aren't doing their job and in a timely manner it will expose it a little better which will help the process.

- 34:00 C. Lazenby Mr. Hermann, the report also indicates that Washington County is possibly the most diverse county in the State of Oregon. I have heard that the city of Beaverton is the most diverse. What is the ethnicity of the 34 DA's that you have in criminal trial work?
- 34:26 DA Hermann So, we have, I don't know if Russian is an ethnicity but we have a native Russian attorney, a native South Korean attorney, a Latino attorney, we have no African American attorneys, we have a number of African American law clerks, not sure if I am missing anyone but that's what comes to mind.
- 35:15 C. Lazenby And gender wise, are you fairly half and half male and female?
- 35:24 DA Hermann I should know these numbers, but I don't know exactly. We are probably at about 60% male. As a practical matter, many of the older lawyers that have been there for 20, 25, 30 years are male although we have some of the female lawyers that have been here 20 or 15 years, but it's changed over time in terms of the composition.
- 35:58 C. Lazenby Sure, another factor in this is there's a conversation that's been going especially in the juvenile area about over-representation of kids of color in the juvenile system. My political sense tells me that it is going to start spilling over into the larger justice system because of things that are going on in Portland with the federal oversight around mental illness, but that's also starting to talk about over-representation of minorities. Are you tracking that data now in terms of who you charge, who you don't charge along ethnic lines?
- 36:32 DA Hermann We do not in terms of our charging. We've never had that criteria in our...
- 36:47 C. Lazenby It just sort of makes sense to me that, since you are in the most diverse county that you might be able to lend some data for that statewide discussion that's going to start happening, especially since you would think that just on an average basis your law enforcement, your deputies would have greater contact with people of color in the criminal justice system so that we can at least to compare apples to apples. Do you think that might be helpful to the state if you were to begin something like that?
- 37:18 DA Hermann Yeah, I mean the law enforcement I believe pretty confidently that they maintain that information, so then it is just a matter of extracting that from the police reports that we get. We've just never done it but that is certainly something we can discuss and consider because that would give us figures in terms of our complaints and no complaints.
- 37:48 C. Lazenby It would be helpful.
- 37:50 Chair Ellis Any other questions? Thanks very much, we appreciate your input.
- 37:56 DA Hermann Okay, thank you all very much.

37:59 Chair Ellis We next have a group, so Steve Berger who is the Community Corrections Director and Penny Belt from the juvenile department, and I am going to ask if Karen James is here that she join this group because I think her interest is related.

38:29 P. Belt Good morning.

38:31 Chair Ellis Good morning, you must be?

38:32 P. Belt I am Penny Belt with Washington County Juvenile.

38:34 Chair Ellis Penny, right okay. I don't know whether Steve Berger is going to join us or not but Penny why don't you start by telling us a little bit about yourself, your role, and any thoughts you have to share with us.

38:54 P. Belt I've been with the juvenile department for 27 years. The bulk of my time has been as a juvenile counselor and I am currently the senior counselor that handles all new unassigned in-custodys, basically all things 'court' that has to do with the juvenile department. I also handle most of the training in the juvenile department as far as court processing and work pretty frequently with all of the defense attorneys. Just kind of looking at how juvenile justice has changed, we've gone from 2012 we had almost 3,200 delinquency referrals and in 2014 that was less than 2,500 and those 2,500 referrals were the result of the activities of about 1,500 youth. Of those 1,500 youth 212 of them were actually adjudicated or went to court, the rest were diverted or handled through formal accountability agreements or another fashion. I think there were 375 petitions in 2014. The bulk of our cases initially go to Metropolitan Public Defender (MPD) or to Karpstein & Verhulst but there are lots of other individuals where there are conflicts of interest and Hillsboro Law Group has begun taking some in the recent past. In looking at, you asked some questions of Mr. Hermann about disproportionate minority representation, we keep pretty close tabs on the kids that we detain based on ethnicity. Our average length of stay in detention is about 7 days. Know that here in Washington County, all Measure 11 kids 15, 16, and 17 are housed in our juvenile detention facility. So we are responsible for their housing and their transportation to and from court and managing their visitation list and medical needs while they are in custody. Our detention numbers have definitely or time in detention has increased. I think the average Measure 11 kid is 68 days in custody, so that really throws off our average number. So, know that the 7 day average for every kid does include those Measure 11 kids. That was a change from a couple years ago when once they hit 16 they would go to the county jail. Now we house them all until they are 18. I think one of the questions that you had was really about the shackling of youth and I know that was an issue several years ago and there was some case law. Then there were some changes made under Judge Fun when he was here as our presiding in juvenile and some policies were put in place a couple of years ago that basically outlined some very clear criteria from when in-custody youth should be shackled and unshackled. Our policy states that if they do not meet the criteria, which typically includes threats to the victim, threats to escape while in custody, history of weapons offenses and so forth, then our policy is we would take their hands out of the belly chain shackles but leave the ankle shackles on. It is not the sheriff's office that transports or handles any of our kids while they are in custody. You mentioned to Mr. Hermann to talk to the sheriff's office. In fact, juvenile department staff is responsible for transporting all Measure 11 kids back and forth as well as all juvenile kids. As you know we house them in Multnomah County at Donald E. Long. We occasionally have assistance from the sheriff's office if we are understaffed but for the most part that is our responsibility. I think to fall on the sword of the juvenile department's error, we have a clear policy and quite frankly it just hasn't been enforced and my staff doesn't routinely follow it.

43:00 Chair Ellis Describe to me the clear policy that you are describing.

43:04 P. Belt We actually have a checklist that when the kids are in custody we are supposed to go over that checklist that says if you say 'yes' then the shackles stay on. If everything says 'no' then the

shackles come off. I just don't think we are routinely using that. We also have a general policy that if a kid is coming into custody and we are requesting their release that their shackles should automatically come off and we are just not following that policy. I think if the defense bar were to call us out on it more frequently I think that would probably encourage my staff to follow our policy. We've certainly had reminders about that but we just haven't really gotten the system down. In the case where we have had defense attorneys request for shackles to be removed the judge has often also just deferred to our policy and to juvenile department discussion. So, even when I have seen defense attorneys push for that, the judges often say it's the security guys at juvenile's call and their case manager.

44:09 Chair Ellis            So, hopefully this issue being raised in the report, you'll do what you can to make that policy more consistently applied?

44:19 P. Belt                Definitely, and I intend to share some of the information with our staff and I think Angela Ramos had talked to us about this several months ago when the law firm she was working with said 'hey we are getting bad marks for not doing this unshackling, what's going on here' and again I think that it is a combination of habit and just not following our policy. There isn't a clear cut policy for our Measure 11 youth. We don't use that form for our Measure 11 youth, they automatically stay shackled. Part of that is due to the transportation issue. We are usually walking them across the street or taking them into the law enforcement center outside of our immediate building. So, for those kids we do not have a policy based on the nature of their crimes. We don't unshackle them at any point unless we are ordered to do so by a judge.

45:12 Chair Ellis            So, Karen James, why don't we get your initial input and then we will have questions for both of you.

45:48 K. James              I am Karen James, Thank you Chair.

45:21 Chair Ellis            Is your mic on? I am not?

45:24 K. James              Yes, can you hear me? Okay. We are a group of parents. We call ourselves The Reentry and Mental Health Reaction Team here in Washington County and we started out to help improve services for people with mental illnesses. They transition back to their communities feeling they needed a continuum of care. We were focusing on the Department of Corrections because of the long term incarceration and wanted to make sure they had a continuum of care as they reentered their communities: mental health, a psychiatrist, medication, things like that. And this was, we all have adult mental health children, people with mental health problems and last November about six of us had our adult mentally ill loved ones in a county jail all with horrible experiences. So, we wrote a letter to the Washington County Sheriff's office explaining what the issues were and the sheriff's office agreed to meet with us. They did meet with us in January and spent a lot of time going over the issues and agreed that they would work on improving some of these services. One of the things they said they would do is call in public defenders, the judges in the court system to also involve them in the issues that we were facing. So, that's why I sent the packet to you to explain to you what was going on in Washington County and we feel that the fixes are quite simple. I spoke to Texas of all places who is in your packet. They have some wonderful things going on down there. They have a code, a Texas code 16.22, which once a person is deemed, someone in the jail feels that this person has a mental health issue, within 72 hours they are required to contact the magistrate to help expedite that process to help get that person either the care they need or whatever needs to happen, so that person doesn't sit in the jail cell and decompensate for months and months as is the case in Washington County. We feel that attorneys in Washington County, the representation of mental health clients we see as an issue. We saw very poor representation and we feel that that can be improved upon by education, continuing education to help them learn.

48:32 Chair Ellis           The criticism you have specifically is the defense lawyers don't seem to identify the mental health issue?

48:39 K. James             Right, or take steps such as one attorney because their client was decompensating when arrested and continued to decompensate and refused to meet with the attorney, she just let him sit in there and further decompensate until he had to be deemed unable to aid in his defense and had to be sent to the state hospital. How costly is this? We feel that upfront, if the attorneys to identify that their person is experiencing a decompensation or some mental health issues to help expedite that process and do whatever they can to represent their client in a more productive and expedient way. And then at the other end coming out, I don't think that they're taking enough steps or finding the resources available to keep their clients from that revolving door to continue revolving and coming back into the jail system. So nothing is being done. There was a promise of housing and care and connection with community resources for some of the people as they left the jail and that didn't occur either. So, the issue is, we feel, from the arrest, the abuse during the arrest with the police the arrest process, the attorneys, the public defenders, the judges, the medical health staff in the jail, the special units, everything. There are issues throughout. But, the attorneys can do a lot to help expedite the process.

50:46 Chair Ellis           Have you communicated with the providers?

50:50 K. James             The providers being?

50:51 Chair Ellis           The defense providers.

50:54 K. James             We sent Judge Bailey, who is the presiding judge, a letter and that is all we have done so far and then we are coming to you.

51:02 Chair Ellis           I would encourage you to make direct contact with the heads of the offices of the defense providers and offer whatever ability to educate that your group has because I think that is the best way to address it.

51: 20 K. James            Well, I understand Alex Bassos from MPD is also available to the public defenders of Washington County to offer his services and he does train the MPD attorneys. They do have mental health education. We were about to write to the DA's office and hearing the DA this morning, we are definitely going to contact him about what we feel are some of the issues here in the county. That's why we were advised to write to the Commission.

51:58 Chair Ellis           Thank you for your letter and attachments. We appreciate it. Any questions for?

52:03 C. Lazenby           Just one, isn't it also a matter of lack of resources in the community to really treat people that are, a foot note; I am dealing with this on a personal level with a family member of mine and our problem is that we can't find sufficient resources in the community to receive and house and treat people with mental illnesses. So, I think we are just a part of the problem but there is a larger issue. What are you finding in terms of available resources?

52:36 K. James             Absolutely, resources are an issue, but we are all family members who are involved. And if this is happening to us, what is happening to people who have no one advocating for them in the jail or in the criminal justice system? It is just appalling. I just felt that we were so much farther ahead of the game. My son was incarcerated for six years in the Oregon prison system. I had a better response in the prison system than I had in the county jail here which is supposed to be grassroots. I was absolutely appalled. Total lack of concern I felt.

53:19 C. Lazenby           I appreciate the work you do, it is very worthwhile. Thanks.

53:24 K. James             And, good luck with your family member.

53:26 Chair Ellis Other questions? Thank you both.

53:33 C. Lazenby Oh, with the juvenile you said you track the ethnicity of the kids that are in your group. First of all, can you provide them to the Commission so we can review them and second of all, generally what do they show in terms of, I mean I am looking at the census data in the report it says that 31% of the people in this county identify as something other than white. What does your data show you about juveniles as least that you are hosting?

54:05 P. Belt I think we have definitely been focusing on it, but it is very clear from the data that there's disproportionate minority over-representation. It's a big picture thing. Is it simply because we have more referrals because those kids are having more police contact? Is it how we are handling those kids? I mean, just as an example last year we had 20 Measure 11 juveniles that were in the system, nine of them were white, one was unknown, eight were Hispanic and two were African American, which isn't a reflection of our population but it's closer than it used to be. We keep tabs of males and females and their ethnicity as far as who's going into detention and I think we are not seeing nearly the over-representation that we used to. We are blessed in that almost half of our staff is bi-lingual in Spanish and we have a large population of bi-lingual bi-cultural Spanish staff, so we are really doing a lot of outreach with not only our gang teams but with our regional teams to Latino communities. We have a larger Somali population that we have worked with as well as some Russian families, but that is lessening. It seems to be more Somalis and Latinos that are really the focus in this county with some influx of African Americans as well as Beaverton has become a much more diverse population. I did have one other to say on the Measure 11 cases because we house those kids. If I could have my wish list for what the defense attorneys and the DA's would do differently, we are kind of the last one in line although we are in charge of the child so often just encouraging defense and District Attorneys to communicate with us on those Measure 11 cases since the child is in our care. There have been times where last minute hearings were scheduled and we weren't notified, well 'how come the kid isn't here?' 'Well, they're in Portland.' No one called juvenile. So we have specific staff that are assigned to those Measure 11 cases that reach out to the defense attorneys and the District Attorneys to just keep us in the loop because we really try to take those Measure 11 kids and treat them as juveniles and in that we are communicating to the kid and the family explaining the system and we think that is really important. Often times, these are kids that don't have prior referrals. So, I just hope that they would remember to keep us in the loop since the child is typically in our facility and we want to be able to help support that child and family and also make sure we get them where they need to be when they have hearings.

56:47 C. Lazenby I think we can all agree that diversity in staff can help address these issues.

56:54 P. Belt Thank you.

56:55 K. James Thank you.

56:55 Chair Ellis Thank you both. Next up is Lynn Travis CASA Director and Sandy Berger with the Citizen's Review Board, although I don't see anybody volunteering here. Okay, Judge Bailey is here? Why don't we take you now?

57:35 Judge Bailey Good morning everyone, thank you for having me here. My name is Charles Bailey and I am the Presiding Judge here in Washington County. It is an honor to be in front of you all and given the opportunity to talk to you about the public defense services we have here in Washington County. Having never done this before I am not exactly sure what all you want from me so, I hope to give you some initial...

57:57 Chair Ellis You're ready to be cross examined?

57:8 Judge Bailey

I can be, certainly. Ready is a whole different thing than 'can be' but I'm more than happy to take any questions that you guys have. I want to start with giving you an overview. I have been a judge now for nearly nine years, I just started presiding judge duties in January. For part of that I was a prosecutor, so I am familiar with the services we have here in Washington County. It's been almost 20 years since the time in which I started here in Washington County, so I have a pretty good idea of what's going on. We started this process back in June of 2014 when we first had some folks come out and chat with us and I think things have changed dramatically from what was happening prior to that and I think that's a credit to the defense bar who listened to and read that report and made some changes and so I think that's a good thing. I wanted to let you all know that I think things have greatly improved from where they were prior to June of 2014. Part of the issues that we were having in the report was part of the affidavit process, which I think you are all aware of. In our mind, the judges mind, we had attorneys abusing the affidavit process and it was creating a lot of difficulties for the court to manage resources and I think that has changed dramatically and there are two attorneys that I really want to make sure I quickly talk about because I think what they did was noble and bold and that is Amanda Alvarez and Ted Occhialino with the Metropolitan Public Defender's office. When they got to their respective firm there was a culture of what we call reserving affidavits and case assignment and they got up in front of their colleagues and instead of doing that reserve process they said 'no affidavits.' In other words, they weren't going to do that, they were going to wait and give the judges an opportunity and then wait to see if something happened and that was, I think, a noble thing and it was difficult to do so in front of their peers. I think it was the right thing, the professional thing and I think they need to be publically told that that is so, and that's how I feel about that.

1:00:20 Chair Ellis

So, is it the case now that here's no defense lawyer that has sort of a standard affidavit?

1:00:27 Judge Bailey

Yeah, we still have some attorneys doing the reserve process which by statute they have the right to do, and we still have a lot of folks now that aren't doing the reserve they are just saying 'no affidavits.' They are giving the judges the opportunities essentially that we have always asked for in the past and I think that's kudos of them. The affidavit process, like I said, it has dramatically changed from where it was in 2014 to where we are now. It is almost non-existent the affidavits that are being filed in Washington County and that's again kudos to all those people who read and listened and heard and are doing what I think is the professional responsible thing to do.

1:01:06 Chair Ellis

This is a better picture than one county in the state. We had a period where in a small county, I think there are two judges on the defense side had a blanket affidavit. That was seriously difficult.

1:01:22 Judge Bailey

Yes, and we have some of those blanket affidavits coming from the state as well and Mr. Hermann has done an excellent job as well of saying that we are not going to do that anymore, we don't have any of those as well either. So that's a positive, both sides have listened, both sides have understood, and both sides can move forward in a very good fashion and its much appreciated from the bench's perspective. The other thing I did want to chat with you all about though that I do hope the council considers is what I see as the unequal pay that I see being done between our respective contract and the Metropolitan Public Defender's office which is not an indictment on them. I think they are being payed appropriate, I just think the contract folks should be paid more. They're doing the same amount of work, the same type of work as the MPD's office and they deserve the same pay.

1:02:16 Chair Ellis

You may not know this, but we succeeded in getting a special package through the legislature this year that should translate.

1:02:28 Judge Bailey

I agree, and I did. When I talked with Mrs. Cozine I hadn't been aware of that until I talked to Mrs. Cozine, she let me know about that. That doesn't change the fact that the contracts went out and they were unable to begin with and it shouldn't have been and that's what I want to

make sure is clear. I think both of them are absolutely necessary to our county and we need not only the Metropolitan Public Defender's office but we also need those contract firms and they all provide the same amount of work and in doing so they should be appropriately compensated for doing that same amount of work. One of the key issues we had with the MPD's office, which again I think they are doing a better job with, is we had a high turnover rate so it felt like we were constantly retraining their attorneys. They had a renegotiating of contract. I think that was part of the issue that they had.

1:03:19 Chair Ellis

You're talking specifically about MPD?

1:03:22 Judge Bailey

Specifically about MPD's office and that contract, to my understanding, has changed and as a result of that we are seeing a difference although there still seems to be a, more recently I think it's just because of personalities, I think some folks were leaving the office completely. It's not a situation where folks were choosing to leave Washington County to go back to Portland or Multnomah County; that I think has changed because management has listened to us and heard our concerns. My point in bringing that out is we didn't see that high turnover rate, we don't see that high turnover rate with the other contract folks which means we have some more experienced attorneys in those firms that are doing the same work and again, it rises that question up why should we be paid less when we have more experience providing a better service to the clients. They should be paid at an equal rate. Those are the main things that I really wanted to chat with you all about. In addition, there was a situation that came up, hopefully Mrs. Cozine had an opportunity to give you all a letter from Judge Raines regarding juvenile. I don't have a lot to say. I think the letter speaks for itself in regards to the concerns. I haven't had much contact at all with the juvenile department in the sense of being a judge out there and having an opportunity to observe any of either the consortium, the contract firms, the MPD's office, or the private bar, but Judge Raines wanted me to bring this letter to you all to make sure it was clear to you that the current private bar that we have is something that is very important to the juvenile justice system here and needing them for conflict types of cases and so we wanted to make sure it was clear that we need them and just in case that wasn't clear that you guys have that information. There was one other thing that was just brought up. In regards to the, and I will apologize to her in advance because I don't know her name, I just received today the letter from the mental health organization, so I haven't had a full chance to go through it. There was a lot of stuff; there was some stuff from Texas and some statutes that I have not had a chance to go over. What I can certainly tell her and what I will tell you all, I think that there is nobody that's involved in the system that will tell you that the justice system is the right place for these folks. It has been an unfortunate situation the way things have happened. We have been called upon to do the best that we can with the limited resources that we have, no different than you guys in a sense of handing out dollars for the public defense services of these folks. The only sort of anecdotal thought I might have on that is maybe in the contracts there's a CLE requirement of each of the firms to participate in some sort of a CLE regarding the identification of mental health issues.

1:06:21 Chair Ellis

The person you want to communicate with is to my right.

1:06:25 Judge Bailey

Mr. Potter?

1:06:27 Chair Ellis

Because, I think OCDLA has been a terrific source of CLE for the criminal defense bar and this is obviously a topic of interest to them.

1:06:40 Judge Bailey

I currently see our defense bar doing a very good job of identifying folks in regards to the aid and assist and the GBI issues. I don't think that's necessarily what the young lady was talking about. I think it was more along the lines of whether there are certain things that they can do prior to a adjudication or prior to those ideas. I don't think anybody in the system that has been involved in the system believes we are the appropriate place, but we've been handed the responsibility to do so and I think that everybody in the system has been doing everything that

they can with the resources that we have to do right by these people. Are there any additional questions? That's really all I had for you all.

- 1:07:24 Chair Ellis Help me understand, how many judges total?
- 1:07:28 Judge Bailey We have 14 judges here in Washington County. We have essentially different teams. In the criminal field we have our criminal team; we have our law enforcement center team which is one judge, Judge Garcia at this time. We have our juvenile team which is part of our family law team; Judge Menchaca is currently the judge that handles all of the juvenile adjudication with the help of our pro tem Michele Rini. She also does a lot of work in the juvenile department. We rely on her heavily on that area as well. The rest of the judges are on a general trial rotation and take on both civil cases and criminal cases.
- 1:08:08 Chair Ellis Any observation about the intake and case assignment system? We are interested to know if defense lawyers are consistently there at arraignment or the initial appointment and the early phases of representation.
- 1:08:29 Judge Bailey We have at our current law enforcement center when arraignments are being done, Metropolitan Public Defenders office has a contract to do those arraignments and I think that's working pretty well. It's been taken advantage of in the sense that we have an Early Case Resolution which is mentioned in there and so sometimes those attorneys are able to communicate there. Sometimes there are reasons why that attorney can step up on behalf of that client on arraignment and ask the judge for certain things that weren't happening before when there weren't attorneys representing them at arraignment. I think that's a good thing. I think for the most part that our attorneys are showing up on time. I think our attorneys are doing a very good job in representing their clients. The only firm that I have seen recently that was really woefully inadequate that has been handled right now would be the McKeown and Brindle firm. They had a very high turnover rate. There was time in which they had Don Watt was the attorney and he was doing (inaudible) work on behalf of that firm and in my mind he was doing way too much on behalf of that firm. I think there was just too much work, too much turnover, too much reliance on new attorneys which was then rising to the level of not necessarily giving the client the best service. But, I think OPDS has done a great a job at taking a look at that and managing that situation. At this point in time it is my understanding with the recent juvenile contract being, I think it's going to be likely handed to you as potentially being dismissed, I think that's appropriate. Other than that, I think the contract firms that we have all do a very good job of the work that has been asked of them and they do it in a pretty efficient manner. I think the clients here in Washington County really do get pretty good service.
- 1:10:22 Chair Ellis Questions for Judge Bailey?
- 1:10:27 P. Ramfjord There has been a little talk about making pre-trial conferences more meaningful. Mr. Hermann talked a little about that and you are in a unique position to observe whether or not that is actually happening and also maybe facilitate it happening. I'd just be interested in your observations about how that has been evolving over time.
- 1:10:47 Judge Bailey I think it's in the report in which we went through our re-engineering process and that was clearly one of the things that NCSC told us is that you guys should be doing a better job at facilitating during these case management conferences. I think they are. In addition to perhaps communicating to parties about the settlement of the case is we are also making sure we are doing things to move the cases along. We are asking them questions about discovery and making sure people are providing discovery in a timely fashion. Obviously, if the defense doesn't have the entire discovery they can't give good advice to their client as to whether or not to accept the offer that's been given to them. So, we are helping to facilitate those things. Prior to the re-engineering, the idea was 'well fine, if we don't take care of it at pre-trial conference we're just going to push you on to trial and let you guys tell us if you can figure

out something later on.' We were told that wasn't a good process, so we changed that process now to where times where we should be resetting or having an additional case management conference we are doing that, i.e. discovery hasn't been completed therefore the idea of asking a client to accept a prison sentence when they haven't had a chance to go over all the discovery is a silly notion. We know that. So, we are having second and sometimes third case management conferences to do that and to address that. We are also at the tail end before we have case assignment because what was happening was everybody was showing up at the case assignment and then doing their exchange of pleas. That no longer is occurring. We have a final resolution conference that is in the middle of that process. So, now at that final resolution conference there is another opportunity for communication between defense and their client and I had an attorney that came up and said 'one of the things that is great about this is sometimes our clients are not the most reliable people and so by you scheduling more court appearances that means we get more opportunities to talk to our clients and therefore go over this information with them that we didn't necessarily have otherwise' and that I think is also helping to facilitate a change of pleas that are happening. I haven't had a chance to run the final numbers but as the NCSC pointed out to us our ratio of trials compared to other counties was two to three times higher than them. Maybe that is another reason where attorneys here in Washington County should be paid at a higher rate than other attorneys in other counties but I'll let them make that pitch to you. We have made a conscious effort to lower, because we all know trial is what takes a lot of extra time versus a change of plea early in the process, the idea is that we made a commitment to try to get that instead of six trials for every hundred felony cases that are filed we are trying to get it to two or three so we are not having to. But, the understanding is that those two or three are the ones that should be going to trial and there would be more time to spend on those trials, to prepare for those trials to give their clients a good representation and we have made that commitment to them. They have all bought into the idea and the concept and I think we are doing an excellent job with this new program and this new system. Both the state and the defense bar deserve kudos for that. Does that help?

1:14:22 P. Ramfjord

That definitely helps, I guess I just have one other question which relates to the early case resolution process and there has been some concern expressed in the report that maybe there is not always as much information given at that point in time and maybe the decisions aren't as well as informed as they could be or defendants aren't being informed of the collateral consequences of a plea and what not. As a presiding judge who also gets to talk to other judges, do you get complaints from people or from judges that clients don't always seem to be as prepared or as ready at plea as they could be? Is that an issue from your perspective? Is that something that we could do better at?

1:15:00 Judge Bailey

Well I also think there is an opportunity to be better at whatever we do and we are constantly taking a look at that. Every month we run the numbers to get an idea of where we are at. Are we successful in the program? I think the key to making the success of that program is the opportunity to set it over and have our set over docket and so we have that. Judge Knapp monitors that, so if you have come to the time of arraignment and you are not sure whether or not you want to except that state's ECR offer, we have an opportunity to say 'I need more time' and to set it over and we are giving an additional two to three weeks to do that and so we have more time to get the information, more time to communicate with the attorney which in this case it is almost always the MPD's office, but it can be both the consortium and the MPD's office. I think that reset process gives a longer opportunity. We know there are some cases that are much more document intensive and more investigation might be needed from the defense side and so that is a reason why we have that reset. I haven't heard from anybody that the reset isn't enough time. Certainly if it wasn't, and I haven't talked to Judge Knapp about it, but certainly I will raise that question with Judge Knapp and if he has heard anything I will get back to you all and let you know what we are going to try to do to address that. This is Judge Menchaca, as I indicated before is our juvenile judge and I think he was here to talk about what's going in juvenile.

- 1:16:38 Judge Menchaca Good stuff. I admittedly was just going to wait for questions and kind of soak it all in. I will say you folks should be very proud of this guy, not to be... He has totally taken a look at our docket, the way we do processes and changed the way we do business in Washington County. Call is almost non-existent on Friday mornings.
- 1:17:05 Judge Bailey I won't take all responsibility. The beauty of the judges in our county that we currently have is that they all come together and recognize that we only have fourteen judges and as a result of that we have to utilize all of our resources very, very well and to do so means that we come together and we collaborate and reach decisions that we are all going to go forward and do in a consistent manner, that it is beneficial to the process as a whole. So, each of the judges here deserve the credit for doing that.
- 1:17:38 Judge Menchaca He precipitated it and so in Juvenile I am trying to follow his example by taking control of the docket. We only have two judges in juvenile. We are very, very busy and it is funny to see Judge Welch here because I grew up with Judge Welch as a baby lawyer and you'd ask for a reset she'd put her glasses down and deny it most of the time because of docket efficiency. As a baby lawyer I didn't get it, but now as a judge I'm like 'oh, okay this makes sense.' When you have limited resources, which we do, you've got to take control of your docket. So, I am trying to follow the lead of the adult court and really pay attention to what's going on in the juvenile docket because it is an extremely heavy docket. Having said that, all of the providers, I just had a long talk with Caroline Meyer yesterday about all of this, I think all of the providers including the private bar contractors do a great job and as I told Caroline Meyer, and I will stand by my comments, we would not survive without the private bar contractors and I know that is one of the issues being discussed today. In juvenile court I would not be able to survive without the private contractors. They take on the conflicts; they take on the more difficult clients, if you will. So, if there are any limitations to the private contractors I would ask that it be very, very carefully thought of because I would not be able to survive going forward without the private contractor bar. As always it is a question of resources, but I do need them.
- 1:19:15 Chair Ellis Any questions?
- 1:19:18 Judge Welch Shackles?
- 1:19:20 Judge Menchaca Shackles, that's a great question. I talked about this with Caroline yesterday. You know, right or wrong and I read about that in the report, I didn't know it was a problem. Then I saw it in the report and I was alarmed by it. Sometimes I just don't see it. They are under the table and sometimes they don't want to say anything, so sometimes I don't even see whether a young person is in shackles. In my experience if the person is in shackles then the security department that we have has had problems with that youth and so that is the reason behind the shackles. I think that in the two years that I have been on the bench, and I think I am right about this, I have never, ever heard a motion to take a young person out of shackles.
- 1:20:10 Chair Ellis Your observation, I think, captures part of the problem. You reasonably assume they are in shackles because they are difficult juveniles. I am sure you try as hard as you can to be fair, but I think you have already indicated that the shackles are a signal to you about that individual and isn't that a big part of the problem?
- 1:20:42 Judge Menchaca Well, let me say this, I think this is where the problem started and I might be wrong about this but we had an individual in the juvenile court that was I think some people would say 'aggressive' and that individual worked very hard and he was a very valuable employee to the county, but it may not have been the right fit for security. So, there was a change made and now I know that deep thought goes into shackling a young person. But I do rely heavily on the three to four security people we have on their judgement because juvenile court, if you folks have been over there, if a person wants to bolt or if a person wants to cause a raucous, there isn't anyone there.

- 1:21:30 Chair Ellis It's a very crowded courthouse.
- 1:21:33 Judge Menchaca It's a very small and crowded courthouse and if a problem is going to be had, it would be easy to have at juvenile. So, in the two years that I have been there we haven't had any security problems. Now, when they get to the holding cell, there are issues. But I know this particular juvenile department makes very conscious to put people in the security department that are very sensitive to the fact that we are dealing with people who are under the age of 18 and sometimes very little in stature. We have paid very close attention to that. I didn't know the shackles were a problem until I read that, so now I pay attention to it in almost every case and if a person is in shackles my mind starts thinking, 'okay what's really going on here?'
- 1:22:21 J. Welch Judge, my philosophy is, I promise I am not making a speech, my philosophy is that a child or an adult as far as that is concerned in shackles in the courtroom I preside in can happen only if I allow it. Now you can go at that any way you want to, in other words have a rule: you can't bring a kid in here shackled without my having a meeting with the prosecution and the defense counsel before the hearing. It just isn't done. These are children and my experience which is long as you know is that it is, in my career it was the rule that this was done for the convenience of the people working in the building. The reasons for it were often non-existent except that the kid was squirrely. Talk about it, come in and tell me why you need to do this to this kid and then I will decide whether you can.
- 1:23:35 Judge Menchaca Right, and in the two years on the bench I have yet to see any DA or defense attorney make any motion whatsoever about a child being in shackles. Having said that, let me say this, even last week I have two individuals very, very gang involved, the families have a very big time anger problem against one another and that person was in shackles because there have been very big serious concerns. In this county we have some gang issues and they are very deep rooted and sometimes I do rely on the security staff to do what they feel is necessary to keep control because in that particular case, very, very gang involved, the temperature was very high in the court room. We just haven't had any problems because we've got four very dedicated security people. I think the person that I eluded to earlier, who by the way I am not knocking on, but I think that was not an appropriate fit for sensitivity. That's been changed and that was changed almost immediately after that report came out.
- 1:24:25 Judge Bailey One last thing, before I forget, I would be amiss if I didn't tell you how thankful I am. I didn't know when I took over this job that I could call Caroline Meyer or that I could call Mrs. Cozine and talk with them, I just didn't know that. They have been really good of reaching out to me and have been very effective in communicating with me and I appreciate that and again I want to give thanks to Mrs. Meyer. I chatted with her on Tuesday when some issues came up and I kept (inaudible) which I thanked her for but I think those folks are doing a really good job and I appreciate them and I just wanted to make sure I communicated that.
- 1:25:33 Chair Ellis Thank you.
- 1:25:34 Judge Menchaca I didn't know that either and it's nice to be able to do that. I have now got her on my (inaudible).
- 1:25:44 C. Lazenby Speed dial for our staff. I think both of you judges missed the earlier conversation around Washington County being the most diverse county in the state. I think close to 31% of the population identifies as non-white and there are a lot of conversations especially in the juvenile area, judge, about over-representation of kids of color in the system. I am interested in your views in what you observe, whether you think that is a problem here. We have had conversations that juvenile staff is tracking the ethnicity of folks that are held and how long they are held. We had a conversation with the District Attorney about the diversity and nature of his staff. I'd like to hear you generally comment about what seems to be over-representation beyond their demographic number of people of color and kids of color in the

juvenile system or people of color in general in the system and whether you think that is a problem or what could be done to remedy that.

1:26:45 Judge Menchaca You are talking to an individual that grew up to a single mother raising three kids, she had three jobs in a Hispanic community. I am Hispanic. I am one of the few Hispanic judges in the state, so I am everyday having been called a spic as a young man. I am everyday aware of Latino over-representation in the criminal and juvenile justice system. If there is any sense of racial intolerance that is going on in my courtroom it stops. Washington County has the highest percentage of Latinos in the state, as I understand it, and so I think I am uniquely qualified to be a juvenile judge because I understand the plight of young Hispanic kids, particularly young Hispanic males that are involved in the gangs. We started a gang court approximately two and half years ago, Judge Butterfield actually started it and I've continued it and I am very, very proud of the work we have done there. We probably have, I am guessing here, but probably seven out of the ten young people we have in that gang court are Hispanic and we are trying very hard to work with them so that we don't have to commit them to OYA. So, we see them during the school year almost every two weeks and during the non-school year we see them once a month. We try to get them out of the gang lifestyle and the goal of that gang court program is to get them out of the gangs and stop committing crimes in our community. When I see what I believe to be something based on race it stops. Again, I don't mean to be naïve or pretend to think that everything is great because we can always do better, as Judge Bailey said, but I feel like I am the right guy at this time for this job because I get it. I get what a Latino person goes through. I have been there. I have had my own trials and tribulations as a young man, so I get it and I tell these young people. Most of them, and I am not trying to generalize all Hispanic males that have gone way south and they are entrenched in the gang lifestyle. I don't believe they are over-represented, it's just the gang problem is so big in this community and we took it on head-on with the gang court and I think we are making a difference with the gang court and I am very proud of that program and I will someday hopefully show the results that we have made because I think we've made a difference in a lot of young Hispanic male lives.

1:29:26 Judge Bailey I of course don't have the same background as Judge Menchaca; I am the old white guy now. Here's what I can tell you. I was raised by my father who was a career military guy and anyone who has been involved in the military knows there is essentially no color there. It is probably one of the most diverse organizations at an early time period and that's the way I was raised. But, the idea that we as judges cannot and are not aware of and consciously making sure that anything we do is not colored by race, we'd be fools. We have to be. That's our job. That's what makes the system just is to make sure that we are doing all the things that ensure that justice is being done in the blind fashion that it is supposed to be done. There are a whole lot of reasons why we may be getting folks in front of us in unequal numbers. There is potentially a lot of solutions for those that we don't necessarily have for the bench, nor the resources to do it whether they are the folks in our communities, whether they are the programs like the gangs in trying to get these kids to realize that there is something better for them out there than these folks that are trying to make them do really dumb bad things. Certainly, we have to be aware, it's our job to be aware and if we're not doing that we are not fulfilling our roles.

1:31:00 Judge Menchaca Sorry, I don't even know if I answered your question.

1:31:03 C. Lazenby Oh now, I was just inviting conversation about it. When we talked about it in terms of getting some data we are going to get even more data out of your juvenile system from the folks that are there and I know you both are aware that there is an active conversation going on around over-representation of kids of color in the juvenile system. I think I said earlier that that will spill over. My own personal prejudice I think in a very glib and superficial sense, it's a little bit like fishing right? If you are concerned about the salmon runs, who you catch is as important as who you release and I think when we study this more we are going to find that where we look for the fish is going to be part of that determination and also the people that

make the decision about whether to catch or release will also be important and we need to have balance in that process too. So, I appreciate you being on the bench Judge and your background in that you've risen through that and had great success in life, but I think it's going to be a repetitive conversation that gets larger and larger and I see it in Portland because of the federal intervention around mental illness. That's spilling over into issues of ethnicity as well and I think for the next five to ten years that's going to become much more of an imperative to get to the root of what goes on. Everybody that's a partner in the system is going to have to have a stake in resolving it, at least in the 60's you were a part of the problem or part of the solution. Everybody is going to have to be part of the solution for that. So, I appreciate what you guys are saying and what you are doing from the bench. That's the reason why I raise it.

- 1:32:56 Judge Menchaca Let me just make two comments on this follow up to this issue. I guess to the extent that I have had success, I would give a lot of it to my mother. She loved me and that goes a long ways especially in juvenile court when I see parents all the time. I had a great mother. Two; I would hope that going forward, you folks OPDS in general, take a look at our gang court program and to the extent necessary provide the support for the defense contractors to participate in that program because we are in the very infantile stages of that program and we are trying to make it even better. Again, I look at committing a person to Mac Laren or Hillcrest as a very, very last resort. That's my judicial philosophy. I think it's a last resort. I do. The gang court program was specifically designed to say rather than just commit these people immediately; can we do something by seeing them frequently? Can we do something to keep them out of OYA? And that's not a knock on OYA because OYA does a really nice job when you get them there but boy, if you can avoid committing a person, not only resource wise, it changes their life if they just get out of the gang and quit committing crimes. Have we had our failures, absolutely, and if I had to commit a lot of people then absolutely. I am very proud of this gang court program and there are some providers here that participate in that program as well and we need more and more support because the gang court program I think is something that can be even better than it is. Thank you.
- 1:34:29 Chair Ellis Any other questions? Thank you both. We appreciate your input. Let me ask the Commission, are you all okay to keep going or do you want a break?
- 1:34:41 C. Lazenby Unless you want to pick up my parking ticket, I might need to go move my car.
- 1:34:47 Chair Ellis That's not the reason I thought you might want to break, but we will. Why don't we take a ten minute recess and we will be back.
- 1:50:32 Chair Ellis Can we resume here? Lynn Travis and Sandy Berger? We've got one of two?
- 1:50:59 S. Berger Lynn is coming.
- 1:51:09 Chair Ellis Welcome, thank you. Why don't you introduce yourselves and then share with us what you think would be helpful.
- 1:51:18 S. Berger Okay, I am Sandy Berger. I am a field manager with the Citizen Review Board here in Washington County and the CRB is a state program under the state judicial branch and Oregon law requires that we review cases of every foster child in Oregon every six months. So, we have volunteers statewide to review every foster child to ensure that they have safe and stable foster homes while they are in foster care and that the children and parents receive the services they need in a timely manner. I kind of have a unique perspective on the importance of attorney representation because during the last 20 years I have worked with the court system helping the courts down in Klamath County develop a family court program that worked with families involved with child welfare. I also worked with CASA advocating for children in the court system. We really appreciate when the attorneys are present at our reviews here in Washington County and definitely see a benefit when they are there. Often

times with these families, parents have issues related to possible mental health issues or substance abuse. There may be chronic trauma and they may be very stressed when they come to our reviews although our review process is a lot less formal than the court process, so sometimes parents don't speak up for themselves and we just really appreciate when the attorneys are there to speak up for their client and make sure that their client is receiving all their needed services so they can have their children returned home to them.

1:53:15 Chair Ellis

Thank you.

1:53:17 L. Travis

My name is Lynn Travis and I'm the Program Director as well as the Program Attorney for CASA for Children. We recruit, train and support volunteer advocates for children under the protection of the juvenile dependency court in Washington, Columbia and Multnomah Counties. As such, we share clients with your contractors and frequently work well and collaborate together and I think you know we are not shy of alerting your staff if there are issues with quality of representation for our kids in all three counties. My reason for being here today is to alert you to what I see as a shift in the locus in the need for advocacy if you will with the advent of managed health care. All kids in foster care will be involved with the Oregon Health Plan and more and more provision of particularly high level foster care and services are provided through mental health as opposed through the Department Of Human Services. Our traditional model for representation for children in juvenile court is we advocate in front of the juvenile court. The juvenile court has oversight over Department of Human Services Child Welfare. In a sense, particularly for children who are involved in several systems at the same time, we're knocking on the wrong door if the only place we go is juvenile court. There is a statutory requirement now that all Coordinated Care Organizations (CCOs) have a wraparound process for children who are in foster care, have had more than four placements during their time in care, or are involved with more than one system and all of our kids qualify for that in that they are involved with child welfare, mental health and the juvenile court system. The best analogy to the legal world is it operates in a sense the way treatment drug courts do. There are regular staffing's, not quite as frequently as most treatment courts need, but regular staffing's that are facilitated. It is a strengths based approach and is typically facilitated through the Coordinated Care Organization which means that the advocacy for visitations, transitions home, transitions out of higher more restrictive levels of care, these decisions are frequently made in that venue as opposed to in juvenile court. Our CASA's, who have the luxury of being appointed for one child for the length of their case as opposed to a member of the defense bar, attend those meetings religiously and it is a place to affect the outcome of our children. It is frequently helpful for the attorney to be able to engage in that process as well. I was talking to one of our contractors outside and we both agreed that the worst place you could be in terms of advocacy is to come into court trying to oppose a decision that has been agreed to by everybody else who is involved in the care and treatment of the child. It is an effective place to work for kids. I brought a copy of the wraparound Oregon's report for the legislature in 2015. I am going to give it to Mrs. Cozine who can kill trees, if that makes sense, or provide you with the link if you are interested in seeing it. They are reporting really positive outcomes, particularly around placement stability for our really tough kids. About 85% of the cases that have wraparound services for Washington County are also involved in juvenile court. I want to advise you about this because in the same way that we adjusted contracts to allow for payments for attendance at Citizen Review Boards we saw an increase in participation from the defense bar. I think we go where our work is valued and in future contracting I think it is something that is worth considering if there is a way to monetize participation in the process. I think we will get a better product for our kids. That's all that I have. If you have any questions about how we work with the defense bar...

1:57:56 Chair Ellis

Any questions? Let me ask Sandy, in some of the counties there is an issue that the defense lawyers don't regularly appear at CRB meetings. How would you describe it here?

1:58:17 S. Berger Previously I was the field manager in Klamath County. I think Klamath County's bar has a unique program where the attorneys have case managers who go into the foster homes to see the children. Also, some of the case managers have caseloads for parents where they meet with the parents. Those case managers attended our CRB reviews in Klamath County on behalf of the attorneys. I thought that model was really great because since the case managers had face to face contacts with the clients they were able to relay information the Board needed to make the recommendations that are required for the court. Here in Washington County, since I have been here in May, sometimes we have legal assistants attend on behalf of attorneys. I do see a great value of actually having the attorneys there and not the legal assistants. I can think of one case in particular where I really wish the attorney could've been there to advocate for their client. I believe the legal assistants are mainly there to take notes or at least that's the Board's impression that they take notes. Sometimes they do relay information by the attorneys but I see a great value of the importance of the attorneys being present at the reviews because our Boards rely on the information that is provided at the review, not only to make the required ten legal findings that we have to make to the judge but also to help make the recommendations that will improve outcomes for these children and hopefully speed up the process so these children are not in foster care any longer than they need to be. I look at that as being very important.

2:00:12 Chair Ellis Thank you.

2:00:17 J. Potter The chair asked half of my question, but to Lynn more or less the same question. You had said that you worked collaboratively well with each other, that is the defense bar. When do you not?

2:00:33 L. Travis Well, just in terms of role, the CASA's job is to report to the court about the child's best interest and the attorney obviously is there to advocate for express wishes. When those differ, we disagree and may work at cross purposes. We work best when we see each other and CASA's most frequent complaint about the defense bar is about returning phone calls and actually being in a place to share information. We teach our folks to be as collaborative and transparent as possible. That's probably when we work the most at cross purposes.

2:01:25 Chair Ellis Other questions. Thank you both. We appreciate you sharing your thoughts. We have two from DHS, I think Tom Vlahos and Shirley Vollmuller. Are they here? Okay, moving right along. We will get to some of the providers. MPD, Gregg and Lane if you want to join and your board chair join.

2:02:05 L. Borg Our Washington County appointee on our board is here and Ellen Johnson is also our new Chair of the Board.

2:02:16 G. Scholl Hello everyone, my name is Gregg Scholl for those of you I have not met before. I am the director of the Washington County office of the Metropolitan Public Defender. That's an office that I have worked in for 22 years and I feel like I am a person that knows that office

2:02:36 Chair Ellis That's a good start.

2:02:39 G. Scholl Thank you. Washington County, I have just a couple of brief comments on some of the areas that I think are important that should only take about two minutes and then of course I will be glad to answer any of your questions. In my view, Washington County can be a difficult county to practice criminal defense but it's not alone in that way. I do believe that it is a very good place to practice criminal defense and an especially good place to be a dedicated public defender. Our attorneys take part in a lot of litigation. The trial rate in Washington County is pretty high and different people will give you different percentages and statistics but there are a lot of trials here and our attorneys are a litigious group of people. I think there are some reasons for that high trial rate and we can get into that if you want. In the peer review report I know one of the concerns mentioned was turnover within our office with our office in

Portland and I think there has been substantial progress made in that area. It's not just because of the change in the time limit that somebody needs to wait to transfer to the Portland office if that's what they want to do. It used to be 18 months, that's been changed to three years. That's not just an arbitrary decision that we made, that had to be worked out with our union. Our office is unionized, so these things had to be negotiated. But, that three year limit frankly we are just now perhaps starting to feel the effects of that even though it went into place over a year ago. The other reason why I think we've made progress in turnover is we have made the Washington County office a good place to work and we've maintained it as a good place to work and even made it a better place to work for public defenders and in part that is because of a training issue. We've engaged in a new training regimen for our young lawyers and we have tried to focus more on them and we have also provided growth opportunities not just for the lawyers but the support staff that work in the office as well. There's on any given day 45 to 50 employees in that office and they are all very important. We try to make sure they are all pleased with the opportunities that they have. I feel that our office, our public defender's office, is not simply a place to start and learn how to litigate and move on to some other type of job or career or jurisdiction even though people do that, and they are always going to do that. But, it's more than that. I think it is an office where a person can start and stay and have a career and in fact now over half of our attorneys have stayed for a relatively long time. There are some 10 to 15 year veterans in the office and then there are some five plus veterans in the office. The last thing I'll mention about that is over the last year or so we had two transfers from the Portland office out to the Washington County office which is a direction of transfer that I personally find to be morally correct. We are happy to have those attorneys and I'll be honest, they both are great lawyers doing really great work. The morale in our office is very good. I would say it is as good as or better than it has been any time over the last couple of decades. We have a very good crew and I think we have succeeded in building kind of a classic public defender's office and we know that in our role as public defenders we are going to occasionally make some people in authority frustrated or angry with us and my own personal view is that's part of the ball game if you are going to work as a public defender. We never have done that on purpose and we also have not engaged in unprofessional behavior. I think there is a big difference between a judge getting frustrated or a DA getting angry at you. Those things are going to happen. You don't want them to happen because sometimes that can affect your advocacy but overall that is part of the work of being a public defender. I have drawn a distinction between that and any unprofessional behavior among the attorneys or staff among our office because I do think that is important. The next thing I'd like to mention to you briefly that I think we have done well in our office is our relationship with other person's not just within Washington County but within the State of Oregon as a whole. I have an excellent relationship with our District Attorney Bob Hermann. We talk weekly. He returns my calls, I return his calls. We don't always agree on everything but we get along quite well. I would say the same thing for Sheriff Pat Garrett, the preceding sheriff had a rocky reputation or relationship with many other people in the county. Pat Garrett is very easy to get along with. Our office has an excellent relationship with the jail command staff which is very important to us because it is very important to our clients. Steve Berger from Community Corrections, I meet with him regularly. I even have had meetings with the county administrator here in Washington County to ask questions about financial issues and have received a good reception there. Our relationship with the judges I think is good. I think it has gotten better over the last couple of years. It is no secret, and we can talk about it more if you want to, we got into a couple of scrapes with some of our judges over the last 24 months. Those have died down to some extent. I don't necessarily want to spend a lot of time talking about affidavits but I can answer your questions about those if you are interested. I do believe that the judges have come around to the idea that our office is not like the DA's office. There is not a specific chain of command in place where I dictate policies and in an authoritarian way tell the lawyer you are allowed to file this kind of motion but not allowed to file this other kind of motion. You can't really engage in that type of practice in a public defender's office because people need to be able to do the things that they think need to be done in their cases within the rules for attorneys and ethical considerations. But, I am not the kind of person to tell somebody 'yes or no, you shall or shall not do this certain thing.' I

do provide guidance and advice for attorneys on those issues as do the other manager type attorneys in our office. I think the judges have been somewhat frustrated with that over the years because they want to call me on the phone and say 'tell the attorneys to stop doing this, it's making me angry' and I have always been polite and called back and done the things I am supposed to do but sometimes the answers to those judges is 'no.' Outside of this jurisdiction, our office is involved in many different things. Right now I have a seat on the ODCLA Board of Directors. That has been very good for me to learn more about that organization. We have a seat on the local Criminal Justice Services group that is meeting right now across the street. We are one the Public Safety Coordinating Council. We are on Supplemental Local Rules committees. We have had membership on the Oregon State Bar Criminal Law Executive Committee, we have a seat on that group right now, and because of the nature of a public defender's office and the way that OPDS does work we get asked to take cases in other jurisdictions and that is something that we often try to do. Not just aggravated murder cases but other serious cases. We enjoy being the place that OPDS can call when they need a lawyer in Columbia County or Lane County or something of that nature. So, we are kind of present in other jurisdictions as well and I think that is very good for our attorneys, especially a long term attorney that is going to be a career public defender or something close to it. They need to get out into another jurisdiction and sort of see how things are done. The last thing that I wanted to mention was we are proud to be involved in special courts in Washington County. We represent 40-50 clients in the Washington County drug court which I would describe as an extremely souped-up alternative court. I think it represents the wave of the future of what should be happening in criminal courts across the country. I represent the clients in the drug court. I found that to be a way for me to keep representing people and to keep going to court that doesn't conflict too badly with my other duties. I enjoy it very much but the Washington County drug court, because it is well funded and well attended and was a group effort to put it together, is really quite an amazing place. It's not like, with all due respect, STOP court or other low level drug courts around the state or around the country. The Washington County drug court is for high-risk, high-needs offenders that are looking at 40, 50, and sometimes even 90 months in prison. It provides an intense level of supervision and a very bizarre collaborative effort towards supervising the participants. By that I mean sometimes my clients ask the deputy sheriff in the drug court for legal advice and it does not bother me. That is the kind of upside down world that is present in the Washington County drug court and I will tell you what, it works. We have had over 160 graduates from that program. They have paid back around \$120,000 in restitution, 90% of them are employed, most of them full-time. I could talk to you about the drug court a lot if you wanted to hear that. We also represent clients in the mental health court here in Washington County. These are the places where we want to try to improve the criminal justice system. We want to try to make things better primarily for our clients, but if we happen to improve the system for people like Judge Bailey, well so much the better. I should also mention our juvenile advocates. I am very proud of the work that they have accomplished. One of our juvenile attorneys I believe is probably the one who knows more about the juvenile code than any lawyer in the State of Oregon. He's been at it a very long time and is very dedicated to those clients and I would like to put in a good word for our juvenile section while we are at it. If you have any questions for me, I would be glad to answer them. Also, if you want to hear it, there are a couple of things I'd suggest we could do to improve our work here and let you know some of the things we are working on over the next year or two.

2:13:22 Chair Ellis

I have a question I want to ask and I am very glad to see Lane here. I think that MPD is one of two PD's around the state that has more than one office and I happen to have been chair of MPD when Washington County opened so at least I am quite familiar with the early history. I would be very interested from each of you, how is that working in today's environment? Washington County is much larger and much more complex than it was when the office first opened. The theory, and I will listen to how it has worked out, was that we can have a lot of the administration concentrated so that you get economies of scale; you can have a lot of the training concentrated so that also has economies of scale and there was this vision of movement of the lawyers, hopefully not all in one direction and not Washington County kind

of being a farm team for Portland. That's the topic I really would appreciate each of you commenting on.

2:14:45 L. Borg

Sure, let me thank you Chair Ellis, for the record Lane Borg, Executive Director of Metropolitan Public Defenders. This is part of the answer. One thing I wanted to address that Mr. Hermann talked about regarding the trials and the turnover, that's not really what was going on. The people that were substituted, and there had to be substitutions across the board on serious cases, were people who left the office and there were some unfortunate hires where we were kind of ramping up. I hired 25 attorneys in an 18 month period and a couple of those were bad hires and those turned out to be cases that transferred over. I am trying to think back, I have been thinking about it since Mr. Hermann said that they moved down town and the cases all had to be reset and transferred, everybody who has transferred downtown in my recollection during my seven year career now has been that they have kept the most serious cases, they've kept the cases that were at issue that were not in the clients best interest to transfer and come back. They might be downtown for a month and then they come out and try a case for a week and to my recollection every single lawyer has had at least one if not a couple of cases that they have kept. So really, that issue was more with people who just left the office and then the cases were reassigned. We are sensitive to that issue. As to your question, I think there are economies of scale in the corporate level, on the IT level. We have had to go to, and have gone to because of our size and complexity, to a co-location site for our computers. That has improved things out in Washington County. There is access to an IT staff that I am not sure on the Washington County budget they would be able to afford in house. The accounting, HR, the stuff that I do has all benefitted the operations manager with dealing with the facilities renting the building. That is a benefit to them. Training had fallen off and that is one of things that changed when I came back is that I instituted a rule that the trainer would come out at least one day a week and for a while it was a day and a half a week. Alex Bassos who is the training and outreach director comes out regularly to Washington County and supervises that process and we are even looking at some models where we can increase that. I think there is a benefit to that. The transfer, I wish there was more. I wish people were going back and forth. I liked the process that was going on when I was a new lawyer at MPD. I started in Clackamas County; I went down to Multnomah County. If I hadn't left to go be the assistant director at MDI, I was on slot to go out to Washington County and in fact I think I would've been swapping places with Keith Rogers. So, we all are the same people just different seats. I think that was a good thing and I wish there was more of that. I can't convince people even within the office that there is more of that and there has been resistance for various reasons both from the union and from some managers because the transition was so one-way. As Gregg mentioned, we have had people transfer down but it's been much slower; turnover has been slower but we also have had some people move back. As I gleefully told the presiding judge in Multnomah County, we did actually have a person move out to Washington County to get out of the thumb of her tyranny at call. There was a little shock by that but yes; Washington County was a more attractive option. I don't know if that answers your question. I wish we were doing more transfers. I have talked to the union about it. Really, the agreement in the last bargaining session was as the stop got measured to change 18 months to three years, but there was supposed to be a commitment to have a committee and discuss this some more, to discuss how we could have... I mean I am willing to even cede some of that power and not just make it my decision who moves back and forth but have part of the bargaining unit participate in part of that decision. If I had my way and could really affect this unilaterally you would, over the course of your tenure at MPD you would be in both offices. You would do both major crimes and minor offenses in both offices and you would cycle back and forth around because that is what private practitioners do. They don't all just practice in one county and I think it would benefit the system, but I may be the lone ranger on that.

2:19:41 Chair Ellis

Is the three year clause only one way? In other words, it applies to Washington County lawyers not going to...?

2:19:50 L. Borg No, actually what it says is that you're not eligible to transfer unless you've been somewhere for three years. It could go either way. There is a special protection clause for Washington County and I have used this occasionally in the last couple of years that if they have a new person in that position in the last 60 days, then I can say 'nope, can't transfer.' That is supposed to buffer it so they wouldn't have to take, unless somebody left the office or resigned, they wouldn't have to. I can block an interoffice transfer if Washington County has a new lawyer that has been there within the last 60 days and I can say 'nope, not eligible to transfer on this switch.'

2:20:33 Chair Ellis Is hiring done centrally or is that done separately?

2:20:37 L. Borg It is done centrally but what happens is, and actually with Alex I give him credit for this on the first level in that we do a screening interview, well actually now we have a paper screening process because we have gotten so many applications still. That's done by one of the chiefs in Washington county, one of the chiefs downtown and Alex. The three of them have a matrix that they use to apply for screening for that. They then get interviews divvied out in both offices. So, about half of the prospective candidates that are interviewed are interviewed out here in Hillsboro and they do the interviews out here, they come out here to do them. Then, ultimately the directors Alex Bassos, Kati Dunn, Gregg Scholl and I do final interviews for decisions. We also have another hiring track that you should be aware of. This is Alex and I collaborating on this, is we have liked the big firms where you previously practiced. We have a process where we take in first year research program for law schools and then some of those will come back to us as second year students and in the past, I just had the fourth year of sending out offer letters to summer intern clerks that are beginning their third year, these two are from Harvard and offering them jobs. We have hired three already. One is downtown; the first one I hired is just leaving to go on a little discovery of herself and the other one started in Hillsboro. He was a certified law student in Hillsboro last year and he just started and he finds out the bar results tomorrow.

2:22:17 Chair Ellis Is compensation the same?

2:22:20 L. Borg Yes, they are hired at step one. You mean between the offices? Yes.

2:22:27 Chair Ellis And one other question, and Gregg we will get back to you but, does Gregg attend the board meetings?

2:22:33 L. Borg Yes, he was not at the board meeting that we had this week because he was busy in Lane County trying a murder case but, yeah all of the directors generally attend the board meetings.

2:22:44 Chair Ellis And Ellen, as I understand it, you're appointed by the Washington County Commission?

2:22:49 E. Johnson Yes, I am the representative from Washington County, so I am appointed by the County Commissioners of this county.

2:22:56 Chair Ellis And you have now risen to be chair of the whole group?

2:23:00 E. Johnson I apologize, I left my crown in my closet. I'm not used to wearing it.

2:23:05 Chair Ellis Okay, Gregg do you want to comment on this subject?

2:23:07 G. Scholl Thank you. I just wanted to add, I think that the economy is present in our administration and I think it works the way that it should. The executive administration of the public defender's office is visible in our office just about to the extent that anybody wants them to be and I don't mean that in a negative way. Lane is much more visible there than his predecessor was and I think people like that. They like to see him. He's there when he needs to be. He's always been there for me if I have an issue that I need his help with. Our treasurer, the people

that run the business of the office, most of them spend one day a week in the Washington County office, there is a little admin office that they use and they are all very approachable. We don't feel like we are adrift on some foreign planet and we can't get the help that we need. The other thing that I will say is I don't fight with Lane about the idea of having more people transfer offices because I get that and I get the way that it used to be. The counter argument to that is now the commute is a lot more difficult than it was 25 years ago. Most of our attorneys, with the exception of two, myself included, live in Portland and it can be a 35 minute car ride getting out here in the morning. Getting home it can be 30 to two hours sometimes.

2:24:33 Chair Ellis

Why don't you do light rail?

2:24:35 G. Scholl

Light rail is an option that a lot of attorneys use and I have used it myself. That, in part, depends on where you live because you might have to take a bus or two to get to the light rail and that can turn into a long time but at least you can read while you are doing it. But, the commuting time definitely has an impact on people's willingness to switch offices. The other thing I will say, especially with that old 18 month transfer, I think the nature of the law and the nature of the judges and the nature of what is going on in these courtrooms makes it very difficult to have a certain level of competence in a jurisdiction in just 18 months. I think it takes longer. Does it take 22 years, maybe? It takes a long time to figure out how...

2:25:20 Chair Ellis

You'll get there eventually.

2:25:22 G. Scholl

I am trying. It takes a long time to get your bearings and figure out how to do things especially in front of certain judges and that is an argument against a shorter transfer period. It almost feels like you've got to spend several years at least to begin to feel like you know what you are doing and you won't get there if you transfer to another county.

2:25:45 L. Borg

The last thing that I would want to add because this has changed since you were the Chair of our board and even in my tenure of seven years. Washington County right now is just over a third of the corporation. We have about a little more than half the size of the Portland office. When I started out it was about 25% and when I was a staff attorney it was around 10% or less. It's a big part of the operation and predictions I am hearing on anticipated contract discussions, it's probably going to get a little bigger. It's foreseeable that even in my tenure it could end up being a 50-50 split. At that point I think there are some things that I would probably revisit around where the center of the organization is. I don't know that it will ever get to be that it's all out here and just a satellite office downtown but it's not inconceivable that it would be 50-50 in the next decade.

2:26:49 Chair Ellis

Other questions?

2:26:51 C. Lazenby

Can you just complete the record and tell us who the lawyer is who is the leading expert in juvenile law? You never named that person.

2:27:00 G. Scholl

I didn't want the other attorneys in that section to feel bad, but they are not here. His name is Doug Killian. He started a couple of years after I did and has been in juvenile court almost that entire time. He had a little break in the middle when he did something else, but Doug Killian I believe is a master of the juvenile code. His supervisor is named Mary Bruington. She is probably the most liked and admired attorney from our office across the board with the judges. They don't all see her in adult criminal court, but people that know her, I routinely get messages from judges saying 'why can't everybody be like Mary.' It's not one of those things where you think 'oh that's too bad the judge likes me too much' because you don't want to fall into that trap. This is real and legitimate. She has a very high standard of advocacy and respect from the bench here.

- 2:27:55 C. Lazenby To be fair and even handed and following up on my theme of the day, how many lawyers do you have on your staff doing trial work and what is your ethnic diversity breakout of that group?
- 2:28:06 G. Scholl We have 20 attorneys, it depends on if you count the certified law students and sometimes they are in flux. There are three of them right now, but in terms of full or part-time attorneys we have 20 lawyers. We have three or four that are minorities. I'll be honest with you, a couple of years ago we were doing really well in that area because we have four or five lawyers that were identified as ethnic minorities and I don't pretend to be an expert on who's a member of a certain group but the obvious facts are we were doing above average. Right now we are about average in lawyers; in support staff we are very good. I don't know the exact number but I know we have about eight or nine support staff that would identify as minorities including some of our managers and people that have titles like Senior Legal Assistant. We are doing okay in Washington County, although we can always do better. That is in part because in this community there are more minorities as Judge Menchaca said. Some of our longest term support staff employees, the people that have been here 25-30 years are from the Hispanic community and have stuck with it at the office and we are happy with that.
- 2:29:40 E. Johnson So I can answer part of the concern behind your question. I asked Lane a couple of weeks ago to get me the demographics of our staff and I don't have them entirely in my mind, I wasn't prepared for that presentation, but I know that overall as an agency five percent of our attorneys are African American and about one-two percent are Hispanic. That mirrors the population of the Oregon State Bar statewide. I can provide the data that I have to you but I would also say that the board has adopted a concern regarding viewing both the agency and the work it does through an equity lens. We are developing thoughts with regard to both how we evaluate the criminal justice system that our agency operates within and the outcomes as well.
- 2:30:40 Chair Ellis I think all three of you were here when District Attorney Hermann spoke and he commented on conflicts in murder cases because they are protracted and conflicts develop. My question is because of the unit rule any client or former client of either office probably presents a conflict. Does the size of the organization, including both offices, is that leading to more conflict than we wish it would and are you pretty good at finding those out early? The thing we try to avoid is you get half way through a case and then there is a conflict and you have to drop out.
- 2:31:38 L. Borg Gregg hadn't arrived by the time Bob Hermann was talking about that, but I am very aware of this and actually addressed it in my RFP as one of the challenges. The cases he was referencing were not the classic 'we represented somebody that is a witness 20 years ago' and I think we are actually pretty good at screening, at getting information. Murder cases are generally handled differently. You get a call, you get some information ahead of time on witnesses and we try to run through and screen what we can. We have had to get off of an aggravated murder case in the last 18 months. We have had to get off of I think another murder case and I don't think that the conflicts were accidental because the conflicts were people who are current clients in the jail and our feeling was that they were particularly targeted to be snitches. Then, ironically they don't get called as witnesses at trial. I think there could be a little more examination if we, it's relatively few number of cases but...
- 2:32:54 G. Scholl I would like to add on to that because I was deeply involved in both of those cases. Mr. Hermann's points as they were explained to me, and I have heard this before, for one thing I want to be clear, we handle eight-twelve murder cases per our contract and we conflicted off a couple of those cases. When you conflict off of a case that has been around for a while, that's a big deal and it gets everyone's attention. If anybody wanted, we could make a list of the murder and aggravated murder cases that we have seen through to completion whether it was litigation or settlement and that is a long list. So, I think this is a relatively small problem. Lane is right, particularly in one of those cases which was mine. Very shortly before the trial date the District Attorney's office said 'we have a new witness against your client and we just

happen to know that it is one of your former clients' and I went very far down the road of trying to find a way to keep that case including trying to talk to that former client letting him know he could obtain a waiver or that he could have other counsel appointed. In the end, the guy wouldn't talk to me so we had to get off that case. I remember standing in court in front of Judge Kohl saying that the state is not going to call this witness and the DA said 'of course we are he is a crucial witness, and he heard your client make an incriminating statement' etc, etc. That case was reassigned to another provider. They took it to trial a couple of months ago and they didn't call that witness.

- 2:34:22 Chair Ellis      It sounds a little bit like a disconnect because District Attorney Hermann was saying 'oh this is terrible when a conflict arises it delays the case' but you're suggesting that this is intentional.
- 2:34:39 L. Borg            Let me be clear, I am saying, not suggesting. I think it is a concerted effort to not...
- 2:34:44 Chair Ellis      I was trying to be soft.
- 2:34:45 L. Borg            I know. Bob Hermann is a very nice man and he is a very dedicated public service servant. Not every deputy in his office is going to do and act like he acts. I am not saying that he is the one who is saying 'let's get this strategy out there' but I don't think that it has missed the point that if the Deputy DA's assigned to these cases think 'if we could get rid of them because this person is causing a problem, they are filing a bunch of motions.' The aggravated murder case that Gregg got off of, it was a cold case. There were a lot of sophisticated investigations being done on it and I think that there was some concern with the District Attorney that they might have some problems with their case. I think they were happy when Gregg was off the case. The other was an aggravated murder, Conor Huseby, he has testified before you on other matters and become very prolific. He is in his third aggravated murder trial this year as we speak across the street in Washington County. This is such an issue that I have talked to Gregg, to the attorneys handling it, to raise it with the judge early and often and as soon as you hear a whiff of them saying that they might have a witness, we are going in there and saying 'Judge, you have some supervisory authority over this, lets really examine if this is a real witness or if its someone being identified as a witness so that we have to sub-off the case.'
- 2:36:26 C. Lazenby      There was some discussion earlier about there had been what sounded to me like an epidemic of affidavits against judges and that with the change of leadership, everybody sort of backed off. Previously, was that largely strategic on both sides or has there been substantive changes in the relationship among the parties involved that have improved the way the system works?
- 2:36:53 G. Scholl        There have been changes although there is some history there that is relevant as well. For many years different presiding judges handled how the parties reported affidavits or potential affidavits in different ways. Sometimes a judge on a call docket would say 'I just want you to write down the judge who you would affidavit and then I won't send you to that judge. You're not required to tell me who you would affidavit, but I'd appreciate it if you give me a little note and then I won't send you to that judge and then you won't have to file the affidavit.' Now that's a pretty convenient way to solve that problem. There are many people who think that is not proper under the procedural part of the statute. Be that as it may, that was the system that was in place for many years. There was not so much a surge in affidavits as suddenly the court began keeping track of how many affidavits were being filed. Nobody really monitored that or kept the call sheet to see what people wrote on it or how many people filed. My memory is that some of the judges started to get a little upset and took it personally that they were being affidavited. Judges began to keep track of that. The different presiding judges handled the situation differently. For instance, Judge Hernandez would do the same thing as the other judges with that call sheet except he would come out on the record and say 'when I went back to assign all the cases you landed in front of Judge Alexander or whoever it was therefore I am not sending you there but you do need to file that paperwork before five

o'clock today' and then the people would rush off and go do it. Over the last couple of years this became a hot issue. It was at its peak during our OPDS peer review evaluation. There were many questions and answers about that process and what was going into affidavits and why this was happening and Judge Bailey contested an affidavit and there was a big ugly hearing about it and what I can say is there is a long history that has to do with the filing of affidavits. The judges, if they ever believed that we had something like a blanket affidavit policy or that myself or other attorney managers were telling brand new lawyers 'you need to affidavit this judge and this judge' nothing could be further from the truth. Similar to my comment at the beginning, we don't issue those kinds of directives to these lawyers and the contrary is what is true. When I need a certified law student or a lawyer and they are in that position where they are thinking 'what am I supposed to do to defend a criminal case' and they hear about filing of affidavits and they think 'oh my gosh I am supposed to file affidavits' my counsel and the counsel of others in the office is 'no you shouldn't do that, what you ought to do is go in front of these judges and see what it's like and decide for yourself which judge you think is fair or unfair' and I think as we have emphasized that advice to them that is what has led to a decrease in the number of affidavits that have been filed.

2:40:08 L. Borg

The only thing I would add to that is that by our nature, the public defenders, are a pretty contrary group and nothing is going to make you want to file an affidavit more than being told you're not allowed to file that or you should be directed not to file or you're doing something wrong when you're not filing it. We went through, and I don't need to get into the 'who did what,' but there was a bar complaint filed and I responded to that and we got a clean sweep. The bar wrote a definitive long reply that said 'what they are doing and saying is absolutely right' and I think that once there was an understanding that them telling us we can't file them, telling us we are being unethical to file them and telling us we are wrong wasn't going to work and the bar was backing us or other judges hearing challenges in other counties were backing us. I think that calmed it down. When you stop telling lawyers they can't file an affidavit, then they file fewer affidavits. There is a little bit of that where you just push against resistance and if you tell them they can't do something they want to do that more than anything.

2:41:23 G. Scholl

You may not hear it directly from any judge that talks to you, but the judges that I know and speak to regularly have always had the opinion if the judge is upset about the affidavits being filed against them then maybe they should not do the things that cause people to file those affidavits. I am not talking about a judge making a ruling that you don't like or getting mad at you, I am talking about other parts of the practice that leads to attorneys thinking that this person can't even be fair, I can't even protect my client in this courtroom. It's not my job to evaluate the judges in any way especially in front of you today but I think there's been a decrease in that type of behavior. People aren't talking about 'guess what the judge did now.' I believe over time, over the last year or so, everybody has kind of calmed down a little and that has been a good thing. There have been one or two judges that we could not have any kind of normal relationship with and now we do and I think that is a good thing.

2:42:26 Chair Ellis

One of the things we are here for is to try and get a handle on the allocation of the case load between MPD, ODAC and other providers. Do either of you have a comment on that? Is the balance about right? Do you think MPD is being overloaded or shorted, any thoughts?

2:42:52 L. Borg

Particular to Washington County I think it is about right. If you talk about best practices and the model of having both an institutional public defender's office that relative to the criminal and public defense appointment community is about right sized. Then we have a robust and not just singular alternative appointment but you have a couple of contractors. I think the mix is about right here. I would not say I think it should be different downtown but we are not here about downtown. The Washington County delivery plan, I think the mix is about right.

- 2:43:27 G. Scholl I would just add, I think the number of cases and the workload that we have per attorney or per team is about right. There was a period of time three, four or even five years ago when our attorneys were overburdened and it was too difficult. I think the numbers are good for them. That is not to say that I don't believe we could do more. We have room in our office. Of course I want to grow the biggest army that I can. I want to be the biggest and best flagship public defender office in Washington County, that's the mission that I am on. So, I don't want to say 'no, no please don't give us more work to do.' As long as we are able to keep the caseloads where they are we could grow and continue to provide a high level of advocacy for our clients and that is what we are trying to do.
- 2:44:14 Chair Ellis One other thing we invite is any comments on OPDS staff and relationships between your offices and OPDS.
- 2:44:30 G. Scholl For my part, Lane should really answer most of this question because he is dealing with them on a larger scale. My own part is that I have seen changes in OPDS over the last ten years and they have all been for the better. I find that I get responses very quickly. The case that I am working on in Eugene, we have been scrambling doing some of the last minute NRE approvals and crazy things that we need to do in that case and they have always risen to the occasion and gotten back to us right away and given us the help that we need. I get along, I think, very well with Paul Levy. I don't call him all that much but when I do he picks up the phone, he calls me back, we have productive conversations and I really appreciate that because sometimes he is the only person that I trust or the only person that I can ask a certain question to. He has always been available to me. As far as the rest of the business administration part of OPDS, I will defer to Lane.
- 2:45:31 L. Borg I think across the board our relationship with the office and the staff I hope they view it as good also. Paul has been helpful to me because I share many of his concerns about NRE's. We do them for other than investigation and I think that process has improved and his staff is quick to respond to those and get back to those even if there needs to be further explanation and I would have to say that I can't think of a case in the last two years where I have disagreed with Paul's analysis of what needed further information. It frankly was the right question to ask. Caroline has been good to work with and I think on the business and contracting side they have been very accommodating when they can be in terms of responding. We are a big complex organization contractor to work with and I appreciate that. Pete Gartlan is being rightfully recognized by ODCLA in the December Morrow Award that he is receiving. The changes that he has made in terms of the appellate staff, the lawyers actually think to call attorneys down there and say 'I have an appellate issue, can we work that through.' Having them work at the office is one regret I will have of having OPDS have an office in the courthouse is having that lawyer in the office has really been helpful to the young lawyers come around and ask questions, talk about how records are made and what really makes a good appeal case. And Nancy, I think, has been great in terms of seeking out input when she needs input. When she wants to bring people together she has been a good resource for that and from what I have seen, and I know this is Multnomah County and not Washington County, but on the courthouse carrying the message forward that we have to have a strong and real presence in that courthouse because we are bringing real money to the table on that project. I don't have any comments, complaints, or criticisms of the office at all.
- 2:47:47 G. Scholl We have bi-monthly meetings at our office for the whole defense bar in Washington County so the other providers can come. Usually, there isn't much of an agenda but it is a time for people to make announcements or talk about an issue or something that the court is doing. Nancy attended one of those meetings recently. She didn't try to take it over or anything like that but it was really good to see her there. I think it's really good for people to see the OPDS director there and interested in what we are doing and what we are talking about.
- 2:48:18 Chair Ellis Any other questions?

2:48:22 C. Lazenby The chair pointed out that he has been at this since the early part of the 20<sup>th</sup> century so I am not sure he heard, where were those lawyers you sent offers to, what school were they from?

2:48:34 L. Borg Harvard.

2:48:35 C. Lazenby Thank you.

2:48:40 Chair Ellis Thank you both. Rob Harris?

2:48:54 R. Harris Thank you Chair Ellis and Commission members. My name is Rob Harris, I am the Executive Director of the Oregon Defense Attorney Consortium, ODAC which I guess is the primary consortium in this county. I think we have the second largest contract. I went through the report that you were handed by staff. I don't have a lot to add to that but I do have a little segue from MPD to us and I really want to give Gregg Scholl a lot of credit for the last several years of his leadership in this county. I think it has made a lot of difference and I don't know if he gets enough credit for what he does in this county. It is always enlightening to me when I come to these meetings and I am able to hear Gregg talk about the things that an organization like MPD is able to do for the entire defense bar and I think sometimes people in my position forget how valuable they are to all of us. For instance, the bi-monthly meetings: Gregg and I met together, talked about it and got them set up. He volunteered the space, I volunteered to get the list of people going and over the past...

2:49:54 Chair Ellis Are any of your lawyers alumni from MPD?

2:49:59 R. Harris Anne Tracey worked there for a short period of time; Dave Audet worked there for a period of time as well. Gabe Biello worked there for a quite a bit of time as well here in Washington County and Gabe is one of our newer attorneys that we added two years ago when our contract expanded slightly. We have three, we don't have any recently other than Gabe and he has been a valuable addition to us and that actually gets us to one of the other issues I wanted to talk about in a minute as well as some of the challenges we face. I did want to give Gregg a lot of credit for the relationships he has been able to build. I think Gregg and I have a very good relationship. We have agreed that we have different financial interests at times as far as caseloads and I know the limited number of dollars and splitting up this pie, but we have always been able to work together for the benefit of both our organizations and where we have disagreed and have disagreed fine. Gregg and I, I think, have a good relationship and we have known each other for a long time. We were co-counsels on a serious criminal case way back in the olden days as well. I have a lot of respect for Gregg and the organization he has been able to lead out here and I do think that you know you have heard about a lot of the rocky relationships between stakeholders and various parties in this county. I think they work themselves out over time. Personalities change. You get a judge come in as PJ then they leave, then these things happen. It is the ebb and flow of things and we can't get too upset about it because things will end up working out and people are working their hardest and pulling in the same direction and I think that things are going in the right direction here. As far as the report about ODAC, it's pretty comprehensive and I don't have much to add but a couple of things. We do take eleven Measure 11's on our contract per month but what's not mentioned in there is that we take probably four to six Jessica Law cases every year on average. There are 25 year minimums, I am sure you know what the Jessica Law case is. The county will call us up when they have one when MPD will have a conflict and they will say 'are you able to take it' and we contact our lawyers and see if anyone is able to take it and I think 95% of the time we can find somebody within the consortium to take it. So we have those eleven Measure 11's plus four to six Jessica Law cases. Challenges that we have as a consortium I think are different to those at a public defender's office. We expect to bring people in. My theory of getting people to join the consortium is that I want really good quality people who are paid enough to do a good job and then I don't consider myself the manager I am the support system and we try to make sure that they are able to go out there using their independent judgment and represent those clients that not only belong to them but to our

consortium as well. In order to do that we are looking for people who already have some experience and training. One of the challenges we've had is finding people who have that experience and training because they not only have to be good lawyers but they have to be able to run a business too because the last thing you want is a really good lawyer who can't run a business and they are no longer practicing law or they are unable to manage their client load on a level they need to take based upon the pay they are receiving. They need to be able to manage a relatively high client base. So, you do need to make sure you get the right kind of people. It may not be the same type of person that wants to go into the public defender's office and quite often it is not. It is someone who is a little more individualistic maybe or at least has an idea that they want to run their own business or they have some feeling that they want to have a little more autonomy. Our universe of potential attorneys is somewhat limited. We have gotten a few from the public defenders like I mentioned. Mr. Biello is the only one that we have gotten since we started this. The other folks have not come from the public defender, they have experience in the public defender's office but they didn't leave the public defender's office in order to come and do a caseload for us. So, one of the challenges is making sure we have the proper mix of attorneys, that we have different levels of experience, different ages because we don't want them all retiring at once. We are losing two very experienced attorneys this contract period at the end of this year. Tom Collins and Dave Audet are both not renewing their contracts. I think Mr. Collins is going into full retirement and Mr. Audet lives in Southeast and he does a lot of federal defense work and I believe he is going to focus on that. Dave Audet is also one of our board members. So, we lost the board member although we replaced him with one of the other providers, Anne Tracey who is now on our board of directors. That is a lot of experience to lose. We knew this was coming, so like I said, two years ago we were able to add three new attorneys. Ramon Pagan who speaks Spanish, he has a Puerto Rican background. He used to be a federal defender in New York and he moved out here. We were able to add him and I think he is also the president of the Hispanic Bar Association of Oregon. He is a real valuable addition for us. Gabe Biello who came from the public defender's office came out. He was practicing downtown and one of the conditions is we want your primary office to be in this county. Its psychological I guess as much as anything. We want them to belong to this county, to become part of the community, to talk to the judges, to feel like they have an investment here in this county. Then, James Jensen who is a really good lawyer, he actually worked out of my firm for several years. His father is a lawyer here in town across the street up here. After working in the Harris law firm for about four or five years he went and joined his father, so I am very familiar with Mr. Jensen's work product so he has been a really good addition. All three of these attorneys have been really good.

2:55:48 Chair Ellis

What is your process for either deciding a new member or a member that is underperforming? How do you end that relationship?

2:56:02 R. Harris

Those are two separate questions obviously. If we are adding a new member, we look at the caseloads that we have. We do it every two years when we get the contract proposals and one of the things we look at is how is everyone's current caseload, can we absorb this within the people we have and if not do we need to carve out a new caseload and create a new position or offer a new attorney a caseload, so that is question number one. We don't ever quit looking honestly; we always keep our eyes open. I have talked to judges. I had a meeting with a judge two weeks ago saying 'hey if you ever see anybody that might be a good fit, let me know.' There is a lot of communication between the bar and myself and our office. They don't feel any problem calling me up and chatting about anything. In fact, I met with Judge Bailey this morning as well. We're always on the lookout and we would prefer people who have some experience here. Mr. Pagan, we located him because we knew we were looking for somebody. I just asked around among people I knew and my law partner Amy Velazquez, she is the other partner at my law firm, she mentioned Ramon. She had a Measure 11 case with him; he was co-counsel on a co-defendant. She had many good things to say. I checked him out, we talked, we met and that's how we convinced him to give it a try and come over here and work with the consortium. A lot of it is word of mouth and personal referrals. As far as

underperforming lawyers, we did have one situation where I had to intervene; we've had two situations. In one it was a corrective measure and we were able to give this attorney a different sort of caseload that fit his style and it has worked out really well. We were able to give him the type of work that he enjoyed and he is doing a very good job. In another situation the attorney was not performing up to expectations and that contract was terminated.

2:58:11 Chair Ellis How do you divide your own time? Are you predominately administrative or do you try cases and do the administration on the side? How does that work?

2:58:24 R. Harris Harris Law firm has 11 attorneys. The indigent defense work makes up maybe 20-25% of what we do predominately, although we do have four attorneys working in it. I am mainly administrative. I do back-up on court appearances; I do back-up on early case resolution so that I can be down there occasionally. I no longer try cases and I am not the primary attorney on any case assignments. We have changed that in response to some of the interviews and the feedback I have received from the review process and of next contract period I will be taking three or four major felony cases every month so I will be back in court on a regular basis.

2:59:11 Chair Ellis But, you will continue to be the administrator of the group?

2:59:15 R. Harris Yes, honestly a lot of the administrative work is done by my staff person who is very good and she has been doing it for 15 or 20 years. At least I think she's good, I'll talk to Caroline later. She tells me she's good and Caroline does too. We usually don't have any problems with that. We've got a pretty good system set up. She does a lot of the work. I have two people actually doing intake, sometimes three, picking up the cases, doing conflict checks. I meet with the administrator every morning and go through the cases looking at our calendars and trying to assign them in the most appropriate way.

2:59:47 Chair Ellis So, in your 11 person law firm are others partners or are you pretty much the proprietor and they are all associated with you?

3:00:00 R. Harris Ms. Velazquez is a minority partner, a minority shareholder. I am 90% owner of the law firm.

3:00:10 Chair Ellis And the four lawyers in your firm that are doing defense work, tell me a little about them and their experience level.

3:00:20 R. Harris One attorney who does our C-felonies, some misdemeanors but mostly lower level felony cases, he worked as an intern, I think, at the Washington County District Attorney's office. He worked for a couple of years at the Lincoln County District Attorney's office then he was looking to come back to the metro area and I interviewed him and talked to some of his supervisors at the DA's and he is now working for us and he has been here for about a year and a half. The other attorney has been an attorney here for two years, she speaks Spanish. She does primarily misdemeanor work although recently she came back from maternity leave and we've got some shuffling going on but you don't need to know all about that. Those are my two primary people. Every Friday we have a team meeting which not only those two but also another attorney who does 100% retained criminal work, it includes my partner Ms. Velazquez, it includes myself, it includes another attorney who used to do a lot of criminal work but recently in the last six months to a year has not done very much but he does have about ten years of experience doing it. We review all the cases that come in as a team and we always cut some time out and reserve some time for the newer attorneys to address what is going on and what their issues are and for them to tell us about their cases. That's how we handle those, training and retention.

3:01:41 Chair Ellis Of the four that are doing defense work what percent of their practice is criminal, what percent is public defense and what percent is other?

- 3:01:54 R. Harris            Of the two, we just hired somebody new. When one came back from maternity leave we brought someone else to take their caseload and we kept him, so he's actually doing the misdemeanor caseload. The one just back from family leave is now during about a third of a caseload. She's back part-time. She is probably working 50-60% right now and probably two-thirds of that is indigent defense. She would like to do some personal injury work so she gets some experience in the civil courtroom as well, so she is dabbling in that. We have an attorney assigned to help her with the PI work who also happens to have the ten years of experience doing criminal work. The newest attorney we have is 100% indigent defense and we try to keep their caseload down so that they can spend some time in an area of law that they are interested in. He is doing some landlord tenant law because we don't have anyone in the law firm that does landlord tenant law. The other felony attorney that came from the District Attorney's office is 100% criminal defense with 90% indigent and 10% retained right now. We do try to make sure our attorneys focus on one or maybe two areas of law and one of the reasons I like to give as a reason to join our law firm is that you will have an opportunity to see if there is something else other than indigent defense you may want to do. It will probably be litigation related, whether it is PI or family, but at least you have an opportunity to watch experienced lawyers do that and an opportunity to learn from them if you chose to and some of them take advantage of that and some don't.
- 3:03:29 Chair Ellis            You heard me ask the question about caseload allocation between MPD and predominately your firm, but the other providers. Any observation you have on the caseload allocation? Do you think there is too much going to MPD, not enough, what do you think?
- 3:03:50 R. Harris              I think it is working out fine for us right now. There are no particular problems.
- 3:03:56 Chair Ellis            Great. Other questions?
- 3:04:00 J. Potter                Rob, you've been around enough to listen to this Commission talk about the greying of the defense bar. In your office you're the shareholder, you're the major mover and shaker. Do you have a transition plan for the day that you retire? We were visiting you and you were adding on to your building, so one might assume that you are not going to retire tomorrow, but is there a transition plan?
- 3:04:28 R. Harris              For the law firm, for ODAC or for both?
- 3:04:31 J. Potter                For both. For Rob Harris.
- 3:04:34 R. Harris              Yes, but no. They tell me I am never going to quit working. My office manager and my wife tell me I am never going to quit working and I tell her that she is probably right but I want to change the type of work I do and make it more focused and valuable and create the value that I can. That being said, I think I will probably be around for a period of time. I do have a plan for the law firm which is why Ms. Velazquez is now a partner. I am looking at what other people could be appropriate, trying to put the pieces together in who has particular skills in making sure that what we've got continues because my wife owns that building, as you know, and we want to be able to keep in rented in full. So, it is important to me that what we've done, at the Harris Law Firm at least, continues and I plan on being a part of it, maybe not full-time but part-time for a period of time here. Yes, you know me John; I've always got a five year plan. As far as ODAC is concerned, yes as well. One of the reasons we brought in these younger attorneys is to make sure that we have a fair distribution of people with the energy and the inclination to want to move into a management position. Some of the attorneys that are closer to our age are probably set in not being managers in some ways, but some of the younger attorneys potentially have that ability and possibility. I am also looking at bringing in a new board member that is not a lawyer to give us some perspective. One thing I will say is when we added a family law lawyer that is really well respected in the county he really brought a very valuable perspective of our jobs to us and when we would sit around thinking one thing he would offer some very valuable insights into options as to maybe what

we haven't thought about or how we should approach different situations. So, I think having a non-lawyer would be very valuable as well. You know John; I have talked about maybe not being the manager a lot longer. My staff person is probably a more important person to keep happy than me, but I think we built an organization within the firm that can continue if I get hit by a bus or something tomorrow.

- 3:06:53 J. Potter I ask the question simply because you are a major provider in this community and if you were to shut it down, it would leave a huge hole. It sounds like, if I understand your answer, is that you are designing it so that there are provisions for it to continue without you so if that organization, whatever the name of it might be, they might still be a contract provider.
- 3:07:20 R. Harris I would say yes, but I would say it might be at a small level. It might have to contract because there is more work and thought that goes into trying to manage and support this many attorneys that have different practices in different locations than maybe you would think. Or, it might break apart into separate groups that are going to do individual contracts which would be costly to the state if that happened.
- 3:07:49 Chair Ellis Other questions? Thank you very much. We appreciate it.
- 3:07:53 R. Harris Thank you.
- 3:07:54 Chair Ellis Ron Ridehalgh?
- 3:08:04 R. Ridehalgh I am Ron Ridehalgh and I have one of the firms that provides services under our contract. I didn't really prepare any statements. The report that was generated about my firm I thought came across quite positively, so I figured if I am talking to a judge and I am ahead I should probably stop right there. As far as who I am and what my firm is, I got hired at another firm right out of law school. I practiced doing this kind of work for a couple of years and then I and another one of their lawyers ran off to start our own firm and our intention was to try and continue to do this very work and we were lucky to in fact receive a contract and now we are still here. My partner is no longer with us. She left the firm long ago but the firm is still churning along. We do the sort of work where you do class C felonies and below and juvenile dependency.
- 3:09:11 Chair Ellis You got some good comments in the report.
- 3:09:14 R. Ridehalgh Thank you, I was very happy about that. It was very kind what they said and I appreciate that.
- 3:09:19 Chair Ellis Any other questions for Ron? Okay, thanks.
- 3:09:27 R. Ridehalgh Okay, thank you.
- 3:09:30 Chair Ellis Grant Burton?
- 3:09:37 G. Burton Good afternoon. I am the managing attorney at Hillsboro Law Group. We are a private law firm in Washington County. I have been managing the firm since 2006. We presently have nine attorneys. We have an indigent defense contract that we have had for a very long time that is a major part of our business. Over time our private practice has grown as well to where we are really truly a hybrid firm these days. There are three shareholders. We are promoting an associate to shareholder in January and then hope to have another associate become shareholder in the following year. That is one thing we have tried to do is try to create the opportunity for advancement within the organization. I do think that the public defender does a great job and is in many ways a vanguard of indigent defense in this county but there are capable talented attorneys that want to do indigent defense but also compliment that with other areas of practice and we hope to continue to provide that type of opportunity for those talented attorneys. I would say that over the years, since 2006, up until this point that has been

a stagnation or even loss of funding at least for our organization. So, it has become more difficult to attract talented attorneys just based on what we can pay them for doing court appointed cases. I think that, given the drop in number of people going to law school and various other factors, I think it is concerning in terms of our long term ability to keep people in this practice but I think that at least with the budget situation that may be changing. I did want to mention in regard to Mr. Lazenby's comments earlier, you made a number of comments about what is happening to minority defendants in this county. I do want to say that for my personal practice and from what our other attorneys have seen I absolutely have concerns that people of color are being treated differently. It may be partially race, may be partially socio-economic background but I would really love to see more data in sentencing in adult criminal cases in terms of what is happening to defendants. Is race a factor? Is income a factor? In cases where I have represented someone where I think it is an issue I don't really have a way of calling out the DA's office on that because I don't really know, but it does seem to me from what my office has seen is that if you are poor, if you are from a certain background then certain assumptions are being made about that person's future and we need more data on that to really know. Questions for me?

3:12:40 J. Potter Just a quick question along some of the same lines that I just asked, at your law firm you are doing bankruptcies and personal injury insurance law. It is a variety of things. In the future do you see yourself still interested in doing contracted criminal defense work?

3:13:00 G. Burton I think we are but I also think it has to be fair and it has to work for us so if the only cases we are getting are felony cases and I can't afford to hire a felony qualified attorney that can do those cases then at that point we'd be in a position where we can't continue to do those cases. If we didn't have the contract we would survive as a business because we have a large private business but it has also worked well for us. We have been doing it since 2006. Before that I was a public defender in Pendleton, I worked for another contracting firm. I like the work. I think it is important. I think if an attorney is at some point in their career going to do some divorce cases then I think it is good to have a background trying cases in court so it works well for our business but I think that the state has to fairly compensate the attorneys that are doing that work if they expect people to continue to do so. Again, it is a business decision for us. We like doing it. It's important. It helps the community. We are a broad multi-practice law firm and that is a major component of our practice. If inflation is three percent every year and our fees go up one percent, at some point we might say we can't afford to do this.

3:14:33 Chair Ellis Thanks very much.

3:14:34 G. Burton Thank you.

3:14:35 Chair Ellis Are there people here from the Karpstein & Verhulst law firm?

3:14:45 N. Law I am Nate Law and I am one of the people on your list from Karpstein & Verhulst.

3:14:54 Chair Ellis Sorry we are running late.

3:14:56 N. Law That's okay. I didn't prepare many remarks either but I will just start off by saying that I think this process, the Commission review process, has been helpful to our firm and I think helpful to the county because I think that it has really sparked a lot of good discussion, particularly in the areas of juvenile law that have all been addressed today. I think without some of those little pushes, some of those areas get overlooked. In particular, our firm is somewhat unique. I think we are in a unique position to influence what goes on in juvenile court. We have the bulk, besides MPD, of juvenile dependency and delinquency cases for the other contract firms, so that is our unique position. We have five attorneys, which I am one. Two of us do about 90% or so contract cases, another attorney is about 50-50 and another at this time is at about 100% contract. I think that most of my comments are addressed in the report to the Commission. I don't have much to add to that. We are in a five to seven year transition plan in

which Gregg Karpstein is the remaining partner in Karpstein and Verhulst and in fact Mr. Verhulst is still involved in the community and around, but Gregg being the only one that is still practicing. We are excited about the transition plan over the next several years. Jake Griffith who is the other person listed there, he and I have stepped in to begin managing a lot of the day to day business of the firm and we are really excited about not only the changes that we can make there but also in this small section of the county we are committed to providing excellent work in Washington County and I quite frankly get a little ticked at people who practice in other counties and I go to the OCDLA events and they say 'how can you stand to practice there?' I think we have a really good, I think they say that because some of the relationships with DA's and people in the past and maybe it's all in the past because I think this is difficult work for people in any county and I really think there are many positives to being here. A couple of the key points that have been addressed by others today in terms of juvenile court, and I will let you ask any questions of me, but one of them is the drug court process that was particularly brought up by Judge Menchaca. That is something that we have been heavily involved in and we also see the benefit of that program. I think it is one of the only ways, as was mentioned, to really hammer at some of the underlying problems of gang related youth, the only way that we have control over anyways. We only have so much control over that. We are not social workers, we are not judges, but on a day to day personal basis I think that is something that is making a big difference for those kids. The other one is shackling. I was much more aware of the shackling issue maybe than some; however my alarm only increased today with hearing that Judge Menchaca has not heard those motions in juvenile court. I think that is a particular area of concern. We have worked with people but it has been primarily behind the scenes talking to juvenile counselors, Mrs. Belt and others about what these checklists are exactly and how often they are used. That is something that we have a good relationship with amongst most if not all the juvenile counselors. I will take her comment today as a challenge accepted.

3:19:34 Chair Ellis

I was going to say, I am predicting more motions.

3:19:36 N. Law

Yes, and some of those and Judge Menchaca mentioned his courtroom is different than Judge Rini's in terms of how the youth are brought in, where they are sitting when the judge can see them. So, there have been times where the youth's hands have been unshackled in his courtroom. Certainly not to the degree that needs to happen. If you have any questions for me, I'd be happy to answer them.

3:20:02 Chair Ellis

Thank you. We appreciate it.

3:20:04 N. Law

Thank you very much.

3:20:05 Chair Ellis

Louise Palmer? I think the record should show that Mrs. Palmer was asked to come and did not appear. I think that concludes the presenters on the Washington County Service Delivery Review. Have I missed anybody that wanted to speak on that? Okay, let's go quickly. Nancy, the Compliance with Best Practices, this is the 'pat ourselves on the back' document attachment three.

### **Agenda Item No. 3**

#### **PDSC Compliance with Best Practices**

3:20:54 N. Cozine

It is. Chair Ellis, Members of the Commission. You have attachment three which outlines the efforts that this Commission has made at least that I have noted throughout the year that allow you to say that you have accomplished compliance with the best practices and if you have any questions about that document or other things that you want to supplement, please feel free.

3:21:16 Chair Ellis

Are we supposed to approve or just acknowledge?

3:21:22 N. Cozine

I think that you need to...

3:21:26 Chair Ellis It is called an action item.

3:21:28 N. Cozine It is called an action item. I think you need to have reviewed the information and you need to confirm that you have complied with the best practices.

3:21:35 Chair Ellis Alright, have all commissioners carefully reviewed attachment three? I am assuming yes, are there any additions or corrections? **MOTION:** Per Ramfjord moved to approve the Compliance Report; John Potter seconded the motion; hearing no objection the motion carried: **VOTE:** 5-0

**Agenda Item No. 4 Annual Performance Progress Report**

3:21:59 Chair Ellis To make good on a promise that was contained in that document we are at item four, the Annual Performance Progress Report.

3:22:09 N. Cozine Yes, and what you have before you is a draft of the report. There may be a few other updates. It's due at the end of September. It's going to look very similar to what you saw last year. We turn this into the state every single year. The customer service survey is sent out every other year, so the information in this year's report is exactly the same as what we had last year. It will be updated again next year. We have made a little progress on our median filing date for the opening brief in appellate cases and you just talked about the Commission best practices. Those are the three key performance measures that we have before us. We have two new key performance measures but we won't be able to measure on those until the next reporting cycle. Those were just approved by the legislature during this last legislative session.

**Agenda Item No. 5 OPDS Monthly Report**

3:23:00 Chair Ellis Any comments or questions on the annual performance progress report draft? Alright, the OPDS monthly report.

3:23:11 N. Cozine Chair Ellis, I am wondering if we should table the monthly report until next month so that we can move into our executive session which has to happen at a separate location. I think the monthly report, I mean we are in the midst of contracting and we have several appellate court actions before the Supreme Court but I think that can all wait until October.

3:23:31 Chair Ellis I see Ernie is here so I want to make sure everybody here gets their moment.

3:23:50 E. Lannet Chair Ellis, Members of the Commission. It would be remiss not to mention that about a little over a week after we met last time that Robin Jones passed away and she was one of our Senior attorneys on our staff. She had been with the office for 18 years and had litigated something like 19 cases in the Oregon Supreme Court. We are having a memorial reception on the 30<sup>th</sup> of September at 3:30 to 5:30 at the Oregon Civic Justice center. It was the same facility that we used when we did the reception for Pete for his retirement. You are all invited of course and I just thought I would put in the record how much she will be missed.

**Agenda Item No. 6 Executive Session**

3:24:36 Chair Ellis Thanks. Are we now ready for the reading of the ritual announcement here? The Public Defense Services Commission will now meet in executive session for the purpose of reviewing contract proposals to provide public defense legal services beginning on January 1, 2016. The executive session is being held pursuant to ORS 192.660(2)(f), which permits the Commission to meet in executive session to consider information and records that are exempt by law from public inspection. Under the terms of the PDSC Request for Proposals, contract proposals will remain confidential and thus exempt from public inspection until a decision is made to award a contract. The Commission will also meet in executive session to receive an update concerning ongoing Union contract negotiations pursuant to ORS 192.660 (2)(d).

Representatives of the news media and designated staff shall be allowed to attend the executive session. Nancy, do you want to identify the designated staff? The designated staff, who will that be?

3:26:07 N. Cozine

I think everyone in the room.

3:26:13 Chair Ellis

All other members of the audience are asked to leave the room. Representatives of the news media are specifically directed not to report on any of the deliberations during the executive session, except to state the general subject of the session as previously announced. No decision may be made in executive session. At the end of the executive session, we will return to open session and welcome the audience back into the room.

3:26:45 N. Cozine

Chair Ellis, I think that we also need to note that because of the restrictions of meeting in this location that executive session and the close of the public session will be held in 102 SW Washington St. Hillsboro, 97123.

3:27:05 Chair Ellis

So, do we have to come back here to re-open to the public?

3:27:08 N. Cozine

We don't. It was posted on our agenda that we would be closing the meeting at that location, so I think we can close the session there and we can walk over to that room now.

3:27:23 Chair Ellis

Okay. I think that means we get lunch.

00:03 C. Lazenby

We are back on the record. The Chair has had to leave, this is Commissioner Lazenby, and I've been designated as the Pro-tem chair. We are back in open session. Is there a motion to adjourn? **MOTION:** John Potter moved to adjourn the meeting; Per Ramsfjord seconded the motion; hearing no objection the motion carried: **VOTE:** 4-0

**Meeting Adjourned**

# Attachment 2

---

IN THE SUPREME COURT OF PENNSYLVANIA

---

ADAM KUREN and STEVEN ALLABAUGH, on behalf of themselves and all  
others similarly situated,

Plaintiffs-Appellants

v.

LUZERNE COUNTY of the Commonwealth of Pennsylvania and ROBERT C.  
LAWTON, County Manager, in his official capacity,

Defendants-Appellees

---

ON APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT AT  
NO. 2072 CD 2013, DATED OCTOBER 14, 2014, AFFIRMING THE ORDER  
OF LUZERNE COUNTY COURT OF COMMON PLEAS, CIVIL DIVISION,  
AT NO. 04517, DATED OCTOBER 22, 2013

---

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*  
IN SUPPORT OF APPELLANTS

---

LISA FOSTER  
Director, Office for Access to Justice

VANITA GUPTA  
Principal Deputy Assistant  
Attorney General

ANDREW STANNER  
Senior Counsel  
Office for Access to Justice  
Department of Justice  
950 Pennsylvania Ave., NW  
Suite 3340  
Washington, DC 20530

TOVAH R. CALDERON  
NATHANIEL S. POLLOCK  
Attorneys  
Department of Justice  
Civil Rights Division  
Appellate Section  
Ben Franklin Station  
P.O. Box 14403  
Washington, DC 20044-4403  
(202) 514-0333  
*Counsel for the United States,  
Amicus Curiae*

---

# TABLE OF CONTENTS

	PAGE
INTRODUCTION .....	1
STATEMENT OF THE QUESTION INVOLVED .....	2
INTEREST OF THE UNITED STATES .....	2
STATEMENT OF THE CASE.....	5
ARGUMENT	
A CIVIL CLAIM FOR CONSTRUCTIVE DENIAL OF COUNSEL UNDER THE SIXTH AMENDMENT IS COGNIZABLE.....	10
A. <i>Courts That Have Considered The Issue Have                 Recognized That A Civil Claim For Constructive                 Denial Of Counsel Is Cognizable</i> .....	13
B. <i>Factors Relevant To A Constructive Denial-Of-                 Counsel Claim</i> .....	17
C. <i>Civil Constructive Denial-Of-Counsel Claims                 Provide An Important Tool For Remedying                 Serious Violations Of The Constitutional                 Right To Counsel</i> .....	20
CONCLUSION .....	21
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES

<b>CASES:</b>	<b>PAGE</b>
<i>Alabama v. Shelton</i> , 535 U.S. 654 (2002) .....	1
<i>Avery v. Alabama</i> , 308 U.S. 444 (1940) .....	12-13
<i>Brown v. Plata</i> , 563 U.S. 493 (2011) .....	17
<i>Commonwealth v. Chmiel</i> , 738 A.2d 406 (Pa. 1999) .....	10
<i>Commonwealth v. O’Keefe</i> , 148 A. 73 (Pa. 1929) .....	12
<i>Duncan v. State</i> , 774 N.W.2d 89 (Mich. Ct. App. 2009) .....	8-9, 15-16
<i>Flora v. Luzerne Cnty.</i> , 103 A.3d 125 (Pa. Commw. Ct. 2014), reargument denied (Dec. 2, 2014) .....	8-9, 15-16
<i>Flora v. Luzerne Cnty.</i> , No. 951 MAL 2014, 2015 WL 3996993 (Pa. June 30, 2015) .....	8
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963) .....	<i>passim</i>
<i>Hurrell-Harring v. State</i> , 930 N.E.2d 217 (N.Y. 2010) .....	<i>passim</i>
<i>Luckey v. Harris</i> , 860 F.2d 1012 (11th Cir. 1988) .....	15
<i>Luckey v. Miller</i> , 976 F.2d 673 (11th Cir. 1992) .....	15
<i>New York Cnty. Lawyers’ Ass’n v. State</i> , 196 Misc. 2d 761 (N.Y. Sup. Ct. 2003) .....	19
<i>Powell v. Alabama</i> , 287 U.S. 45 (1932) .....	12
<i>Public Defender, Eleventh Jud. Cir. of Fla. v. State</i> , 115 So. 3d 261 (Fla. 2013) .....	18-19
<i>State v. Peart</i> , 621 So. 2d 780 (La. 1993) .....	20

**CASES (continued):** **PAGE**

*State v. Young*, 172 P.3d 138 (N.M. 2007).....20

*Strickland v. Washington*, 466 U.S. 668 (1984) .....1, 9

*United States v. Cronin*, 466 U.S. 648 (1984) ..... 12-13

*Wilbur v. City of Mount Vernon*,  
989 F. Supp. 2d 1122 (W.D. Wash. 2013) ..... 18-19

*Wilbur v. City of Mount Vernon*, No. 2:11-cv-1100,  
2012 WL 600727 (W.D. Wash. Feb. 23, 2012) ..... 14-15

*Younger v. Harris*, 401 U.S. 37 (1971) .....15

**STATUTES:**

42 U.S.C. 1983 .....5

Violent Crime Control and Law Enforcement Act of 1994,  
42 U.S.C. 14141 .....3

**MISCELLANEOUS:**

Government Accountability Office, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support this Purpose*, 11-14 (May 2012) .....4

Office for Access to Justice, <http://www.justice.gov/atj> (last visited Sept. 8, 2015) .....2

Office for Access to Justice, *Accomplishments* (July 21, 2015), available at <http://www.justice.gov/atj/accomplishments> .....5

Office for Access to Justice, *Fifty Years Later: The Legacy of Gideon v. Wainwright* (Oct. 21, 2014), available at <http://www.justice.gov/atj/fifty-years-later-legacy-gideon-v-wainwright>.....4

**MISCELLANEOUS (continued):**

**PAGE**

Office of Public Affairs, *Attorney General Holder Announces \$6.7 Million to Improve Legal Defense Services for the Poor* (Oct. 30, 2013), available at <http://www.justice.gov/opa/pr/2013/october/13-ag-1156.html> .....4

Office of Public Affairs, *Department of Justice Enters into Agreement to Reform the Juvenile Court of Memphis and Shelby County, Tennessee* (Dec. 18, 2012), available at <http://www.justice.gov/opa/pr/department-justice-enters-agreement-reform-juvenile-court-memphis-and-shelby-county-tennessee>.....3

## INTRODUCTION

More than fifty years ago, the United States Supreme Court held in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that the Sixth Amendment guarantees access to counsel in state court for all those charged with a felony.<sup>1</sup> This Court will become the second state court of last resort to consider whether indigent defendants who are assigned counsel in name only may vindicate that Sixth Amendment right through a constructive denial-of-counsel claim for prospective injunctive relief, or whether their only remedy is to seek post-conviction relief under *Strickland v. Washington*, 466 U.S. 668 (1984). The New York Court of Appeals was the first state court of last resort to consider this question, and in *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010), it upheld the right of indigent defendants to seek relief in a civil action asserting a constructive denial of the right to counsel, as guaranteed by *Gideon*. That ruling was correct. The availability of civil actions for constructive denial of counsel is critical to protecting the constitutional right to counsel that *Gideon* recognized.

---

<sup>1</sup> The Court later made clear that the guarantee of access to counsel extends to all criminal defendants faced with incarceration, including those charged with misdemeanors. See *Alabama v. Shelton*, 535 U.S. 654, 661-662 (2002). For simplicity's sake, this brief sometimes uses "*Gideon*" as shorthand for the Court's recognition of the right to counsel in both felony and misdemeanor contexts.

The Commonwealth Court has deprived indigent defendants in Pennsylvania of this essential tool, well grounded in the law, for enforcing their constitutional right to counsel. This Court should correct that error.

### **STATEMENT OF THE QUESTION INVOLVED**

The United States will address:

Whether a civil claim for prospective, injunctive relief based on constructive denial of counsel under the Sixth Amendment to the United States Constitution is cognizable.<sup>2</sup>

### **INTEREST OF THE UNITED STATES**

The United States has a strong interest in ensuring that all jurisdictions – federal, state, and local – are fulfilling their constitutional obligation to provide counsel to criminal defendants facing incarceration who cannot afford an attorney, as required by *Gideon v. Wainwright*, 372 U.S. 335 (1963). In March 2010, the Attorney General launched the Office for Access to Justice to address the crisis in indigent defense services. The Office coordinates the Department of Justice’s commitment to improving indigent defense. See *Office for Access to Justice*, <http://www.justice.gov/atj> (last visited Sept. 8, 2015).

---

<sup>2</sup> The United States takes no position on the merits of this particular case. The United States also takes no position on the state-law mandamus issue or on any issue particular to the claim based on the Pennsylvania Constitution.

The Department of Justice enforces the right to counsel in juvenile delinquency proceedings under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14141. For example, the Department entered into a comprehensive memorandum of agreement with Shelby County, Tennessee, that requires the County, among other things, to appoint counsel before children appear before a magistrate judge, and to establish a juvenile defender unit within the public defender's office.<sup>3</sup>

The Department of Justice has filed statements of interest (SOIs) in cases involving constructive denial-of-counsel claims under the Sixth and Fourteenth Amendments. See U.S. SOI, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sup. Ct. Sept. 25, 2014)<sup>4</sup>; U.S. SOI, *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013) (No. 2:11-cv-1100)<sup>5</sup>; see also U.S. SOI, *N.P. v. Georgia*, No. 2014-cv-241025 (Fulton Cnty. Ga. Super. Ct.) (addressing juveniles' right to

---

<sup>3</sup> Office of Public Affairs, *Department of Justice Enters into Agreement to Reform the Juvenile Court of Memphis and Shelby County, Tennessee* (Dec. 18, 2012), available at <http://www.justice.gov/opa/pr/department-justice-enters-agreement-reform-juvenile-court-memphis-and-shelby-county-tennessee>.

<sup>4</sup> available at [http://www.justice.gov/sites/default/files/crt/legacy/2014/09/25/hurrell\\_soi\\_9-25-14.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2014/09/25/hurrell_soi_9-25-14.pdf).

<sup>5</sup> available at <http://www.justice.gov/sites/default/files/crt/legacy/2013/08/15/wilbursoi8-14-13.pdf>.

counsel).<sup>6</sup> These SOIs have addressed the scope of the right to counsel, the appropriate remedy for systemic deprivations of that right, or both.

The Department of Justice also has sought to address the crisis in indigent defense services through a number of grant programs, as well as through support for state policy reform. The Department, for example, has identified indigent defense as a priority area for Byrne-JAG funds, the leading source of federal justice funding to state and local jurisdictions.<sup>7</sup> In 2013, at a government-wide event hosted by the Department, the Department's Office of Justice Programs announced a collection of grants totaling \$6.7 million to improve legal defense services for the poor.<sup>8</sup> These grants were preceded in 2012 by a \$1.2 million grant program, *Answering Gideon's Call: Strengthening Indigent Defense Through Implementing the ABA Ten Principles of a Public Defense Delivery System*,

---

<sup>6</sup> available at [http://www.justice.gov/sites/default/files/crt/legacy/2015/03/13/np\\_soi\\_3-13-15.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2015/03/13/np_soi_3-13-15.pdf).

<sup>7</sup> See Government Accountability Office, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support this Purpose*, 11-14 (May 2012), <http://www.gao.gov/assets/600/590736.pdf>.

<sup>8</sup> Office of Public Affairs, *Attorney General Holder Announces \$6.7 Million to Improve Legal Defense Services for the Poor* (Oct. 30, 2013), available at <http://www.justice.gov/opa/pr/2013/october/13-ag-1156.html>. See also Office for Access to Justice, *Fifty Years Later: The Legacy of Gideon v. Wainwright* (Oct. 21, 2014), available at <http://www.justice.gov/atj/fifty-years-later-legacy-gideon-v-wainwright>.

administered by the Bureau of Justice Assistance. The Department of Justice's efforts to address the crisis in indigent defense with grants and other initiatives remain ongoing.<sup>9</sup>

### **STATEMENT OF THE CASE**

Plaintiffs Adam Kuren and Steven Allabaugh are individuals facing criminal charges in Luzerne County who are represented by the Luzerne County Office of the Public Defender (OPD). They seek certification of a class comprised of "all indigent adults in Luzerne County who are or will be represented by the Office of the Public Defender from this point until the Office of the Public Defender has the funding and resources necessary to enable it to meet ethical, legal, and constitutional standards of representation." (R. 852a).

1. Plaintiffs' claim under 42 U.S.C. 1983 asserts a violation of their Sixth Amendment right to counsel, as articulated in *Gideon v. Wainwright*, 372 U.S. 335 (1963). (R. 882a-883a). Plaintiffs ask the court to compel the County to provide the necessary funding to allow OPD to provide constitutional representation to

---

<sup>9</sup> See Office for Access to Justice, *Accomplishments* (July 21, 2015), available at <http://www.justice.gov/atj/accomplishments>.

indigent defendants. (R. 861a). Among other allegations,<sup>10</sup> the complaint sets out the following:

- “Without significantly more lawyers and support staff, [OPD attorneys] will continue to endure overwhelming caseloads that effectively preclude constitutionally adequate representation.” (R. 864a).
- “[G]iven the OPD’s current volume of work, [OPD] \* \* \* lawyers are unable to engage in many of the basic functions of representation, including conferring with clients in a meaningful way prior to critical stages of their legal proceedings, reviewing client files, conducting discovery, motion practice, and factual investigation, as well as devoting necessary time to prepare for hearings, trials, and appeals.” (R. 864a).
- OPD attorneys “simply do not have the time and resources to provide constitutionally adequate and professionally required representation for the majority of Public Defender clients.” (R. 864a).
- “[H]eavy caseloads regularly lead to scheduling conflicts, causing OPD attorneys to request continuances of critical proceedings. These continuances can lead to clients remaining in pre-trial detention for longer periods than necessary.” (R. 867a).
- “The heavy caseloads also frequently result in the OPD attorneys’ inability to consult with their clients prior to each stage of their case. Consequently, OPD attorneys participate in many stages of their clients’ criminal proceedings without a full understanding of the facts and potential strategies for the case.” (R. 867a).
- “[B]ecause of scheduling conflicts, OPD lawyers must frequently substitute for one another and thus attend proceedings for cases of which they have no prior knowledge.” (R. 867a).
- “OPD attorneys are often unable to conduct reasonable factual investigation prior to the pre-trial hearing or even prior to negotiating a plea agreement.” (R. 867a).

---

<sup>10</sup> The United States takes no position on whether plaintiffs’ allegations are true or will be proved.

- “When discovery is obtained, the attorneys are frequently unable to review the information. If discovery responses are inadequate or incomplete, attorneys rarely have time to follow up to obtain complete information.” (R. 867a).

- “OPD attorneys also rarely have time to conduct the necessary fact inquiry and investigation prior to preliminary hearings.” (R. 867a).

- “Generally, OPD attorneys are limited to a few minutes’ introduction immediately prior to the hearings in a non-secure area of a district magistrate’s office, or a similarly brief meeting at the County prison. These brief meetings are not sufficient to gather information about a case to provide constitutionally adequate representation.” (R. 869a).

- OPD attorneys are often unable to contact their clients at any point during the three-month period between the preliminary hearing and the status conference, or in the one-month period between the status conference and the pre-trial hearing. (R. 870a).

- “OPD attorneys are often unable to conduct meaningful and comprehensive interviews with clients until the eve of trial, if the case proceeds that far.” (R. 870a).

- “Overall, OPD attorneys are unable to maintain regular contact with their clients and to follow up on client attempts to communicate with them.” (R. 871a).

- OPD attorneys handle massive caseloads that far exceed the maximum caseloads recommended by the American Bar Association and must fulfill other time-consuming responsibilities as well. (R. 872a-874a).

- OPD attorneys are often scheduled to appear in two different courtrooms at the same time. (R. 874a).

- “[M]any [OPD] attorneys still do not have their own desks, workspaces, or dedicated phone lines, which makes it difficult, if not impossible, to receive and return calls from clients.” (R. 874a-875a).

2. The trial court granted the County’s motion to dismiss, concluding that plaintiffs lacked standing<sup>11</sup> and did not state a valid claim. *Flora v. Luzerne Cnty.*, 103 A.3d 125, 130 (Pa. Commw. Ct. 2014), reargument denied (Dec. 2, 2014). Plaintiffs appealed, and the Pennsylvania Commonwealth Court affirmed. *Id.* at 140.

The Commonwealth Court held that a civil claim for constructive denial of counsel is not a cognizable claim. *Flora*, 103 A.3d at 136. The court explained its holding by stating (1) that it “accept[ed] the analyses of the dissenting judges in *Hurrell–Harring* and *Duncan* [v. *State*, 774 N.W.2d 89 (Mich. Ct. App. 2009)] and reject[ed] as not persuasive the majority opinions in those cases,” and (2) that “there is no precedent from the United States Supreme Court acknowledging that a constructive denial-of-counsel claim may be brought in a civil case that seeks prospective relief in the form of more funding and resources to an entire office, as

---

<sup>11</sup> There were two separate standing issues in this case. The first was whether one of the original plaintiffs, former Chief Public Defender Al Flora, continued to have a cognizable injury after he stopped working at OPD. The trial court concluded that he did not, and the Commonwealth Court agreed. *Flora v. Luzerne Cnty.*, 103 A.3d 125, 130 (Pa. Commw. Ct. 2014), reargument denied (Dec. 2, 2014). The plaintiffs petitioned this Court on that standing issue, but this Court declined to review it. *Flora v. Luzerne Cnty.*, No. 951 MAL 2014, 2015 WL 3996993 (Pa. June 30, 2015) (granting the petition in part). Thus, the Commonwealth Court’s ruling that Flora lacks standing is final. The second standing issue, whether the indigent clients of OPD have standing, “merges with the question of whether the amended complaint states a claim upon which relief can be granted.” *Flora*, 103 A.3d at 133.

opposed to relief to individual indigent criminal defendants.” *Ibid.* The court also indicated agreement with the *Duncan* dissent’s conclusion that recognition of such a cause of action would violate separation-of-powers principles. *Ibid.*

The court then ruled that, even if a civil constructive denial-of-counsel claim exists, it was not adequately pleaded here. *Flora*, 103 A.3d at 136-137. The court characterized the complaint as alleging that Luzerne County OPD attorneys “meet only briefly with indigent clients, rarely contact clients between court appearances, do not conduct significant investigation or discovery, do not engage in sufficient trial preparation, and cannot properly litigate appeals due to lack of experience.” *Id.* at 137. It concluded that “[t]hese allegations do not create circumstances that are ‘so likely [to create prejudice] that case-by-case inquiry into prejudice is not worth the cost.’” *Ibid.* (alteration in original) (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)). The court concluded that, because prejudice could not properly be inferred under the circumstances alleged in the complaint, plaintiffs’ only recourse is to bring a post-conviction *Strickland* claim.

Finally, the court concluded that plaintiffs did not state a claim for actual denial of counsel. *Flora*, 103 A.3d at 139-140. The court recognized that plaintiffs’ complaint alleges nonrepresentation at preliminary arraignments. *Id.* at 139. But the court concluded that, though the right to counsel attaches at the

preliminary arraignment, “the defendant does not have a right to counsel to represent him *at* the preliminary arraignment.” *Ibid.*

Plaintiffs filed a petition for allowance to appeal with this Court, which this Court granted in part.

## **ARGUMENT**

### **A CIVIL CLAIM FOR CONSTRUCTIVE DENIAL OF COUNSEL UNDER THE SIXTH AMENDMENT IS COGNIZABLE**

The Sixth Amendment to the Constitution provides that “[i]n all criminal prosecutions, the accused shall \* \* \* have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. In *Gideon v. Wainwright*, the U.S. Supreme Court held that the Sixth Amendment right to counsel requires state courts to appoint attorneys for defendants who are charged with felonies and cannot afford to retain counsel, because “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” 372 U.S. 335, 344 (1963). The Court explained that “lawyers in criminal courts are necessities, not luxuries.” *Ibid.* This Court also has explained that “the right to counsel has been recognized as a fundamental right, one that is essential to the goal of ensuring that every criminal defendant receives a fair trial before an impartial tribunal.” *Commonwealth v. Chmiel*, 738 A.2d 406, 422 (Pa. 1999) (citing *Gideon*, 372 U.S. at 344-345).

The Sixth Amendment right to counsel requires more than the mere appointment of a member of the bar. The right of indigent criminal defendants to be provided an attorney may be violated by the government's *actual* denial of counsel, or by a *constructive* denial of counsel.<sup>12</sup> A civil claim for systemic prospective relief based on constructive denial of counsel is viable: (1) when, on a system-wide basis, the traditional markers of representation – such as timely and confidential consultation with clients, appropriate investigation, and meaningful adversarial testing of the prosecution's case – are absent or significantly compromised; and (2) when substantial structural limitations – such as a severe lack of resources, unreasonably high workloads, or critical understaffing of public defender offices – cause that absence or limitation on representation. In these circumstances, the appointment of counsel is merely cosmetic, effectively resulting in a lawyer in name only. And when that is the case – that is, when the totality of the circumstances indicate that structural limitations are causing such a system-wide problem of nonrepresentation – indigent criminal defendants may seek

---

<sup>12</sup> *Strickland* claims and *Gideon* claims are doctrinally distinct. An ineffective assistance-of-counsel claim under *Strickland* contends that counsel (whether appointed or selected and paid for by the defendant) failed to represent his or her client effectively, and that that failure prejudiced the client. A constructive denial-of-counsel claim under *Gideon* asserts a form of nonrepresentation – that appointed counsel is counsel in name only – and seeks prospective relief. In a constructive denial-of-counsel claim no individualized showing of prejudice is required.

prospective, systemic relief in a civil suit to protect the full Sixth Amendment rights of the class that they represent.

The concept of a constructive denial-of-counsel claim is both legitimate and rooted in U.S. Supreme Court case law. In *United States v. Cronin*, 466 U.S. 648 (1984), the U.S. Supreme Court recognized that some infringements of the right to counsel are so significant that no showing of prejudice is necessary. No showing of prejudice is required where there is a complete denial of counsel at a critical stage; where “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing”; or where “although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Id.* at 659-660. In *Powell v. Alabama*, 287 U.S. 45 (1932), for example, the Court ruled that it would be “vain” to give the defendant a lawyer “without giving the latter any opportunity to acquaint himself with the facts or law of the case.” *Id.* at 59 (quoting *Commonwealth v. O’Keefe*, 148 A. 73, 74 (Pa. 1929)). Similarly, in *Avery v. Alabama*, 308 U.S. 444, 446 (1940), the Court explained that “mere formal appointment” of counsel does not satisfy the right to counsel. Specifically, the Court ruled that “the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment

of counsel into a sham.” *Ibid.* Thus, the Court has repeatedly indicated that the absence of traditional markers of representation can result in a constructive denial of counsel.<sup>13</sup>

A. *Courts That Have Considered The Issue Have Recognized That A Civil Claim For Constructive Denial Of Counsel Is Cognizable*

*Hurrell-Harring* is the leading case recognizing a civil constructive denial-of-counsel claim and, in the United States’ view, is correctly reasoned. The court in that case recognized a constructive denial-of-counsel claim under *Gideon* that is distinct from an ineffective-assistance claim under *Strickland*. The court determined that, “[g]iven the simplicity and autonomy of a claim for nonrepresentation, as opposed to one truly involving the adequacy of an attorney’s performance, there is no reason \* \* \* why such a claim cannot or should not be brought without the context of a completed prosecution.” *Hurrell-Harring v.*

---

<sup>13</sup> To be sure, the Supreme Court did not ultimately conclude that the right to counsel was violated in *Cronic* or *Avery*. In both cases, the Court concluded that, in the particular circumstances presented, late appointment of counsel did not justify a presumption of ineffectiveness. See *Cronic*, 466 U.S. at 665; *Avery*, 308 U.S. at 450-453. The appointed counsel in those cases, the Court determined, were not merely formal appointments who were unable to subject the government’s theory to adversarial testing. But in a systemic constructive denial-of-counsel claim, plaintiffs allege that the counsel assigned to indigent defendants are counsel in name only and thus are not subjecting the government’s theory to meaningful adversarial testing, or providing other traditional markers of representation because of severe structural limitations that make these failures of representation inevitable. That situation is different from the facts underlying the individual claims at issue in *Cronic* and *Avery*.

*State*, 930 N.E.2d 217, 225-226 (N.Y. 2010). The court recognized that to conclude that this type of claim is only cognizable in an action for post-conviction relief would be to prevent courts from effectively remedying systemic violations of *Gideon*. The court concluded that “the fairly minimal risks involved in sustaining the closely defined claim of nonrepresentation we have recognized must be weighed against the very serious dangers that the alleged denial of counsel entails.” *Id.* at 226. The court also determined that “enforcement of a clear constitutional or statutory mandate is the proper work of the courts,” and the mere fact “that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities” was not reason enough to shrink from that obligation. *Id.* at 227.

The court in *Wilbur v. City of Mount Vernon* followed a similar analysis. Like *Hurrell-Harring*, it recognized that plaintiffs’ suit was not alleging ineffective assistance of counsel under *Strickland*, but rather was asserting a systemic deprivation of the right to counsel promised in *Gideon*. No. 2:11-cv-1100, 2012 WL 600727, at \*2 (W.D. Wash. Feb. 23, 2012). The *Wilbur* court concluded that plaintiffs had asserted facts that could support a finding “that the assignment of public defenders is little more than a sham,” and that a civil action seeking a systemic remedy was appropriate: “Where official government policies trample rights guaranteed by the Constitution, the courts have not hesitated to use their

equitable powers to correct the underlying policies or systems.” *Id.* at \*2-3. See also *Duncan v. State*, 774 N.W.2d 89, 127 (Mich. Ct. App. 2009) (concluding that plaintiffs state a valid civil claim where they allege an actual denial of counsel, a constructive denial of counsel, or conflicted counsel)<sup>14</sup>; *Luckey v. Harris*, 860 F.2d 1012, 1018 (11th Cir. 1988) (concluding that a civil Sixth Amendment claim was cognizable where plaintiffs asserted, among other things, “systemic delays in the appointment of counsel,” that their attorneys are denied the resources necessary to investigate their cases, and that attorneys are pressured to hurry cases to trial and to enter guilty pleas).<sup>15</sup>

The Commonwealth Court is the first court we are aware of to have ruled that a claim for constructive denial of counsel is not cognizable at all. The court’s primary justification for that ruling was that “there is no precedent from the United States Supreme Court acknowledging that a constructive denial-of-counsel claim may be brought in a civil case that seeks prospective relief.” *Flora v. Luzerne Cnty.*, 103 A.3d 125, 136 (Pa Commw. Ct. 2014), reargument denied (Dec. 2,

---

<sup>14</sup> As the Commonwealth Court in this case explained, the procedural history of *Duncan* is complex, but ultimately the Court of Appeals affirmed that plaintiffs had stated a claim in that case. See *Flora v. Luzerne Cnty.*, 103 A.3d 125, 135 n.7 (Pa Commw. Ct. 2014), reargument denied (Dec. 2, 2014).

<sup>15</sup> This case was dismissed on remand based on abstention grounds under *Younger v. Harris*, 401 U.S. 37 (1971). See *Luckey v. Miller*, 976 F.2d 673, 675 (11th Cir. 1992). But the Eleventh Circuit’s initial opinion remains good law.

2014). Specifically, the court noted that *Strickland*, *Cronic*, and *Gideon* were cases in which a defendant sought post-conviction relief, not civil actions. But none of those cases suggest, let alone hold, that the Sixth Amendment right to counsel cannot be vindicated through a civil action. The Commonwealth Court failed to articulate any affirmative reason for its conclusion that a civil constructive denial-of-counsel claim is not cognizable.

Rather, the court simply stated that it accepted the analyses of the dissenting judges in *Hurrell-Harring* and *Duncan*. *Flora*, 103 A.3d at 136. But the dissent in *Hurrell-Harring* expressly avoided espousing an absolute rule that a civil claim for constructive denial of counsel is never cognizable. It concluded instead that “the various claims asserted by plaintiffs [in that case] do not rise to that level.” *Hurrell-Harring*, 930 N.E.2d at 230 (Pigott, J., dissenting). The dissent in *Duncan*, meanwhile, lends no relevant authority here as both the majority and dissent in that case viewed the claim through a *Strickland* lens alone. Thus, the *Duncan* dissent should be interpreted as concluding (correctly) that a *Strickland* ineffectiveness-of-counsel claim cannot be brought in a civil action. See *Duncan*, 774 N.W.2d at 158-166 (Whitbeck, J., dissenting).

And though the *Duncan* dissent also found that the systemic relief the plaintiffs sought in that case would violate separation-of-powers principles, courts are *not* powerless to compel action by other branches of government in order to

remedy a constitutional violation. To the contrary, courts have long recognized the necessity of systemic equitable relief to correct unconstitutional conduct. See, e.g., *Brown v. Plata*, 563 U.S. 493 (2011); see also *Hurrell-Harring*, 930 N.E. 2d at 227 (“It is, of course, possible that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right.”).

This Court should reach the same conclusion that the courts in *Hurrell-Harring* and *Wilbur* reached. It should rule that a constructive denial-of-counsel claim based on *Gideon* is cognizable, and that such a claim is pled adequately where the allegations, if true, support a conclusion that assigned attorneys are attorneys in name only.

*B. Factors Relevant To A Constructive Denial-Of-Counsel Claim*

Courts should consider two related questions in assessing a claim for systemic constructive denial of counsel: (1) whether traditional markers of representation are frequently absent or significantly compromised in plaintiffs’ relationships with their assigned counsel; and (2) whether the absence of traditional markers of representation is caused by assigned attorneys operating under systemic

structural limitations that prevent the attorneys from offering bona fide assistance of counsel.

Courts assessing a constructive denial-of-counsel claim should consider whether traditional markers of representation are present for clients of the public defender's office. These include the attorney's availability to engage in meaningful attorney-client contact to learn from and advise the client, the attorney's ability to investigate the allegations and the client's circumstances that may inform strategy, and the attorney's ability to advocate for the client either through plea negotiation, trial, or post-trial. When these markers of representation are absent, there is a serious question whether the assigned counsel is merely a lawyer in name only. Indeed, "[a]ctual representation assumes a certain basic representational relationship." *Hurrell-Harring*, 930 N.E.2d at 224 (emphasis added); see also *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013) (finding that, where clients met their attorneys for the first time in court and immediately accepted a plea bargain, without discussing their cases in a confidential setting, the system "amounted to little more than a 'meet and plead' system," and that the resulting lack of representational relationship violated the Sixth Amendment); *Public Defender, Eleventh Jud. Cir. of Fla. v. State*, 115 So. 3d 261, 278 (Fla. 2013) (finding denial of counsel where attorneys were "mere

conduits for plea offers,” did not communicate with clients, were unable to investigate the allegations, and were unprepared for trial).

Concerning systemic structural limitations, courts should consider factors such as insufficient funding, insufficient staffing, excessive workloads, lack of training and supervision, and lack of resources. In *Wilbur*, for example, the court noted the structural limitations – insufficient staffing, excessive caseloads, and almost nonexistent supervision – that resulted in a system “broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned.” *Wilbur*, 989 F. Supp. 2d at 1127. Similarly, the court in *Public Defender*, 115 So. 3d at 279, held that the public defender’s office could withdraw from representation of indigent defendants because of structural limitations. Insufficient funds and the resultant understaffing and excessive caseloads created a situation where indigent defendants did not receive assistance of counsel as required by the Sixth Amendment. *Ibid.* Other courts have also concluded that severe structural limitations result in a denial of Sixth Amendment rights. See, e.g., *New York Cnty. Lawyers’ Ass’n v. State*, 196 Misc. 2d 761, 790 (N.Y. Sup. Ct. 2003) (holding statutory rates for assigned counsel unconstitutional as they resulted in denial of counsel and excessive caseloads, among other issues);

*State v. Young*, 172 P.3d 138, 144 (N.M. 2007) (holding that inadequate compensation of defense attorneys deprived capital defendants of their Sixth Amendment right to counsel).

Structural limitations can lead to a situation where even a well-intentioned and competent lawyer is a merely nominal counsel because the lawyer is unable to fulfill the basic obligation of preparing a defense, including conferring with the defendant, investigating the facts of the case, interviewing witnesses, securing discovery, engaging in motions practice, identifying experts when necessary, and subjecting the evidence to adversarial testing. As the Supreme Court of Louisiana stated, “[w]e know from experience that no attorney can prepare for one felony trial per day, especially if he has little or no investigative, paralegal, or clerical assistance.” *State v. Peart*, 621 So. 2d 780, 789 (La. 1993).

*C. Civil Constructive Denial-Of-Counsel Claims Provide An Important Tool For Remediating Serious Violations Of The Constitutional Right To Counsel*

A civil constructive denial-of-counsel claim is an effective way for litigants to seek to effectuate the promise of *Gideon*. Post-conviction claims cannot provide systemic structural relief that will help fix the problem of under-funded and under-resourced public defenders. The constructive denial-of-counsel claim recognized in *Hurrell-Harring* and *Wilbur* provides indigent defendants deprived of their constitutional right to counsel with a meaningful tool for pursuing systemic relief. The Commonwealth Court’s opinion in this case is the only decision the United

States is aware of that concludes that a *Gideon*-based civil action for constructive denial of counsel is not viable at all. It erects a roadblock that will impede indigent defendants' ability to vindicate their Sixth Amendment right to counsel. This Court should remove that roadblock and rule that constructive denial-of-counsel claims are actionable.

### CONCLUSION

The judgment of the Commonwealth Court should be reversed.

Respectfully submitted,

LISA FOSTER  
Director, Office for Access to Justice

VANITA GUPTA  
Principal Deputy Assistant  
Attorney General

ANDREW STANNER  
Senior Counsel  
Office for Access to Justice  
Department of Justice  
950 Pennsylvania Ave., NW  
Suite 3340  
Washington, DC 20530

s/ Nathaniel S. Pollock  
TOVAH R. CALDERON  
NATHANIEL S. POLLOCK  
Attorneys  
Department of Justice  
Civil Rights Division  
Appellate Section  
Ben Franklin Station  
P.O. Box 14403  
Washington, DC 20044-4403  
(202) 514-0333  
*Counsel for the United States,  
Amicus Curiae*

## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS complies with Pennsylvania Rule of Appellant Procedure 2135 because it contains 4805 words, excluding the parts of the brief exempted.

s/ Nathaniel S. Pollock  
NATHANIEL S. POLLOCK  
Attorney

Dated: September 10, 2015

## CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2015, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS with the Deputy Prothonotary for the Pennsylvania Supreme Court using the PACFile system.

I further certify that I served two copies of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS on the following counsel by first class mail, which service satisfies the requirements of Pennsylvania Rule of Appellant Procedure 121.

Kimberly D. Borland  
Borland & Borland, LLP  
69 Public Square, 11th Floor  
Wilkes Barre, PA 18701  
Telephone: (570) 822-3311  
*Counsel for Appellants*

David Rudovsky  
Kairys, Rudovsky, Messing & Feinberg  
718 Arch Street, Suite 501 S  
Philadelphia, PA 19106  
Telephone: (215) 925-4400  
*Counsel for Appellants*

Witold J. Walczak  
American Civil Liberties Union of Pennsylvania  
247 Fort Pitt Blvd., 2nd Floor  
Pittsburgh, PA 15222  
Telephone: (412) 681-7864  
*Counsel for Appellants*

Vernon L. Francis  
Telephone: (215) 994-2577  
Sean Patrick McConnell  
Telephone: (215) 994-2418  
Dechert, LLP  
2929 Arch Street  
Philadelphia, PA 19104  
*Counsel for Appellants*

Mary Catherine Roper  
Telephone: (215) 592-1513  
Martha Meredith Tack-Hooper  
Telephone: (215) 592-1513  
American Civil Liberties Union of Pennsylvania  
P.O. Box 60173  
Philadelphia, PA 19102  
*Counsel for Appelants*

I also certify that all counsel of record are registered PACFile users and will  
be served by the PACFile system.

s/ Nathaniel S. Pollock  
NATHANIEL S. POLLOCK  
Attorney (D.C. Bar No. 1013075)  
Department of Justice  
Civil Rights Division  
Appellate Section  
Ben Franklin Station  
P.O. Box 14403  
Washington, DC 20044-4403  
202-514-0333  
*Counsel for the United States,  
Amicus Curiae*

# Attachment 3

Public Defense Contracts Recommended for Approval by the Public Defense Services Commission at its  
October 23, 2015 Meeting

COUNTY	PROPOSED CONTRACTOR	CASE TYPES	VALUE
Baker	Eagle Cap Defenders*	civil commitment, criminal, juvenile	\$1,287,621
Benton	Benton County Legal Defense Corporation	civil commitment, criminal, juvenile	\$2,152,435
Clackamas	Clackamas Indigent Defense Corporation	criminal, specialty courts	\$6,765,760
	Indigent Defenders, Inc.	civil commitment, juvenile, specialty courts	\$852,818
	Juvenile Advocates of Clackamas*	juvenile	\$2,714,156
Clatsop	Clatsop County Defender's Association	civil commitment, criminal, juvenile, specialty courts	\$1,889,365
	Mary Ann Murk	civil commitment, criminal, juvenile	\$465,745
Columbia	Columbia County Indigent Defense Corporation	civil commitment, criminal, juvenile, specialty courts	\$3,011,830
Coos	Coos County Indigent Defense Consortium	civil commitment, criminal, juvenile	\$1,178,928
	Southwestern Oregon Public Defender Services	civil commitment, criminal, juvenile, specialty courts	\$3,695,883
Crook/Jefferson	22 <sup>nd</sup> Circuit Defenders	civil commitment, criminal, juvenile, specialty courts	\$2,134,495
	Madras Consortium	civil commitment, criminal, juvenile	\$808,630
Curry	Curry County Public Defense, LLC	civil commitment, criminal, juvenile	\$1,068,932
Deschutes	Bend Attorney Group	civil commitment, criminal, juvenile, specialty courts	\$3,151,452
	Crabtree & Rahmsdorff	civil commitment, criminal, juvenile, specialty courts	\$5,515,816
	The DeKalb Group	civil commitment, criminal	\$1,942,342
Douglas	James A. Arneson, PC	civil commitment, criminal, juvenile	\$1,070,881
	Richard Cremer, PC	criminal, juvenile	\$617,836
	Roseburg Defense Consortium	civil commitment, criminal, juvenile	\$994,868
	Umpqua Valley Public Defender	civil commitment, criminal, juvenile, specialty courts	\$4,236,823
Grant/Harney	John B. Lamborn	civil commitment, criminal, juvenile	\$747,913
	Robert S. Raschio	civil commitment, criminal, juvenile	\$747,913
Hood River/Wasco	7 <sup>th</sup> Circuit Attorney Group	civil commitment, criminal, juvenile	\$1,554,020
	Morris, Starns & Sullivan, PC	civil commitment, criminal, juvenile, specialty courts	\$2,552,182
Jackson	Jackson Juvenile Consortium	civil commitment, juvenile	\$2,174,384
	Los Abogados, LLC	criminal	\$2,284,196
	Southern Oregon Public Defender, Inc	civil commitment, criminal, juvenile, specialty courts	\$6,463,037
Josephine	Josephine County Defense Lawyers, Inc	civil commitment, criminal, juvenile	\$1,940,360
	Southern Oregon Public Defender, Inc	civil commitment, criminal, specialty courts	\$2,677,332
Klamath/Lake	Klamath Defender Services, Inc	civil commitment, criminal, juvenile, specialty courts	\$6,606,116
Lane	Lane County Defense Consortium	criminal	\$1,642,412
	Lane Juvenile Lawyers Association	juvenile	\$5,615,640
	Public Defender Services of Lane County Inc	civil commitment, criminal, juvenile, specialty courts	\$6,144,612
Lincoln	Lincoln Defenders & Juvenile Advocates	civil commitment, criminal, juvenile, specialty courts	\$2,871,120
Linn	Linn Defenders Inc.	civil commitment, criminal, specialty courts	\$3,723,401
Malheur	David R. Carlson	civil commitment, criminal, juvenile	\$387,032
	Stoddard & Denison	civil commitment, criminal, juvenile, specialty courts	\$1,050,757
	Douglas J. Rock	civil commitment, criminal, juvenile	\$361,380
	Stunz Fonda Kiyuna & Horton, LLP*	civil commitment, criminal, juvenile	\$385,742

<b>Marion</b>	Harris Matarazzo	PSRB	\$527,724
	Juvenile Advocacy Consortium	juvenile, specialty courts	\$4,859,269
	Marion County Assoc. of Defenders	criminal, specialty courts	\$6,762,652
	Public Defender of Marion County	civil commitment, criminal, specialty courts	\$3,474,279
	Susan Isaacs	PSRB	\$29,592
<b>Multnomah</b>	Liebowitz & Associates	criminal	\$1,360,972
	Metropolitan Public Defenders	civil commitment, criminal, juvenile, specialty courts	\$13,028,864
	Multnomah Defenders, Inc.	appeals, criminal, juvenile, specialty courts	\$8,782,136
	Portland Juvenile Defenders, Inc.	juvenile	\$3,191,960
	Sage Legal Center	juvenile	\$677,608
	Portland Defense Consortium	criminal	\$4,611,000
	Troy & Rosenberg	juvenile	\$923,376
	Youth, Rights & Justice	appeals, juvenile	\$4,523,941
<b>Polk</b>	Chris Lillegard, PC	civil commitment, criminal, juvenile	\$1,332,836
	Polk County Conflicts Consortium	civil commitment, criminal, juvenile, specialty courts	\$1,083,833
<b>Tillamook</b>	McIntosh & Long/Connell Consortium	civil commitment, criminal, juvenile	\$920,028
<b>Umatilla/Morrow</b>	Blue Mountain Defenders	civil commitment, criminal, juvenile	\$1,389,852
	Intermountain Public Defenders	civil commitment, criminal, juvenile, specialty courts	\$2,509,384
<b>Union/Wallowa</b>	Grande Ronde Defenders	civil commitment, criminal, juvenile, specialty courts	\$1,286,042
<b>Washington</b>	Hillsboro Law Group, P.C.	criminal, juvenile	\$1,173,126
	Karpstein & Verhulst	criminal, juvenile	\$1,441,036
	Metropolitan Public Defenders	civil commitment, criminal, juvenile, specialty courts	\$8,000,913
	Oregon Defense Attorney Consortium, Inc.	criminal, juvenile, specialty courts	\$4,213,828
	Ridehalgh & Associates, LLC	criminal, juvenile, specialty courts	\$1,472,467
<b>Yamhill</b>	Justice Alliance Center	criminal, juvenile, specialty courts	\$2,329,368
<b>Statewide</b>	O'Connor Weber LLP	post-conviction appeals	\$1,005,566
	Oregon Post Conviction Consortium	post-conviction & habeas corpus	\$2,435,814
	Jesse Wm. Barton	Veteran's resource center	\$30,000
		<b>Total</b>	<b>\$178,863,631</b>

\*New contracts

# Attachment 4

Public Defense Contracts Recommended for Approval by the Public Defense Services Commission at its  
October 23, 2015 Meeting

<b>LEGAL SERVICES CONTRACTS</b>	<b>RATE</b>	<b>HOURS</b>	<b>VALUE</b>
Andy Simrin, PC	\$100	1,800	\$180,000
Benjamin Kim	\$100	3,680	\$368,000
Bronson James, LLC	\$100	3,680	\$368,000
Christopher Edward Burris	\$100	3,680	\$368,000
Christopher M. Clayhold	\$100	3,680	\$368,000
Daniel J. Casey	\$100	3,600	\$360,000
Deborah Burdzik	\$100	3,680	\$368,000
Dianna J. Gentry, LLC	\$100	3,680	\$368,000
Duane J. McCabe	\$100	1,840	\$184,000
Evelyn A. Oldenkamp	\$100	3,680	\$368,000
Geoffrey J. Gokey	\$100	3,680	\$368,000
Gordon Mallon	\$100	3,680	\$368,000
Jeffrey Erwin Ellis	\$100	3,680	\$368,000
Jenny Cooke	\$100	2,760	\$276,000
Katherine O. Berger, PC	\$100	3,680	\$368,000
Kathleen M. Correll	\$100	3,680	\$368,000
Laura Graser	\$100	1,800	\$180,000
Laurie Bender	\$100	3,680	\$368,000
Lynne B. Morgan*	\$100	3,680	\$368,000
Mark Rader (1 yr)	\$100	1,840	\$184,000
Mark Sabitt	\$100	2,000	\$200,000
Michael B. Charlton*	\$100	3,680	\$368,000
Patrick John Sweeney, PC	\$100	3,240	\$324,000
Richard L. Wolf, P.C.	\$100	3,680	\$368,000
Russell S. Barnett, III, PC*	\$100	3,680	\$368,000
Steven H. Gorham	\$100	3,680	\$368,000
Steven L. Krasik	\$100	3,680	\$368,000
Wm. David Falls	\$100	3,680	\$368,000
W. Keith Goody (1 yr)	\$100	1,350	\$135,000

<b>MITIGATION INVESTIGATION SERVICES CONTRACTS</b>	<b>RATE</b>
Alice D. Ellis Gaut	\$62
Andrea Titus Mitigation & Investigation, Inc	\$62
Carin J. Connell	\$62
Christine L. Inglis, Investigation and Mitigation Services, Inc	\$62
Joyce Naffziger Investigations and Mitigation Services	\$62
Julia B. Demorest	\$62
Keeley McCrea McCallum	\$62
Laura Kathleen Rittall	\$62
Mary C. Goody Mitigation Specialists, LLC	\$62
Meghan Planchon*	\$62
Miriam Widman Investigations*	\$62
Mitigation Services, Inc (Ellen Rogers)	\$62
Pacific Mitigation Specialists, LLC (James Hudson)	\$62
Pamela Lundberg Rogers	\$62
Rhonda Lee Coats	\$62
Richard Hursey*	\$62
Rita R. Lapp*	\$62
Roger K. Harris	\$62
Teresa A. McMahill, MSW, Inc	\$62

# Attachment 5

**OFFICE OF PUBLIC DEFENSE SERVICES  
PERSONNEL POLICIES AND PROCEDURES**

*REVISED April 30, 2014*

	<b>PAGE</b>
I. Definitions .....	2
II. Performance Management and Evaluation .....	8
III. Reassignment and Layoff .....	13
IV. Discipline .....	17
V. Dismissal .....	21
VI. Vacation Leave .....	26
VII. Sick Leave .....	29
VIII. Other Types of Leave .....	35
IX. Holidays .....	45
X. Overtime .....	48
XI. Recruitment and Hiring .....	49

***Applicability:***

Except as otherwise noted, the following Policies and Procedures apply to all Office of Public Defense Services (OPDS) employees on and after July 1, 2003.

***Definitions:***

As used in the following Policies and Procedures:

The “Administrative Authority” means OPDS’s Chief Public Defender, the Chief Deputy Public Defender, the Director of OPDS’s Contract Division and any other person so designated by the Executive Director of OPDS.

The “ADA” means the Americans with Disabilities Act.

The “Executive Director” means the Executive Director of OPDS.

“FLSA” means the Fair Labor Standards Act.

“FMLA” means the Federal Family Medical Leave Act.

“OFLA” means the Oregon Family Leave Act.

“OPDS” means the Office of Public Defense Services.

“PDPR” means Office of Public Defense Services Personnel Rule.

“PEBB” means the Public Employees’ Benefit Board.

“PERS” means the Public Employee Retirement System.

“PDSC” or the “Commission” means the Public Defense Services Commission.

## **Definitions**

- 2.01 ADMINISTRATIVE AUTHORITY**  
An administrative authority is the Executive Director of the OPDS, a division director, or any other management-level employee designated, in writing, as an administrative authority by the Executive Director.
- 2.02 ALLOCATION**  
Allocation is the assignment of a position to an existing classification on the basis of duties, responsibilities, authority, and required employment qualifications.
- 2.03 ANNUAL SALARY INCREASE**  
Subject to approval by the administrative authority, an annual salary increase is a one-step pay increase given to a limited duration or regular status employee on the employee's salary eligibility date, provided the employee's pay does not equal or exceed the maximum step of the current salary range.
- 2.04 BREAK IN SERVICE**  
A break in service is a separation from or interruption of paid employment, with the OPDS or another State of Oregon agency, that exceeds 15 consecutive calendar days.
- 2.05 CALENDAR MONTH**  
A calendar month is any month encompassing the first calendar day through the last calendar day inclusive.
- 2.06 CLASS OR CLASSIFICATION**  
A class or classification is a group of positions sufficiently similar in duties, responsibilities, authority, and employment qualifications to permit their combination under a single title based on common standards of selection and compensation.
- 2.07 CLASS SPECIFICATION**  
A class specification is a written description of a class containing a title and a statement of duties, responsibilities, authority, and qualifications that are broadly representative of the positions in the class.
- 2.08 CLASSIFICATION SYSTEM**  
A classification system is a uniform and consistent method of identifying, describing, and analyzing assigned work through evaluation of specific job factors. The product of the classification system is the allocation of each position to a classification, the assignment of a class title, a written description of the duties commonly performed by positions allocated to the classification, and a comparative ranking of all classifications within the OPDS.
- 2.09 COMPENSATION PLAN**  
A compensation plan is a listing of the designated salary ranges, and pay rates within those ranges, for each classification.

- 2.10 COMPENSATORY TIME**  
Compensatory time is paid leave (in lieu of cash payment) accrued at the rate of time and one-half for the overtime hours worked.
- 2.11 CONTINUOUS SERVICE**  
Continuous service is uninterrupted employment. Interruption of employment occurs any time a break in service exceeds 15 consecutive calendar days.
- 2.12 CRIMINAL HISTORY CHECK**  
A criminal history check is a search for criminal convictions conducted on the Law Enforcement Data Systems (LEDS), which includes the National Criminal Information Center (NCIC).
- 2.13 DAY**  
A day is a 24 consecutive hour period beginning at 12:00:01 a.m. (one second after midnight) and ending at 12:00 midnight.
- 2.14 DEMOTION, INVOLUNTARY**  
An involuntary demotion is an employer-initiated movement of a nontemporary employee, for disciplinary reasons, from the employee's classification and position to a classification and position having a lower salary range.
- 2.15 DEMOTION, VOLUNTARY**  
A voluntary demotion is an employee-initiated movement of a nontemporary employee, for non-disciplinary reasons, from the employee's classification and position to a classification and position having a lower salary range.
- 2.16 DISMISSAL**  
A dismissal is an involuntary separation from employment for disciplinary reasons.
- 2.17 FAIR LABOR STANDARDS ACT (FLSA)**  
The FLSA is a federal law governing overtime.
- 2.18 FAMILY MEDICAL LEAVE ACT (FMLA)**  
The FMLA is a federal law governing family leave.
- 2.19 FAMILY MEMBER, QUALIFIED (As defined by FMLA and/or OFLA; applies to PDPR 14.10, 15.05, 15.06, and 16.03 only.)**  
Spouse, child, parent, parent-in-law, same-sex domestic partner or an individual for whom the employee is or was in a relationship of "in loco parentis". Child, parent, and parent-in-law includes biological, adoptive, step, or foster relationships.
- 2.20 FULL-TIME EMPLOYEE**  
A full-time employee is one who normally is scheduled to work 40 hours each work week in a monthly pay period.
- 2.21 INITIAL HIRE**  
The first employment by the Office of Public Defense Services, or the re-employment of a former employee after a break in service of two years or more.

- 2.22 JOB-SHARE**  
A job-share is a position split into two or more part-time positions. Each employee working in a job-share position is treated as a part-time employee.
- 2.23 LAYOFF**  
A layoff is an employer-initiated separation from employment due to lack of work, shortage of funds, organizational restructuring, or other circumstances not related to employee performance.
- 2.24 LIMITED DURATION POSITION**  
A limited duration position is a position created for a project or special study or in anticipation of legislative approval of a regular position. A limited duration position has a specified end date that is no later than the last day of the current biennium.
- 2.25 LIMITED DURATION STATUS**  
Limited duration status is employment in a regular or limited duration position by initial hire (or by transfer, promotion, or voluntary demotion of a limited duration status employee) for a stated period of time, for a special study or project. The study or project is subject to renewal for a specified or unspecified period or subject to termination on or before the stated expiration date. Time worked as a limited duration employee does not apply toward completion of a trial service period or toward attaining regular status.
- 2.26 OREGON FAMILY LEAVE ACT (OFLA)**  
The OFLA is a state law governing family leave.
- 2.27 OVERTIME**  
Overtime is time worked (including paid leave taken) by a FLSA non-exempt employee in excess of 40 hours in a work week.
- 2.28 PART-TIME EMPLOYEE**  
A part-time employee is one who normally is scheduled to work less than the equivalent of 40 hours each work week in a monthly pay period.
- 2.29 PERSONAL LEAVE**  
Personal leave is paid leave given to nontemporary employees who have completed six months of nontemporary service.
- 2.30 PERSONNEL ACTION**  
A personnel action is any action taken with reference to an employee or a position including, but not limited to, appointment, rate of pay, promotion, demotion, transfer, layoff, dismissal, or classification.
- 2.31 POSITION**  
A position is a group of duties, authorities, and responsibilities assigned by an administrative authority requiring the full-time or part-time employment of one person. Types of positions include regular, limited duration, and temporary.

**2.32 PROMOTION**

Promotion is the movement of an employee from the employee's classification and position to a classification and position having a higher salary range.

**2.33 PUBLIC EMPLOYEE'S BENEFIT BOARD (PEBB)**

The PEBB is a State of Oregon agency that administers employee insurance benefit plans.

**2.34 RECLASSIFICATION**

A reclassification is the change in allocation of a position from one existing class to another existing class (or the movement of an employee from one class to another class) as a result of a substantive change in the duties assigned to the position.

**2.35 RECOGNIZED SERVICE DATE**

The recognized service date is the date an employee began working for a State of Oregon agency (with the exception of temporary or volunteer work) adjusted by any break(s) in service of more than 15 consecutive calendar days. A break in service of more than two years, for reasons other than approved leave without pay, voids all previous employment.

**2.36 REEMPLOYMENT**

Reemployment is the noncompetitive employment of a former regular, limited duration, or trial service status OPDS employee within two years from the effective date of that employee's resignation, voluntary demotion, layoff, or downward reclassification. An employee may only be reemployed in a position in a class of work with a salary range equal to or lower than the salary range for the classification that employee last held.

**2.37 REGULAR POSITION**

A regular position is a position which has been approved as such by the legislative assembly. A regular position, subject to administrative or organizational change, is anticipated to continue in future biennia.

**2.38 REGULAR STATUS**

Regular status is employment following successful completion of the most recent trial service period. Time employed with temporary or limited duration status does not apply toward attaining regular status.

**2.39 SALARY ELIGIBILITY DATE**

The salary eligibility date is the date an employee is eligible to receive a one-step increase in pay. This date is one year after initial hire or rehire, or one year after a subsequent promotion, upward reclassification or an adjustment to the compensation plan that results in a 5% or greater increase in an employee's salary, and annually thereafter until the employee reaches the maximum rate of pay for a class. This date shall be permanently adjusted for leave without pay in excess of 15 consecutive calendar days by adding to the date the number of calendar days absent without pay, thereby making the date later than it would have been if leave without pay had not occurred.

**2.40 SALARY RANGE**

A salary range is the minimum, maximum, and intermediate pay rates to which a classification is assigned.

**2.41 SELECTION METHOD**

A selection method is any procedure or technique used to assess applicant qualifications for employment in a position.

**2.42 STATUS**

Status is the employment relationship between an employee and the OPDS. Types of status include limited duration, regular, temporary, and trial service.

**2.43 SUPERVISOR**

A supervisor is an individual who, subject to review by the administrative authority, has responsibility for hiring, assigning duties, disciplining, providing performance feedback, resolving first-step grievances, and applying personnel rules and relevant personnel policies.

**2.44 SUSPENSION**

A suspension is the temporary, involuntary removal of an employee from the work site with or without pay.

**2.45 TEMPORARY POSITION**

A temporary position is a position created as a result of a non-recurring or periodic workload increase or due to a regular, trial service, or limited duration status employee's absence. A temporary position has a specified end date that is usually no later than one year from the date the position was created.

**2.46 TEMPORARY STATUS**

Temporary status is noncompetitively appointed employment (in any type of position) for a period of up to one year and subject to renewal for a specific period of time. Employees with temporary status have no rights or benefits except as provided by state and Federal law.

**2.47 TERMINATION**

Termination is cessation of employment for any reason.

**2.48 TRANSFER**

Transfer is movement of an employee of the OPDS from one position to another position in the same classification or to another position in a different classification having the same salary range.

**2.49 TRIAL SERVICE PERIOD**

A trial service period is a six-month period of continuous service after the initial date of hire or rehire (initial trial service period) or after the date of promotion (promotional trial service period). An administrative authority may extend the trial service period so long as the total trial service period does not exceed twelve months. The trial service period shall be extended by any period of leave without pay in excess of 15 consecutive calendar days by adding to it the number of calendar days absent without pay, thereby

making the completion date later than it would have been if leave without pay had not occurred.

**2.50 TRIAL SERVICE STATUS**

Trial service status is employment during the first six months following initial hire or rehire in a regular position (initial trial service) or the six months following a promotion (promotional trial service), unless the trial service is extended by the administrative authority. An employee on trial service status retains that status upon transfer or promotion to a limited duration position. Trial service status is extended by any period of leave without pay in excess of 15 consecutive calendar days by adding to it the number of calendar days absent without pay, thereby making the completion date later than it would have been if leave without pay had not occurred.

**2.51 UNDERFILL**

An underfill is the employment of a person in a classification with a salary range lower than the salary range of the budgeted or established classification level of the position.

**2.52 WORK WEEK**

The work week is a fixed and regularly recurring period of 168 hours during seven consecutive 24-hour periods. The work week for all OPDS employees shall begin at one second after midnight Sunday and end at midnight the following Saturday.

**2.54 Y-RATE**

A Y-rate is a salary rate that is higher than the maximum rate paid to an employee's class.

## **Performance Management and Evaluation**

### ***Applicability:***

In order to develop performance measures in collaboration with OPDS employees and establish the requisite supervisory and management structure within OPDS, the Performance Management and Evaluation Policy and Procedures shall not apply to OPDS employees before January 1, 2004. On that date, OPDS shall commence developing individual written performance plans and establishing annual performance evaluation periods for OPDS employees in accordance with the following Policy and the Procedures and shall complete that process for all OPDS employees no later than July 1, 2004.

### ***Policy:***

- I. OPDS shall establish a Performance Management Process to assist in managing the performance of all of its employees. This process shall promote employees' understanding of successful job performance and encourage their commitment to OPDS's mission, the goals and objectives.
- II. OPDS shall develop a Performance Management Plan in accordance with this Policy.
- III. OPDS's Performance Management Plan shall be communicated to all OPDS employees. OPDS is responsible for training its managers and supervisors in the administration of the Performance Management Plan.
- IV. OPDS's Performance Management Plan shall include the following requirements.
  - A. an annual performance evaluation period for all employees;
  - B. an individual performance plan for each employee that is developed in collaboration with the employee and communicated to the employee and includes:
    1. identification of the employee's job performance expectations and performance measures, which are results-based or behavior-based or a combination of both.
    2. an individual employee development plan, initially developed by the employee, which addresses any previous performance deficiencies, performance goals for the following year, and career plans and objectives.
    3. provision for interim reviews during the year to discuss employee performance, monitor progress and modify and update the performance plan as needed.
  - C. a scoring system to evaluate performance that permits comparison of performance and ratings among similarly situated employees;

- D. a rating system that includes at least three performance level ratings to provide for consistency in describing, analyzing and reporting ratings among similarly situated employees;
- E. an annual written performance evaluation for each employee. The evaluation shall be based on the employee's performance plan and include:
  - 1. a discussion of the employee's performance between the supervisor and employee;
  - 2. documented performance achievements and/or deficiencies;
  - 3. a rating of each employee which is consistent with OPDS's scoring and rating systems;
  - 4. an internal agency review process completed prior to finalizing and communicating performance ratings to each employee;
  - 5. required signatures of the employee, supervisor, and reviewer with a copy of the signed evaluation form provided to the employee; and
  - 6. provision for at least one interim performance plan review during the annual performance evaluation period to discuss the progress of the employee's performance, any performance deficiencies, and plan updates as needed.
- F. An employee may prepare written comments or rebuttal to their evaluation within thirty (30) calendar days of receiving the signed evaluation, which shall be attached to the evaluation form and become part of the employee's personnel file.

***Procedures:***

- 1. OPDS's Performance Management Plan applies to all OPDS employees, including supervisors, members of the Administrative Authority, and the Executive Director.
- 2. OPDS supervisors are responsible for distributing and discussing the agency Performance Management Plan with all of the employees they supervise.
- 3. Each supervisor shall develop an annual written performance plan for each employee supervised and discuss the plan with the employee prior to the beginning of each annual performance evaluation period. Supervisors shall develop the performance plan in concert with each employee. Each employee performance plan shall include:
  - (a) an annual performance evaluation period;

- (b) job-related performance measures developed in collaboration with the employee that are consistent with the employee's position description and relate to OPDS's mission, goals, and objectives. Each performance measure shall describe standards or indicators of success, achievement or measurable results and timeframes where applicable. An employee's performance plan may also include behavior-based performance measures when certain behaviors such as leadership, teamwork, cooperation and consensus building are important to successful job performance.

Each supervisor's performance plan shall include performance measures related to the successful performance management of their subordinates;

- (c) the relative weight or score of each performance measure in the employee's plan, (i.e. the possible points assigned to each measure according to the priority placed on it in relation to the other performance measures in the plan). The total points possible for all measures or total score shall equal 100;
  - (d) an individual employee development plan, initially developed by the individual employee, that provides for the continuous improvement of the employee's job-related knowledge and skills and that promotes the achievement of the employee's career plans and objectives. This development plan may be incorporated as one of the employee's performance measures, or may be a separate part of the plan;
  - (e) the signatures and date of the employee, supervisor and Administrative Authority acknowledging a mutual understanding and acceptance of the plan at the beginning of the performance plan year; and
  - (f) provision for at least one interim performance plan review during the annual performance evaluation period to discuss the progress of the employee's performance, any performance deficiencies and plan updates as needed. The employee, supervisor and Administrative Authority shall sign and date the plan at each review.
4. OPDS shall adopt the following uniform scoring and rating systems to facilitate consistency in employee performance evaluations:
- (a) a total of 100 possible points for an employee performance plan distributed in accordance with the relative weight or score assigned to each performance measure; and
  - (b) a rating system of 1 through 5 based on the annual score of total points achieved.

90-100 total points equals an overall rating of 1—Outstanding level of performance. The employee excels in all aspects of the position and significantly and consistently exceeds the established job requirements and performance standards, goals and expectations of the job. Generally, in any given year, a very limited number of employees achieve results at this level.

80-89 total points equals an overall rating of 2—Exceeds expectations. The employee consistently exceeds standards and expectations of the position and may perform at an outstanding level in some areas.

70-79 total points equals an overall rating of 3—Meets expectations. The employee's performance fulfills established standards and job expectations. Work is consistently performed at an acceptable level and at times may be performed at a higher level. Results are those expected of most employees successfully performing their jobs.

60-69 total points equals an overall rating of 4—Does not fully meet expectations. The employee's performance does not consistently satisfy position requirements, but the employee has shown the aptitude, interest or skills needed to attain them. Improved sustained results need to be shown within a limited time period.

Less than 60 total points equals an overall rating of 5—Unacceptable. The employee's performance clearly fails to meet standards and the employee does not demonstrate the aptitude or interest to perform the job successfully. Immediate sustained improvement must be shown.

5. Each supervisor shall complete an annual written performance evaluation for each employee supervised based on the employee's individual performance plan and job performance. The performance evaluation shall include:
  - (a) input on the employee's performance during the annual performance evaluation period from others, including employees, judges, attorneys, peers, managers, clients and other persons with relevant knowledge of the employee's job performance as determined by the supervisor;
  - (b) a discussion of job performance between the supervisor and the employee regarding the results of the employee's individual performance plan. Each employee shall have the opportunity to provide input, examples of work and a self-evaluation for the supervisor's consideration;
  - (c) documented performance achievements and/or deficiencies;
  - (d) points achieved or score for each performance measure, total points achieved or total score for the employee's individual performance plan and an overall rating of the employee's performance according to the scoring and rating systems described above;
  - (e) a review of all employee ratings with the Administrative Authority prior to finalizing and communicating the performance rating to each employee; and
  - (f) a discussion of the evaluation scoring and rating with each employee and notice to the employee of the opportunity to attach written comments or

rebuttal. The employee, supervisor and Administrative Authority shall sign and date the completed performance evaluation.

6. The supervisor is responsible for transmitting a copy of the signed performance evaluation for each employee to the employee's personnel file.
7. For the purposes of administering this Performance Management Plan with regard to OPDS supervisors and management, the Administrative Authority is the supervisor of any OPDS supervisor, the Executive Director is the supervisor of any member of the Administrative Authority, and the PDSC is the supervisor of the Executive Director.
8. Any employee disagreeing with his or her performance evaluation may prepare written comments or rebuttal within thirty (30) calendar days of receiving the evaluation. These comments or rebuttal shall be attached to the written performance evaluation and become part of the employee's personnel file.

## **Reassignments and Layoffs**

### ***Policy:***

- I. OPDS shall establish fair and rational procedures for reassigning or laying-off employees due to reorganizations, reduced workloads or revenues, or to meet position reduction goals.
- II. An OPDS employee may be reassigned or laid off through a reduction in work force because of lack of work, funds curtailment, reorganization, or other non-disciplinary reasons consistent with the needs and mission of OPDS that do not reflect discredit on the employee.
- III. OPDS is committed to providing its employees with options to remain employed with OPDS or the State of Oregon in lieu of layoffs if possible. Therefore, all work force adjustment measures within OPDS shall be explored prior to implementing layoffs, including reassignment to existing vacancies, voluntary terminations, or demotions. Should such work force adjustment measures be unavailable or infeasible, OPDS shall make reasonable efforts to inform laid off employees of their options and the processes to be considered for other employment opportunities in state government and to minimize negative impacts on laid-off employees to the extent possible.
- IV. This policy does not authorize the displacement or “bumping” within OPDS by any OPDS employee.
- V. OPDS employees laid off in accordance with this policy may request to be added to any applicable statewide reemployment layoff list for the same, equal, or lower positions or classifications for which they are qualified.
- VI. An OPDS employee who is reassigned or laid off pursuant to this policy may appeal the action to the Administrative Authority and the Executive Director in accordance with the written procedures described below.
- VII. Failure of OPDS, the Executive Director or the Administrative Authority to comply with one or more provisions of this Policy or the accompanying Procedures in taking any action with regard to an employee shall not invalidate the action unless the employee is deprived of a constitutionally protected right and there is no possibility of correcting or reversing the deprivation of the employee’s constitutionally protected right. When the potential deprivation of the employee’s rights is brought to the attention of OPDS, the Executive Director or Administrative Authority may rescind the action, may take new action of the same or different nature, or may let the action taken stand.

### ***Procedures:***

1. The PDSC shall determine the necessity to reduce OPDS's work force due to lack of work, funds curtailment, reorganization, or other valid reasons based upon the needs and mission of OPDS, and establish timelines to accomplish such work force reductions.
2. The Executive Director or the Administrative Authority shall determine the number of positions, classifications or organizational units in OPDS affected by the pending work force reduction. In making this determination, the Executive Director or the Administrative Authority shall consider the needs and mission of OPDS, including the types of positions affected and remaining positions, the special knowledge, skills, and experience necessary to accomplish the mission and work of OPDS, and the diversity of employees in OPDS as this factor affects OPDS's ability to accomplish its mission.
3. The Executive Director or the Administrative Authority shall identify any vacant positions in OPDS and prepare a summary of the knowledge, skills and experience required of those vacant positions at the same or lower salary ranges of those positions affected by the pending work force reduction.
4. The Executive Director or the Administrative Authority shall identify all OPDS employees by position or classification affected by the pending work force reduction and request updated information regarding their relevant knowledge, skills and experience.
5. The Executive Director or the Administrative Authority shall identify the OPDS employees to be reassigned or laid off, taking into consideration the following factors in descending order of importance:
  - A. The relevant knowledge, skills and experience of each employee in the positions, classifications or organizational units affected by the pending work force reduction, the diversity of OPDS's work force as it relates to the ability of OPDS to accomplish its mission, and the transition time for a potentially qualified employee to be capable of performing the duties of a vacant or open position at OPDS;
  - B. The quality of performance and relative merit of each employee in the positions, classifications or organizational units affected by the pending work force reduction as determined by (i) the employee's most recent performance evaluation or (ii) a special performance evaluation for all employees in positions, classifications or organizational units affected by the pending work force reduction;
  - C. The length of an affected employee's service with OPDS, the State Public Defender or the Indigent Defense Services Division; and
  - D. The length of an affected employee's service with any other Oregon state agency.

6. The Executive Director or the Administrative Authority shall consider reassignment options within OPDS for employees identified for layoff.
7. At least fifteen (15) calendar days prior to the effective date of layoff or reassignment, the Executive Director or the Administrative Authority shall provide written notice to the affected employees of the reasons for the reassignment or layoff and the rights and options provided by the OPDS Reassignment and Layoff Policy and Procedures. In addition to the right to appeal, an employee who is laid off may request to be added to the statewide reemployment layoff list for the same, equal or lower positions or classifications for which an employee is qualified.
8. The Executive Director or the Administrative Authority shall document the foregoing actions, submit this documentation to the Public Defense Services Commission, and maintain the documents for three (3) years from the date of the layoff. This documentation shall include reasons and rationale supporting the determination of individual layoffs in accordance with Procedure 5, above.
9. The employee may appeal from the reassignment or lay off decision as follows.
  - A. The appeal shall be in writing and mailed or hand-delivered to the Administrative Authority not later than fifteen (15) calendar days after the effective date of the personnel action in question.
  - B. The Administrative Authority shall affirm or deny the appeal in writing not later than fifteen (15) calendar days after receipt of the appeal. The failure of the Administrative Authority to respond within fifteen (15) days after receipt of the appeal shall constitute a denial of the appeal, unless the parties mutually agree in writing to extend the time limit.
  - C. If the Administrative Authority denies the appeal, the employee may appeal in writing to the Executive Director not later than (i) seven (7) days after the Administrative Authority's written decision was received or (ii) in the absence of a written decision by the Administrative Authority, seven (7) days after the date that the appeal was deemed denied. The appeal shall be confined to the subject matter contained in the original appeal to the Administrative Authority.
  - D. The Executive Director shall rule in writing not later than fifteen (15) calendar days after receipt of the appeal. Failure of the Executive Director to respond within fifteen (15) days after receipt of the appeal shall constitute a denial of the appeal, unless the parties mutually agree in writing to extend the time limit.
  - E. The employee may file in writing a discrimination claim not resolved to the satisfaction of the parties with the state's Affirmative Action Office, the Civil Rights Division of the Oregon Bureau of Labor and Industries, and/or the federal Equal Employment Opportunity Commission.

10. Failure of OPDS, the Executive Director or the Administrative Authority to comply with one or more provisions of these Procedures in taking any action with regard to an employee shall not invalidate the action unless the employee is deprived of a constitutionally protected right and there is no possibility of correcting or reversing the deprivation of the employee's constitutionally protected right. When the potential deprivation of the employee's rights is brought to the attention of OPDS, the Executive Director or Administrative Authority may rescind the action, may take new action of the same or different nature, or may let the action taken stand.

## Discipline

### *Policy:*

- I. OPDS may, at the discretion of the Executive Director, provide OPDS employees with an opportunity to correct problems interfering with the accomplishment of the mission or operations of OPDS. The Executive Director shall maintain and administer written procedures consistent with the provisions of this Policy.
- II. Any OPDS employee may be disciplined for inability or unwillingness to fully and faithfully perform the duties of the employee's position satisfactorily. The reasons for discipline may include:
  - A. conduct, performance, or behavior including acts or omissions on or off the job which may interfere with the mission or operations of OPDS or which affect the employee's suitability for his or her position; or
  - B. other conduct, performance, or behavior which affects the employee's suitability for his or her position.
- III. Except for reprimands, which shall be in writing, a specific warning, in any reasonable form, of OPDS's concerns and reasonable opportunity to correct the problem shall be given to the employee prior to the imposition of discipline unless the employee knew or reasonably should have known the conduct, performance or behavior could lead to disciplinary action.
- IV. The Executive Director or the Administrative Authority shall determine the severity of the disciplinary action based on the seriousness of the conduct, performance or behavior, the level of fault, or the unsuitability of the employee, and the needs of OPDS. The severity of the discipline must have a reasonable basis in fact.
- V. The types of discipline which may be taken under this Policy are:
  - A. Written reprimand;
  - B. Suspension without pay;
  - C. Salary reduction; and
  - D. Demotion when an appropriate vacancy, as determined by OPDS, exists at a lower level.
- VI. When disciplinary action other than reprimand is contemplated, the Executive Director or the Administrative Authority shall give the employee a reasonable opportunity to respond before taking final disciplinary action. The Executive Director or the Administrative Authority shall notify the employee in writing of disciplinary actions.

- VII. Failure of OPDS, its Executive Director or the Administrative Authority to comply with one or more of the provisions of this Policy or the accompanying Procedures in taking any disciplinary action against an employee shall not invalidate the action unless the employee is deprived of a constitutionally protected right and there is no possibility of correcting or reversing the deprivation of the employee's constitutionally protected right. When the potential deprivation of the employee's rights is brought to the attention of OPDS, the Executive Director or the Administrative Authority may rescind the action, may take new action of the same or different nature, or may let the action stand.

***Procedures:***

1. In accordance with the foregoing OPDS Employee Discipline Policy, OPDS may take the following disciplinary actions as follows:
  - A. Reprimand: The reprimand shall be in writing and shall reasonably inform the employee of the conduct, performance or behavior supporting the reprimand and the potential for further discipline if the conduct, performance or behavior is not corrected;
  - B. Suspension: The suspension shall be without pay for a specified period of time. For employees exempt under the FLSA, the suspension must be in increments of 40-hour work weeks or full days in cases of major safety violations. The employee will be notified of the potential for further discipline if the conduct, performance or behavior is not corrected;
  - C. Salary reduction: The salary reduction shall be one or more steps within the employee's classification salary range for a period of time determined to be necessary to improve and monitor the conduct, performance or behavior in question. Salary reduction shall not be imposed for employees who are exempt from FLSA. The employee will be notified of the potential for further discipline if the conduct, performance or behavior is not corrected; and
  - D. Demotion: This action is available when an appropriate vacancy, as determined by the agency, exists at a lower level, with a commensurate permanent reduction in salary. The employee will be notified of the potential for further discipline if the conduct, performance or behavior is not corrected while performing the new job duties.
2. The Executive Director or the Administrative Authority shall notify the employee in writing of disciplinary actions. The written notice shall contain:
  - A. Action being taken: Suspension without pay for a specific period of time, reduction in pay, or demotion;
  - B. The date on which the action takes effect;

- C. Grounds for the action. Grounds or cause as defined in Paragraph II.A. and B. of the foregoing Discipline Policy;
  - D. Background: Any pertinent information such as length of service, classification, training, statements in position description, written policies and rules, descriptions of long-standing practices, and/or statements from performance evaluations that are relevant and apply to the current issue; and any other data or information which would have reasonably made the employee aware of the conduct, performance or behavior to be expected;
  - E. Supporting facts: The dates, times, places and other facts known by OPDS sufficient to apprise the employee of the acts, omissions, and conditions being charged;
  - F. Conclusion: A statement as to why the employee's supervisor is concerned about the conduct, performance or behavior at issue. It is also meant to advise the employee of the relative seriousness of the conduct, performance or behavior as viewed by the supervisor, as well as to advise the employee that future conduct, performance or behavior of similar nature will result in more severe discipline; and
  - G. Notice of appeal: A statement that the action taken may be appealed according to the appeal process described in procedure 4, below.
- 3. The written notice of disciplinary action may be hand delivered to the employee or mailed by certified or registered mail to the employee's last known address. The effective date shall be three (3) calendar days after the postmark date on the letter or the date hand delivery was accomplished.
  - 4. The employee may appeal a disciplinary action as follows:
    - A. The appeal shall be in writing and mailed or hand-delivered to the Administrative Authority not later than fifteen (15) calendar days after the effective date of the personnel action in question.
    - B. The Administrative Authority shall affirm or deny the appeal in writing not later than fifteen (15) calendar days after receipt of the appeal. The failure of the Administrative Authority to respond with fifteen (15) days after receipt of the appeal shall constitute a denial of the appeal, unless the parties mutually agree in writing to extend the time limit.
    - C. If the Administrative Authority denies the appeal, the employee may appeal in writing to the Executive Director not later than (i) seven (7) days after the Administrative Authority's written decision was received or (ii) in the absence of a written decision by the Administrative Authority, seven (7) days after the date that the appeal was deemed denied. The appeal shall be confined to the subject matter contained in the original appeal to the Administrative Authority.

- D. The Executive Director shall rule in writing not later than fifteen (15) calendar days after the receipt of the appeal. Failure of the Executive Director to respond within fifteen (15) days after receipt of the appeal shall constitute a denial of the appeal, unless the parties mutually agree in writing to extend the time limit.
5. Disciplinary demotions shall not be used if an employee is not qualified for employment in the lower class or position, or if such action would cause a regular employee in a lower class to be laid off.
  6. Documentation shall be maintained to support any actions taken under the OPDS Employee Discipline Policy and Procedures.
  7. Failure of OPDS, its Executive Director or Administrative Authority to comply with one or more of the provisions of these Procedures in taking any disciplinary action against an employee shall not invalidate the action unless the employee is deprived of a constitutionally protected right and there is no possibility of correcting or reversing the deprivation of the employee's constitutionally protected right. When the potential deprivation of the employee's rights is brought to the attention of OPDS, the Executive Director or Administrative Authority may rescind the action, may take new action of the same or different nature, or may let the action stand.

## Dismissal

### *Policy:*

- I. OPDS is authorized to dismiss an OPDS employee for actions or omissions as provided by law or OPDS Personnel Policies and Procedures or which interfere with the accomplishment of the mission, goals or objectives of OPDS.<sup>1</sup>
- II. OPDS shall maintain written procedures governing dismissal of OPDS employees which are consistent with this Policy.
- III. The Executive Director or the Administrative Authority of OPDS may, at their discretion, provide an opportunity for an employee to correct problems pursuant to the OPDS Employee Discipline Policy and Procedures before dismissal action is taken, unless the conduct or unfitness of the employee warrants dismissal and the employee knew or should have known that dismissal would be logical under the circumstances.
- IV. When dismissal is contemplated, the employee shall be given an opportunity to be heard in a pre-dismissal meeting.
  - A. OPDS shall provide the employee with written notice of possible dismissal. Notice shall state the charges and supporting facts. It shall include the date, time and purpose of the proceeding, right to refute charges, consequences of failure to appear at the meeting, and notice of right to be represented.
  - B. Pending determination of appropriate action, the employee may be authorized to continue a normal or alternative work assignment, continue in the current employment status, be placed in an administrative assignment to work from home, or be placed on administrative leave with pay.
- V. Appropriate action shall be determined within any time periods noted in this Policy and the accompanying Procedures.
- VI. A notice of dismissal action shall be in writing, sent by certified mail or hand-delivered to the employee, and include: action being taken, statutory grounds, if any, background, supporting facts, conclusion, and notice of appeal process.
- VII. Failure of OPDS, the Executive Director or the Administrative Authority to comply with one or more provisions of this Policy or the accompanying Procedures in taking any action against an employee shall not invalidate the action unless the employee is deprived of a constitutionally protected right and there is no possibility of correcting or reversing the deprivation of the employee's constitutionally protected right. When the potential deprivation of the employee's rights is brought to the attention of OPDS,

---

<sup>1</sup> OPDS's mission, goals and objectives are set forth in ORS 151.211 to 151.219. See Appendix A attached hereto.

the Executive Director or the Administrative Authority may rescind the action, may take new action of the same or different nature, or may let the action taken stand.

***Procedures:***

1. When dismissal is contemplated, the Executive Director or the Administrative Authority shall deliver to the employee a written notice indicating that dismissal is being considered. The notice shall:
  - A. state the grounds, provide relevant background facts, and state supporting facts to the employee, including such facts that are necessary to apprise the employee of the nature of the charges;
  - B. indicate the time, date, and place for the pre-dismissal meeting which would allow the employee an opportunity to refute the charges or present mitigating circumstances to the Executive Director or the Administrative Authority;
  - C. provide the consequences of failure to appear at the pre-dismissal meeting; and
  - D. state that the employee may be represented during the pre-dismissal proceedings.
2. The date of the pre-dismissal meeting shall not be sooner than eight (8) calendar days and not later than fifteen (15) calendar days following the postmark date or date of personal delivery of the notice to the employee. The parties may mutually waive the timelines established for the pre-dismissal meeting.
3. Upon reasonable advance request by the employee or the employee's representative, the Executive Director or the Administrative Authority may reschedule the date and time of the pre-dismissal meeting.
4. Pending the completion of the pre-dismissal process, the employee may be:
  - A. authorized to continue the normal or alternative work assignment;
  - B. continued in the current employment status;
  - C. placed in an administrative assignment to work from home; or
  - D. placed on administrative assignment with pay.
5. The Executive Director or the Administrative Authority shall conduct the pre-dismissal meeting. At the meeting, the Executive Director or the Administrative Authority shall:
  - A. verify that the employee has read and understands the pre-dismissal notice; and

- B. inform the employee of his/her right to refute the charges and present mitigating circumstances and information, and provide the employee with the opportunity to do so.
6. The pre-dismissal meeting is not a formal hearing proceeding and does not include rights of direct examination or cross-examination of witnesses.
  7. If the employee fails to appear at the pre-dismissal meeting or offer any refutation of the charges or present mitigating circumstances or information, in writing or otherwise, a decision shall be made without input from the employee. The failure of the employee to appear shall not be construed as an admission or a denial of any charges and shall have no bearing on any other rights, including post-suspension and post-termination remedies, which may be available to the employee.
  8. If new facts are discovered during the pre-dismissal process:
    - A. The Executive Director or the Administrative Authority may send a supplemental notice to the employee incorporating the new facts as an additional basis for discipline and give the employee an opportunity to refute the new charges if the new facts are unfavorable to the employee;
    - B. The Executive Director or the Administrative Authority may disregard the new facts and proceed with the original action based on the original charges if the new facts are unfavorable to the employee, or if, in the judgment of the Executive Director or the Administrative Authority, the remaining facts justify dismissal; or
    - C. A portion of the charges may be withdrawn; however, no withdrawal by OPDS of any portion of the charges supporting a dismissal or other disciplinary action shall require OPDS to rescind the action or take new action.
  9. The Executive Director or the Administrative Authority shall determine the appropriate action within twenty-one (21) calendar days after completion of the pre-dismissal meeting. The Executive Director or the Administrative Authority may choose to impose other discipline as outlined in the OPDS Discipline Policy, in lieu of dismissal.
  10. The Executive Director or the Administrative Authority shall notify the employee of dismissal or alternative disciplinary action in writing. The written notice shall contain:
    - A. The action being taken;
    - B. The date on which the action takes effect, which must be on or after the date of delivery of the written notice;

- C. The grounds for the action as set forth in the OPDS Employee Dismissal Policy and these Procedures;
  - D. Relevant Background: Any pertinent information such as length of service, classification, training, statements in position description, written policies and rules, descriptions of long-standing practices, and statement from performance evaluations that are relevant and apply to the issue; specific performance standards; prior advisory, corrective, or disciplinary actions; and any other data or information which would have reasonably made the employee aware of the conduct, performance, or behavior to be expected;
  - E. Supporting Facts: The dates, times, places and other facts known to OPDS sufficient to apprise the employee of acts, omissions, and conditions being charged;
  - F. Conclusion: A statement as to why the employee's conduct, performance, or behavior violates applicable law or OPDS Personnel Policies and Procedures or interferes with the accomplishment of OPDS's mission, goals and objectives. For an employee subject to alternative disciplinary action, the statement should inform the employee of the relative seriousness of the conduct, performance, or behavior as viewed by the supervisor, and advise the employee that future conduct, performance, or behavior of a similar nature will result in more severe discipline; and
  - G. Notice of appeal: A statement that the action taken may be appealed according to the appeal process described in Procedure 12, below.
11. The written notice of dismissal or alternative disciplinary action shall be hand delivered to the employee or mailed by certified or registered mail to the employee's last known address. The effective date shall be the date on which the hand delivery was accomplished or three (3) calendar days after the postmark date on the letter.
12. The employee may appeal the dismissal or other disciplinary action as follows:
- A. The appeal shall be in writing and mailed or hand-delivered to the Administrative Authority not later than fifteen (15) calendar days after the effective date of the personnel action in question.
  - B. The Administrative Authority shall affirm or deny the appeal in writing not later than fifteen (15) calendar days after receipt of the appeal. The failure of the Administrative Authority to respond within fifteen (15) days after receipt of the appeal shall constitute a denial of the appeal, unless the parties mutually agree in writing to extend the time limit.
  - C. If the Administrative Authority denies the appeal, the employee may appeal in writing to the Executive Director not later than (i) seven (7) days after the Administrative Authority's written decision was received or (ii) in the absence of a written decision by the Administrative Authority, seven (7) days after the

date that the appeal was deemed denied. The appeal shall be confined to the subject matter contained the original appeal to the Administrative Authority.

- D. The Executive Director shall rule in writing not later than fifteen (15) calendar days after receipt of the appeal. Failure of the Executive Director to respond within fifteen (15) days after receipt of the appeal shall constitute a denial of the appeal, unless the parties mutually agree in writing to extend the time limit.
13. Failure of OPDS, the Executive Director or the Administrative Authority to comply with one or more provisions of these Procedures in taking any action against an employee shall not invalidate the action unless the employee is deprived of a constitutionally protected right and there is no possibility of correcting or reversing the deprivation of the employee's constitutionally protected right. When the potential deprivation of the employee's rights is brought to the attention of OPDS, the Executive Director or the Administrative Authority may rescind the action, may take new action of the same or different nature, or may let the action taken stand.

## Vacation Leave

### *Policy:*

- I. In order to promote the efficiency and effectiveness of OPDS employees, ensure the health and well-being of employees and their families, and recruit and retain valued employees, OPDS provides vacation leave commensurate with that of other state agencies.
- II. In light of the foregoing benefits of vacation leave, OPDS encourages its employees to use vacation leave on an annual basis.

### *Procedures:*

#### 1. Monthly Accrual

- A. Full-time Employees. Full-time employees shall accrue vacation leave at a rate based on each full calendar month employed in accordance with the following schedule, which is based on the employee's recognized service date.

<u>Years of Service</u>	<u>Hours Per Year</u>	<u>Hours Per Month</u>
Through 5th year	120 (12 days)	10.00
After 5th year through 10th year	144 (18 days)	12.00
After 10th year through 15th year	168 (21 days)	14.00
After 15th year through 20th year	192 (24 days)	16.00
After 20th year	216 (27 days)	18.00

- B. Part-time Employees. Part-time employees shall earn vacation leave on a prorated basis.
- C. Trial Service Employees. During the trial service period, employees are eligible to accrue vacation leave.
- D. Crediting of Vacation. Vacation leave shall be credited to an employee on the first day of the calendar month following the calendar month in which it was earned.

E. Partial Month Accrual. Vacation leave accrual for an employee working less than a full calendar month in a pay period due to hire, termination, or leave without pay shall be computed on a prorated basis using the number of available work hours, based on the employee's schedule, in that month.

2. Maximum Accumulation. An employee may accrue a maximum of 350 hours of vacation leave. Employees who accrue 350 hours must take vacation or forfeit payment for or use of additional hours earned that would cause the employee's vacation balance to exceed 350 hours.
3. Scheduling of Vacations. Unless otherwise protected by law, rule or OPDS policy, the time when an employee may take vacation leave shall be subject to the approval of the administrative authority with due regard to the employee and the needs of the OPDS.

Vacation leave accrued during the initial trial service period may not be used until the completion of the trial service period. Use of vacation leave during an extension of the trial service period may be granted by the administrative authority.

4. Illness During Vacation. When an employee is on vacation and circumstances arise that would qualify the employee to use accrued sick leave, the employee may charge that time in accordance with PDPR 15.05.
5. Holiday During Vacation. If a holiday occurs while an employee is on vacation leave, the holiday shall not be deducted from the employee's accrued vacation leave.
6. Effect of Movement Between Divisions. When an employee transfers, promotes, or demotes, from one division to another within the OPDS, all of the employee's accrued vacation leave shall also be transferred.
7. Employees Hired from Another State Agency. When an employee from another State of Oregon agency is employed by the OPDS without a break in service a maximum of 80 hours of accrued vacation leave may be transferred, at the discretion of the administrative authority, to the OPDS. The employee's recognized service date shall be used to determine the monthly vacation accrual rate under PDPR 14.01.
8. Vacation Pay Upon Termination. Unless an employee requests to transfer vacation to another State of Oregon agency, an employee (or, in the case of death, an employee's beneficiary or estate) shall be compensated for a maximum of 250 hours of accrued and unused vacation leave. The rate of pay for vacation shall be the employee's pay rate at time of termination, exclusive of other types of compensation such as differentials.
9. Donation of Vacation Leave For Sick Leave Purposes. Vacation leave may be donated to another OPDS employee as follows:

- A. Any OPDS employee may voluntarily donate accrued vacation leave in full-hour increments to another nontemporary OPDS employee provided the employee to whom the leave is to be donated:
- (a) is absent due to their own FMLA and/or OFLA qualifying reason or to care for a qualifying family member (as defined by FMLA and/or OFLA) or domestic partner (as defined by PEBB eligibility rules) with a condition that qualifies as a serious health condition under the FMLA and/or OFLA,
  - (b) has exhausted all accrued paid leave,
  - (c) is not receiving workers' compensation or disability payments,
  - (d) is not the subject of pending disciplinary action, and
  - (e) has the approval of their administrative authority to receive donated leave.
- B. Conversion of Donated Leave. Donated vacation leave shall be converted to the receiving employee's sick leave account by multiplying the amount of leave donated by the donating employee's hourly rate of pay (exclusive of differentials) and by then dividing this amount by the receiving employee's hourly rate of pay (exclusive of differentials).
- C. Maximum Donated Leave That May Be Received. The maximum donated leave an employee may receive per incident is 480 hours.
- D. Unused Donated Leave. Unused donated leave shall be retained by the receiving employee.

## **Sick Leave**

### ***Policy:***

- I. In order to promote the health and well-being of OPDS employees and their families, OPDS provides sick leave commensurate with that of other state agencies.
- II. For the same reasons, OPDS is committed to complying with all applicable state and federal laws such as FMLA, OFLA and Workers' Compensation laws.

### ***Procedures:***

1. Monthly Accrual.
  - A. Full-time Employees. Full-time employees shall accrue sick leave at the rate of eight hours for each full calendar month employed.
  - B. Part-time Employees. Part-time employees shall earn sick leave on a prorated basis.
  - C. Trial Service Employees. During the trial service period, employees are eligible to accrue and use sick leave.
  - D. Crediting Sick Leave. Sick leave shall be credited to an employee on the first day of the calendar month following the calendar month in which the leave was earned.
  - E. Partial Month Accrual. Sick leave accrual for an employee working less than a full calendar month in a pay period due to hire, termination, or leave without pay shall be computed on a prorated basis using the number of available work hours, based on the employee's schedule, in that month.
2. Maximum Accumulation. Sick leave shall accrue without limitation.
3. Notification.
  - A. Leave Not Covered by Family Leave Laws. It is the employee's responsibility to notify the immediate supervisor of the need to use sick leave. If the employee's absence is unanticipated, the employee shall personally contact the immediate supervisor at the beginning of each missed day's regularly scheduled work time unless other arrangements have been approved by the supervisor. If the employee's absence is prescheduled, the employee shall notify the supervisor of the need for leave as far in advance as possible.

- B. Leave Covered by Family Leave Laws. It is the employee's responsibility to notify the immediate supervisor of the need to use sick leave. If the employee's absence is unanticipated, the employee or the employee's personal representative shall contact the immediate supervisor at the beginning of each missed day's regularly scheduled work time unless other arrangements have been approved by the supervisor. In emergency situations, the employee or the employee's representative shall contact the supervisor as soon as possible during the 24-hour period immediately following the employee's scheduled work time. If the employee's absence is prescheduled, the employee shall notify the supervisor of the need for leave as far in advance as possible.
4. Holiday During Sick Leave. If a holiday occurs while an employee is on sick leave, the holiday shall not be deducted from the employee's accrued sick leave.
5. Accrued Sick Leave.
- A. Personal. An employee who is absent because of his or her own physical illness or injury, disability resulting from pregnancy or childbirth, mental illness, or medical or dental appointment, must use accrued sick leave for the absence. An employee who is receiving income from a disability benefit plan, however, may opt to use leave without pay instead of sick leave while receiving such disability income. An employee opting to use leave without pay must provide evidence of such disability income to the supervisor.
- B. Family. An employee may request, and must be allowed to use, accrued sick leave to care for a qualified family member (as defined by the FMLA and/or OFLA), a domestic partner (as defined by PEBB eligibility rules), or a child or parent of that domestic partner only for the following reasons:
- (i) to care for that person when that person's condition meets the definition of serious health condition under the FMLA and/or OFLA;
  - (ii) to care for that child when that child's condition qualifies as sick child leave under OFLA;
  - (iii) to accompany that person to a medical or dental appointment; or
  - (iv) to care for that person when that person's condition does not meet the definition of serious health condition under the FMLA and/or OFLA, but that person is unable to care for him/herself. In such cases, the employee is responsible to make alternative care arrangements within a reasonable time.

At the discretion of the administrative authority, an employee may be allowed to use accrued sick leave to care for other relatives, in-laws, or other persons residing in the same household. When determining whether to grant the use of sick leave and how much sick leave to grant, the administrative authority shall consider the significance of the

relationship, the severity of the illness/injury, and the needs of the OPDS.

6. Use of Other Leave in Lieu of Sick Leave or When Sick Leave is Exhausted. Other leave may be used in lieu of sick leave, or when sick leave is exhausted, as follows:

A. Personal

- (i) Absence Qualifying Under FMLA and/or OFLA During FMLA and/or OFLA Leave Entitlement

An employee who is absent because of their own FMLA and/or OFLA qualifying condition, and who has exhausted accrued sick leave, may request and must be allowed to use, any other form of accrued paid leave or leave without pay during the FMLA and/or OFLA leave entitlement. If the employee uses accrued compensatory time, the amount of compensatory time taken shall not be deducted from the employee's family leave entitlement(s). (Also see PDPR 16.05(1).)

- (ii) Absence Not Qualifying Under FMLA and/or OFLA or Absence After FMLA and/or OFLA Leave Entitlement

An employee who has exhausted their accrued sick leave and is absent after exhausting their FMLA and/or OFLA leave entitlement or is absent because of their own FMLA and/or OFLA non-qualifying physical illness or injury, disability resulting from pregnancy or childbirth, mental illness, or medical or dental appointment may request use of any other form of accrued paid leave or leave without pay for their absence. The use of such leave is subject to prior supervisory approval. Normally, if granted, leave without pay will not be granted until all other accrued paid leave is exhausted. (Also see PDPR 16.05(1).)

B. Family

- (i) An employee may request, and must be allowed to use, any form of accrued paid leave or leave without pay prior to, or immediately after, exhausting accrued sick leave when:

(a) the employee will care for a qualified family member (as defined by the FMLA and/or OFLA), a domestic partner (as defined by PEBB eligibility rule), or a child or parent of that domestic partner when:

- (1) that person's condition meets the definition of serious health condition under the FMLA and/or OFLA;

- (2) that child's condition qualifies as sick child leave under OFLA;
  - (3) the employee must accompany that person to a medical or dental appointment; or
  - (4) that person's condition does not meet the definition of serious health condition under the FMLA and/or OFLA, but that person is unable to care for him or herself. In such cases, the employee is responsible to make alternative care arrangements within a reasonable time; and
- (b) the employee has not exhausted their FMLA and/or OFLA leave entitlement or has not exceeded the leave entitlement that would be available to the employee if the absence and/or relationship otherwise qualified under the FMLA and/or OFLA.
- (ii) If the employee uses accrued compensatory time to care for a qualified family member (as defined by the FMLA and/or OFLA) when that person's condition qualifies as a serious health condition under the FMLA and/or OFLA, the amount of compensatory time taken shall not be deducted from the employee's family leave entitlement(s). (Also see PDPR 16.05(1).)
  - (iii) An employee may request to use other accrued paid leave or leave without pay to care for other relatives, in-laws, or other persons residing in the same household. The use of such leave is subject to prior approval of the administrative authority. Normally leave without pay will not be granted until all other accrued paid leave is exhausted. (Also see PDPR 16.05(1).)
7. Proof Required. Unless otherwise provided in state or federal law (e.g. FMLA, OFLA, ADA, Workers' Compensation), the Administrative Authority may require the employee to submit substantiating evidence for the use of sick leave. This evidence includes, but is not limited to, a qualified health care provider's certificate. Where in the opinion of the Administrative Authority circumstances warrant and applicable law permits, OPDS may require a second or third certificate or medical opinion from qualified health care providers. If the Administrative Authority does not find the evidence adequate, the administrative authority may disapprove the request for sick leave.
8. Workers' Compensation Application. The requirements of Oregon's Workers' Compensation laws apply as follows:
- A. Reporting Requirements.

- (i) An employee who is injured on the job or becomes ill as a result of the job shall immediately report the occurrence to the Administrative Authority.
- (ii) The Administrative Authority shall respond to this report in accordance with the relevant provisions of the Workers' Compensation laws.

B. Use of Leave.

An employee who is absent for more than three consecutive work days because of a job-incurred injury or illness may charge the absence to leave without pay or may make prorated charges to accrued sick leave. If the employee has no accrued sick leave or exhausts accrued sick leave, the employee may make prorated charges to accrued vacation, compensatory time, or personal leave. An employee who takes leave without pay receives no compensation other than the time loss payments authorized by the workers' compensation insurance carrier.

An employee who is absent for three or fewer consecutive work days because of a job-incurred injury or illness shall charge the absence in accordance with PDPR 15.05 and 15.06.

An employee who is required by SAIF to attend a medical exam in relation to the employee's workers' compensation claim shall charge the absence to leave without pay and may submit a claim to SAIF for earnings lost while attending the required medical exam.

C. Prorated Leave Charges.

An employee who is absent for more than three consecutive work days because of a job-incurred injury or illness for more than three consecutive work days and who chooses to make prorated charges to accrued leave, shall do so by charging for every hour absent, 1/3 of one hour to accrued leave and 2/3 of one hour to leave without pay. The amount of time charged to leave without pay shall represent the amount of time loss compensation received.

- 9. Effect of Reemployment. A former employee of a State of Oregon agency who is hired into a nontemporary OPDS position within two years from the employee's date of separation shall have previously accrued and unused sick leave restored.
- 10. Effect of Movement Between Divisions. When an employee transfers, promotes, or demotes from one division to another within the OPDS, all of the employee's accrued sick leave shall be transferred.

11. **Employees Hired From Another State Agency.** An employee from another State of Oregon agency who is hired by the OPDS within two years of separation from that agency shall have previously accrued unusual sick leave transferred.
12. **Sick Leave Upon Termination.** There shall be no compensation for unused sick leave upon termination of employment. The OPDS will report unused sick leave to the Public Employees Retirement System. Depending on the retirement method used to calculate the employee's monthly retirement benefit, the value of one-half the unused sick leave may be used in computing benefits to be received by the employee upon retirement.
13. **Use of Donated Vacation Leave for Sick Leave Purposes.** In accordance with the provisions of PDPR 14.10, an employee may receive paid sick leave which has been converted from vacation leave donated by other employees. An employee receiving such donated leave may use such leave only in accordance with PDPR 15.05. Unused donated leave shall be retained as sick leave by the receiving employee.

## Other Types of Leave

### *Policy:*

- I. To ensure that its employees comply with their civic duties and commitments and advance important personal and profession goals, OPDS provides other types of leave as set forth below.
- II. For the same reasons, OPDS is committed to complying with all applicable laws requiring employers to provide leave, such as military leave and jury duty.

### *Procedures:*

1. Jury/Witness Leave. While on jury duty or while appearing as a subpoenaed witness (other than as a party in the action), an employee will receive full pay provided the employee submits witness or juryfees to the OPDS. The employee shall forward the cash fees or endorse the instrument by which payment is made and forward it to the OPDS Business Services Manager. Employees may retain any mileage fees paid to them.
2. Military Leave.
  - A. Eligibility.

To be eligible for military leave, an employee must:

    - (i) be inducted into the U.S. Armed Forces under the Military Service Act;  
or
    - (ii) enlist in the U.S. Armed Forces; or
    - (iii) be a member of a reserve component of the U.S. Armed Forces.
  - B. Military Leave With Pay.
    - (i) Eligibility for Military Leave With Pay. To be eligible for military leave with pay, an employee must have been employed, including temporary appointments, by the State of Oregon or by any county, municipality, or other political subdivision of the state for the six-month period immediately preceding the employee's request for leave.
    - (ii) Annual Active Duty. An employee who requests military leave for the purpose of discharging an obligation of annual active duty for military training ("summer camp") shall be placed on military leave with pay and shall be paid for the first 11 work days of such leave. If the annual active duty (including time spent reporting to and returning from such duty) exceeds 11 work days in any one federal fiscal year (October 1 through September 30), the employee shall be placed on military leave without pay for the amount of time in excess of 11 work days.

### C. Military Leave Without Pay.

- (i) An employee who does not meet the requirements listed in PDPR 16.02(2)(a) or who requests military leave for the purpose of attending active duty basic military training, annual active duty in excess of 11 work days, or any other voluntary or involuntary special military training not covered in PDPR 16.02(2)(b) shall be granted military leave without pay.
- (ii) An employee shall be entitled to military leave without pay during a period of service with the U.S. Armed Forces not exceeding four years. Military leave without pay shall be extended beyond four years under the following circumstances:
  - (a) If a period of military duty is extended at the request of or for the convenience of the federal government, the period of leave shall be extended up to one additional year for a total period of leave not exceeding five years.
  - (b) If a period of additional military duty is imposed by law or results from the inability of an employee to obtain orders relieving the employee from active duty, the period of leave shall be extended for the duration of such additional military leave.

### D. Application for Military Leave.

- (i) An employee shall submit to the administrative authority, a written request for military leave with or without pay as early as possible.
- (ii) An employee may elect to use accrued vacation leave prior to or in lieu of military leave without pay.
- (iii) An administrative authority may request a copy of the employee's military orders upon return from military leave.

### E. Return From Military Leave.

- (i) An employee who is a member of a reserve component and is on military leave to perform weekend or summer camp active duty for training or inactive duty training (drills) shall report for work at the beginning of the employee's next regularly scheduled work day after completion of such training (including necessary travel time from the place of training to the place of employment) or the end of hospitalization caused by military duty.

- (ii) An employee who is a member of a reserve component and who is on military leave to perform a service of initial active duty for training (usually for six months duration) must notify the administrative authority of the employee's intent to return to work within 31 days after release from such training or the end of hospitalization caused by military duty. Provided no layoff has occurred that would have resulted in layoff of the employee, the employee shall be returned to work within two working days after receipt of the employee's notification of intent.
- (iii) Within 90 days after satisfactory completion of a tour of full active military duty or the end of hospitalization caused by such duty, the employee shall notify the administrative authority of the employee's intent to return to work. Provided no layoff has occurred that would have resulted in layoff of the employee, the employee shall be returned to work within two working days after receipt of the employee's notification of intent.
- (iv) Failure to return to work within the time periods specified in PDPR 16.02(5)(a), (b), and (c) shall result in termination of military leave, and the employee shall be considered to have resigned.
- (v) If, due to disability resulting from military service, an employee is not qualified to perform the duties of the position the employee held in the OPDS before going on leave but is qualified to perform the duties of another position in the Office, the employee shall be returned from leave to a position for which the employee is qualified and that has a level of pay that is closest to but does not exceed the maximum step of the employee's former class.

F. Effect of Paid or Unpaid Military Leave on Employment.

- (i) An employee who has not completed the required initial or promotional trial service period at the time of military leave shall, upon returning from leave, be required to serve the remainder of such period.
- (ii) Military leave will be considered as time worked for purposes of computing the employee's recognized service date and length of continuous service with the OPDS.
- (iii) Upon return from military leave, an employee shall be placed at the rate of pay the employee would have been receiving had the employee been working. This rate of pay includes across the board increases and any other salary increase for which the employee would have been eligible.

- (iv) If a layoff occurs during the time an employee is on military leave and the employee has insufficient service credits to be retained in the employee's classification, the employee shall, upon return from leave, be given the opportunity to exercise any displacement rights the employee would have had.

3. Bereavement Leave.

- A. At the request of the employee, an administrative authority shall grant up to 40 hours paid bereavement leave per occurrence because of the death of a qualifying family member as defined by FMLA and/or OFLA, a domestic partner as defined by PEBB eligibility rules, or a child or parent of the employee's domestic partner (as defined by PEBB eligibility rules). At the discretion of the administrative authority, up to 24 hours of paid bereavement leave per occurrence may be granted because of death(s) of any other relative, in-law, or person residing in the same household as the employee. In determining the amount of time to grant, the administrative authority shall consider the significance of the relationship and need for travel time.
- B. With the prior approval of the administrative authority, accrued leave may be used to cover time spent beyond bereavement leave. Accrued sick leave may only be used in accordance with PDPR 15.
- C. Bereavement leave shall be prorated for part-time employees.

4. Administrative Leave.

- A. At the discretion of the administrative authority, employees ineligible to receive overtime compensation under the FLSA may be granted up to 40 hours administrative leave per calendar year. Use of such leave shall be scheduled in advance with the employee's supervisor.
- B. Eligible part-time employees may be granted administrative leave on a prorated basis.
- C. Administrative leave may not be accrued, converted to vacation or sick leave, or converted to cash remuneration.
- D. Administrative leave not used by December 31 of the year in which granted shall be forfeited.
- E. There is no eligibility waiting period for administrative leave.

5. Leave Without Pay.

A. Conditions:

- (i) An employee desiring a leave of absence without pay must submit a written request for that leave. The request must specify the duration of the leave and the purpose of the leave.
- (ii) Except as otherwise provided by law, any request for leave without pay must be submitted in advance of the leave. Except as provided by law, approval or denial of the request is at the discretion of the administrative authority.
- (iii) Normally, leave without pay will not be granted until all other appropriate accrued paid leave has been exhausted. (Also see PDPR 15 for absences that may qualify as sick leave.)
- (iv) Employees cannot alternate the use of accrued leave and leave without pay; that is, leave without pay, if used, must be taken at the end of the leave period.

B. Effect On Leave Accrual. Vacation and sick leave accrual for an employee who worked less than a full calendar month in a pay period because of leave without pay shall be computed on a prorated basis using the number of available work hours, based on the employee's schedule, in that month.

C. Effect on Recognized Service Date. Leave without pay in excess of 15 consecutive calendar days shall result in a permanent adjustment of the employee's recognized service date. An employee's recognized service date shall be adjusted by adding to it the number of calendar days absent without pay, thereby making the recognized service date later than it would have been if leave without pay had not occurred.

D. Outside Employment. An administrative authority, prior to granting leave without pay to an employee who is accepting employment outside the OPDS, must obtain advance, written approval from the Executive Director.

E. Effect on Trial Service Period. Leave without pay in excess of 15 consecutive calendar days shall not be considered continuous employment when determining the completion of the initial or promotional trial service period. An employee's trial service period shall be adjusted by adding to it the number of calendar days absent without pay, thereby making the ending date of the trial service period later than it would have been if leave without pay had not occurred.

6. Personal Leave.

- A. Full-time nontemporary employees who have completed six months of employment since initial hire or rehire shall be granted 24 hours of personal leave on July 1 of each year. Use of such leave shall be subject to prior approval by the employee's administrative authority.
  - B. Part-time employees shall be granted personal leave on a pro-rated basis.
  - C. Personal leave may not be accrued, converted to vacation or sick leave, or converted to cash remuneration.
  - D. Personal leave not used by June 30 of each year shall be forfeited.
  - E. When an employee from another state of Oregon agency is employed by the OPDS and the other agency grants personal leave for a fiscal year, the personal leave may be transferred.
  - F. When an employee from another state of Oregon agency is employed by the OPDS and the other agency grants personal leave for a calendar year, the personal leave may be transferred. Personal leave granted by the OPDS on July 1 of the calendar year in which the employee was hired will be prorated so the employee receives no more than 12 hours personal leave for the 6-month periods January through June or July through December.
7. Leaves During Temporary Interruption of Employment.
- A. Planned Temporary Interruption of Employment.
    - (i) A temporary interruption of employment, not exceeding 15 continuous calendar days, due to lack of work, budget deficit, or other unusual or unexpected circumstances, shall not be considered as a layoff pursuant to PDPR 11 if, at the termination of the situation that created the need for the interruption, all affected employees are returned to work.
    - (ii) A temporary interruption due to lack of work or other unusual or unexpected circumstances may, at the employee's option, be charged to accrued paid leave or leave without pay. Since the FLSA prohibits deductions of less than one full work week from a FLSA-exempt employee's salary, FLSA-exempt employees will not be required to charge absences of less than one full work week to accrued paid leave or leave without pay. Accrued sick leave may only be used in accordance with PDPR 15.

- (iii) A temporary interruption of employment due to budget deficit shall be charged to leave without pay by both FLSA-exempt and non-exempt employees.
- B. Unplanned Temporary Interruption of Employment Due to Hazardous Environmental Condition or Inoperable Facility.
- (i) Hazardous Environmental Condition. Hazardous environmental condition includes, but is not limited to, fire, flood, earthquake, pollution, or inclement weather.
  - (ii) Inoperable Facility. An inoperable facility is one where essential services are lost to fire, mechanical failure, accident, weather, or other causes.
  - (iii) Official Closure Due to Hazardous Environmental Condition or Inoperable Facility. Official closure is defined as the employer-initiated closing of:
    - (a) all operations and the cessation of public access to a facility and all services when no employee is allowed to remain at work; or
    - (b) most, but not all, operations and public access to services in that location or another is continued on a limited basis when a minimum number of employees, as determined by the administrative authority, are required to remain at work.
  - (iv) Declaration of Official Closure. The Executive Director shall be responsible for declaring an official closure or temporary interruption of employment.
  - (v) Notification of Official Closure. When an official closure is declared prior to the start of the workday, administrative authorities shall make a reasonable effort to notify employees in a timely manner. In such cases, the administrative authority will use announcements on local radio or television stations, recorded messages, or individual telephone contacts to notify employees of the official closure. The final responsibility for finding out whether the operation is open or closed lies with each employee.
  - (v) Staffing During Official Closure. When a minimum number of employees are required to remain at work, the administrative authority shall first determine whether FLSA-exempt employees are available to remain. If no FLSA-exempt employee is available or if an insufficient number of FLSA-exempt employees are available to remain at work, then a necessary number of FLSA non-exempt employees may be required to remain at work. An

employee shall not be required to remain at work if such a requirement would pose a threat to the employee's safety or the safety of a family member residing in the employee's household.

(vi) Charging of Time Off Due to Official Closure.

(a) Official Closures of More Than One Hour.

Employees shall be granted leave with pay not to exceed 16 hours in a calendar year. This leave may be deducted from the amount of paid leave taken by any employee on paid leave at the time of the closure(s) but shall not be useable by any employee on leave without pay during the official closure. When a hazardous environmental condition or inoperable facility results in official closure of the work site in excess of a total of 16 hours in a calendar year, FLSA non-exempt employees will have the option of charging the time in excess of 16 hours to accrued paid leave or leave without pay. Since the FLSA prohibits deductions of less than one full work week from an FLSA-exempt employee's salary, FLSA-exempt employees will not be required to charge to accrued paid leave or leave without pay the time that is in excess of 16 hours, but less than one full work week. Sick leave may only be used in accordance with PDPR 15.

(b) Official Closures of One Hour or Less.

Official closure of the work site of one hour or less shall be considered as regular hours worked.

(vii) Recording of Time Worked During Official Closure.

(a) FLSA-exempt employees shall record time worked as regular hours.

(b) FLSA non-exempt employees who remain at work as required by the administrative authority during an official closure shall record time worked as regular hours and shall be provided compensatory time off at the rate of time and one half for each hour worked during the official closure

(viii) Absences Due to A Hazardous Environmental Condition When An Official Closure Has Not Been Declared.

When a hazardous environmental condition does not result in official closure of the work site, but prevents individual employees from reporting to work or necessitates their leaving

work early, employees will have the option of charging their absence to accrued paid leave or leave without pay. Sick leave may only be used in accordance with PDPR 15.

8. Pre-retirement Leave.
  - A. Purpose. Pre-retirement leave shall be used to prepare for retirement or to investigate and attend retirement programs or retirement counseling.
  - B. Eligibility. A full-time nontemporary employee with five or more years employment with a PERS-covered employer shall be granted up to 28 hours of paid pre-retirement leave. Such 28 hours of leave is the maximum amount of paid pre-retirement leave an employee may take during the entirety of his/her employment with the State of Oregon. Part-time employees shall be granted pre-retirement leave on a prorated basis.
  - C. Scheduling. The scheduling of pre-retirement leave is subject to prior approval of the Administrative Authority. Such leave may not be converted to vacation, sick or personal leave, or to cash remuneration. Pre-retirement leave not used before retirement shall be forfeited.
  - D. Registration/Tuition Fees. Provided sufficient funds are available, the Administrative Authority may authorize reimbursement of an employee's tuition/registration fees at a pre-retirement seminar or workshop sponsored by the PERS. An employee may receive no more than one such reimbursement during the entirety of his/her employment with the OPDS.
9. Interview Leave. An employee shall be granted time off with pay to interview for other jobs within the OPDS or with other State of Oregon agencies. Time off shall be granted for the time spent during the employee's regularly scheduled workday and work hours in the interview.
10. Service Award Leave.
  - A. Eligibility. All nontemporary employees who have completed at least five years of nontemporary service with the OPDS are eligible.
  - B. Calculation. Only nontemporary continuous service with the OPDS shall count toward service award eligibility. For the purposes of this

section, continuous service with the former State Public Defender in a nontemporary position shall count towards an employee's service eligibility if the employee was employed by the State Public Defender on October 1, 2001. For the purposes of this section, continuous service with the Oregon Judicial Department in a nontemporary position shall count towards an employee's service eligibility if the employee was in a position that was transferred to the OPDS on July 1, 2003. Time worked for the OPDS before and after a break in service will be considered in determining eligibility. Service award leave is granted in one-time intervals to full-time employees in accordance with the following schedule:

Years Employed	Service Award Leave Granted
5	4 hours
10	8 hours
15	12 hours
20	16 hours
25	20 hours
30	24 hours
35	28 hours
40	32 hours
45	36 hours

Part-time employees shall be granted service award leave on a prorated basis.

C. Utilization. Service award leave must be scheduled in advance with the Administrative Authority and may be accrued. Service award leave shall not be converted to cash remuneration. Service award leave not used prior to termination shall be forfeited.

11. Family Leave. An employee may be absent for reasons that qualify under State and/or Federal family leave laws (OFLA and/or FMLA) in accordance with the OJD policy on family leave and these rules.

12. Red Cross Disaster Relief Services Leave. The Administrative Authority may grant leave for relief services in Oregon. Such leave may not exceed 15 workdays in any 12-month period. To qualify for such leave, the employee must be a certified disaster services volunteer of the American Red Cross and the disaster must be designated at Level II or above by the American Red Cross.

## Holidays

### *Policy:*

I. OPDS shall observe the following holidays:

New Year's Day on January 1;

Martin Luther King, Jr.'s Birthday on the third Monday in January;

President's Day on the third Monday in February;

Memorial Day on the last Monday in May;

Independence Day on July 4;

Labor Day on the first Monday in September;

Veterans Day on November 11;

Thanksgiving Day on the fourth Thursday in November; and

Christmas Day on December 25.

II. In addition to the foregoing holidays, OPDS shall observe as a holiday every day appointed as a holiday in accordance with ORS 187.020

III. If a holiday falls on Saturday, it shall be observed on the preceding Friday. If a holiday falls on Sunday, it shall be observed on the following Monday.

### *Procedures:*

1. Holiday Leave shall be granted as follows:

A. Full-time Employees. A full-time employee shall be granted eight hours of holiday leave for each holiday.

B. Part-time Employees. A part-time employee shall be granted holiday leave for each holiday based upon the same percentage or fraction of a month as the employee is normally scheduled to work.

C. Effect of Leave Without Pay. Exclusive of the holiday, an employee on unpaid leave for more than 32 consecutive work hours (prorated for part-time employees) shall not be granted the paid holiday if the holiday falls at the beginning, end, or during the period of leave without pay.

D. Employees Working an Irregular or Flexible Schedule. If an employee is on an irregular or flexible work schedule, the administrative authority may:

- (i) make appropriate schedule adjustments for the work week in which the holiday falls that result in a total of 40 hours work time and holiday leave (or, for a part-time employee, the normal number of weekly hours); or
- (ii) permit the employee to use paid leave or leave without pay to account for the scheduled hours in excess of the holiday leave. Sick leave may only be used in accordance with PDPR 15.

E. Employees Required to Work on a Holiday.

- (i) An employee, regardless of salary range, who is required by the Executive Director or the Administrative Authority to work on a holiday and whose shift commences on the holiday shall be entitled to compensatory time for the entire shift worked. In lieu of compensatory time, the administrative authority may grant payment in cash.
- (ii) If the holiday falls on a Saturday or Sunday and is observed on a Friday or Monday and an employee is required to work on both the actual holiday and the day of observance, the employee shall receive compensatory time for the entire shift worked on either the actual holiday or its day of observance by the OPDS. In lieu of compensatory time, the administrative authority may grant payment in cash.
- (iii) Compensatory time or cash payment shall be at the rate of time and one-half. The rate at which an employee is paid for working on a holiday shall not exceed the rate of time and one-half in addition to regular pay.

F. Effect of Appointment and Separation on Holiday Leave.

- (i) Appointment. All nontemporary employees appointed on a holiday observed on the first regularly scheduled work day of the month shall be paid for the holiday pursuant to the other provisions of this rule. No appointments shall be made effective on holidays observed on other than the first day of the month.
- (ii) Separation. An employee who separates from employment in a month including a holiday on the last regularly scheduled work day

of the month shall be paid for the holiday if the employee actually works on the work day immediately preceding the holiday and is otherwise eligible to receive holiday leave.

## Overtime

### *Policy:*

- I. An OPDS employee who is eligible for overtime compensation shall not work overtime without advance approval by the Executive Director or the Administrative Authority. The Executive Director or the Administrative Authority may require an employee to work overtime if the operations or mission of OPDS necessitate it.
- II. OPDS employees covered by the Fair Labor Standards Act (FLSA) as non-exempt employees are eligible for overtime compensation.
- III. OPDS shall determine the status under FLSA of each of its employees as either exempt or non-exempt from the Act, using the guidelines set forth in FLSA. OPDS shall keep accurate records of the status of its employees under FLSA and any overtime accrued by its non-exempt employees.

### *Procedures:*

1. All overtime<sup>2</sup> worked shall be recorded on an employee's time sheet or attendance record. Overtime work shall be compensated at the rate of one and one-half (1.5) the employee's current hourly rate of pay.
2. OPDS may elect to compensate an employee by cash payment or by compensatory time. A maximum of 240 hours compensatory time may be accrued. An employee who has accrued 240 hours compensatory time must receive cash payment for additional further overtime work.
3. Compensatory time may be requested by the employee or required by the Executive Director or the Administrative Authority. The use of compensatory time shall be scheduled in advance with the employee's supervisor. The supervisor shall grant an employee's request to use accrued compensatory time unless doing so would unduly disrupt OPDS's operations.
4. An employee shall be allowed to use accrued compensatory time for qualifying family leave purposes. The amount of compensatory time taken shall not be deducted from an employee's family leave entitlements under FMLA or OFLA.
5. An employee who resigns or whose employment is terminated shall be paid for accrued compensatory time at the average hourly rate received by the employee during the last three years of employment.

---

<sup>2</sup> "Overtime" means time worked in excess of 40 hours in a workweek.

## **Recruitment and Hiring**

### ***Policy:***

- I. OPDS's recruitment and hiring processes shall be fair, impartial and designed to ensure that all of its positions are filled by the most qualified job applicants available and by individuals well suited to perform the work required of those positions.
- II. Hiring for all vacant positions shall be based on merit as determined by a comparison of a job applicant's qualifications with the requirements and duties of the vacant position. All individuals selected to fill a vacant position at OPDS must meet the minimum qualifications for that position.
- III. OPDS shall establish procedures for the recruitment, screening, selection and hiring of job applicants and for the transfer and advancement of current OPDS employees in accordance with this Policy

### ***Procedures:***

#### **1. Methods of Recruitment for Vacant Positions.**

- A. OPDS may fill vacant positions through the following methods.
  - i. Competitive Recruitment Methods:
    - a. Open Competitive Recruitment. Any OPDS employee or member of the public may apply for the vacant position
    - b. Limited Recruitment. Only permanent OPDS employees may apply for the vacant position.
  - ii. Noncompetitive Recruitment Methods:
    - a. Transfer. Any OPDS employee may request a transfer, or be transferred, to a vacant position.
    - b. Voluntary Demotion. Any OPDS employee may request a voluntary demotion to a vacant position.
    - c. Involuntary Demotion. The Executive Director or the Administrative Authority may for disciplinary reasons demote an employee to a position with a lower salary range.
    - d. Reemployment.

- (1) A former OPDS employee may request to be reemployed in a position for which the employee is qualified with a salary range equal to or lower than the salary range for the position the employee last held. An OPDS employee may be reemployed only once within the one-year period following resignation, voluntary demotion, layoff, or downward reclassification. Reemployment shall be subject to the discretion of the Executive Director.
- (2) Reemployment following retirement. Pursuant to ORS 238.082, an OPDS employee who wishes to retire may request to be reemployed in a position for which the employee is qualified with a salary range equal to or lower than the salary range for the position the employee last held. An OPDS employee may be reemployed only once within the one-year period following retirement. Reemployment following retirement shall be at the discretion of the Public Defense Services Commission upon recommendation of the Executive Director, but shall be authorized only when there is a documented business need for the employment, or reemployment is necessary to ensure adequate transfer of knowledge.

e. Vacant Management Positions. At the discretion of the Executive Director, vacancies in the Administrative Authority and other vacant OPDS positions with management or supervisory responsibilities may be filled without resort to any of the foregoing Recruitment Methods.

B. An Under-fill Appointment<sup>3</sup> may be authorized by the Executive Director for the following reasons.

i. Employee Development:

Subject to approval of the Executive Director, a position may be under-filled for the purposes of providing an employee with the opportunity to develop the skills and qualifications necessary to fill the position on a permanent basis. Recruitment for such an opportunity shall be conducted in accordance with Procedure 1.A.(i.). The length of the under-fill and requirements to satisfactorily complete the developmental experience shall be documented prior to the appointment. Upon satisfactorily meeting the under-fill conditions, the employee shall be reclassified up to the level of the position.

---

<sup>3</sup> Add to the definition section of the rules: "Under-fill Appointment" means appointment of an employee to a position who lacks the qualifications for that position and, accordingly, receives a job classification and salary lower than the position to which the employee is appointed.

ii. Administrative Need:

Subject to the approval of the Executive Director, a position may be under-filled if, due to organizational changes, the budgeted level of a position is higher than OPDS's needs require. Recruitment for such an under-fill appointment shall be conducted in accordance with Procedure 1.A. The duration of such an appointment may be limited or unlimited.

**2. Job Announcements, Notice of Transfer Opportunities and Applications.**

A. Announcements shall be issued for all vacant positions subject to Competitive Recruitment Methods as follows:

Announcements are required for all vacancies being filled by Competitive Recruitment Methods set forth in Procedure 1.A.(i.). Announcements of job vacancies shall be posted in a location accessible to all OPDS employees. Announcements of job vacancies to be filled through Open Competitive Recruitment Methods in accordance with Procedure 1.A.(i.) (a.) shall be posted in a manner accessible to the public at least fourteen (14) calendar days before job applications are due. Announcements shall specify the class title, salary range, location, type of recruitment, nature of the assigned work, qualifications, manner of making application, and notification that a criminal or credit history check will be conducted. Other pertinent information about the position, such as work hours and special working conditions, may be included in job announcements.

B. Notice of Job Transfer Opportunities shall be issued as follows:

OPDS shall ensure that notices of job transfer opportunities are accessible to all eligible OPDS employees. Notices of transfer opportunities shall be issued at least seven (7) calendar days before applications for job transfers are due. Such notices shall specify the class title, salary range, location, type of transfer, nature of the assigned work, qualifications, manner of making application, and notification if a criminal or credit history check will be conducted. Other pertinent information about the position, such as work hours and special working conditions, shall be included in the notices.

C. Application Forms are required as follows:

Applications for vacant positions subject to Competitive Recruitment Methods and applications for job transfer opportunities shall be submitted by applicants in the form prescribed by OPDS and must be signed by the applicant. Incomplete applications may be rejected without consideration.

D. Effective Period of Applications.

Subject to the discretion of the Executive Director, all applications received in response to a job announcement or notice of job transfer opportunity may remain in effect for up to one year after the closing date in the announcement or notice. Applications received in response to job announcements may be used to fill vacancies in the same or lower class.

3. Requests for Job Transfers or Voluntarily Demotions.

A. Job Transfers shall be accomplished in the following manner.

An OPDS employee may submit a written request to the Administrative Authority to transfer from one position to another vacant position with the

same class or salary range as the employee's current position. Such a request shall be submitted in the form prescribed by OPDS. Requests for job transfers must be approved by the Executive Director.

B. Voluntary Demotions shall be accomplished in the following manner.

An OPDS employee may submit a written request to the Administrative Authority for a voluntarily demotion from one position to a vacant position with a lower classification or salary range. Requests for voluntary demotions shall be submitted in the form prescribed by OPDS. Requests for voluntary demotions must be approved by the Executive Director.

4. Hiring Process.

A. The following requirements apply to Applications received in response to Job Announcements issued in accordance with OPDS's Competitive Recruitment Methods.

i. Screening Job Applications:

The process of screening applications for vacant positions shall be fair and impartial and shall relate to the duties and requirements of the vacant position. Screening methods shall objectively measure the qualifications of applicants and may include skills testing, employment or personal references and internal or external evaluations of applicants' job qualifications, education and employment history.

ii. Interviews of Job Applicants:

The Executive Director, the Administrative Authority or their designee shall select job applicants for an interview based upon the results of the foregoing screening process. The Executive Director, the Administrative Authority and/or a panel of other OPDS employees may conduct the interviews of job applicants. In extraordinary circumstances and with the approval of the Executive Director

or the Administrative Authority, an applicant may be selected to fill a vacant position without an interview.

iii. Selection and Notification of Job Applicants

The final selection of a job applicant to fill a vacant position shall be approved by the Executive Director. OPDS shall notify in writing all job applicants who are not selected to fill a vacant position. In the event OPDS decides not to fill a vacant position, OPDS shall notify all applicants in writing of that decision.

- B. OPDS shall document its job recruitment, screening, evaluation and hiring decisions and retain this documentation for 10 years.
- C. OPDS shall confirm its offers of employment to selected job applicants in writing and require those applicants to accept the terms and conditions of OPDS's offers of employment in writing. Selected applicants who fail to accept OPDS's offers of employment in writing shall be deemed to have declined those offers.
- D. At the discretion of the Executive Director, OPDS may require criminal or credit history checks of all applicants or finalists for certain positions. OPDS shall notify all applicants of this requirement in the job announcement for that position. A felony or misdemeanor conviction or poor credit history may prohibit an applicant from qualifying for a position with OPDS.

In determining if a criminal conviction prohibits an applicant's employment with OPDS, the Executive Director shall consider the following factors:

- i. the nature and gravity of the offense or offenses;
- ii. the time that has passed since the conviction or completion of the sentence; and
- iii. the nature of the position sought.

Arrests in the absence of subsequent convictions shall not prohibit an applicant's employment with the OPDS. OPDS shall keep confidential all records of a job applicant's arrests or convictions.

Attachment 5b

***OFFICE OF PUBLIC DEFENSE SERVICES  
PERSONNEL POLICIES AND PROCEDURES***

*REVISED ~~FEBRUARY 9, 2006~~(insert new date)*

## CONTENTS

	<i><b>PAGE</b></i>
I. Definitions .....	2
II. Performance Management and Evaluation .....	8
III. Reassignment and Layoff .....	13
IV. Discipline .....	17
V. Dismissal .....	21
VI. Vacation Leave .....	26
VII. Sick Leave .....	29
VIII. Other Types of Leave .....	35
IX. Holidays .....	45
X. Overtime .....	48
XI. Recruitment and Hiring .....	49
<b>FOREWARD</b> .....	<b>5</b>
<b>APPLICABILITY</b> .....	<b>6</b>
<b>AGENCY DEFINITIONS</b> .....	<b>6</b>
<b>SECTION I: GENERAL DEFINITIONS</b> .....	<b>8</b>
<b>SECTION II: EQUAL OPPORTUNITY, NON DISCRIMINATION</b> .....	<b>17</b>
<i>Policy</i> .....	17
<b>SECTION III: PERFORMANCE ASSESSMENT AND MANAGEMENT</b> .....	<b>18</b>
<i>Policy</i> .....	18
<b>SECTION IV: REASSIGNMENTS AND LAYOFFS</b> .....	<b>25</b>
<i>Policy</i> .....	25
<i>Procedure</i> .....	26
<b>SECTION V: DISCIPLINE</b> .....	<b>29</b>
<i>Policy</i> .....	29
<i>Procedure</i> .....	30
<b>SECTION VI: DISMISSAL</b> .....	<b>34</b>

<i>Policy</i> .....	34
<i>Procedure</i> .....	35
<b>SECTION VII: LEAVES</b> .....	<b>39</b>
VACATION LEAVE .....	39
SICK LEAVE .....	41
OTHER TYPES OF LEAVE.....	45
1.    Jury/Witness Leave.....	45
2.    Military Leave.....	45
3.    Bereavement Leave.....	47
4.    Special Recognition Leave.....	48
5.    Leave Without Pay.....	48
6.    Personal Leave.....	49
7.    Leaves During Temporary Interruption of Employment.....	50
8.    Pre-retirement Planning Leave.....	52
9.    Interview Leave.....	52
10.   Service Award Leave.....	52
11.   Red Cross Disaster Relief Services Leave.....	53
12.   Leave to Address Domestic Violence, Harassment, Sexual Assault or Stalking.....	53
<i>Donated Leave</i> .....	56
Sick leave.....	56
Bereavement leave.....	56
Military Donated Leave.....	56
<b>SECTION VIII: HOLIDAYS</b> .....	<b>81</b>
<i>Policy</i> .....	81
<i>Procedure</i> .....	81
<b>SECTION IX: OVERTIME</b> .....	<b>84</b>
<i>Policy</i> .....	84
<i>Procedure</i> .....	84
<b>SECTION X: RECRUITMENT AND HIRING</b> .....	<b>86</b>
<i>Policy</i> .....	86
Methods of Recruitment for Vacant Positions.....	86
Job Announcements, Notice of Transfer Opportunities, and Applications.....	88
Requests for Job Transfers or Voluntarily Demotions.....	89
Hiring Process.....	89
<b>SECTION XI: USE OF PUBLICLY OWNED EQUIPMENT</b> .....	<b>92</b>
<i>Policy</i> .....	92
<i>Definitions</i> .....	92
Allowable Personal Use.....	93
Personal Use During Non-Work Time.....	93
Personal Use During Work Time.....	94
Improper Use.....	94
Privacy Expectations.....	95
Sanctions.....	95
<b>SECTION XII: CONFLICT OF INTEREST</b> .....	<b>96</b>
<i>Policy</i> .....	96
<b>APPENDIX A</b> .....	<b>98</b>
<b>APPENDIX B</b> .....	<b>103</b>

DRAFT

## **FOREWARD**

The purpose of these personnel policies and procedures are to ensure all Employees enjoy the same rights, terms, and conditions of employment.

The Office of Public Defense Services is committed to continually improving and refining its personnel administration system. These Personnel Policies and Procedures will be reviewed in odd-numbered years beginning in 2015. A committee of both management-level and non-management level Employees will review the existing policies and procedures, make recommendations, and submit these to the Executive Director or his/her designee for presentation to the Public Defense Services Commission for adoption of the changes. In the event a law or rule change requires an update in the interim, the Executive Director will determine whether to implement immediately or convene a policy committee for review and recommendation to the Public Defense Services Commission.

DRAFT

***Applicability:***

~~Except as otherwise noted, the following Policies and Procedures apply to all Office of Public Defense Services (OPDS) ~~employee~~Employees on and after July 1, 2003, except where in conflict with the provisions of a collective bargaining agreement.~~

***Agency Definitions:***

~~As used in the following Policies and Procedures:~~

~~The “Administrative Authority” means OPDS’s Chief Public Defender, the Chief Deputy Public Defender, the Director of OPDS’s Contract Division and any other person so designated by the Executive Director of OPDS.~~

~~The “ADA” means the Americans with Disabilities Act and Americans with Disabilities Act Amendments Act.~~

~~The “Executive Director” means is the Executive Director of OPDS.~~

~~“FLSA” means the Fair Labor Standards Act.~~

~~“FMLA” means the Federal Family Medical Leave Act.~~

~~“OFLA” means the Oregon Family Leave Act.~~

~~“OPDS” means the Office of Public Defense Services.~~

~~“PDPR” means Office of Public Defense Services Personnel Rule.~~

~~“PEBB” means the Public Employees’ Benefit Board.~~

~~“PERS” means the Public Employee Retirement System.~~

~~“PDSC” or the “Commission” means the Public Defense Services Commission.~~

***Agency Definitions***

As used in the following Policies and Procedures:

The “Executive Director” is the Executive Director of OPDS.

“OPDS” means the Office of Public Defense Services.

| “PDSC” or the “Commission” is the Public Defense Services Commission.

DRAFT

## SECTION I: General Definitions

### **2.01 — ADMINISTRATIVE AUTHORITY**

~~An administrative authority is t~~The Executive Director of the OPDS, ~~a division director~~the Chief Public Defender, the Chief Deputy Public Defender, or any other management-level ~~e~~Employee designated, in writing, as an Administrative Authority by the Executive Director.

### **2.02 — ALLOCATION**

~~Allocation is t~~The ~~assignment of a position to an existing classification on the basis of~~ duties, responsibilities, authority, and required employment qualifications assigned to a position of an existing classification.

### **2.03 — AMERICANS WITH DISABILITIES ACT (ADA)**

The Americans with Disabilities Act (ADA) and ~~the~~ Americans with Disabilities Act Amendments Act (ADAAA) are federal laws ~~that protecting~~ the rights of qualified individuals with a disability who are an Employee or applicant for employment.~~people with disabilities.~~

### **2.034 — ANNUAL SALARY (MERIT) INCREASE**

Subject to approval by the Administrative Authority, an annual salary (merit) increase is a one-step pay increase given to a limited duration or regular status ~~e~~Employee on the ~~e~~Employee's salary eligibility date, provided the ~~e~~Employee's pay does not equal or exceed the maximum step of the current salary range.

### **2.045 — BREAK IN SERVICE**

A break in service is a separation from or interruption of paid employment, ~~with the OPDS or another State of Oregon agency, that which~~ exceeds 15 consecutive calendar days.

### **2.056 — CALENDAR MONTH**

A calendar month is any month encompassing the first calendar day through the last calendar day inclusive.

### **2.076 — CLASS OR CLASSIFICATION**

A ~~class or classification is a~~ group of positions sufficiently similar in duties, responsibilities, authority, and employment qualifications to permit their combination under a single title based on common standards of selection and compensation.

### **2.07 — CLASS SPECIFICATION**

A class specification is a written description of a class containing a title and a statement of duties, responsibilities, authority, and qualifications that are broadly representative of the positions in the class.

### **2.08 — CLASSIFICATION SYSTEM**

~~A~~The classification system is a~~classification system is a~~ uniform and consistent method of identifying, describing, and analyzing assigned work through evaluation of specific job factors. The product of the classification system is the allocation of each position to a classification, the assignment of a class title, a written description of the duties commonly performed by positions allocated to the classification, and a comparative ranking of all classifications within ~~the~~ OPDS.

#### **~~2.09~~ ——— COMPENSATION PLAN**

A ~~compensation plan is a~~ listing of the designated salary ranges, and pay rates within those ranges, for each classification.

#### **~~2.10~~ ——— COMPENSATORY TIME**

~~Compensatory time is p~~aid leave (in lieu of cash payment) accrued at the rate of time and one-half for ~~the~~ overtime hours worked.

#### **~~2.11~~ ——— CONFLICT OF INTEREST**

~~—A conflict, or the appearance of a conflict, (or the potential for either), between an eEmployee’s personal or financial interests or other obligations and an eEmployee’s obligation to act in the best interest of the OPDS and without improper bias.~~

#### **~~2.121~~ ——— CONTINUOUS SERVICE**

Continuous service is uninterrupted employment. ~~—~~ Interruption of employment occurs any time a break in service exceeds 15 consecutive calendar days.

#### **~~2.12~~ ——— CRIMINAL HISTORY CHECK**

A criminal history check is a search for criminal convictions conducted on the Law Enforcement Data Systems (LEDS), which includes the National Criminal Information Center (NCIC).

#### **~~2.13~~ ——— DAY**

A ~~consecutive day is a~~ 24 ~~consecutive~~ hour period beginning at 12:00:01 a.m. (one second after midnight), and ending at 12:00 midnight.

#### **~~2.14~~ ——— DEMOTION, INVOLUNTARY**

An ~~involuntary demotion is an~~ eEmployer-initiated movement of a nontemporary eEmployee, for disciplinary reasons, from the eEmployee’s classification and position to a classification and position having a lower salary range.

#### **~~2.15~~ ——— DEMOTION, VOLUNTARY**

A ~~voluntary demotion is an~~ eEmployee-initiated movement of a nontemporary eEmployee, for non-disciplinary reasons, from the eEmployee’s classification and position to a classification ~~or and~~ position having a lower salary range.

#### **DIFFERENTIAL**

A fixed percentage of pay added to an Employee’s base pay in recognition of performance of a specialized set of skills, assigned by the supervisor, which are not normally a requirement

of the position. Examples include bilingual differential or assignment of lead work for more than 10 work days.

**2.16 — DISMISSAL**

A dismissal is an eEmployer-initiated separation from employment of a regular status or promotional trial service eEmployee as a result of improper conduct or inadequate performance, including situations that may be beyond the control of the eEmployee. involuntary separation from employment for disciplinary reasons.

**EXEMPT EMPLOYEE**

Executive, administrative, or professional Employees as defined by the Fair Labor Standards Act (FLSA) paid on a salary basis and exempt from both minimum wage and overtime provisions of the FLSA.

**2.17 — FAIR LABOR STANDARDS ACT (FLSA)**

The FLSA is a federal law governing establishing minimum wage, overtime pay, recordkeeping, and youth employment standards. Sets forth criteria regarding work which may be exempt from these standards.

**2.18 — FAMILY MEDICAL LEAVE ACT (FMLA)**

The FMLA is a federal law governing family leave entitling eligible Employees to take job-protected leave for specified family and medical reasons. Also see Oregon Family Leave Act (OFLA) at 2.26.

**2.19 — FAMILY MEMBER, QUALIFIED (As defined by FMLA and/or OFLA); applies to PDPR 14.10, 15.05, 15.06, and 16.03 only)**

Under FMLA, “family member” is a spouse, child, or parent. OFLA includes the FMLA qualified family members, and adds parent-in-law, same-sex domestic partner, child of a same-sex domestic partner, parent of a same-sex domestic partner, grandparent or grandchild of an eEmployee, or an individual for whom the eEmployee is or was in a relationship of “in loco parentis”. Under FMLA rules, children who are the eEmployee’s biological, adopted, step or foster child under 17 or incapable of self-care are qualified, under OFLA there is no age limit defined. Child, parent, and parent-in-law includes biological, adoptive, step, or foster relationships.

**2.20 — FULL-TIME EMPLOYEE**

A full-time eEmployee is one who normally is scheduled to work 40 hours each work week in a monthly pay period or any average of 40 hours per week over the course of a monthly pay period.

**2.21 — INITIAL HIRE**

The first employment by the Office of Public Defense Services, or the re-employment of a former eEmployee after a break in service of two years or more.

## **2.22 — JOB-SHARE**

A ~~full-time job share is a~~ position ~~held by split into~~ two or more Employees working part-time positions. ~~Each employee working in a job share position is treated as a part time employee.~~

## **2.23 — LAYOFF**

A ~~layoff is an~~ employer-initiated separation from employment due to lack of work, shortage of funds, organizational restructuring, or other circumstances not related to Employee performance.

## **LEAD WORK**

Duties assigned in writing to a non-management service Employee to perform all of the following on a recurring daily basis, (1) to prioritize and assign tasks to efficiently complete work; (2) give direction to workers concerning work procedures and performance standards; (3) review the completeness, accuracy, quality, and quantity of work; and (4) provide informal feedback of Employee performance to the supervisor, if the classification for the Employee's position does not include lead work duties in writing.

## **2.24 — LIMITED DURATION POSITION**

A ~~limited duration position is a~~ position created for a project or special study or in anticipation of legislative approval of a regular position. ~~-A limited duration position has a specified end date that is no later than the last day of the current biennium.~~

## **2.25 — LIMITED DURATION STATUS**

~~Limited duration status is e~~Employment in a regular or limited duration position by initial hire (or by transfer, promotion, or voluntary demotion ~~of a limited duration status of an e~~Employee) for a stated period of time, for a special study or project. ~~-The study or project is subject to renewal for a specified or unspecified period or subject to termination on or before the stated expiration date. -Time worked as a limited duration e~~Employee does not apply toward completion of a trial service period or toward attaining regular status.

## **MANAGEMENT-LEVEL EMPLOYEE**

An Employee delegated the authority to formulate and carry out management decisions or who represents management's interest by taking or effectively recommending discretionary actions that control or implement employer policy and who has the discretion in the performance of these management responsibilities beyond the routine discharge of duties. A managerial Employee need not act in a supervisory capacity in relation to other Employees.

## **MERIT INCREASE**

See Annual Salary Increase.

## **2.26 — OREGON FAMILY LEAVE ACT (OFLA) and OREGON MILITARY FAMILY LEAVE ACT (OMFLA)**

The OFLA is a state law governing family leave needs and bereavement leave. OMFLA governs leave granted tofor eEmployees who are the spouse or same sex domestic partner of

[a member of the military forces on active duty. Also see Family Medical Leave Act \(FMLA\) at 2.18.](#)

**~~2.27~~ OVERTIME**

~~Overtime is~~ Time worked (including paid leave taken) by an [eEmployee not subject to FLSA non-exempt employee](#) in excess of 40 hours in a work week.

**~~2.28~~ PART-TIME EMPLOYEE**

~~An part-time eEmployee is one~~ who normally is scheduled to work less than the equivalent of 40 hours each work week in a monthly pay period.

**~~2.29~~ PERSONAL LEAVE**

~~Personal leave is~~ paid leave given to nontemporary [eEmployees who have completed six months of nontemporary service at the beginning of each fiscal year, July 1<sup>st</sup>, and which exhausts on June 30<sup>th</sup> each year if not utilized.](#)

**~~2.30~~ PERSONNEL ACTION**

~~A personnel action is~~ any action taken with reference to an [eEmployee](#) or a position including, but not limited to, appointment, rate of pay, promotion, demotion, transfer, layoff, dismissal, or classification.

**~~2.31~~ POSITION**

~~A position is~~ a group of duties, authorities, and responsibilities assigned by an Administrative Authority requiring the ~~full-time or part-time~~ employment of one person [to perform the duties.](#) -Types of positions include regular, limited duration, and temporary.

**~~2.32~~ POSITION DESCRIPTION**

~~The written description of the specific work assigned to a position which describes the duties, authorities and responsibilities assigned by management, and identifies the essential functions of the job.~~

**~~2.323~~ PROMOTION**

~~Promotion is~~ The movement of an [eEmployee](#) from the [eEmployee's](#) [current](#) classification and position to a classification and position having a higher salary range.

**~~2.343~~ PUBLIC EMPLOYEE'S BENEFIT BOARD (PEBB)**

~~The PEBB is~~ a State of Oregon agency that administers [eEmployee](#) insurance benefit plans.

**PUBLIC EMPLOYEES RETIREMENT SYSTEM (PERS)**

~~A State of Oregon agency responsible for administration of the state Employee retirement plans.~~

### **~~2.354~~ — RECLASSIFICATION**

~~A reclassification is the~~ The change in allocation of an ~~e~~Employee, ~~or~~ a position, ~~or both~~ from one existing class to another existing class ~~(or the movement of an employee from one class to another class)~~ as a result of a substantive change in the duties assigned to the position.

### **~~2.365~~ — RECOGNIZED SERVICE DATE**

The ~~recognized service date is the~~ date an ~~e~~Employee began working for ~~OPDS or~~ a State of Oregon agency (with the exception of temporary or volunteer work), adjusted by any break(s) in service of more than 15 consecutive calendar days, ~~used to determine the Employee's retirement service credits and vacation accrual rate.~~ ~~The recognized service date does not change when leave without pay is less than 15 calendar days, due to military leave, to FMLA and/or OFLA leave, or Workers' compensation leave.~~ A break in service of more than two years, for reasons other than approved leave without pay, voids all previous employment ~~and reemployment sets a new recognized service date.~~

### **~~2.376~~ — REEMPLOYMENT**

~~Reemployment is the~~ The noncompetitive employment of a former regular, ~~limited duration,~~ or trial service status OPDS ~~e~~Employee ~~within two years from the effective date of that employee's resignation, voluntary demotion, layoff, or downward reclassification.~~ ~~An employee may only be reemployed into~~ a position in a class of work with a salary range equal to or lower than the salary range for the classification ~~that that~~ ~~employee~~Employee last held.

### **~~2.387~~ — REGULAR POSITION**

A ~~regular position is a~~ position ~~which has been~~ approved ~~as such~~ by the legislative assembly. A regular position, subject to administrative or organizational change, is anticipated to continue in future biennia.

### **~~2.398~~ — REGULAR STATUS**

~~Regular status is e~~Status attained~~employment upon following~~ successful completion of the most recent trial service period (~~initial or promotional~~). ~~Time employed with temporary or limited duration status does not apply toward attaining regular status.~~

### **~~2.4039~~ — SALARY ELIGIBILITY DATE**

~~The salary eligibility date is the date an employee is eligible to receive a one-step increase in pay. This date is one year after initial hire or rehire, or one year after a subsequent promotion, upward reclassification or an adjustment to the compensation plan that results in a 5% or greater increase in an employee's salary, and annually thereafter until the employee reaches the maximum rate of pay for a class. This date shall be permanently adjusted for leave without pay in excess of 15 consecutive calendar days by adding to the date the number of calendar days absent without pay, thereby making the date later than it would have been if leave without pay had not occurred.~~ ~~The date an Employee is eligible for consideration for an annual salary increase. This date is one year after initial hire or rehire, or one year after a~~

subsequent promotion, upward reclassification and annually thereafter until the Employee reaches the maximum rate of pay for their class.

#### **2.410 — SALARY RANGE**

A salary range is the minimum, maximum, and intermediate pay rates to which a classification is assigned. A range of pay established for each classification, normally including a minimum rate, maximum rate, and intermediate rates.

#### **2.421 — SELECTION METHOD**

A selection method is any procedure or technique used to assess applicant qualifications for employment in a position.

#### **2.432 — STATUS**

Status is the employment relationship between an Employee and the OPDS. Types of status include limited duration, regular, temporary, and trial service.

#### **2.443 — SUPERVISOR**

A supervisor is an individual who, subject to review by the administrative authority, has responsibility for hiring, assigning duties, disciplining, providing performance feedback, resolving first step grievances, and applying personnel rules and relevant personnel policies. delegated the authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other Employees, or responsibility to direct them, or to adjust their grievances or effectively recommend such action, if the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

#### **2.454 — SUSPENSION**

A suspension is the temporary, involuntary removal of an Employee from the work site with or without pay, usually for disciplinary reasons.

#### **TEMPORARY INTERRUPTION OF EMPLOYMENT**

A planned interruption of employment, not exceeding 15 continuous days, caused by lack of work, budget deficit, or other unexpected or unusual reasons or an unplanned interruption caused by environmental or other reasons.

#### **2.465 — TEMPORARY POSITION**

A temporary position is a position created as a result of a non-recurring or periodic workload increase or due to a regular, trial service, or limited duration status Employee's absence. -A temporary position has a specified end date that is usually no later than one year from the date the position was created.

#### **2.476 — TEMPORARY STATUS**

~~Temporary status is~~ A noncompetitively appointed ~~e~~Employee~~ment~~ (in any type of position) for a period of up to one year and subject to renewal for a specific period of time. Employees with temporary status have no rights or benefits except as provided by state and Federal law.

#### **~~2.487~~——TERMINATION**

~~The involuntary separation of an Employee from state service. ermination is cessation of employment for any reason.~~

#### **~~2.498~~——TRANSFER**

~~Transfer is~~The lateral movement of an ~~OPDS e~~Employee ~~of the OPDS~~ from one position to another position in the same classification or to another position in a different classification having the same salary range.

#### **~~2.5049~~——TRIAL SERVICE PERIOD**

~~six month period of continuous service after the initial date of hire or rehire, including reemployment (initial trial service period) or after the date of promotion (promotional trial service period). A working test period during which an Employee is required to demonstrate, by conduct and actual performance of duties, the qualifications and fitness for the position. An administrative authority may extend the trial service period so long as the total trial service period does not exceed twelve months. The trial service period shall be extended by any period of leave without pay in excess of 15 consecutive calendar days by adding to it the number of calendar days absent without pay, thereby making the completion date later than it would have been if leave without pay had not occurred. An Administrative Authority may extend the trial service period so long as the total trial service period does not exceed twelve months. Trial service is extended by any period of leave without pay in excess of 15 consecutive calendar days by adding to it the number of calendar days absent without pay, thereby making the completion date later than it would have been if leave without pay had not occurred.~~

#### **~~2.510~~——TRIAL SERVICE STATUS**

Trial service status is employment during the first six months following initial hire or rehire in a regular position (initial trial service) or the six months following a promotion (promotional trial service), unless the trial service is extended by the administrative authority. An ~~e~~Employee on trial service status retains that status upon transfer or promotion to a limited duration position. ~~Trial service status is extended by any period of leave without pay in excess of 15 consecutive calendar days by adding to it the number of calendar days absent without pay, thereby making the completion date later than it would have been if leave without pay had not occurred.~~

#### **~~2.521~~——UNDERFILL**

The ~~An underfill is the~~ employment of a person in a classification with a salary range lower than the salary range of the budgeted or established classification level of the position. ~~When applying this personnel rule, the qualification level of the Employee, not the position or classification, is the determining factor in the case of an underfill.~~

### **WORK OUT OF CLASS**

The temporary assignment of an Employee to perform additional duties in their current position or essentially all of the duties, authority, and responsibility of a position classified at a higher salary level for a limited period of time.

### **2.532 — WORK WEEK**

The ~~A work week is a~~ fixed and regularly recurring period of 168 hours during seven consecutive 24-hour periods. ~~The work week for all OPDS- employee~~ Employees shall begin at one second after midnight Sunday and end at midnight the following Saturday.

### **2.544 — Y-RATE**

A Y-rate is a salary rate that is higher than the maximum rate paid to an employee'

## SECTION II: Equal Opportunity, Non Discrimination

### Policy

- I. OPDS offers equal employment opportunities without regard to race, color, national origin, sex, sexual orientation, union orientation, gender identity or expression, religion, marital status, age, disability, veteran or other status protected under applicable local, state, or federal law. OPDS requires that all Employees cooperate fully to ensure the fulfillment of this commitment in all actions and decisions, including:
- Hiring, placement, promotion, transfer, and discharge;
  - Recruitment, advertising, or solicitation for employment;
  - Compensation and benefits; and
  - Selection for training.
- II. It is also the policy of OPDS that all Employees work in an environment where the dignity of each individual is respected. Harassment due to status protected under this policy is prohibited.
- III. OPDS will make reasonable accommodations for the known physical or mental disabilities of an otherwise qualified applicant or Employee, unless an undue hardship would result. Any applicant or Employee who requires an accommodation in the hiring process or to perform the essential functions of a job should contact the Human Resources Manager.
- IV. OPDS is committed to a workplace that offers equal employment opportunity in keeping with the Employer's policy and all Employees will affirmatively work to ensure that the workplace operates in accordance with this policy.

### SECTION III: Performance Assessment and Management

#### **Performance Management and Evaluation**

##### **Applicability:**

~~In order to develop performance measures in collaboration with OPDS employees and establish the requisite supervisory and management structure within OPDS, the Performance Management and Evaluation Policy and Procedures shall not apply to OPDS employees before January 1, 2004. On that date, OPDS shall commence developing individual written performance plans and establishing annual performance evaluation periods for OPDS employees in accordance with the following Policy and the Procedures and shall complete that process for all OPDS employees no later than July 1, 2004.~~

##### **Policy:**

- I. OPDS ~~maintains shall establish~~ a Performance Management Process to assist in managing the performance of ~~all of~~ its ~~e~~Employees. ~~This process shall promote the e~~Employees' understanding of successful job performance and encourage their commitment to OPDS' s mission, the goals and objectives.<sup>1</sup>

~~OPDS shall develop a Performance Management Plan in accordance with this Policy.~~

- ~~II. OPDS's Performance Management Plan shall be communicated to all OPDS employees. OPDS is responsible for provides~~ training for its managers and supervisors in the administration of the Performance Management Plan.

~~III. OPDS's~~ Performance Management Plan ~~shall include~~ the following requirements.

- ~~A. An assessment and written formal feedback regarding the Employees' performance at the conclusion of the initial or promotional trial service period.~~
- ~~B. Assessments and feedback from supervisors to promote professional development and assess training needs throughout the review period.~~
- ~~A. an annual performance evaluation period for all employees;~~
- ~~B. an individual performance plan for each employee that is developed in collaboration with the employee and communicated to the employee and includes:~~

<sup>1</sup> OPDS's mission, goals and objectives are set forth in ORS 151.211 to 151.219 included as Appendix A.

- ~~1. identification of the employee's job performance expectations and performance measures, which are results based or behavior based or a combination of both.~~
  - ~~2. an individual employee development plan, initially developed by the employee, which addresses any previous performance deficiencies, performance goals for the following year, and career plans and objectives.~~
  - ~~3. provision for interim reviews during the year to discuss employee performance, monitor progress and modify and update the performance plan as needed.~~
- ~~C. a scoring system to evaluate performance that permits comparison of performance and ratings among similarly situated employees;~~
- ~~D. a rating system that includes at least three performance level ratings to provide for consistency in describing, analyzing and reporting ratings among similarly situated employees;~~
- C. An annual written performance evaluation for each eEmployee. The evaluation shall be based on the eEmployee's performance plan position and duties and include:
1. a discussion of the eEmployee's performance between the supervisor and employeeEmployee;
  2. documented performance achievements and/or deficiencies;
  3. a rating of each employee which is consistent with OPDS's scoring and rating systems. training and education received throughout the review period and an identification of relevant training and education goals for the following review period;
  4. development of job-related performance measures in collaboration with the Employee that are consistent with the Employee's position description and relate to OPDS's mission, goals, and objectives for the next review period;
- ~~2.5. an internal agency review process completed prior to finalizing and communicating performance ratings to each eEmployee;~~
- ~~3.6. required signatures of the eEmployee and, supervisor, and reviewer with a copy of the signed evaluation form provided to the eEmployee; and~~
- ~~6. provision for at least one interim performance plan review during the annual performance evaluation period to discuss the progress of the employee's performance, any performance deficiencies, and plan updates as needed.~~

D. A copy of the performance evaluation will become a part of the Employee's personnel file located in Human Resources and retained for no less than three years.

D.E. \_\_\_\_\_ An eEmployee may prepare written comments or rebuttal to their evaluation within thirty (30) calendar days of receiving the signed evaluation, which shall be attached to the evaluation form and become part of the eEmployee's personnel file.

**Procedures:**

- ~~1. OPDS's Performance Management Plan applies to all OPDS employees, including supervisors, members of the Administrative Authority, and the Executive Director.~~
- ~~2. OPDS supervisors are responsible for distributing and discussing the agency Performance Management Plan with all of the employees they supervise.~~
- ~~3. Each supervisor shall develop an annual written performance plan for each employee supervised and discuss the plan with the employee prior to the beginning of each annual performance evaluation period. Supervisors shall develop the performance plan in concert with each employee. Each employee performance plan shall include:
  - ~~(a) an annual performance evaluation period;~~
  - ~~(b) job related performance measures developed in collaboration with the employee that are consistent with the employee's position description and relate to OPDS's mission, goals, and objectives. Each performance measure shall describe standards or indicators of success, achievement or measurable results and timeframes where applicable. An employee's performance plan may also include behavior based performance measures when certain behaviors such as leadership, teamwork, cooperation and consensus building are important to successful job performance.~~

~~Each supervisor's performance plan shall include performance measures related to the successful performance management of their subordinates;~~
  - ~~(c) the relative weight or score of each performance measure in the employee's plan, (i.e. the possible points assigned to each measure according to the priority placed on it in relation to the other performance measures in the plan). The total points possible for all measures or total score shall equal 100;~~
  - ~~(d) an individual employee development plan, initially developed by the individual employee, that provides for the continuous improvement of the employee's job-~~~~

~~related knowledge and skills and that promotes the achievement of the employee's career plans and objectives. This development plan may be incorporated as one of the employee's performance measures, or may be a separate part of the plan;~~

- ~~(e) the signatures and date of the employee, supervisor and Administrative Authority acknowledging a mutual understanding and acceptance of the plan at the beginning of the performance plan year; and~~
- ~~(f) provision for at least one interim performance plan review during the annual performance evaluation period to discuss the progress of the employee's performance, any performance deficiencies and plan updates as needed. The employee, supervisor and Administrative Authority shall sign and date the plan at each review.~~

~~4. OPDS shall adopt the following uniform scoring and rating systems to facilitate consistency in employee performance evaluations:~~

- ~~(a) a total of 100 possible points for an employee performance plan distributed in accordance with the relative weight or score assigned to each performance measure; and~~
- ~~(b) a rating system of 1 through 5 based on the annual score of total points achieved.~~

~~90-100 total points equals an overall rating of 1—Outstanding level of performance. The employee excels in all aspects of the position and significantly and consistently exceeds the established job requirements and performance standards, goals and expectations of the job. Generally, in any given year, a very limited number of employees achieve results at this level.~~

~~80-89 total points equals an overall rating of 2—Exceeds expectations. The employee consistently exceeds standards and expectations of the position and may perform at an outstanding level in some areas.~~

~~70-79 total points equals an overall rating of 3—Meets expectations. The employee's performance fulfills established standards and job expectations. Work is consistently performed at an acceptable level and at times may be performed at a higher level. Results are those expected of most employees successfully performing their jobs.~~

~~60-69 total points equals an overall rating of 4—Does not fully meet expectations. The employee's performance does not consistently satisfy position requirements, but the employee has shown the aptitude, interest or skills needed to attain them. Improved sustained results need to be shown within a limited time period.~~

~~Less than 60 total points equals an overall rating of 5—Unacceptable. The employee's performance clearly fails to meet standards and the employee does not demonstrate the aptitude or interest to perform the job successfully. Immediate sustained improvement must be shown.~~

- ~~5. Each supervisor shall complete an annual written performance evaluation for each employee supervised based on the employee's individual performance plan and job performance. The performance evaluation shall include:
  - ~~(a) input on the employee's performance during the annual performance evaluation period from others, including employees, judges, attorneys, peers, managers, clients and other persons with relevant knowledge of the employee's job performance as determined by the supervisor;~~
  - ~~(b) a discussion of job performance between the supervisor and the employee regarding the results of the employee's individual performance plan. Each employee shall have the opportunity to provide input, examples of work and a self-evaluation for the supervisor's consideration;~~
  - ~~(c) documented performance achievements and/or deficiencies;~~
  - ~~(d) points achieved or score for each performance measure, total points achieved or total score for the employee's individual performance plan and an overall rating of the employee's performance according to the scoring and rating systems described above;~~
  - ~~(e) a review of all employee ratings with the Administrative Authority prior to finalizing and communicating the performance rating to each employee; and~~
  - ~~(f) a discussion of the evaluation scoring and rating with each employee and notice to the employee of the opportunity to attach written comments or rebuttal. The employee, supervisor and Administrative Authority shall sign and date the completed performance evaluation.~~~~
- ~~6. The supervisor is responsible for transmitting a copy of the signed performance evaluation for each employee to the employee's personnel file.~~
- ~~7. For the purposes of administering this Performance Management Plan with regard to OPDS supervisors and management, the Administrative Authority is the supervisor of any OPDS supervisor, the Executive Director is the supervisor of any member of the Administrative Authority, and the PDSC is the supervisor of the Executive Director.~~
- ~~8. Any employee disagreeing with his or her performance evaluation may prepare written comments or rebuttal within thirty (30) calendar days of receiving the~~

evaluation. These comments or rebuttal shall be attached to the written performance evaluation and become part of the employee's personnel file.

DRAFT

DRAFT

## **SECTION IV: Reassignments and Layoffs**

### **Policy:**

- I. OPDS shall establish fair and rational procedures for reassigning or laying-off **eE**mployees due to reorganizations, reduced workloads or revenues, or to meet position reduction goals.
- II. An OPDS **eE**mployee may be reassigned or laid off through a reduction in work force because of lack of work, funds curtailment, reorganization, or other non-disciplinary reasons consistent with the needs and mission of OPDS that do not reflect discredit on the **eE**mployee.
- III. OPDS is committed to providing its **eE**mployees with options to remain employed with OPDS ~~or the State of Oregon~~ in lieu of layoffs if possible. -Therefore, all work force adjustment measures within OPDS shall be explored prior to implementing layoffs, including reassignment to existing vacancies, voluntary terminations, or demotions. -Should such work force adjustment measures be unavailable or infeasible, OPDS shall make reasonable efforts to inform laid off **eE**mployees of their options and the processes to be considered for other employment opportunities in state government and to minimize negative impacts on laid-off **eE**mployees to the extent possible.
- IV. This policy does not authorize the displacement or “bumping” within OPDS by any OPDS **eE**mployee.
- V. OPDS **eE**mployees laid off in accordance with this policy may request to be added to any applicable ~~agency-statewide reemployment~~ layoff list for the same, equal, or lower positions or classifications for which they are qualified, valid for a period of one (1) year.
- VI. An OPDS **eE**mployee who is reassigned or laid off pursuant to this policy may appeal the action to the Administrative Authority and the Executive Director in accordance with the written procedures described below.
- VII. Failure of OPDS, the Executive Director or ~~the~~ Administrative Authority to comply with one or more provisions of this Policy or the accompanying Procedures in taking any action with regard to an **eE**mployee shall not invalidate the action unless the **eE**mployee is deprived of a constitutionally protected right and there is no possibility of correcting or reversing the deprivation of the **eE**mployee’s constitutionally protected right. -When the potential deprivation of the **eE**mployee’s rights is brought to the attention of OPDS, the Executive Director or Administrative Authority may rescind the action, may take new action of the same or different nature, or may let the action taken stand.

**Procedures:**

1. The PDSC shall determine the necessity to reduce OPDS's work force due to lack of work, funds curtailment, reorganization, or other valid reasons based upon the needs and mission of OPDS, and establish timelines to accomplish such work force reductions.
2. The Executive Director or ~~the~~ Administrative Authority shall determine the number of positions, classifications or organizational units in OPDS affected by the pending work force reduction. In making this determination, the Executive Director or the Administrative Authority shall consider the needs and mission of OPDS, including the types of positions affected and remaining positions, the special knowledge, skills, and experience necessary to accomplish the mission and work of OPDS, and the diversity of eEmployees in OPDS as this factor affects OPDS's ability to accomplish its mission.
3. The Executive Director or ~~the~~ Administrative Authority shall identify any vacant positions in OPDS and prepare a summary of the knowledge, skills and experience required of those vacant positions at the same or lower salary ranges of those positions affected by the pending work force reduction.
4. The Executive Director or the Administrative Authority shall identify all OPDS eEmployees by position or classification affected by the pending work force reduction and request updated information regarding their relevant knowledge, skills and experience.
5. The Executive Director or the Administrative Authority shall identify the OPDS Eemployees to be reassigned or laid off, taking into consideration the following factors in descending order of importance:
  - A. The relevant knowledge, skills and experience of each eEmployee in the positions, classifications or organizational units affected by the pending work force reduction, the diversity of OPDS's work force as it relates to the ability of OPDS to accomplish its mission, and the transition time for a potentially qualified eEmployee to be capable of performing the duties of a vacant or open position at OPDS;
  - B. The quality of performance and relative merit of each eEmployee in the positions, classifications, or organizational units affected by the pending work force reduction as determined by (i) the eEmployee's most recent performance evaluation, or (ii) a special performance evaluation for all Eemployees in positions, classifications or organizational units affected by the pending work force reduction;

- C. The length of an affected eEmployee's service with OPDS, the State Public Defender or the Indigent Defense Services Division; and
  - D. The length of an affected eEmployee's service with any other Oregon state agency.
6. The Executive Director or the Administrative Authority shall consider reassignment options within OPDS for eEmployees identified for layoff.
  7. At least ~~fifteen-thirty~~ (1530) calendar days prior to the effective date of layoff or reassignment, the Executive Director or the Administrative Authority shall provide written notice to the affected eEmployees of the reasons for the reassignment or layoff and the rights and options provided by the OPDS Reassignment and Layoff Policy and Procedures. In addition to the right to appeal, an eEmployee who is laid off may request to be added to the ~~statewide reemployment agency~~ layoff list for the same, equal or lower positions or classifications for which an eEmployee is qualified.
  8. The Executive Director or the Administrative Authority shall document the foregoing actions, submit this documentation to the Public Defense Services Commission, and maintain the documents for three (3) years from the date of the layoff. This documentation shall include reasons and rationale supporting the determination of individual layoffs in accordance with Procedure 5, above.
  9. The eEmployee may appeal from the reassignment or lay off decision as follows.
    - A. The appeal shall be in writing and mailed or hand-delivered to the Administrative Authority not later than fifteen (15) calendar days after the effective date of the personnel action in question.
    - B. The Administrative Authority shall affirm or deny the appeal in writing not later than fifteen (15) calendar days after receipt of the appeal. -The failure of the Administrative Authority to respond within fifteen (15) days after receipt of the appeal shall constitute a denial of the appeal, unless the parties mutually agree in writing to extend the time limit.
    - C. If the Administrative Authority denies the appeal, the eEmployee may appeal in writing to the Executive Director not later than (i) seven (7) days after the Administrative Authority's written decision was received, or (ii) in the absence of a written decision by the Administrative Authority, seven (7) days after the date that the appeal was deemed denied. -The appeal shall be confined to the subject matter contained in the original appeal to the Administrative Authority.
    - D. The Executive Director shall rule in writing not later than fifteen (15) calendar days after receipt of the appeal. -Failure of the Executive Director to respond within fifteen (15) days after receipt of the appeal shall constitute a denial of the appeal, unless the parties mutually agree in writing to extend the time limit.

- E. The ~~e~~Employee may file in writing a discrimination claim not resolved to the satisfaction of the parties with the ~~state's Affirmative Action Office, the~~ Civil Rights Division of the Oregon Bureau of Labor and Industries, and/or the federal Equal Employment Opportunity Commission.
10. Failure of OPDS, the Executive Director or the Administrative Authority to comply with one or more provisions of these Procedures in taking any action with regard to an ~~e~~Employee shall not invalidate the action unless the ~~employee~~Employee is deprived of a constitutionally protected right and there is no possibility of correcting or reversing the deprivation of the ~~e~~Employee's constitutionally protected right. When the potential deprivation of the ~~e~~Employee's rights is brought to the attention of OPDS, the Executive Director or Administrative Authority may rescind the action, may take new action of the same or different nature, or may let the action taken stand.

DRAFT

## SECTION V: Discipline

### **Policy:**

- I. OPDS may, at the discretion of the Executive Director, provide OPDS ~~e~~Employees with an opportunity to correct problems interfering with the accomplishment of the mission or operations of OPDS. -The Executive Director shall maintain and administer written procedures consistent with the provisions of this Policy.
- II. Any OPDS ~~e~~Employee may be disciplined for inability or unwillingness to fully and faithfully perform the duties of the ~~employee~~Employee's position satisfactorily. -The reasons for discipline may include:
  - A. ~~conduct, performance, or behavior including acts or omissions on or off the job which may interfere with the mission or operations of OPDS or which affect the~~ ~~e~~Employee's suitability for ~~his or her~~the position; or
  - ~~A.~~B. other conduct, performance, or behavior which affects the ~~e~~Employee's suitability for his or her position.
- III. ~~Except for reprimands, which shall be in writing, a~~ specific warning, in any reasonable form, of OPDS's concerns and reasonable opportunity to correct the problem shall be given to the ~~e~~Employee prior to the imposition of discipline unless the ~~e~~Employee knew or reasonably should have known the conduct, performance or behavior could lead to disciplinary action.
- IV. The Executive Director or the Administrative Authority shall determine the severity of the disciplinary action based on the seriousness of the conduct, performance or behavior, the level of fault, or the unsuitability of the ~~e~~Employee, and the needs of OPDS. -The severity of the discipline must have a reasonable basis in fact.
- ~~IV.~~V. ~~Verbal warnings, work plans, coaching, counseling, and evaluations are not discipline and are not subject to appeal.~~
- ~~V.~~VI. ~~—~~The types of discipline which may be taken under this policy are:
  - A. Written reprimand;
  - B. ~~Suspension without pay;~~Temporary salary reduction;
  - C. ~~Suspension without pay~~Salary reduction; and
  - D. Demotion when an appropriate vacancy, as determined by OPDS, exists at a lower level.

~~VI.VII.~~ When disciplinary action ~~is other than reprimand is~~ contemplated, the Executive Director or the Administrative Authority shall ~~meet with~~ give the ~~e~~Employee ~~to provide~~ a reasonable opportunity for the Employee to respond before taking final disciplinary action. The Executive Director or the Administrative Authority shall notify the ~~e~~Employee in writing of disciplinary actions.

~~VII.VIII.~~ Failure of OPDS, its Executive Director, or the Administrative Authority to comply with one or more of the provisions of this Policy or the accompanying Procedures in taking any disciplinary action against an ~~e~~Employee shall not invalidate the action unless the ~~e~~Employee is deprived of a constitutionally protected right and there is no possibility of correcting or reversing the deprivation of the ~~e~~Employee's constitutionally protected right. When the potential deprivation of the ~~e~~Employee's rights is brought to the attention of OPDS, the Executive Director or the Administrative Authority may rescind the action, may take new action of the same or different nature, or may let the action stand.

***Procedures:***

1. The Administrative Authority or designee investigates the alleged misconduct or deficient performance or other circumstances indicating that grounds may exist for disciplinary action or dismissal.
  - A. The Administrative Authority or designee meets with the ~~e~~Employee to hear the ~~e~~Employee's response.
  - B. The ~~e~~Employee may request to have a representative present with them at the investigatory meeting. The attendance of a representative may not obstruct the investigation.
  - C. The ~~e~~Employee may request to delay the meeting and such request will not be unreasonably denied by the Administrative Authority or designee.
2. In accordance with the foregoing OPDS Discipline Policy, OPDS may take the following disciplinary actions as follows:
  - A. Reprimand: -The reprimand shall be in writing and shall reasonably inform the ~~e~~Employee of the conduct, performance, or behavior supporting the reprimand and the potential for further discipline if the conduct, performance or behavior is not corrected;
  - B. Temporary Salary reduction: The salary reduction shall be one or more steps within the Employee's classification salary range for a period of time determined to be necessary to improve and monitor the conduct, performance, or behavior in question. A reprimand in lieu of salary reduction shall be imposed for Employees

who are exempt under the FLSA. The Employee will be notified of the potential for further discipline if the conduct, performance or behavior is not corrected; and

~~B.C.~~ Suspension: -The suspension shall be without pay for a specified period of time. For ~~e~~Employees exempt under the FLSA, the suspension ~~is~~must be in increments of 40-hour work weeks or full days in cases of major safety violations. The ~~e~~Employee will be notified of the potential for further discipline if the conduct, performance or behavior is not corrected;

~~C. Salary reduction: The salary reduction shall be one or more steps within the employee's classification salary range for a period of time determined to be necessary to improve and monitor the conduct, performance or behavior in question. Salary reduction shall not be imposed for employees who are exempt from FLSA. The employee will be notified of the potential for further discipline if the conduct, performance or behavior is not corrected; and~~

D. Demotion: -This action is available when an appropriate vacancy, as determined by the agency, exists at a lower level, with a commensurate permanent reduction in salary. -The ~~e~~Employee will be notified of the potential for further discipline if the conduct, performance or behavior is not corrected while performing the new job duties.

23. The Executive Director or the Administrative Authority shall notify the ~~e~~Employee in writing of disciplinary actions. -The written notice shall contain:

A. Action being taken: Reprimand, temporary reduction in pay, sSuspension without pay for a specific-stated period of time, ~~, reduction in pay,~~ or demotion;

B. The date on which the action takes effect;

C. Grounds for the action. -Grounds or cause as defined in Paragraph II-~~(A)~~ and ~~(B)~~ of the foregoing Discipline Policy;

D. Background: -Any pertinent information such as length of service, classification, training, statements in position description, written policies and rules, descriptions of long-standing practices, and/or statements from performance evaluations that are relevant and apply to the current issue; and any other data or information which would have reasonably made the ~~e~~Employee aware of the conduct, performance or behavior to be expected;

E. Supporting facts: -The dates, times, places and other facts known by OPDS sufficient to apprise the ~~e~~Employee of the acts, omissions, and conditions being charged;

F. Conclusion: -A statement as to why the ~~e~~Employee's supervisor is concerned about the conduct, performance or behavior at issue. -It is also meant to advise the

eEmployee of the relative seriousness of the conduct, performance or behavior as viewed by the supervisor, as well as to advise the eEmployee that future conduct, performance or behavior of similar nature will result in more severe discipline; and

- G. Notice of appeal: -A statement that the action taken may be appealed according to the appeal process described in procedure 4, below.
4. The written notice of disciplinary action may be hand delivered to the eEmployee or mailed by certified or registered mail to the eEmployee's last known address. -The effective date shall be three (3) calendar days after the postmark date on the letter or the date hand delivery was accomplished.
  5. The eEmployee may appeal a disciplinary action as follows:
    - A. The appeal shall be in writing and mailed or hand-delivered to the Administrative Authority not later than fifteen (15) calendar days after the effective date of the personnel action in question.
    - B. The Administrative Authority shall affirm or deny the appeal in writing not later than fifteen (15) calendar days after receipt of the appeal. -The failure of the Administrative Authority to respond with fifteen (15) days after receipt of the appeal shall constitute a denial of the appeal, unless the parties mutually agree in writing to extend the time limit.
    - C. If the Administrative Authority denies the appeal, the eEmployee may appeal in writing to the Executive Director not later than (i) seven (7) days after the Administrative Authority's written decision was received, or (ii) in the absence of a written decision by the Administrative Authority, seven (7) days after the date that the appeal was deemed denied. -The appeal shall be confined to the subject matter contained in the original appeal to the Administrative Authority.
    - D. The Executive Director shall rule in writing not later than fifteen (15) calendar days after the receipt of the appeal. -Failure of the Executive Director to respond within fifteen (15) days after receipt of the appeal shall constitute a denial of the appeal, unless the parties mutually agree in writing to extend the time limit.
  6. ~~Disciplinary-Involuntary~~ demotions shall not be used if an eEmployee is not qualified for employment in the lower class or position, or if such action would cause a regular eEmployee in a lower class to be laid off.
  7. Documentation shall be maintained to support any actions taken under the OPDS Employee Discipline Policy and Procedures.
  8. Failure of OPDS, its Executive Director or Administrative Authority to comply with one or more of the provisions of these Procedures in taking any disciplinary action

against an eEmployee shall not invalidate the action unless the eEmployee is deprived of a constitutionally protected right and there is no possibility of correcting or reversing the deprivation of the eEmployee's constitutionally protected right. -When the potential deprivation of the eEmployee's rights is brought to the attention of OPDS, the Executive Director or Administrative Authority may rescind the action, may take new action of the same or different nature, or may let the action stand.

DRAFT

## **SECTION VI: Dismissal**

### **Policy:**

I. OPDS is authorized to dismiss an OPDS eEmployee for actions or omissions as provided by law or OPDS Personnel Policies and Procedures or which interfere with the accomplishment of the mission, goals or objectives of OPDS.

~~II. OPDS shall maintain written procedures governing dismissal of OPDS employees which are consistent with this Policy.~~

~~III.~~II. The Executive Director or the Administrative Authority of OPDS may, at their discretion, provide an opportunity for an eEmployee to correct problems pursuant to the OPDS Employee Discipline Policy and Procedures before dismissal action is taken, unless the conduct or unfitness of the eEmployee warrants dismissal and the eEmployee knew or should have known that dismissal would be logical under the circumstances.

~~IV.~~III. When dismissal is contemplated, the eEmployee shall be given an opportunity to be heard in a pre-dismissal meeting.

~~A. OPDS shall provide the employee with written notice of possible dismissal. Notice shall state the charges and supporting facts. It shall include the date, time and purpose of the proceeding, right to refute charges, consequences of failure to appear at the meeting, and notice of right to be represented.~~

~~B. Pending determination of appropriate action, the employee may be authorized to continue a normal or alternative work assignment, continue in the current employment status, be placed in an administrative assignment to work from home, or be placed on administrative leave with pay.~~

~~V.~~IV. Appropriate action shall be determined within any time periods noted in this Policy and the accompanying Procedures.

~~VI.~~V. A notice of pre-dismissal ~~action~~ shall be in writing, sent by certified mail or hand-delivered to the eEmployee, and include: action being taken, statutory grounds, if any, background, supporting facts, conclusion, and notice of appeal process.

~~VII.~~VI. Failure of OPDS, the Executive Director or the Administrative Authority to comply with one or more provisions of this Policy or the accompanying Procedures in taking any action against an eEmployee shall not invalidate the action unless the eEmployee is deprived of a constitutionally protected right and there is no possibility of correcting or reversing the deprivation of the eEmployee's constitutionally protected right. -When the potential deprivation of the eEmployee's rights is brought to the

attention of OPDS, the Executive Director or the Administrative Authority may rescind the action, may take new action of the same or different nature, or may let the action taken stand.

**Procedures:**

1. When dismissal is contemplated, the Executive Director or the Administrative Authority shall deliver to the eEmployee a written pre-dismissal notice indicating that dismissal is being considered. -The pre-dismissal notice shall:
  - A. state the grounds, provide relevant background facts, and state supporting facts to the eEmployee, including such facts that are necessary to apprise the eEmployee of the nature of the charges;
  - B. indicate the time, date, and place for the pre-dismissal meeting which would allow the eEmployee an opportunity to refute the charges or present mitigating circumstances to the Executive Director or the Administrative Authority;
  - C. provide the consequences of failure to appear at the pre-dismissal meeting; and
  - D. state that the eEmployee may be represented during the pre-dismissal proceedings.
2. The date of the pre-dismissal meeting shall not be sooner than eight-five (85) calendar days and not later than fifteen (15) calendar days following the postmark date or date of personal delivery of the notice to the eEmployee. -The parties may mutually waive the timelines established for the pre-dismissal meeting.
3. Upon reasonable advance request by the eEmployee or the eEmployee's representative, the Executive Director or the Administrative Authority may reschedule the date and time of the pre-dismissal meeting.
4. Pending the completion of the pre-dismissal process, the eEmployee may be:
  - A. authorized to continue the normal or alternative work assignment;
  - B. continued in the current employment status;
  - C. placed in an administrative assignment to work from home; or
  - D. placed on administrative assignment with pay.
5. The Executive Director or the Administrative Authority shall conduct the pre-dismissal meeting. -At the meeting, the Executive Director or the Administrative Authority shall:

- A. verify that the eEmployee has read and understands the pre-dismissal notice; and
  - B. inform the eEmployee of the his/hers right to refute the charges and present mitigating circumstances and information, and provide the eEmployee with the opportunity to do so.
6. The pre-dismissal meeting is not a formal hearing proceeding and does not include rights of direct examination or cross-examination of witnesses.
7. If the eEmployee fails to appear at the pre-dismissal meeting or offer any refutation of the charges or present mitigating circumstances or information, in writing or otherwise, a decision shall be made without input from the eEmployee. -The failure of the eEmployee to appear shall not be construed as an admission or a denial of any charges and shall have no bearing on any other rights, including post-suspension and post-termination remedies, which may be available to the eEmployee.
8. If new facts are discovered during the pre-dismissal process:
  - A. The Executive Director or the Administrative Authority may send a supplemental notice to the eEmployee incorporating the new facts as an additional basis for discipline and give the eEmployee an opportunity to refute the new charges if the new facts are unfavorable to the eEmployee; or
  - B. The Executive Director or the Administrative Authority may disregard the new facts and proceed with the original action based on the original charges if the new facts are unfavorable to the eEmployee, or if, in the judgment of the Executive Director or the Administrative Authority, the remaining facts justify dismissal; or
  - C. A portion of the charges may be withdrawn; however, no withdrawal by OPDS of any portion of the charges supporting a dismissal or other disciplinary action shall require OPDS to rescind the action or take new action.
9. The Executive Director or the Administrative Authority shall determine the appropriate action within ~~twenty-one (21)~~10 calendar days after completion of the pre-dismissal meeting. -The Executive Director or the Administrative Authority may choose to impose other discipline as outlined in the OPDS Discipline Policy, in lieu of dismissal.
10. The Executive Director or the Administrative Authority shall notify the eEmployee of dismissal or alternative disciplinary action in writing. -The written notice shall contain:
  - A. The action being taken;

- B. The date on which the action takes effect, which must be on or after the date of delivery of the written notice;
  - C. The grounds for the action as set forth in the OPDS Employee Dismissal Policy and these Procedures;
  - D. Relevant Background: -Any pertinent information such as length of service, classification, training, statements in position description, written policies and rules, descriptions of long-standing practices, and statement from performance evaluations that are relevant and apply to the issue; specific performance standards; prior advisory, corrective, or disciplinary actions; and any other data or information which would have reasonably made the eEmployee aware of the conduct, performance, or behavior to be expected;
  - E. Supporting Facts: -The dates, times, places and other facts known to OPDS sufficient to apprise the eEmployee of acts, omissions, and conditions being charged;
  - F. Conclusion: -A statement as to why the eEmployee's conduct, performance, or behavior violates applicable law or OPDS Personnel Policies and Procedures or interferes with the accomplishment of OPDS's mission, goals and objectives. For an eEmployee subject to alternative disciplinary action, the statement should inform the eEmployee of the relative seriousness of the conduct, performance, or behavior as viewed by the supervisor, and advise the eEmployee that future conduct, performance, or behavior of a similar nature will result in more severe discipline; and
  - G. Notice of appeal: -A statement that the action taken may be appealed according to the appeal process described in Procedure 12, below.
11. The written notice of dismissal or alternative disciplinary action shall be hand delivered to the eEmployee or mailed by certified or registered mail to the eEmployee's last known address. -The effective date shall be the date on which the hand delivery was accomplished or three (3) calendar days after the postmark date on the letter.
12. The eEmployee may appeal the dismissal to the Executive Director or appeal other disciplinary action to the Administrative Authority as follows:
- A. The appeal shall be in writing and mailed or hand-delivered to the Administrative Authority not later than fifteen (15) calendar days after the effective date of the personnel action in question.
  - B. The Administrative Authority shall affirm or deny the appeal in writing not later than fifteen (15) calendar days after receipt of the appeal. -The failure of the Administrative Authority to respond within fifteen (15) days after receipt of the

appeal shall constitute a denial of the appeal, unless the parties mutually agree in writing to extend the time limit.

- C. If the Administrative Authority denies the appeal, the eEmployee may appeal in writing to the Executive Director not later than (i) seven (7) days after the Administrative Authority's written decision was received or (ii) in the absence of a written decision by the Administrative Authority, seven (7) days after the date that the appeal was deemed denied. -The appeal shall be confined to the subject matter contained the original appeal to the Administrative Authority.
  - D. The Executive Director shall rule in writing not later than fifteen (15) calendar days after receipt of the appeal. -Failure of the Executive Director to respond within fifteen (15) days after receipt of the appeal shall constitute a denial of the appeal, unless the parties mutually agree in writing to extend the time limit.
13. Failure of OPDS, the Executive Director or the Administrative Authority to comply with one or more provisions of these Procedures in taking any action against an eEmployee shall not invalidate the action unless the eEmployee is deprived of a constitutionally protected right and there is no possibility of correcting or reversing the deprivation of the eEmployee's constitutionally protected right. -When the potential deprivation of the eEmployee's rights is brought to the attention of OPDS, the Executive Director or the Administrative Authority may rescind the action, may take new action of the same or different nature, or may let the action taken stand.

**SECTION VII: ~~Vacation~~ Leaves**

In order to promote the efficiency and effectiveness of OPDS Employees, ensure the health and well-being of Employees and their families, and recruit and retain valued Employees, OPDS provides the following paid and unpaid leave.

**Vacation Leave**

OPDS encourages its Employees to use vacation leave on an annual basis.

1. Monthly Accrual

A. Full-time Employees. Full-time Employees shall accrue vacation leave at a rate based on each full calendar month employed in accordance with the following schedule, which is based on the Employee's recognized service date.

<u>Years of Service</u>	<u>Hours Per Year</u>	<u>Hours Per Month</u>
<u>Through 5th year</u>	<u>120 (15 days)</u>	<u>10.00</u>
<u>After 5<sup>th</sup> year to 10<sup>th</sup> year</u>	<u>144 (18 days)</u>	<u>12.00</u>
<u>After 10<sup>th</sup> year to 15<sup>th</sup> year</u>	<u>168 (21 days)</u>	<u>14.00</u>
<u>After 15<sup>th</sup> year to 20<sup>th</sup> year</u>	<u>192 (24 days)</u>	<u>16.00</u>
<u>After 20<sup>th</sup> year to 25<sup>th</sup> year</u>	<u>216 (27 days)</u>	<u>18.00</u>
<u>After 25<sup>th</sup> year</u>	<u>240 (30 days)</u>	<u>20.00</u>

2. Part-time Employees. Part-time Employees shall earn vacation leave on a prorated basis.

3. Initial Trial Service Employees. During the initial trial service period, Employees are eligible to accrue vacation leave each month. Accrued vacation leave may be used at the completion of the initial trial service period. Use of vacation leave may be granted during an extension of the initial trial service period.

4. Crediting of Vacation. Vacation leave shall be credited to an Employee on the first day of the calendar month following the calendar month in which it was earned.

5. Partial Month Accrual. Vacation leave accrual for an Employee working less than a full calendar month in a pay period due to hire, termination, or leave without pay shall be computed on a prorated basis using the number of available work hours, based on the Employee's schedule, in that month.

6. *Maximum Accumulation.* An Employee may accrue a maximum of 350 hours of vacation leave. Employees who accrue 350 hours must take vacation or forfeit payment for or use of additional hours earned that would cause the Employee's vacation balance to exceed 350 hours.
7. *Scheduling of Vacations.* Unless otherwise protected by law, rule or OPDS policy, the time when an Employee may take vacation leave shall be subject to the approval of the Administrative Authority or his/her designee with due regard to the Employee and the needs of OPDS.
8. *Illness During Vacation.* When an Employee is on vacation leave and circumstances arise that would qualify the Employee to use accrued sick leave, the Employee may charge that time to sick leave.
9. *Holiday During Vacation.* If a holiday occurs while an Employee is on vacation leave, the Employee shall charge that time as holiday leave.
10. *Effect of Movement Between Divisions.* When an Employee transfers, promotes, or demotes, from one division to another within OPDS, the Employee's accrued vacation leave shall also be transferred.
11. *Employees Hired from Another State Agency.* When an Employee from another State of Oregon agency is employed by OPDS without a break in service a maximum of 80 hours of accrued vacation leave may be transferred, at the discretion of the Administrative Authority or his/her designee, to OPDS. The Employee's recognized service date shall be used to determine the monthly OPDS vacation accrual rate. See Policy Section 1(A).
12. *Vacation Pay Upon Termination.* Unless an Employee requests to transfer vacation to another State of Oregon agency, an Employee (or, in the case of death, an Employee's beneficiary or estate) shall be compensated for a maximum of 250 hours of accrued and unused vacation leave. The rate of pay for vacation shall be the Employee's pay rate at time of termination, exclusive of other types of compensation such as differentials.
13. *Donation of Vacation Leave.* Vacation leave may be donated to another OPDS Employee when requested for sick leave purposes. See Donated Leave.

## Sick Leave

OPDS is committed to complying with all applicable state and federal laws including FMLA, OFLA, and Workers' Compensation laws in the application of sick leave accrual and use.

### 1. Monthly Accrual.

A. *Full-time Employees.* Full-time Employees shall accrue sick leave at the rate of eight (8) hours for each full calendar month employed.

B. *Part-time Employees.* Part-time Employees shall earn sick leave on a prorated basis.

C. *Trial Service Employees.* During the trial service period, Employees are eligible to accrue and use sick leave upon accrual.

### 2. Crediting Sick Leave. Sick leave shall be credited to an Employee on the first day of the calendar month following the calendar month in which the leave was earned.

### 3. Partial Month Accrual. Sick leave accrual for an Employee working less than a full calendar month in a pay period due to hire, termination, or leave without pay shall be computed on a prorated basis using the number of available work hours, based on the Employee's schedule, in that month.

### 4. Maximum Accumulation. Sick leave shall accrue without limitation.

### 5. Notification.

A. *Leave Not Covered by Family Leave Laws.* It is the Employee's responsibility to notify the immediate supervisor of the need to use sick leave. If the Employee's absence is unanticipated, the Employee shall personally contact the immediate supervisor at the beginning of each missed day's regularly scheduled work time unless other arrangements have been approved by the supervisor. If the Employee's absence is anticipated, the Employee shall notify the supervisor of the need for leave as far in advance as possible.

B. *Leave Covered by Family and Medical Leave Laws.* If the Employee's absence is unanticipated, supervisor, the Employee or the Employee's personal representative shall contact Human Resources. In emergency situations, the Employee or the Employee's representative shall contact the Human Resources Manager as soon as possible during the 24-hour period immediately following the Employee's scheduled work time. If the Employee's absence is prescheduled, the Employee shall notify the Human Resources Manager of the need for leave at least 30 days in advance. See OPDS Policy - Family and Medical Leave.

C. *Holiday During Sick Leave.* If a holiday occurs while an Employee is on paid sick leave, the holiday shall not be deducted from the Employee's accrued sick leave.

6. Accrued Sick Leave.

A. Personal. An Employee who is absent because of his or her own physical illness or injury, or medical or dental appointment, must use accrued sick leave for the absence before use of any other paid or unpaid leave. An Employee who is receiving income from a disability benefit plan may opt to use leave without pay instead of sick leave while receiving such disability income. An Employee opting to use leave without pay may be required to provide evidence of such disability income to the Human Resources Manager.

B. Family. An Employee may request, and must be allowed to use, accrued sick leave to care for a qualified family member (as defined by the FMLA and/or OFLA). See OPDS Policy - Family and Medical Leave.

7. Use of Other Leave in Lieu of Sick Leave or When Sick Leave is Exhausted. Other leave may be used in lieu of sick leave, or when sick leave is exhausted, as follows:

A. Personal

*Absence Qualifying Under FMLA and/or OFLA During FMLA and/or OFLA Leave Entitlement*

An Employee who is absent because of his/her own FMLA and/or OFLA qualifying condition, and who has exhausted accrued sick leave, may request and must be allowed to use, any other form of accrued paid leave or leave without pay during the FMLA and/or OFLA leave entitlement. If the Employee uses accrued compensatory time, the amount of compensatory time taken shall not be deducted from the Employee's family leave entitlement(s). See OPDS Policy – Family and Medical Leave, Exhaustion of leave.

*Absence Not Qualifying Under FMLA and/or OFLA or Absence After FMLA and/or OFLA Leave Entitlement*

An Employee who has exhausted their accrued sick leave and is absent after exhausting FMLA and/or OFLA leave entitlement may request use of any other form of accrued paid leave or leave without pay for the absence. The use of such leave is subject to prior supervisor approval. See OPDS policy – Family and Medical Leave, Exhaustion of leave.

B. Family

An Employee may request, and must be allowed to use, any form of accrued paid leave or leave without pay prior to, or immediately after, exhausting accrued sick leave when the Employee will care for a qualified family member (as defined by the FMLA and/or OFLA) or when that person's condition does not meet the definition

of serious health condition under the FMLA and/or OFLA, but that person is unable to care for him or herself. In such cases, the Employee is responsible to make alternative care arrangements within a reasonable time.

8. If the Employee uses accrued compensatory time to care for a qualified family member (as defined by the FMLA and/or OFLA) when that family member's condition qualifies as a serious health condition under the FMLA and/or OFLA, the amount of compensatory time taken shall not be deducted from the Employee's family leave entitlement(s).

9. Proof Required. Unless otherwise provided in state or federal law (e.g. FMLA, OFLA, ADA, Workers' Compensation), the Human Resources Manager may require the Employee to submit substantiating evidence for the use of sick leave. This evidence includes, but is not limited to, a qualified health care provider's certificate. Where in the opinion of the Human Resources Manager circumstances warrant and applicable law permits, OPDS may require a second or third certificate or medical opinion from qualified health care providers. If the Human Resources Manager does not find the evidence adequate, the request for use of other leave in lieu of sick leave may be denied.

10. Workers' Compensation Application. The requirements of Oregon's Workers' Compensation laws apply as follows:

A. Reporting Requirements.

- i. An Employee who is injured on the job or becomes ill as a result of the job shall immediately report the occurrence to Human Resources or the Administrative Authority.
- ii. The Human Resources Manager or Administrative Authority shall respond to this report in accordance with the relevant provisions of the Workers' Compensation laws.

B. Use of Leave.

- i. An Employee who is absent for more than three consecutive work days because of a job-incurred injury or illness may charge the absence to leave without pay or may use accrued sick leave. If the Employee has no accrued sick leave or exhausts accrued sick leave, the Employee may use accrued vacation, compensatory time, or personal leave. An Employee who takes leave without pay receives no compensation other than the time loss payments authorized by the Workers' Compensation insurance carrier (SAIF).<sup>2</sup>
- ii. An Employee who is absent for three or fewer consecutive work days because of a job-incurred injury or illness shall charge the absence in accordance with Section 6(A) or 7(A) of this policy.

---

<sup>2</sup> See ORS 656.210(1) and 656.210(2)(d)(3).

iii. An Employee who is required by SAIF to attend a medical exam in relation to the Employee's workers' compensation claim shall charge the absence to leave without pay and may submit a claim to SAIF for earnings lost while attending the required medical exam.

C. Prorated Leave Charges.

An Employee who is absent for more than three consecutive work days because of a job-incurred injury or illness for more than three consecutive work days and who chooses to make prorated charges to accrued leave, shall do so by charging for every hour absent, 1/3 of one hour to accrued leave and 2/3 of one hour to leave without pay. The amount of time charged to leave without pay shall represent the amount of time loss compensation received from SAIF.

11. Effect of Movement Between Divisions. When an Employee transfers, promotes, or demotes from one division to another within OPDS, all of the Employee's accrued sick leave shall be transferred.

12. Effect of Reemployment. A former OPDS Employee who is hired into a non-temporary OPDS position within two years from the Employee's date of separation shall have previously accrued and unused sick leave restored.

13. Effect of Movement Between Divisions. When an Employee transfers, promotes, or demotes from one division to another within the OPDS, all of the Employee's accrued sick leave shall be transferred.

14. Employees Hired From Another State Agency. An Employee from another State of Oregon agency who is hired by the OPDS within two years of separation from that agency shall have previously accrued unused sick leave transferred.

15. Sick Leave Upon Termination. There shall be no compensation for unused sick leave upon termination of employment. OPDS will report unused sick leave to the Public Employees Retirement System.

16. Use of Donated Vacation Leave for Sick Leave Purposes. After exhausting all paid leave time, an Employee may elect to receive paid sick leave which has been converted from vacation leave donated by other Employees. See OPDS Policy - Donated Leave.

## Other Types of Leave

To ensure that its Employees comply with their civic duties and commitments, and advance important personal and professional goals, OPDS provides other types of leave as set forth below. OPDS is committed to complying with all applicable laws requiring Employers to provide leave.

### 1. Jury/Witness Leave. ORS 10.061 and 10.090

While on jury duty or while appearing as a subpoenaed witness (other than as a party in the action), an Employee will receive full pay. The Employee must waive any jury fees except for expense reimbursement. OPDS may request and retain a copy of the jury summons and court release, if applicable, to support the leave.

### 2. Military Leave. ORS 408.240, 408.290, 399.065, 399.075 and 659A.086

A. Eligibility for Military Leave With Pay. An Employee eligible for leave with pay:

- i. must have been employed, including temporary appointments, by the State of Oregon or by any county, municipality, or other political subdivision of the state for six months or more immediately preceding the Employee's request for leave; and
- ii. is a member of any National Guard, National Guard Reserve or of any reserve component of the Armed Forces of the United States; and
- iii. has provided advance written or verbal notice of the absence, except in circumstances involving military necessity or where the giving of notice is otherwise impossible or unreasonable.

B. To receive pay for the annual active duty training, the Employee must provide, before, during, or after the leave, confirming documentation which indicates the call-up was for annual active duty training or active duty in lieu of annual training.

- i. If the Employee is called to active duty for a period longer than 15 calendar days, the Employee may be paid for the first 11 work days only if such time is served for the purpose of discharging an obligation of annual active duty for training.
- ii. If the Employee has been on military active duty training leave for 15 days or less, the Employee shall return to work at the beginning of the first regularly scheduled work period following completion of service, after allowance for safe travel home and an 8-hour rest period.

C. Military Leave Without Pay. ORS 408.240, 399.065, 399.075, and 399.230.

- i. An Employee is entitled to military leave without pay for military duty when an Employee is a member of the organized militia of Oregon, or a member of an organized militia of another state, and is called into active service. Leave will continue through any applicable decompression time.
- ii. The Employee will provide verbal or written notice of military service. OPDS will require military orders or other official documents for approval of the absence. The Employee may provide the documents prior to, during, or upon completion of the military training leave. In instances involving military necessity or where the giving of notice is otherwise impossible or unreasonable, the Employee will be relieved of this obligation.
- iii. An Employee may only be paid during active military leave or applicable decompression time if:
  - a. the Employee elects to be paid for accrued vacation leave, personal leave, and compensatory time;
  - b. the Employee is an FLSA-exempt Employee who works any part of a work week while on temporary military leave of up to 3 months; or
  - c. the Employee receives supplemental income through the Military Donated Leave policy.
  - d. the Employee is a member of the Oregon organized militia and is called to active duty under ORS 399.065 and 399.075, the Employee shall be paid in accordance with that statute. Otherwise, military leave and decompression time is without pay.
- iv. Accrued leave does not have to be exhausted before leave without pay is granted for military leave or subsequent decompression time.
- v. While the Employee is on military leave without pay, vacation, sick or personal business leave will not accrue. The Employee shall receive full credit for time spent on military leave and subsequent decompression time upon return to work. Refer to D(i) of this procedure.
- vi. An FLSA-exempt Employee who works any part of a work week while on temporary military leave (defined as up to 3 months), shall receive a full week's salary for that particular week. However, OPDS will only pay the difference between the amount received from the Employee's military pay and the state salary due for that particular week. During such week, the Employee shall receive full credit toward accrual of sick and vacation leave hours and will be paid for any holiday occurring during the week.

#### D. Return From Military Leave.

- i. Upon return from Military Leave, an Employee will receive his/her vacation accrual rate, salary eligibility date, and service credits as though the Employee had remained continuously employed. See ORS 408.270.
  - a. An Employee shall notify the Administrative Authority or Human Resources of the intent to return to work within 90 days of release from service if the period of service was more than 180 days. Otherwise, an Employee will resume the duties of employment within seven (7) calendar days of release from service.
  - b. An Employee's failure to return to work within the time periods specified in Uniformed Services Employment and Reemployment Rights Act (USERRA) shall result in termination of military leave, and the Employee shall be considered to have resigned.
  - c. If, due to disability resulting from military service, an Employee is not qualified to perform the duties of the position the Employee held at OPDS before going on leave but is qualified to perform the duties of another position in the office, the Employee will be reemployed in a position of equivalent seniority, status, and pay, so long as the Employee is qualified to perform the duties of the position, or could become qualified to perform them with reasonable efforts by the Employer.

#### 3. Bereavement Leave.

- A. At the request of the Employee, the Administrative Authority or his/her designee shall grant up to 40 hours paid bereavement leave per occurrence because of the death of a qualifying family member (as defined by OFLA) to be used intermittently or in a block of time. At the discretion of the Administrative Authority or his/her designee, up to 24 hours of paid bereavement leave per occurrence may be granted because of death(s) of any other relative or person residing in the same household as the Employee. In determining the amount of time to grant, the Administrative Authority or his/her designee shall consider the significance of the relationship and need for travel time.
- B. With the prior approval of the Administrative Authority or his/her designee, accrued paid leave may be used to cover time away after paid bereavement leave is exhausted. Accrued sick leave may only be used in accordance with OPDS policy - Sick Leave.
- C. Paid time off for bereavement shall be prorated for part-time Employees.

D. See OPDS Policy – Family and Medical Leave regarding eligibility for bereavement leave under Oregon Family Medical Leave.

#### 4. Special Recognition Leave.

A. At the discretion of the Administrative Authority or his/her designee, Employees ineligible to receive overtime compensation under the FLSA may be granted up to 40 hours special recognition leave per calendar year. Use of such leave shall be scheduled in advance with the Employee's supervisor.

B. Eligible part-time Employees may be granted special recognition leave on a prorated basis.

C. Special recognition leave may not be accrued, converted to vacation or sick leave, or converted to cash remuneration.

D. Special recognition leave not used by December 31 of the year in which granted shall be forfeited.

E. There is no eligibility waiting period for special recognition leave.

#### 5. Leave Without Pay.

##### A. Conditions:

i. An Employee desiring a leave of absence without pay must submit a written request to the Administrative Authority or his/her designee. The request must specify the duration and purpose of the leave.

ii. Except as otherwise provided by law, any request for leave without pay must be submitted in advance of the leave. Except as provided by law, approval or denial of the request is at the discretion of the Administrative Authority or his/her designee when the absence of the Employee will not seriously impact the work of the agency

iii. Normally, leave without pay will not be granted until all other appropriate accrued paid leave has been exhausted. See OPDS Policy – Sick leave for exceptions.

iv. Employees cannot alternate the use of accrued leave and leave without pay; that is, leave without pay, if used, must be taken at the end of the leave period.

A. Effect On Leave Accrual. Vacation and sick leave accrual for an Employee who worked less than a full calendar month in a pay period because of leave without pay shall be computed on a prorated basis using the number of available work hours, based on the Employee's schedule, in that month.

B. Effect on Recognized Service Date and Salary Eligibility Date. Leave without pay in excess of 15 consecutive calendar days shall result in a permanent adjustment of the Employee's service date. An Employee's recognized service date shall be adjusted by adding to it the number of calendar days absent without pay, thereby making the recognized service date later than it would have been if leave without pay had not occurred. No adjustment shall be made to Employees on FMLA or OFLA approved leave in a leave without pay status.

C. Outside Employment. The Administrative Authority or his/her designee, prior to granting leave without pay to an Employee who is accepting employment outside OPDS, must obtain advance, written approval from the Administrative Authority or his/her designee.

D. Effect on Trial Service Period. Leave without pay in excess of 15 consecutive calendar days shall not be considered continuous employment when determining the completion of the initial or promotional trial service period. An Employee's trial service period shall be adjusted by adding to it the number of calendar days absent without pay, thereby making the ending date of the trial service period later than it would have been if leave without pay had not occurred

## 6. Personal Leave.

A. Full-time non-temporary Employees shall be granted 24 hours of personal leave on July 1 of each year. Leave will be prorated for an Employee hired after July 1 of the fiscal year as defined in Appendix B of this manual. There is no waiting period to use this leave, however use of such leave shall be subject to prior approval by the Employee's Administrative Authority or his/her designee.

B. Part-time Employees shall be granted personal leave on a prorated basis.

C. Personal leave may not be accrued, donated, converted to vacation or sick leave, or converted to cash remuneration.

D. Personal leave balances not used by June 30 of each year shall be forfeited.

E. When an Employee from another state of Oregon agency is employed by OPDS and the other agency grants personal leave for a calendar year, the personal leave may be transferred.

## 7. Leaves During Temporary Interruption of Employment.

### A. Planned Temporary Interruption of Employment.

- i. A temporary interruption of employment, not exceeding 15 continuous calendar days, due to lack of work, budget deficit, or other unusual or unexpected circumstances, shall not be considered as a layoff if, at the termination of the situation that created the need for the interruption, all affected Employees are returned to work.
- ii. A temporary interruption due to lack of work or other unusual or unexpected circumstances other than a budget deficit may, at the Employee's option, be charged to accrued paid leave or leave without pay. FLSA-exempt Employees will not be required to charge absences of less than one full work week to accrued paid leave or leave without pay. Accrued sick leave may only be used in accordance with ODPS Policy – Sick Leave.

### B. A temporary interruption of employment due to budget deficit shall be charged to leave without pay by both FLSA-exempt and non-exempt Employees.

### C. Unplanned Temporary Interruption of Employment Due to Hazardous Environmental Condition or Inoperable Facility.

- i. Hazardous Environmental Condition. Hazardous environmental condition includes, but is not limited to, fire, flood, earthquake, pollution, or inclement weather.
- ii. Inoperable Facility. An inoperable facility is one where essential services are lost to fire, mechanical failure, accident, weather, or other causes.

### D. Official Closure Due to Hazardous Environmental Condition or Inoperable Facility. Official closure is defined as the employer-initiated closing of:

- i. all operations and the cessation of public access to a facility and all services when no Employee is allowed to remain at work; or
- ii. most, but not all, operations and public access to services in that location or another is continued on a limited basis when a minimum number of Employees, as determined by the Administrative Authority or his/her designee, are required to remain at work.
- iii. Declaration of Official Closure. The Executive Director shall be responsible for declaring an official closure or temporary interruption of employment.

iv. Notification of Official Closure. When an official closure is declared prior to the start of the workday, Administrative Authorities shall make a reasonable effort to notify Employees in a timely manner. In such cases, the Administrative Authority or his/her designee will use email, Flash Alert, and the Court Administrators recorded message to notify Employees of the official closure. The final responsibility for finding out whether the operation is open or closed lies with each Employee. See OPDS Policy – Inclement Weather.

v. Staffing During Official Closure. When a minimum number of Employees are required to remain at work, the Administrative Authority or his/her designee shall first determine whether FLSA-exempt Employees are available to remain. If no FLSA-exempt Employee is available or if an insufficient number of FLSA-exempt Employees are available to remain at work, then a necessary number of FLSA non-exempt Employees may be required to remain at work. An Employee shall not be required to remain at work if such a requirement would pose a threat to the Employee’s safety or the safety of a family member residing in the Employee’s household.

E. Charging of Time Off Due to Official Closure.

i. Official Closures of More Than One Hour.

Employees shall be granted leave with pay not to exceed 16 hours in a calendar year. This leave may be deducted from the amount of paid leave taken by any Employee on paid leave at the time of the closure(s). When an official closure of the work site in excess of a total of 16 hours in a calendar year occurs, FLSA non-exempt Employees will have the option of charging the time in excess of 16 hours to accrued paid leave or leave without pay. Because the FLSA prohibits deductions of less than one full work week from an FLSA-exempt Employee’s salary, FLSA-exempt Employees will not be required to charge to accrued paid leave or leave without pay the time that is in excess of 16 hours, but less than one full work week. Accrued sick leave may only be used in accordance with ODPS Policy – Sick Leave.

ii. Official Closures of One Hour or Less.

Official closure of the work site of one hour or less shall be considered as regular hours worked.

iii. Recording of Time Worked During Official Closure.

a. FLSA-exempt Employees shall record time worked as regular hours.

b. FLSA non-exempt Employees who remain at work as required by the Administrative Authority or his/her designee during an official closure shall record time worked as regular hours for which they are paid and in addition

shall be provided compensatory time off at the rate of time and one half for each hour worked during the official closure

iv. Absences Due to A Hazardous Environmental Condition When An Official Closure Has Not Been Declared.

When a hazardous environmental condition does not result in official closure of the work site, but prevents individual Employees from reporting to work or necessitates their leaving work early, Employees will have the option of charging their absence to accrued paid leave or leave without pay. Sick leave may only be used in accordance with OPDS Policy – Sick Leave.

**8. Pre-retirement Planning Leave.**

A. Pre-retirement leave shall be used to prepare for retirement or to investigate and attend retirement programs or retirement counseling.

B. A full-time non-temporary Employee with five or more year's employment with a PERS-covered Employer shall be granted up to 28 hours of paid pre-retirement leave. The 28 hours of leave is the maximum amount of paid pre-retirement leave an Employee may take during the entirety of his/her employment with the State of Oregon.

C. Part-time Employees shall be granted pre-retirement leave on a prorated basis.

D. The scheduling of pre-retirement leave is subject to prior approval of the Administrative Authority or his/her designee. Such leave may not be converted to vacation, sick or personal leave, or to cash remuneration. Pre-retirement leave not used before retirement shall be forfeited.

**9. Interview Leave.**

An Employee shall be granted a reasonable amount of time off with pay to interview for other jobs within OPDS or with other State of Oregon agencies. Time off shall be granted for the time spent during the Employee's regularly scheduled workday and work hours in the interview.

**10. Service Award Leave.**

A. All non-temporary Employees who have completed at least five years of non-temporary service with OPDS are eligible for service award leave.

B. Only non-temporary continuous service with OPDS shall count toward service award eligibility. For the purposes of this section, continuous service in a non-temporary position shall count towards an Employee's service eligibility if either:

- the Employee was employed by the State Public Defender on October 1, 2001 and transferred to OPDS, or
- the Employee was employed by the Oregon Judicial Department and transferred to OPDS on July 1, 2003, or
- the Employee has been continuously employed with OPDS.

Time worked for OPDS before and after a break in service will be considered in determining eligibility. Service award leave is granted in one-time intervals to full-time Employees in accordance with the following schedule:

<u>Years Employed</u>	<u>Service Award Leave Granted</u>
<u>5</u>	<u>5 hours</u>
<u>10</u>	<u>10 hours</u>
<u>15</u>	<u>15 hours</u>
<u>20</u>	<u>20 hours</u>
<u>25</u>	<u>25 hours</u>
<u>30</u>	<u>30 hours</u>
<u>35</u>	<u>35 hours</u>
<u>40</u>	<u>40 hours</u>
<u>45</u>	<u>45 hours</u>

Part-time Employees shall be granted service award leave on a prorated basis.

- C. Service award leave must be scheduled in advance with the Administrative Authority or his/her designee and may be accrued. Service award leave shall not be converted to cash remuneration. Service award leave not used prior to retirement or termination of employment shall be forfeited.

#### **11. Red Cross Disaster Relief Services Leave. ORS 401.378**

The Administrative Authority or his/her designee may grant an Employee leave for performance of relief services in Oregon. Such leave may not exceed 15 workdays in any 12-month period. To qualify for such leave, the Employee must be a certified disaster services volunteer of the American Red Cross and the disaster must be designated at Level II or above by the American Red Cross.

#### **12. Leave to Address Domestic Violence, Harassment, Sexual Assault or Stalking ORS659A.270 through 659A.290**

- A. An Employee who works for a state agency on the date leave begins who is the victim of domestic violence, harassment, sexual assault or the parent or guardian of a minor child or dependent who is the victim of domestic violence, harassment, sexual assault or stalking is eligible for leave under this policy.

B. Up to 160 hours of leave with pay each calendar year is available to an eligible Employee for the purposes specified in (C) below. The 160 hours of paid leave is in addition to any vacation, sick, personal business or other form of paid or unpaid leave available to the eligible Employee. An Employee must exhaust all other forms of paid leave before the Employee may use the paid leave established by this policy.

C. An eligible Employee may use the 160 hours of employer-paid leave for any of the following purposes:

i. To seek legal or law enforcement assistance or remedies to ensure the health and safety of the Employee or the Employee's minor child or dependent, including preparing for and participating in protective order proceedings or other civil or criminal legal proceedings related to domestic violence, harassment, sexual assault or stalking;

ii. To seek medical treatment for or to recover from injuries caused by domestic violence, harassment, sexual assault or stalking of the eligible Employee or the Employee's minor child or dependent;

iii. To obtain, or to assist a minor child or dependent in obtaining counseling from a licensed mental health professional related to an experience of domestic violence, harassment, sexual assault or stalking;

iv. To obtain services from a victim services provider for the eligible Employee or the Employee's minor child or dependent; or

v. To relocate or take steps to secure an existing home to ensure the health and safety of the eligible Employee or the Employee's minor child or dependent. Relocation includes:

a. Transition periods spent moving the eligible Employee or the Employee's minor child or dependent from one home or facility to another, including but not limited to time to pack and make security or other arrangements for such transitions;

b. Transportation or other assistance required for an eligible Employee or the Employee's minor child or dependent related to the domestic violence, harassment, sexual assault or stalking.

D. An eligible Employee seeking leave under this policy must give reasonable advance notice of the intent to take leave unless giving the advance notice is not feasible. When taking leave in an unanticipated or emergency situation, an eligible Employee must give oral or written notice as soon as practicable. Notice may be given by any other person on behalf of an Employee taking unanticipated leave.

E. Certification requirements. An Employee must provide, within a reasonable amount of time, written certification that the leave is for the Employee or the Employee's minor child or dependent who is a victim of domestic violence, harassment, sexual assault or stalking; and the leave is taken for one of the purposes identified in (C)(i)-(v) of this policy.

i. Intermittent Leave, Altered or Reduced Work Schedule. An Employee may take leave as provided in this policy in multiple blocks of time, intermittently, and/or supplementing an altered work schedule.

ii. To the extent the Employee's need for leave under this policy is also covered by FMLA and/or OFLA the leave types run concurrently.

DRAFT

### **Donated Leave**

OPDS administers a donated leave program that allows Employees to support other Employees in serious need of leave by donating paid vacation leave time to be used for sick, bereavement, or military leave needs.

Any OPDS Employee (Donor) may voluntarily donate accrued vacation leave in full-hour increments to another non-temporary OPDS Employee (Requestor) provided the Requestor to whom the leave is to be donated requires the leave for sick, bereavement, or military leave and meets the requirements below.

### **Sick leave**

The requesting Employee:

- A. is absent due to their own FMLA and/or OFLA qualifying reason, or to care for a qualifying family member (as defined by FMLA and/or OFLA), with a condition that qualifies as a serious health condition under the FMLA and/or OFLA, and
- B. has exhausted all accrued paid leave, and
- C. is not receiving workers' compensation or disability payments, and
- D. is not the subject of pending disciplinary action, and
- E. has the approval of the Human Resources Manager to receive donated leave.

### **Bereavement leave**

The requesting Employee:

- A. meets the OFLA eligibility requirements, and
- B. is absent due to the death of a qualifying family member as defined under OFLA, and
- C. has exhausted all accrued paid leave, and
- D. has the approval of the Human Resources Manager to receive donated leave.

### **Military Donated Leave**

As provided in ORS 659A.086, the requesting Employee:

- A. is a member of the organized militia of this state and is called in to active service of this state under ORS 399.065(1) or state active duty under ORS 399.075, or

B. is a member of the organized militia of another state and is called into active status service by the Governor of the respective state, and

C. holds regular status (i.e. has completed initial trial service), and

D. is in a leave without pay status during active military duty status, and

E. has the approval of the Human Resources Manager to receive donated leave.

1. Conversion of Donated Leave. Donated vacation leave shall be converted to the receiving Employee's sick leave account by multiplying the amount of leave donated by the donating Employee's hourly rate of pay (exclusive of differentials) and by then dividing this amount by the receiving Employee's hourly rate of pay (exclusive of differentials).

2. Maximum Donated Leave That May Be Received.

A. Sick leave purposes: 480 hours per incident.

B. Bereavement leave purposes: 40 hours per occurrence.

NOTE: Donated bereavement leave can impact long- and short-term disability benefits. Before applying for donated leave while receiving disability benefits, consult the agency payroll office for information on how donated bereavement leave will impact your special circumstances.

C. Military leave purposes: May not receive more than the amount the Employee was earning in total compensation on the date the Employee began the military leave of absence.

3. Unused Donated Leave. Unused donated leave shall be returned to the donor.

~~**Policy:**~~

- ~~I. In order to promote the efficiency and effectiveness of OPDS employees, ensure the health and well-being of employees and their families, and recruit and retain valued employees, OPDS provides vacation leave commensurate with that of other state agencies.~~
- ~~H. In light of the foregoing benefits of vacation leave, OPDS encourages its employees to use vacation leave on an annual basis.~~

~~**Procedures:**~~

~~1. Monthly Accrual~~

~~A. Full-time Employees. Full-time employees shall accrue vacation leave at a rate based on each full calendar month employed in accordance with the following schedule, which is based on the employee's recognized service date.~~

<del>Years of Service</del>	<del>Hours Per Year</del>	<del>Hours Per Month</del>
<del>Through 5th year</del>	<del>120 (12 days)</del>	<del>10.00</del>
<del>After 5th year through 10th year</del>	<del>144 (18 days)</del>	<del>12.00</del>
<del>After 10th year through 15th year</del>	<del>168 (21 days)</del>	<del>14.00</del>
<del>After 15th year through 20th year</del>	<del>192 (24 days)</del>	<del>16.00</del>
<del>After 20th year</del>	<del>216 (27 days)</del>	<del>18.00</del>

~~B. Part-time Employees. Part-time employees shall earn vacation leave on a prorated basis.~~

~~C. Trial Service Employees. During the trial service period, employees are eligible to accrue vacation leave.~~

~~D. Crediting of Vacation. Vacation leave shall be credited to an employee on the first day of the calendar month following the calendar month in which it was earned.~~

~~E. Partial Month Accrual. Vacation leave accrual for an employee working less than a full calendar month in a pay period due to hire, termination, or leave without pay shall be computed on a prorated basis using the number of available work hours, based on the employee's schedule, in that month.~~

~~2. Maximum Accumulation. An employee may accrue a maximum of 350 hours of vacation leave. Employees who accrue 350 hours must take vacation or forfeit payment for or use of additional hours earned that would cause the employee's vacation balance to exceed 350 hours.~~

~~3. Scheduling of Vacations. Unless otherwise protected by law, rule or OPDS policy, the time when an employee may take vacation leave shall be subject to the approval of the administrative authority with due regard to the employee and the needs of the OPDS.~~

~~Vacation leave accrued during the initial trial service period may not be used until the completion of the trial service period. Use of vacation leave during an extension of the trial service period may be granted by the administrative authority.~~

~~4. Illness During Vacation. When an employee is on vacation and circumstances arise that would qualify the employee to use accrued sick leave, the employee may charge that time in accordance with PDPR 15.05.~~

~~5. Holiday During Vacation. If a holiday occurs while an employee is on vacation leave, the holiday shall not be deducted from the employee's accrued vacation leave.~~

~~6. Effect of Movement Between Divisions. When an employee transfers, promotes, or demotes, from one division to another within the OPDS, all of the employee's accrued vacation leave shall also be transferred.~~

~~7. Employees Hired from Another State Agency. When an employee from another State of Oregon agency is employed by the OPDS without a break in service a maximum of 80 hours of accrued vacation leave may be transferred, at the discretion of the administrative authority, to the OPDS. The employee's recognized service date shall be used to determine the monthly vacation accrual rate under PDPR 14.01.~~

~~8. Vacation Pay Upon Termination. Unless an employee requests to transfer vacation to another State of Oregon agency, an employee (or, in the case of death, an employee's beneficiary or estate) shall be compensated for a maximum of 250 hours of accrued and unused vacation leave. The rate of pay for vacation shall be~~

~~the employee's pay rate at time of termination, exclusive of other types of compensation such as differentials.~~

~~9. Donation of Vacation Leave For Sick Leave Purposes. Vacation leave may be donated to another OPDS employee as follows:~~

~~A. Any OPDS employee may voluntarily donate accrued vacation leave in full-hour increments to another nontemporary OPDS employee provided the employee to whom the leave is to be donated:~~

~~(a) is absent due to their own FMLA and/or OFLA qualifying reason or to care for a qualifying family member (as defined by FMLA and/or OFLA) or domestic partner (as defined by PEBB eligibility rules) with a condition that qualifies as a serious health condition under the FMLA and/or OFLA;~~

~~(b) has exhausted all accrued paid leave;~~

~~(c) is not receiving workers' compensation or disability payments;~~

~~(d) is not the subject of pending disciplinary action; and~~

~~(e) has the approval of their administrative authority to receive donated leave.~~

~~B. Conversion of Donated Leave. Donated vacation leave shall be converted to the receiving employee's sick leave account by multiplying the amount of leave donated by the donating employee's hourly rate of pay (exclusive of differentials) and by then dividing this amount by the receiving employee's hourly rate of pay (exclusive of differentials).~~

~~C. Maximum Donated Leave That May Be Received. The maximum donated leave an employee may receive per incident is 480 hours.~~

~~D. Unused Donated Leave. Unused donated leave shall be retained by the receiving employee.~~

## **Sick Leave**

### ***Policy:***

- ~~I. In order to promote the health and well being of OPDS employees and their families, OPDS provides sick leave commensurate with that of other state agencies.~~
- ~~II. For the same reasons, OPDS is committed to complying with all applicable state and federal laws such as FMLA, OFLA and Workers' Compensation laws.~~

### ***Procedures:***

- ~~1. Monthly Accrual.
  - ~~A. Full-time Employees. Full-time employees shall accrue sick leave at the rate of eight hours for each full calendar month employed.~~
  - ~~B. Part-time Employees. Part-time employees shall earn sick leave on a prorated basis.~~
  - ~~C. Trial Service Employees. During the trial service period, employees are eligible to accrue and use sick leave.~~
  - ~~D. Crediting Sick Leave. Sick leave shall be credited to an employee on the first day of the calendar month following the calendar month in which the leave was earned.~~
  - ~~E. Partial Month Accrual. Sick leave accrual for an employee working less than a full calendar month in a pay period due to hire, termination, or leave without pay shall be computed on a prorated basis using the number of available work hours, based on the employee's schedule, in that month.~~~~
- ~~2. Maximum Accumulation. Sick leave shall accrue without limitation.~~
- ~~3. Notification.
  - ~~A. Leave Not Covered by Family Leave Laws. It is the employee's responsibility to notify the immediate supervisor of the need to use sick leave. If the employee's absence is unanticipated, the employee shall personally contact the immediate supervisor at the beginning of each missed day's regularly scheduled work time unless other arrangements have been approved by the~~~~

~~supervisor. If the employee's absence is prescheduled, the employee shall notify the supervisor of the need for leave as far in advance as possible.~~

~~B. Leave Covered by Family Leave Laws. It is the employee's responsibility to notify the immediate supervisor of the need to use sick leave. If the employee's absence is unanticipated, the employee or the employee's personal representative shall contact the immediate supervisor at the beginning of each missed day's regularly scheduled work time unless other arrangements have been approved by the supervisor. In emergency situations, the employee or the employee's representative shall contact the supervisor as soon as possible during the 24-hour period immediately following the employee's scheduled work time. If the employee's absence is prescheduled, the employee shall notify the supervisor of the need for leave as far in advance as possible.~~

~~4. Holiday During Sick Leave. If a holiday occurs while an employee is on sick leave, the holiday shall not be deducted from the employee's accrued sick leave.~~

~~5. Accrued Sick Leave.~~

~~A. Personal. An employee who is absent because of his or her own physical illness or injury, disability resulting from pregnancy or childbirth, mental illness, or medical or dental appointment, must use accrued sick leave for the absence. An employee who is receiving income from a disability benefit plan, however, may opt to use leave without pay instead of sick leave while receiving such disability income. An employee opting to use leave without pay must provide evidence of such disability income to the supervisor.~~

~~B. Family. An employee may request, and must be allowed to use, accrued sick leave to care for a qualified family member (as defined by the FMLA and/or OFLA), a domestic partner (as defined by PEBB eligibility rules), or a child or parent of that domestic partner only for the following reasons:~~

(i) ~~to care for that person when that person's condition meets the definition of serious health condition under the FMLA and/or OFLA;~~

~~(ii) to care for that child when that child's condition qualifies as sick child leave under OFLA;~~

~~(iii) to accompany that person to a medical or dental appointment; or~~

(iv) ~~to care for that person when that person's condition does not meet the definition of serious health condition under the FMLA and/or OFLA, but that person is unable to care for him/herself. In such cases, the employee is responsible to make alternative care arrangements within a reasonable time.~~

~~At the discretion of the administrative authority, an employee may be allowed to use accrued sick leave to care for other relatives, in-laws, or other persons residing in the same household. When determining whether to grant the use of sick leave and how much sick leave to grant, the administrative authority shall consider the significance of the relationship, the severity of the illness/injury, and the needs of the OPDS.~~

~~6. Use of Other Leave in Lieu of Sick Leave or When Sick Leave is Exhausted. Other leave may be used in lieu of sick leave, or when sick leave is exhausted, as follows:~~

~~A. Personal~~

~~(i) Absence Qualifying Under FMLA and/or OFLA During FMLA and/or OFLA Leave Entitlement~~

~~An employee who is absent because of their own FMLA and/or OFLA qualifying condition, and who has exhausted accrued sick leave, may request and must be allowed to use, any other form of accrued paid leave or leave without pay during the FMLA and/or OFLA leave entitlement. If the employee uses accrued compensatory time, the amount of compensatory time taken shall not be deducted from the employee's family leave entitlement(s). (Also see PDPR 16.05(1).)~~

~~(ii) Absence Not Qualifying Under FMLA and/or OFLA or Absence After FMLA and/or OFLA Leave Entitlement~~

~~An employee who has exhausted their accrued sick leave and is absent after exhausting their FMLA and/or OFLA leave entitlement or is absent because of their own FMLA and/or OFLA non-qualifying physical illness or injury, disability resulting from pregnancy or childbirth, mental illness, or medical or dental appointment may request use of any other form of accrued paid leave or leave without pay for their absence. The use of such leave is subject to prior supervisory approval. Normally, if granted, leave without pay will not be granted until all other accrued paid leave is exhausted. (Also see PDPR 16.05(1).)~~

~~B. Family~~

~~(i) An employee may request, and must be allowed to use, any form of accrued paid leave or leave without pay prior to, or immediately after, exhausting accrued sick leave when:~~

~~(a) the employee will care for a qualified family member (as defined by the FMLA and/or OFLA), a domestic partner (as defined~~

by PEBB eligibility rule), or a child or parent of that domestic partner when:

~~(1) that person's condition meets the definition of serious health condition under the FMLA and/or OFLA;~~

~~31~~

~~(2) that child's condition qualifies as sick child leave under OFLA;~~

~~(3) the employee must accompany that person to a medical or dental appointment; or~~

~~(4) that person's condition does not meet the definition of serious health condition under the FMLA and/or OFLA, but that person is unable to care for him or herself. In such cases, the employee is responsible to make alternative care arrangements within a reasonable time; and~~

~~(b) the employee has not exhausted their FMLA and/or OFLA leave entitlement or has not exceeded the leave entitlement that would be available to the employee if the absence and/or relationship otherwise qualified under the FMLA and/or OFLA.~~

~~(ii) If the employee uses accrued compensatory time to care for a qualified family member (as defined by the FMLA and/or OFLA) when that person's condition qualifies as a serious health condition under the FMLA and/or OFLA, the amount of compensatory time taken shall not be deducted from the employee's family leave entitlement(s). (Also see PDPR 16.05(1).)~~

~~(iii) An employee may request to use other accrued paid leave or leave without pay to care for other relatives, in-laws, or other persons residing in the same household. The use of such leave is subject to prior approval of the administrative authority. Normally leave without pay will not be granted until all other accrued paid leave is exhausted. (Also see PDPR 16.05(1).)~~

~~11. Proof Required. Unless otherwise provided in state or federal law (e.g. FMLA, OFLA, ADA, Workers' Compensation), the Administrative Authority may require the employee to submit substantiating evidence for the use of sick leave. This evidence includes, but is not limited to, a qualified health care provider's certificate. Where in the opinion of the Administrative Authority circumstances warrant and applicable law permits, OPDS may require a second or third certificate or medical opinion from qualified health care providers. If the Administrative Authority does not find the evidence adequate, the administrative authority may disapprove the request for sick leave.~~

~~12. Workers' Compensation Application. The requirements of Oregon's Workers' Compensation laws apply as follows:~~

~~A. Reporting Requirements.~~

~~—~~

~~32~~

~~(i) An employee who is injured on the job or becomes ill as a result of the job shall immediately report the occurrence to the Administrative Authority.~~

~~(ii) The Administrative Authority shall respond to this report in accordance with the relevant provisions of the Workers' Compensation laws.~~

~~—~~

~~B. Use of Leave.~~

~~— An employee who is absent for more than three consecutive work days because of a job-incurred injury or illness may charge the absence to leave without pay or may make prorated charges to accrued sick leave. If the employee has no accrued sick leave or exhausts accrued sick leave, the employee may make prorated charges to accrued vacation, compensatory time, or personal leave. An employee who takes leave without pay receives no compensation other than the time loss payments authorized by the workers' compensation insurance carrier.~~

~~— An employee who is absent for three or fewer consecutive work days because of a job-incurred injury or illness shall charge the absence in accordance with PDPR 15.05 and 15.06.~~

~~— An employee who is required by SAIF to attend a medical exam in relation to the employee's workers' compensation claim shall charge the absence to leave without pay and may submit a claim to SAIF for earnings lost while attending the required medical exam.~~

~~C. Prorated Leave Charges.~~

~~—~~

~~An employee who is absent for more than three consecutive work days because of a job-incurred injury or illness for more than three consecutive work days and who chooses to make prorated charges to accrued leave, shall do so by charging for every hour absent, 1/3 of one hour to accrued leave and 2/3 of one hour to leave without pay. The amount of time charged to leave without pay shall represent the amount of time loss compensation received.~~

~~9. Effect of Reemployment. A former employee of a State of Oregon agency who is hired into a nontemporary OPDS position within two years from the employee's date of separation shall have previously accrued and unused sick leave restored.~~

~~10. Effect of Movement Between Divisions. When an employee transfers, promotes, or demotes from one division to another within the OPDS, all of the employee's accrued sick leave shall be transferred.~~

~~33~~

~~11. Employees Hired From Another State Agency. An employee from another State of Oregon agency who is hired by the OPDS within two years of separation from that agency shall have previously accrued unusual sick leave transferred.~~

~~12. Sick Leave Upon Termination. There shall be no compensation for unused sick leave upon termination of employment. The OPDS will report unused sick leave to the Public Employees Retirement System. Depending on the retirement method used to calculate the employee's monthly retirement benefit, the value of one-half the unused sick leave may be used in computing benefits to be received by the employee upon retirement.~~

~~13. Use of Donated Vacation Leave for Sick Leave Purposes. In accordance with the provisions of PDPR 14.10, an employee may receive paid sick leave which has been converted from vacation leave donated by other employees. An employee receiving such donated leave may use such leave only in accordance with PDPR 15.05. Unused donated leave shall be retained as sick leave by the receiving employee.~~

---

---

---

## **Other Types of Leave**

---

### ***Policy:***

---

34

~~I. To ensure that its employees comply with their civic duties and commitments and advance important personal and profession goals, OPDS provides other types of leave as set forth below.~~

~~II. For the same reasons, OPDS is committed to complying with all applicable laws requiring employers to provide leave, such as military leave and jury duty.~~

***Procedures:***

~~1. Jury/Witness Leave. While on jury duty or while appearing as a subpoenaed witness (other than as a party in the action), an employee will receive full pay provided the employee submits witness or jury fees to the OPDS. The employee shall forward the cash fees or endorse the instrument by which payment is made and forward it to the OPDS Business Services Manager. Employees may retain any mileage fees paid to them.~~

~~2. Military Leave.~~

~~A. Eligibility.~~

~~To be eligible for military leave, an employee must:~~

- ~~(i) be inducted into the U.S. Armed Forces under the Military Service Act; or~~
- ~~(ii) enlist in the U.S. Armed Forces; or~~
- ~~(iii) be a member of a reserve component of the U.S. Armed Forces.~~

~~B. Military Leave With Pay.~~

~~(i) Eligibility for Military Leave With Pay. To be eligible for military leave with pay, an employee must have been employed, including temporary appointments, by the State of Oregon or by any county, municipality, or other political subdivision of the state for the six-month period immediately preceding the employee's request for leave.~~

~~(ii) Annual Active Duty. An employee who requests military leave for the purpose of discharging an obligation of annual active duty for military training ("summer camp") shall be placed on military leave with pay and shall be paid for the first 11 work days of such leave. If the annual active duty (including time spent reporting to and returning from such duty) exceeds 11 work days in any one federal fiscal year (October 1 through September 30), the employee shall be placed on military leave without pay for the amount of time in excess of 11 work days.~~

~~C. Military Leave Without Pay.~~

~~(i) An employee who does not meet the requirements listed in PDPR 16.02(2)(a) or who requests military leave for the purpose of attending active duty basic military training, annual active duty in excess of 11 work days, or any other voluntary or involuntary special military training not covered in PDPR 16.02(2)(b) shall be granted military leave without pay.~~

~~ii. An employee shall be entitled to military leave without pay during a period of service with the U.S. Armed Forces not exceeding four years. Military leave without pay shall be extended beyond four years under the following circumstances:~~

~~(a) If a period of military duty is extended at the request of or for the convenience of the federal government, the period of leave shall be extended up to one additional year for a total period of leave not exceeding five years.~~

~~(b) If a period of additional military duty is imposed by law or results from the inability of an employee to obtain orders relieving the employee from active duty, the period of leave shall be extended for the duration of such additional military leave.~~

~~D. Application for Military Leave.~~

~~(i) An employee shall submit to the administrative authority, a written request for military leave with or without pay as early as possible.~~

~~(ii) An employee may elect to use accrued vacation leave prior to or in lieu of military leave without pay.~~

~~(iii) An administrative authority may request a copy of the employee's military orders upon return from military leave.~~

~~E. Return From Military Leave.~~

~~(i) An employee who is a member of a reserve component and is on military leave to perform weekend or summer camp active duty for training or inactive duty training (drills) shall report for work at the beginning of the employee's next regularly scheduled work day after completion of such training (including necessary travel time from the place of training to the place of employment) or the end of hospitalization caused by military duty.~~

~~(ii) An employee who is a member of a reserve component and who is on military leave to perform a service of initial active duty for training (usually for six months duration) must notify the administrative authority of the employee's intent to return to work within 31 days after release from such training or the end of hospitalization caused by military duty. Provided no layoff has occurred that would have resulted in layoff of the employee, the employee shall be returned to work within two working days after receipt of the employee's notification of intent.~~

~~(iii) Within 90 days after satisfactory completion of a tour of full active military duty or the end of hospitalization caused by such duty, the employee shall notify the administrative authority of the employee's intent to return to work. Provided no layoff has occurred that would have resulted in layoff of the employee, the employee shall be returned to work within two working days after receipt of the employee's notification of intent.~~

~~(iv) Failure to return to work within the time periods specified in PDPR 16.02(5)(a), (b), and (c) shall result in termination of military leave, and the employee shall be considered to have resigned.~~

~~(v) If, due to disability resulting from military service, an employee is not qualified to perform the duties of the position the employee held in the OPDS before going on leave but is qualified to perform the duties of another position in the Office, the employee shall be returned from leave to a position for which the employee is qualified and that has a level of pay that is closest but does not exceed the maximum step of the employee's former class.~~

~~F. Effect of Paid or Unpaid Military Leave on Employment.~~

~~(i) An employee who has not completed the required initial or promotional trial service period at the time of military leave shall, upon returning from leave, be required to serve the remainder of such period.~~

~~(ii) Military leave will be considered as time worked for purposes of computing the employee's recognized service date and length of continuous service with the OPDS.~~

~~(iii) Upon return from military leave, an employee shall be placed at the rate of pay the employee would have been receiving had the employee been working. This rate of pay includes across the board increases and any other salary increase for which the employee would have been eligible.~~

~~(iv) If a layoff occurs during the time an employee is on military leave and the employee has insufficient service credits to be retained in the employee's classification, the employee shall, upon return from leave, be given the opportunity to exercise any displacement rights the employee would have had.~~

~~3. Bereavement Leave:~~

~~A. At the request of the employee, an administrative authority shall grant up to 40 hours paid bereavement leave per occurrence because of the death of a qualifying family member as defined by FMLA and/or OFLA, a domestic partner as defined by PEBB eligibility rules, or a child or parent of the employee's domestic partner (as defined by PEBB eligibility rules). At the discretion of the administrative authority, up to 24 hours of paid bereavement leave per occurrence may be granted because of death(s) of any other relative, in-law, or person residing in the same household as the employee. In determining the amount of time to grant, the administrative authority shall consider the significance of the relationship and need for travel time.~~

~~B. With the prior approval of the administrative authority, accrued leave may be used to cover time spent beyond bereavement leave. Accrued sick leave may only be used in accordance with PDPR 15.~~

~~C. Bereavement leave shall be prorated for part time employees.~~

~~4. Administrative Leave:~~

~~A. At the discretion of the administrative authority, employees ineligible to receive overtime compensation under the FLSA may be granted up to 40 hours administrative leave per calendar year. Use of such leave shall be scheduled in advance with the employee's supervisor.~~

~~B. Eligible part time employees may be granted administrative leave on a prorated basis.~~

~~C. Administrative leave may not be accrued, converted to vacation or sick leave, or converted to cash remuneration.~~

~~D. Administrative leave not used by December 31 of the year in which granted shall be forfeited.~~

~~E. There is no eligibility waiting period for administrative leave.~~

~~5. Leave Without Pay.~~

~~38~~

~~F. Conditions:~~

- ~~(i) An employee desiring a leave of absence without pay must submit a written request for that leave. The request must specify the duration of the leave and the purpose of the leave.~~
- ~~(ii) Except as otherwise provided by law, any request for leave without pay must be submitted in advance of the leave. Except as provided by law, approval or denial of the request is at the discretion of the administrative authority.~~
- ~~(iii) Normally, leave without pay will not be granted until all other appropriate accrued paid leave has been exhausted. (Also see PDPR 15 for absences that may qualify as sick leave.)~~
- ~~(iv) Employees cannot alternate the use of accrued leave and leave without pay; that is, leave without pay, if used, must be taken at the end of the leave period.~~

~~G. Effect On Leave Accrual. Vacation and sick leave accrual for an employee who worked less than a full calendar month in a pay period because of leave without pay shall be computed on a prorated basis using the number of available work hours, based on the employee's schedule, in that month.~~

~~H. Effect on Recognized Service Date. Leave without pay in excess of 15 consecutive calendar days shall result in a permanent adjustment of the employee's recognized service date. An employee's recognized service date shall be adjusted by adding to it the number of calendar days absent without pay, thereby making the recognized service date later than it would have been if leave without pay had not occurred.~~

~~I. Outside Employment. An administrative authority, prior to granting leave without pay to an employee who is accepting employment outside the OPDS, must obtain advance, written approval from the Executive Director.~~

~~J. Effect on Trial Service Period. Leave without pay in excess of 15 consecutive calendar days shall not be considered continuous employment when determining the completion of the initial or promotional trial service period. An employee's trial service period shall be adjusted by adding to it the number of calendar days absent without pay, thereby making the ending date of the trial service period later than it would have been if leave without pay had not occurred.~~

~~6. Personal Leave.~~

~~39~~

- ~~A. Full-time nontemporary employees who have completed six months of employment since initial hire or rehire shall be granted 24 hours of personal leave on July 1 of each year. Use of such leave shall be subject to prior approval by the employee's administrative authority.~~
- ~~B. Part-time employees shall be granted personal leave on a pro-rated basis.~~
- ~~C. Personal leave may not be accrued, converted to vacation or sick leave, or converted to cash remuneration.~~
- ~~D. Personal leave not used by June 30 of each year shall be forfeited.~~
- ~~E. When an employee from another state of Oregon agency is employed by the OPDS and the other agency grants personal leave for a fiscal year, the personal leave may be transferred.~~
- ~~F. When an employee from another state of Oregon agency is employed by the OPDS and the other agency grants personal leave for a calendar year, the personal leave may be transferred. Personal leave granted by the OPDS on July 1 of the calendar year in which the employee was hired will be prorated so the employee receives no more than 12 hours personal leave for the 6-month periods January through June or July through December.~~

~~7. Leaves During Temporary Interruption of Employment.~~

~~A. Planned Temporary Interruption of Employment.~~

- ~~(i) A temporary interruption of employment, not exceeding 15 continuous calendar days, due to lack of work, budget deficit, or other unusual or unexpected circumstances, shall not be considered as a layoff pursuant to PDPR 11 if, at the termination of the situation that created the need for the interruption, all affected employees are returned to work.~~
- ~~(ii) A temporary interruption due to lack of work or other unusual or unexpected circumstances may, at the employee's option, be charged to accrued paid leave or leave without pay. Since the FLSA prohibits deductions of less than one full work week from a FLSA-exempt employee's salary, FLSA-exempt employees will not be required to charge absences of less than one full work week to accrued paid leave or leave without pay. Accrued sick leave may only be used in accordance with PDPR 15.~~

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

iii. ~~A temporary interruption of employment due to budget deficit shall be charged to leave without pay by both FLSA exempt and non exempt employees.~~

~~B. Unplanned Temporary Interruption of Employment Due to Hazardous Environmental Condition or Inoperable Facility.~~

~~(i) Hazardous Environmental Condition. Hazardous environmental condition includes, but is not limited to, fire, flood, earthquake, pollution, or inclement weather.~~

~~(ii) Inoperable Facility. An inoperable facility is one where essential services are lost to fire, mechanical failure, accident, weather, or other causes.~~

~~(iii) Official Closure Due to Hazardous Environmental Condition or Inoperable Facility. Official closure is defined as the employer-initiated closing of:~~

~~(a) all operations and the cessation of public access to a facility and all services when no employee is allowed to remain at work; or~~

~~(b) most, but not all, operations and public access to services in that location or another is continued on a limited basis when a minimum number of employees, as determined by the administrative authority, are required to remain at work.~~

iv. ~~Declaration of Official Closure. The Executive Director shall be responsible for declaring an official closure or temporary interruption of employment.~~

v. ~~Notification of Official Closure. When an official closure is declared prior to the start of the workday, administrative authorities shall make a reasonable effort to notify employees in a timely manner. In such cases, the administrative authority will use announcements on local radio or television stations, recorded messages, or individual telephone contacts to notify employees of the official closure. The final responsibility for finding out whether the operation is open or closed lies with each employee.~~

~~(v) Staffing During Official Closure. When a minimum number of employees are required to remain at work, the~~

~~administrative authority shall first determine whether FLSA exempt employees~~

~~are available to remain. If no FLSA exempt employee is available~~

~~or if an insufficient number of FLSA exempt employees are available to remain at work, then a necessary number of FLSA non-exempt employees may be required to remain at work. An employee shall not be required to remain at work if such a requirement would pose a threat to the employee's safety or the safety of a family member residing in the employee's household.~~

~~(vi) Charging of Time Off Due to Official Closure.~~

~~(a) Official Closures of More Than One Hour.~~

~~Employees shall be granted leave with pay not to exceed 16 hours in a calendar year. This leave may be deducted from the amount of paid leave taken by any employee on paid leave at the time of the closure(s) but shall not be useable by any employee on leave without pay during the official closure. When a hazardous environmental condition or inoperable facility results in official closure of the work site in excess of a total of 16 hours in a calendar year, FLSA non-exempt employees will have the option of charging the time in excess of 16 hours to accrued paid leave or leave without pay. Since the FLSA prohibits deductions of less than one full work week from an FLSA exempt employee's salary, FLSA exempt employees will not be required to charge to accrued paid leave or leave without pay the time that is in excess of 16 hours, but less than one full work week. Sick leave may only be used in accordance with PDPR 15.~~

~~(b) Official Closures of One Hour or Less.~~

~~Official closure of the work site of one hour or less shall be considered as regular hours worked.~~

~~(vii) Recording of Time Worked During Official Closure.~~

~~a. FLSA exempt employees shall record time worked as regular hours.~~

~~b. FLSA non-exempt employees who remain at work as required by the administrative authority during an official closure shall record time worked as regular hours and shall be provided~~

compensatory time off at the rate of time and one half for each hour worked during the official closure

~~(viii) Absences Due to A Hazardous Environmental Condition When An Official Closure Has Not Been Declared.~~

~~42~~

~~When a hazardous environmental condition does not result in official closure of the work site, but prevents individual employees from reporting to work or necessitates their leaving work early, employees will have the option of charging their absence to accrued paid leave or leave without pay. Sick leave may only be used in accordance with PDPR 15.~~

~~8. Pre-retirement Leave.~~

~~A. Purpose. Pre-retirement leave shall be used to prepare for retirement or to investigate and attend retirement programs or retirement counseling.~~

~~B. Eligibility. A full time nontemporary employee with five or more years employment with a PERS covered employer shall be granted up to 28 hours of paid pre-retirement leave. Such 28 hours of leave is the maximum amount of paid pre-retirement leave an employee may take during the entirety of his/her employment with the State of Oregon. Part-time employees shall be granted pre-retirement leave on a prorated basis.~~

~~C. Scheduling. The scheduling of pre-retirement leave is subject to prior approval of the Administrative Authority. Such leave may not be converted to vacation, sick or personal leave, or to cash remuneration. Pre-retirement leave not used before retirement shall be forfeited.~~

~~D. Registration/Tuition Fees. Provided sufficient funds are available, the Administrative Authority may authorize reimbursement of an employee's tuition/registration fees at a pre-retirement seminar or workshop sponsored by the PERS. An employee may receive no more than one such reimbursement during the entirety of his/her employment with the OPDS.~~

~~9. Interview Leave. An employee shall be granted time off with pay to interview for other jobs within the OPDS or with other State of Oregon agencies. Time off shall be granted for the time spent during the employee's regularly scheduled workday and work hours in the interview.~~

~~10. Service Award Leave.~~

~~A. Eligibility. All nontemporary employees who have completed at least five years of nontemporary service with the OPDS are eligible.~~

~~B. Calculation. Only nontemporary continuous service with the OPDS shall count toward service award eligibility. For the purposes of this~~

DRAFT

~~section, continuous service with the former State Public Defender in a nontemporary position shall count towards an employee's service eligibility if the employee was employed by the State Public Defender on October 1, 2001. For the purposes of this section, continuous service with the Oregon Judicial Department in a nontemporary position shall count towards an employee's service eligibility if the employee was in a position that was transferred to the OPDS on July 1, 2003. Time worked for the OPDS before and after a break in service will be considered in determining eligibility. Service award leave is granted in one-time intervals to full-time employees in accordance with the following schedule:~~

<del>Years Employed</del>	<del>Service Award Leave Granted</del>
<del>5</del>	<del>4 hours</del>
<del>10</del>	<del>8 hours</del>
<del>15</del>	<del>12 hours</del>
<del>20</del>	<del>16 hours</del>
<del>25</del>	<del>20 hours</del>
<del>30</del>	<del>24 hours</del>
<del>35</del>	<del>28 hours</del>
<del>40</del>	<del>32 hours</del>
<del>45</del>	<del>36 hours</del>

~~Part-time employees shall be granted service award leave on a prorated basis.~~

~~C. Utilization. Service award leave must be scheduled in advance with the Administrative Authority and may be accrued. Service award leave shall not be converted to cash remuneration. Service award leave not used prior to termination shall be forfeited.~~

~~11. Family Leave. An employee may be absent for reasons that qualify under State and/or Federal family leave laws (OFLA and/or FMLA) in accordance with the OJD policy on family leave and these rules:~~

~~12. Red Cross Disaster Relief Services Leave. The Administrative Authority may grant leave for relief services in Oregon. Such leave may not exceed 15 workdays in any 12-month period. To qualify for such leave, the employee must be a certified disaster services volunteer of the American Red Cross and the disaster must be designated at Level II or above by the American Red Cross.~~

**SECTION VIII: Holidays**

**Policy:**

I. ~~I.~~ ~~OPDS~~ shall observe the following holidays:

- New Year's Day on January 1;
- Martin Luther King, Jr.'s Birthday on the third Monday in January;
- President's Day on the third Monday in February;
- Memorial Day on the last Monday in May;
- Independence Day on July 4;
- Labor Day on the first Monday in September;
- Veterans Day on November 11;
- Thanksgiving Day on the fourth Thursday in November; and
- Christmas Day on December 25.

II. In addition to the foregoing holidays, OPDS shall observe as a holiday every ~~—~~ day appointed as a holiday in accordance with ORS 187.020.

~~III. III.~~ If a holiday falls on Saturday, it shall be observed on the preceding Friday. If a holiday falls on Sunday, it shall be observed on the following Monday.

~~III.~~ IV. If the courts are closed on the Friday after Thanksgiving, that day will be considered a holiday. If the courts are open on the Friday after Thanksgiving, Employees will be expected to work a regular day and will be granted eight (8) hours paid leave to be used as a floating holiday between the day before Thanksgiving and January 31<sup>st</sup> of the following year.

**Procedures:**

1. ~~—~~ ~~1.~~ Holiday Leave shall be granted as follows:

A. Full-time Employees. A full-time ~~e~~Employee shall be granted eight ~~—~~ hours of holiday leave for each holiday.

B. Part-time Employees. A part-time eEmployee shall be granted holiday leave for each holiday based upon the same percentage or fraction of a month as the eEmployee is normally scheduled to work.

C. Effect of Leave Without Pay. -Exclusive of the holiday, an eEmployee —on unpaid leave for more than 32 consecutive work hours (prorated for part-time employeeEmployees) shall not be granted the paid holiday if the —holiday falls ~~at the beginning, end, or~~ during the period of leave —without pay.

45

D. Employees Working an ~~Irregular or Flexible~~Alternate Schedule. If an eEmployee is on an ~~irregular or flexible~~alternate work schedule, the administrative authority may:

- i. make appropriate schedule adjustments for the work week in —which the holiday falls that result in a total of 40 hours work time —and holiday leave (or, for a part-time eEmployee, the normal number —of weekly hours); or
- ii. permit the eEmployee to use paid leave or leave without pay to —account for the scheduled hours in excess of the holiday leave. ~~Sick leave may only be used in accordance with PDPR 15.~~

~~A-E.~~ E. —Employees Required to Work on a Holiday.

- i. ~~(i)~~—An eEmployee, regardless of salary range, who is required by ~~the an Executive Director or the~~ Administrative Authority to work on a —holiday and whose shift ecommences on the holiday shall be —entitled to compensatory time for the entire shift worked. ~~In lieu —of compensatory time, the administrative authority may grant —payment in cash.~~
- ii. ~~(ii)~~—If the holiday falls on a Saturday or Sunday and is observed on a Friday or Monday and an eEmployee is required to work on both the —actual holiday and the day of observance, the eEmployee shall —receive compensatory time for the entire shift worked on either the —actual holiday or its day of observance by the OPDS. ~~In lieu of compensatory time, the administrative authority may grant —payment in cash.~~
- iii. ~~(iii)~~—Compensatory time ~~or cash payment~~ shall be at the rate of time and one-half. -The rate at which an eEmployee is paid for working on a —holiday shall not exceed the rate of time and one-half in addition to regular pay.

F. Effect of Appointment and Separation on Holiday Leave.

- ~~(i)~~—*Appointment.*— All nontemporary eEmployees appointed on a holiday observed on the first —regularly scheduled work day of the —month shall be paid for the holiday pursuant to the other provisions —of this rule.

No appointments shall be made effective on holidays observed ~~on~~ other than the first day of the month.

i.

- ~~i. (ii) Separation.~~ -An employee who separates from employment in a month including a holiday on the last regularly scheduled work day
- ii. —of the month shall be paid for the holiday if the employee actually works on the work day immediately preceding the holiday and is otherwise eligible to receive holiday leave.

DRAFT

## SECTION IX: Overtime

### **Policy:**

~~I.—An OPDS employee who is eligible for overtime compensation shall not work overtime without advance approval by the Executive Director or the Administrative Authority. The Executive Director or the Administrative Authority may require an employee to work overtime if the operations or mission of OPDS necessitate it.~~

~~II.—OPDS employees covered by the Fair Labor Standards Act (FLSA) as non-exempt employees are eligible for overtime compensation.~~

I. ~~III.~~—OPDS shall determine the status under Fair Labor Standards Act (FLSA) of each of its eEmployees as either ~~exempt~~either exempt or non-exempt from the Act, using the guidelines set forth in FLSA. —OPDS shall keep accurate records of the status of its eEmployees under FLSA and —any overtime accrued by its non-exempt eEmployees.

II. OPDS Employees covered by the Fair Labor Standards Act (FLSA) as non-exempt Employees are eligible for overtime compensation.

III. An OPDS Employee who is eligible for overtime compensation shall not work overtime without advance approval by the Executive Director or the Administrative Authority. The Executive Director or the Administrative Authority may require an Employee to work overtime if the operations or mission of OPDS necessitate it.

### **Procedures:**

1. All overtime<sup>+</sup> worked shall be recorded on an eE
mployee's time sheet ~~or attendance record~~. Overtime work shall be compensated at the rate of one and one-half (1.5) times the eEmployee's current hourly rate of pay.2. OPDS may elect to compensate an eE
mployee by cash payment or by compensatory time. A maximum of 240 hours compensatory time may be accrued. An eEmployee who has accrued 240 hours compensatory time must receive cash payment for additional further overtime work.3. Compensatory time may be requested by the eE
mployee or required by the Executive Director or the Administrative Authority. The use of compensatory time shall be scheduled in advance with the eEmployee's supervisor. The supervisor shall grant an eEmployee's request to use accrued compensatory time unless doing so would unduly disrupt OPDS's operations.

<sup>+</sup> ~~“Overtime” means time worked in excess of 40 hours in a workweek.~~

4. An eEmployee shall be allowed to use accrued compensatory time for qualifying family leave purposes. The amount of compensatory time taken shall not be deducted from an eEmployee's family leave entitlements under FMLA or OFLA.
5. An eEmployee who resigns or whose employment is terminated shall be paid for accrued compensatory time at the ~~average hourly rate received by the employee during the last three years of employment~~Employees regular hourly rate at the time of termination.

DRAFT

**SECTION X: Recruitment and Hiring**

**Policy:**

~~I.~~ OPDS's recruitment and hiring processes shall be fair, impartial and designed ~~II.~~ to ensure that ~~all of its~~ positions are filled by the most qualified job applicants available and by individuals well suited to perform the work required of ~~these~~ positions.

~~III.~~ Hiring for ~~all~~ vacant positions shall be based on merit as determined by a comparison of a job applicant's qualifications with the requirements and — duties of the vacant position. All individuals selected to fill a vacant position — at OPDS must meet the minimum and special qualifications defined for that position.

III. OPDS shall establish procedures for the recruitment, screening, selection and -hiring of job applicants and for the transfer and advancement of current OPDS ~~e~~Employees in accordance with this Policy.

IV. All Employees serve a 6 month trial service period following the date of hire or promotion during which they are expected to demonstrate, by conduct and actual performance of duties, the qualifications and fitness for the position.

~~—~~  
~~—~~ **Procedures:**

**1.** ~~Methods of Recruitment for Vacant Positions.~~

A. OPDS ~~shall~~may fill vacant positions through the following methods.

i. ~~-~~Competitive Recruitment Methods:

- a. ~~a.~~ Open Competitive Recruitment. ~~-~~Any OPDS ~~E~~mployee or member of the public may apply for the vacant position
- b. ~~b.~~ Limited Recruitment. Only permanent~~t~~ OPDS ~~e~~Employees — may apply for the vacant position.

ii. ~~-~~Noncompetitive Recruitment Methods:

- a. Transfer. ~~-~~Any qualified OPDS ~~e~~Employee may request a transfer, or be transferred, to a vacant position.

b. Voluntary Demotion. Any qualified OPDS ~~e~~Employee may request a voluntary demotion to a vacant position.

c. Involuntary Demotion. The Executive Director or the Administrative Authority may, for disciplinary reasons, demote an ~~E~~employee to a position with a lower salary range provided the Employee is qualified to fill the lower range position.

d. Reemployment.

(1) A former OPDS ~~e~~Employee may request to be reemployed in a position for which the ~~e~~Employee is qualified with a salary range equal to or lower than the salary range for the position the ~~e~~Employee last held. An OPDS ~~e~~Employee may be reemployed only once within the one-year period following resignation, voluntary demotion, layoff, or downward reclassification. Reemployment shall be subject to the discretion of the Executive Director.

(2) Reemployment following retirement. Pursuant to ORS 238.082, an OPDS ~~e~~Employee who wishes to retire may request to be reemployed in a position for which the ~~e~~Employee is qualified with a salary range equal to or lower than the salary range for the position the ~~e~~Employee last held. An OPDS ~~employee~~Employee may be reemployed only once within the one-year period following retirement. Reemployment following retirement shall be at the discretion of the Public Defense Services Commission upon recommendation of the Executive Director, but shall be authorized only when there is a documented business need for the employment, or reemployment is necessary to ensure adequate transfer of knowledge.

e. ~~e~~-Vacant Management Positions. -At the discretion of the ~~E~~Executive Director, vacancies in the Administrative Authority and other vacant OPDS positions with management or supervisory responsibilities may be filled without resort to any of the foregoing Recruitment Methods.

B. An Under-fill Appointment may be authorized by the Executive Director for the following reasons.

i. ~~i~~-Employee Development:

Subject to approval of the Executive Director, a position may be under-filled for the purposes of providing an ~~e~~Employee with the opportunity to develop the skills and qualifications necessary to fill the position on a permanent basis. Recruitment for such an opportunity shall be conducted in accordance with Procedure ~~4-(A-)(i)~~. The length of the under-fill and requirements to satisfactorily complete the developmental experience shall

be documented prior to the appointment but shall not exceed 24 months from date of appointment. Upon satisfactorily meeting the under-fill conditions, the ~~employee~~ Employee shall be reclassified up to the level of the position.

ii. Administrative Need:

Subject to the approval of the Executive Director, a position may be under-filled if, due to organizational changes, the budgeted level of a position is higher than OPDS's needs require. -Recruitment for such an under-fill appointment shall be conducted in accordance with Procedure ~~1(-A)(i)~~. ~~The duration of such an appointment may be limited or unlimited.~~

**~~2-~~ Job Announcements, Notice of Transfer Opportunities, and Applications.**

A. Announcements shall be issued for all vacant positions subject to Competitive Recruitment Methods as follows:

~~Announcements are required for all vacancies being filled by Competitive Recruitment Methods set forth in Procedure 1.A.(i.).~~ Announcements of job vacancies shall be posted at [www.oregon.gov/jobs](http://www.oregon.gov/jobs) in a location accessible to all OPDS employees and an email sent to all OPDS Employees. Announcements of job vacancies to be filled ~~through Open Competitive Recruitment Methods in accordance with Procedure 1.A.(i.) (a.)~~ shall be posted ~~in a manner accessible to the public~~ at least fourteen (14) calendar days before job applications are due. Announcements shall specify the class title, salary range, location, type of recruitment, nature of the assigned work, qualifications, manner of making application, and notification that a criminal ~~or credit~~ history check ~~will may be conducted~~ be required. -Other pertinent information about the position, such as work hours and special working conditions, may be included in job announcements.

B. Notice of Job Transfer Opportunities shall be issued as follows:

~~OPDS shall ensure that notices of job transfer opportunities are accessible to all eligible OPDS employees.~~ Notices of internal transfer opportunities shall be sent via email to all OPDS Employees and issued at least seven (7) calendar days before applications for job transfers are due. -Such notices shall specify the class title, salary range, location, type of transfer, nature of the assigned work, qualifications, manner of making application, and notification ~~if a criminal or credit~~ history check will be conducted (if applicable). -Other pertinent information about the position, such as work hours and special working conditions, shall be included in the notices.

C. Application Forms are required as follows:

~~Applications for vacant positions subject to Competitive Recruitment Methods and applications for job transfer opportunities shall be submitted by applicants in the form prescribed by OPDS and must be signed by the applicant. Incomplete applications may be rejected without consideration. Applications for Open Competitive recruitments shall be submitted electronically as defined in the job announcement posted at [www.oregon.gov/jobs](http://www.oregon.gov/jobs) with a link on the OPDS website.~~

~~Applications for internal recruitment or job transfer shall be submitted in the form prescribed by the hiring manager and as detailed in the email announcing the job opening.~~

D. Effective Period of Applications.

Subject to the discretion of the Executive Director, all applications received in response to a job announcement or notice of job transfer opportunity may remain in effect for up to one year after the closing date in the announcement or notice. ~~Ap~~Applications received in response to job announcements may be used to fill future vacancies in the same or lower class.

~~3. Requests for Job Transfers or Voluntarily Demotions.~~

A. Job Transfers shall be accomplished in the following manner.

An OPDS ~~e~~Employee may submit a written request to the Administrative Authority to transfer from ~~the current one~~ position to ~~another~~ vacant position with the same class or salary range as the ~~e~~Employee's current position. The requesting Employee must meet the minimum qualifications and the established screening criteria to be interviewed for the vacancy. Such a request shall be submitted in the form prescribed by OPDS. Requests for job transfers must be approved by the supervisor and Executive Director.

B. Voluntary Demotions shall be accomplished in the following manner.

An OPDS ~~e~~Employee qualified to fill a vacant position with a lower classification or salary range may submit a written request to the Administrative Authority for a voluntarily demotion. ~~from one position to a vacant position with a lower classification or salary range. Requests for voluntary demotions shall be submitted in the form prescribed by OPDS.~~ Requests for voluntary demotions must be approved by the supervisor and Executive Director.

~~4. Hiring Process.~~

A. The following requirements apply to Applications received in response to Job Announcements issued in accordance with OPDS's Competitive Recruitment Methods.

i. ~~i.~~ Screening Job Applications:

The process of screening applications for vacant positions shall be fair and impartial and shall relate to the duties and requirements of the vacant position. Screening methods shall objectively measure the qualifications of applicants and may include skills testing, employment or personal references, and internal or external evaluations of applicants' job qualifications, education, and employment history and comply with controlling law regarding Public Employers. Refer to Applicant Sorting and Veterans Preference Process in Appendix C.

ii. ~~ii.~~ Interviews of Job Applicants:

The Executive Director, the Administrative Authority or designee shall select qualified job applicants for an interview based upon the results of the foregoing screening process. ~~The Executive Director, the Administrative Authority and/or a panel of other OPDS employee~~ Employees may conduct the interviews of qualified job applicants. ~~In extraordinary circumstances and with the approval of the Executive Director or the Administrative Authority, a~~ qualified applicant may be selected to fill a vacant position without an interview.

iii. ~~iii.~~ Selection and Notification of Job Applicants

The final selection of a job applicant to fill a vacant position shall be approved by the Executive Director or designated Administrative Authority. ~~OPDS shall notify in writing all job applicants who are not selected to fill a vacant position. In the event OPDS decides not to fill a vacant position, OPDS shall notify all applicants in writing of that decision.~~

B. OPDS shall document its job recruitment, screening, and evaluation of applicants and retain these materials for 10 years. All other recruitment and selection records shall be retained for 3 years after the position is filled or the recruitment was cancelled. ~~and hiring decisions and retain this documentation for 10 years.~~

C. OPDS shall confirm its offers of employment to selected job applicants in writing and require those applicants to accept the terms and conditions of OPDS's offers of employment in writing. ~~Selected applicants who fail to accept OPDS's offers of employment in writing shall be deemed to have declined these offers.~~

D. At the discretion of the Executive Director, OPDS may require criminal ~~or credit~~ history checks of all applicants or finalists for ~~certain~~ positions. -OPDS shall notify all applicants of this requirement in the job announcement for that position. -A felony or misdemeanor conviction ~~or poor credit history~~ may prohibit an applicant from qualifying for a position with OPDS.

In determining if a criminal conviction prohibits an applicant's employment with OPDS, the Executive Director shall consider the following factors:

- i. ~~i.~~ the nature and gravity of the offense or offenses;
- ii. ~~ii.~~ the time that has passed since the conviction or completion of the sentence; and
- iii. ~~iii.~~ the nature of the position sought.

Arrests in the absence of subsequent convictions shall not prohibit an applicant's employment with ~~the~~ OPDS. -OPDS shall keep confidential all records of a job applicant's arrests or convictions.

## SECTION XI: Use of Publicly Owned Equipment

### Policy

- I. It is the policy of OPDS to comply with all statutory and ethical standards related to use of publicly owned equipment and to provide for allowable personal use on a limited and defined basis.
- II. OPDS provides publicly owned equipment at taxpayer expense for official business use. State law defines ethical and appropriate use. In addition, OPDS must protect proprietary and confidential information, keep systems and internal controls secure, and keep the workforce productive. Therefore, OPDS's general policy is to use publicly owned equipment for business purposes only and in a cost-effective manner.
- III. At the same time, OPDS strives to provide a supportive work environment for Employees and recognizes that situations exist where limited personal use is allowable and appropriate.

### Definitions

DE MINIMIS ADDITIONAL COST: "De minimis additional cost" means that the equipment use results in (a) no additional tangible cost, or (b) a cost for which a compensable rate is not practical to set (e.g., negligible "wear and tear" on the equipment or negligible use of overhead expenses or supplies).

ECONOMIC BENEFIT: ORS 244.040(1)(a) prohibits using one's official position or office for personal financial gain or cost avoidance, such as: (a) reducing personal costs by purchasing personal goods or (b) reducing personal costs by using publicly owned equipment services at a "state rate," at a lesser cost rate (e.g., using office long-distance lines for personal calls and reimbursing the state at the more favorable government rate), or (c) avoiding personal costs by using publicly owned equipment instead of personal equipment (e.g., using publicly owned email or internet services for personal purposes if such use allows the user to avoid purchasing comparable services).

IMPROPER USE: Illegal, unethical, inappropriate, or unauthorized use of publicly owned equipment as delineated in Section II.

PERSONAL USE: Using equipment for purposes other than authorized OPDS work. Examples of allowed personal uses: Placing a prescription refill order, checking an online bank statement, or accessing a personal phone service provider's web page to resolve a billing error.

PUBLICLY OWNED EQUIPMENT: Any and all publicly owned property and other resources. This includes equipment, workspace, systems, and supplies provided for work purposes. Examples include state vehicles, desks, lockers, telephones (land and cellular), pagers, photocopiers, facsimile machines, document scanners, personal computers and related

peripheral equipment and software, iPads, office supplies, postage meters and mail services, internet connectivity, access to internet services, and electronic mail.

REIMBURSEMENT COST: Tangible costs to OPDS (such as for a personal photocopy or fax) that an Employee may reimburse OPDS or other public-funded entity in accordance with OPDS policy. The reimbursement rate cannot be so low as to result in economic benefit and must be limited to low volume and only occasional and appropriate uses.

WORK TIME: For this policy only, “work time” is distinguished from “personal time” as follows:

For overtime-eligible Employees, “work time” is the individual’s designated paid hours of work, excluding paid break time, unpaid mealtime, and approved leave time.

For overtime-exempt Employees, “work time” usually means normal OPDS public business hours of operation or the individual’s designated work hours, if different, excluding paid break time, unpaid mealtime, and approved leave time. (Since overtime-exempt Employees work on a salaried basis, without hour-for-hour compensation, “work time” is less subject to constant definition.)

### **Allowable Personal Use**

This policy acknowledges that the world of work includes social and personal components.

For example, a business transaction using public equipment (e.g., telephone, email, fax, internet) may include some limited and appropriate personal interaction.

Similarly, public equipment may be used (on a limited and appropriate basis) for social and personal matters that are the normal "fabric" of the workplace, such as recognition of personal and family milestones (e.g., birthdays, weddings, anniversaries, births, deaths); posting of postcards from vacationing staff; displaying/sharing personal photographs; local food menus/telephone/fax; and the like.

OPDS recognizes two narrowly defined exceptions to the general policy of “business use only.”

### **Personal Use During Non-Work Time**

Personal use is allowable during non-work time **if all** of the following conditions are clearly met:

- the use is not improper (as defined in Section 2 below);
- the use results in no cost, or in de minimis additional cost (excluding reimbursement cost) to OPDS or the state;
- the use is minimal and insignificant in terms of time or quantity; and
- the supervisor has not prohibited the type of use.

⋮

### **Personal Use During Work Time**

Personal use is allowable during work time **only if all** of the above conditions are clearly met, and:

- the use is essential and brief; and
- the use cannot reasonably wait until non-work time.

### **Improper Use**

Improper use at any time (work time or non-work time) includes:

- violating any law or OPDS rule or policy;
- conducting any illegal activity or unlawful communication;
- using for economic benefit (including operating or supporting a personal business);
- (except as provided in A. and B. below) personal lobbying, soliciting, recruiting, selling or
- persuading, for or against, commercial or noncommercial ventures, products,
- organizations, religions, or political causes;

#### **Exception A: Authorized Charitable Drive**

The administrative authority may authorize a charitable event, organization, or effort. In any such case, internal communication to OPDS staff will be considered as work related. Examples include the Governor's Food and Toy Drives and the Charitable Fund Drive.

#### **Exception B: Designated OPDS Physical Space for Personal Use**

An administrative authority may designate de minimis OPDS physical surface space for limited and appropriate personal use by Employees. Such space could include a bulletin board or other surface space in a lunch room or other appropriate workspace not normally accessible to the public. Uses could include a posting of personal (i.e., noncommercial) items for sale; notice of an Employee garage/yard sale; short-term local school or other appropriate fund raiser (e.g., magazine drive or Girl Scout cookie order forms) so long as participation is clearly voluntary; a community event notice where an Employee is involved; and the like.

- revealing or publicizing proprietary or confidential information;
- representing personal opinions as those of OPDS;
- exposing OPDS to unnecessary liability of any kind;
- personal (non-work related) publishing or posting to personal web pages, internet groups, chat rooms, web pages, or "list servs";
- creating, posting, emailing, or otherwise distributing false, indecent, lewd, threatening, or discriminatory remarks, proposals, jokes, stories, anecdotes, etc.;
- creating, downloading, viewing, storing, copying, or transmitting any pornographic, sexually explicit, or sexually oriented materials (unless a legitimate business requirement);
- gambling (including legal), placing a wager of any kind, or playing games of chance

- involving cards, dice, or other means of keeping score for money or other thing of value, including those that can be accessed through the internet and those installed as software; **Note:** This use, while not inherently “improper,” is included as a matter of policy to decrease the appearance of improper use by OPDS Employees.
- playing computer games such as card games (e.g., solitaire), word games (e.g., crossword puzzles), video games, including those that can be accessed through the internet and those installed as software; **Note:** This use, while not inherently “improper,” is included as a matter of policy to decrease the appearance of improper use by OPDS Employees.
  - using an OPDS land telephone to place a personal long-distance toll call (even if reimbursed);
  - causing congestion, overload, delay, or disruption of service to any OPDS system or equipment;
  - streaming or downloading audio or video for personal use;
  - intentionally interfering with the normal operations of any internet gateway;
  - installing software on OPDS equipment without prior approval;
  - downloading any software or electronic file without reasonable and required virus protection measures in place;
  - uploading or downloading commercial software or other products in violation of copyright (e.g., “burning” CDs); and
  - using equipment or technology in any other way that results in an appearance of impropriety or discredit to the OPDS.

This list is intended to provide examples of improper use; it is not necessarily exhaustive or complete.

### **Privacy Expectations**

Use of equipment, particularly computers and networks, is subject to monitoring and audit. Any file or record, including electronic, associated with use of publicly owned equipment is subject to public records law and may be a public record. This policy explicitly denies any internal expectation of privacy within OPDS by any user for business or personal use. However, OPDS will preserve confidentiality required by law.

The administrative authority or designee may access or inspect any publicly owned equipment (or space) and may remove an individual’s access to publicly owned equipment (or space) for administrative or operational reasons with, or without, advance notice to the user.

### **Sanctions**

Any person who violates this policy is subject to appropriate sanction including loss of use, or limits on use, of equipment and disciplinary proceedings according to OPDS policies or other adverse actions and penalties.

## Section XII: Conflict of Interest

### Policy

- I. OPDS has the responsibility to ensure staff members engage in activities consistent with the OPDS mission and values in delivering OPDS programs and services. Employees are held personally responsible for complying with the provisions in Oregon Government Ethics law. Refer to ORS Chapter 244 – Government Ethics.
- II. In situations in which Employees are engaged in activities that could constitute a conflict of interest, OPDS has the responsibility to review each situation and determine whether a conflict exists.
- III. Employees will:
  - a. abstain from using information received in the course of OPDS employment to further private interests of self or others.
  - b. withdraw from processing, unless otherwise authorized by an administrative authority, any court document or matter involving anyone who is a personal acquaintance or relative of the Employee or a member of the Employee's family.
  - c. use OPDS property, equipment (including electronic systems), and funds only for the official business of OPDS in accordance with laws, rules, policies, and procedures unless a specific exception is stated within those laws, rules, policies, and procedures.
  - d. abstain from the use of OPDS employment to influence (or attempt to influence) others or to gain (or attempt to gain) preferential treatment for self or others.
  - e. refuse to accept money or other consideration, except for honoraria as defined by ORS 244.020(7) unless otherwise restricted by the administrative authority, from anyone other than OPDS for activities which are part of the Employee's official duties.
  - f. abstain from engaging in outside employment or activities that constitute a conflict of interest as determined by the administrative authority.
- IV. Any Employee with a potential conflict of interest shall promptly advise the administrative authority.
- V. Employees appointed, employed, or volunteering with OPDS faced with an actual or potential conflict of interest must provide a written notice to the person who appointed or

employed them. The notice must describe the nature of the conflict of interest with which they are met.

VI. The appointing authority will review the notice within a reasonable time, record the actual or potential conflict of interest in the official records, and provide direction to the Employee in disposing of the conflict.

DRAFT

## APPENDIX A

### PUBLIC DEFENSE SERVICES COMMISSION

#### 151.211 Definitions for ORS 151.211 to 151.221. For purposes of ORS 151.211 to 151.221:

- (1) “Bar member” means an individual who is an active member of the Oregon State Bar.
- (2) “Chief Justice” means the Chief Justice of the Supreme Court.
- (3) “Commission” means the Public Defense Services Commission.
- (4) “Director” means the public defense services executive director appointed under ORS 151.216.
- (5) “Office of public defense services” means the office established by the commission under the director to handle the cases assigned and to carry out the administrative policies and procedures for the public defense system. [2001 c.962 §1; 2007 c.71 §43]

**Note:** 151.211 to 151.225 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 151 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

**151.213 Public Defense Services Commission; membership; terms.** (1) The Public Defense Services Commission is established in the judicial branch of state government. Except for the appointment or removal of commission members, the commission and Employees of the commission are not subject to the exercise of Administrative Authority and supervision by the Chief Justice of the Supreme Court as the administrative head of the Judicial Department.

(2) The commission consists of seven members appointed by order of the Chief Justice. In addition to the seven appointed members, the Chief Justice serves as a nonvoting, ex officio member. The Chief Justice shall appoint at least two persons who are not bar members, at least one person who is a bar member and who is engaged in criminal defense representation and at least one person who is a former Oregon state prosecutor. Except for the Chief Justice or a senior judge under ORS 1.300, a member may not serve concurrently as a judge, a prosecuting attorney or an Employee of a law enforcement agency. A person who is primarily engaged in providing public defense services may not serve as a member of the commission.

(3) The term of a member is four years beginning on the effective date of the order of the Chief Justice appointing the member. A member is eligible for reappointment if qualified for membership at the time of reappointment. A member may be removed from the commission by order of the Chief Justice. If a vacancy occurs for any cause before the expiration of the term of a member, the Chief Justice shall make an appointment to become immediately effective for the unexpired term.

(4) A chairperson and a vice chairperson shall be appointed by order of the Chief Justice every two years with such functions as the commission may determine. A member is eligible for reappointment as chairperson or vice chairperson.

(5) A majority of the voting members constitutes a quorum for the transaction of business.

(6) A member of the commission is not entitled to compensation for services as a member, but is entitled to expenses as provided in ORS 292.495 (2). [2001 c.962 §2; 2003 c.449 §15]

**Note:** See note under 151.211.

**151.216 Duties.** (1) The Public Defense Services Commission shall:

(a) Establish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice.

(b) Establish an office of public defense services and appoint a public defense services executive director who serves at the pleasure of the commission.

(c) Submit the budget of the commission and the office of public defense services to the Legislative Assembly after the budget is submitted to the commission by the director and approved by the commission. The Chief Justice of the Supreme Court and the chairperson of the commission shall present the budget to the Legislative Assembly.

(d) Review and approve any public defense services contract negotiated by the director before the contract can become effective.

(e) Adopt a compensation plan, classification system and personnel plan for the office of public defense services that are commensurate with other state agencies.

(f) Adopt policies, procedures, standards and guidelines regarding:

(A) The determination of financial eligibility of persons entitled to be represented by appointed counsel at state expense;

(B) The appointment of counsel;

(C) The fair compensation of counsel appointed to represent a person financially eligible for appointed counsel at state expense;

(D) Appointed counsel compensation disputes;

(E) Any other costs associated with the representation of a person by appointed counsel in the state courts that are required to be paid by the state under ORS 34.355, 135.055, 138.500,

138.590, 161.346, 161.348, 161.365, 419A.211, 419B.201, 419B.208, 419B.518, 419B.908, 419C.206, 419C.209, 419C.408, 419C.535, 426.100, 426.135, 426.250, 426.307, 427.265, 427.295, 436.265 or 436.315 or any other provision of law that expressly provides for payment of such compensation, costs or expenses by the commission;

(F) Professional qualifications for counsel appointed to represent public defense clients;

(G) Performance for legal representation;

(H) The contracting of public defense services;

(I) Contracting with expert witnesses to allow contracting with out-of-state expert witnesses only if in-state expert witnesses are not available or are more expensive than out-of-state expert witnesses; and

(J) Any other matters necessary to carry out the duties of the commission.

(g) Establish a peer review system for the approval of nonroutine fees and expenses incurred in cases involving aggravated murder and the crimes listed in ORS 137.700 and 137.707. The review shall be conducted by a panel of attorneys who practice in the area of criminal defense.

(h) Establish a complaint process that allows district attorneys, criminal defense counsel and the public to file complaints concerning the payment from public funds of nonroutine fees and expenses incurred in cases.

(i) Reimburse the State Court Administrator from funds deposited in the Public Defense Services Account established by ORS 151.225 for the costs of personnel and other costs associated with location of eligibility verification and screening personnel pursuant to ORS 151.489 by the State Court Administrator.

(2) Policies, procedures, standards and guidelines adopted by the commission supersede any conflicting rules, policies or procedures of the Public Defender Committee, State Court Administrator, circuit courts, the Court of Appeals, the Supreme Court, the Psychiatric Security Review Board and the Oregon Health Authority related to the exercise of the commission's administrative responsibilities under this section and transferred duties, functions and powers as they occur.

(3) The commission may accept gifts, grants or contributions from any source, whether public or private. However, the commission may not accept a gift, grant or contribution if acceptance would create a conflict of interest. Moneys accepted under this subsection shall be deposited in the Public Defense Services Account established by ORS 151.225 and expended for the purposes for which given or granted.

(4) The commission may not:

(a) Make any decision regarding the handling of any individual case;

(b) Have access to any case file; or

(c) Interfere with the director or any member of the staff of the director in carrying out professional duties involving the legal representation of public defense clients. [2001 c.962 §§3,106; 2003 c.449 §§1,2,42; 2005 c.843 §23; 2011 c.708 §20; 2012 c.107 §42]

**Note:** See note under 151.211.

**151.219 Public defense services executive director; duties.** (1) The public defense services executive director shall:

(a) Recommend to the Public Defense Services Commission how to establish and maintain, in a cost-effective manner, the delivery of legal services to persons entitled to, and financially eligible for, appointed counsel at state expense under Oregon statutes, the Oregon Constitution, the United States Constitution and consistent with Oregon and national standards of justice.

(b) Implement and ensure compliance with contracts, policies, procedures, standards and guidelines adopted by the commission or required by statute.

(c) Prepare and submit to the commission for its approval the biennial budget of the commission and the office of public defense services.

(d) Negotiate contracts, as appropriate, for providing legal services to persons financially eligible for appointed counsel at state expense. No contract so negotiated is binding or enforceable until the contract has been reviewed and approved by the commission as provided in ORS 151.216.

(e) Employ personnel or contract for services as necessary to carry out the responsibilities of the director and the office of public defense services.

(f) Supervise the personnel, operation and activities of the office of public defense services.

(g) Provide services, facilities and materials necessary for the performance of the duties, functions and powers of the Public Defense Services Commission.

(h) Pay the expenses of the commission and the office of public defense services.

(i) Prepare and submit to the commission an annual report of the activities of the office of public defense services.

(j) Prepare and submit to the Legislative Assembly a biennial report on the activities of the office of public defense services.

(k) Provide for legal representation, advice and consultation for the commission, its members, the director and staff of the office of public defense services who require such services or who are named as defendants in lawsuits arising from their duties, functions and responsibilities. If requested by the director, the Attorney General may also provide for legal representation, advice and consultation for the commission, its members, the director and staff of the office of public defense services in litigation.

(2) The director may designate persons as representatives of the director for the purposes of determining and paying bills submitted to the office of public defense services and determining preauthorization for incurring fees and expenses under ORS 135.055. [2001 c.962 §§4,106a; 2003 c.449 §§3,4]

**Note:** See note under 151.211

DRAFT

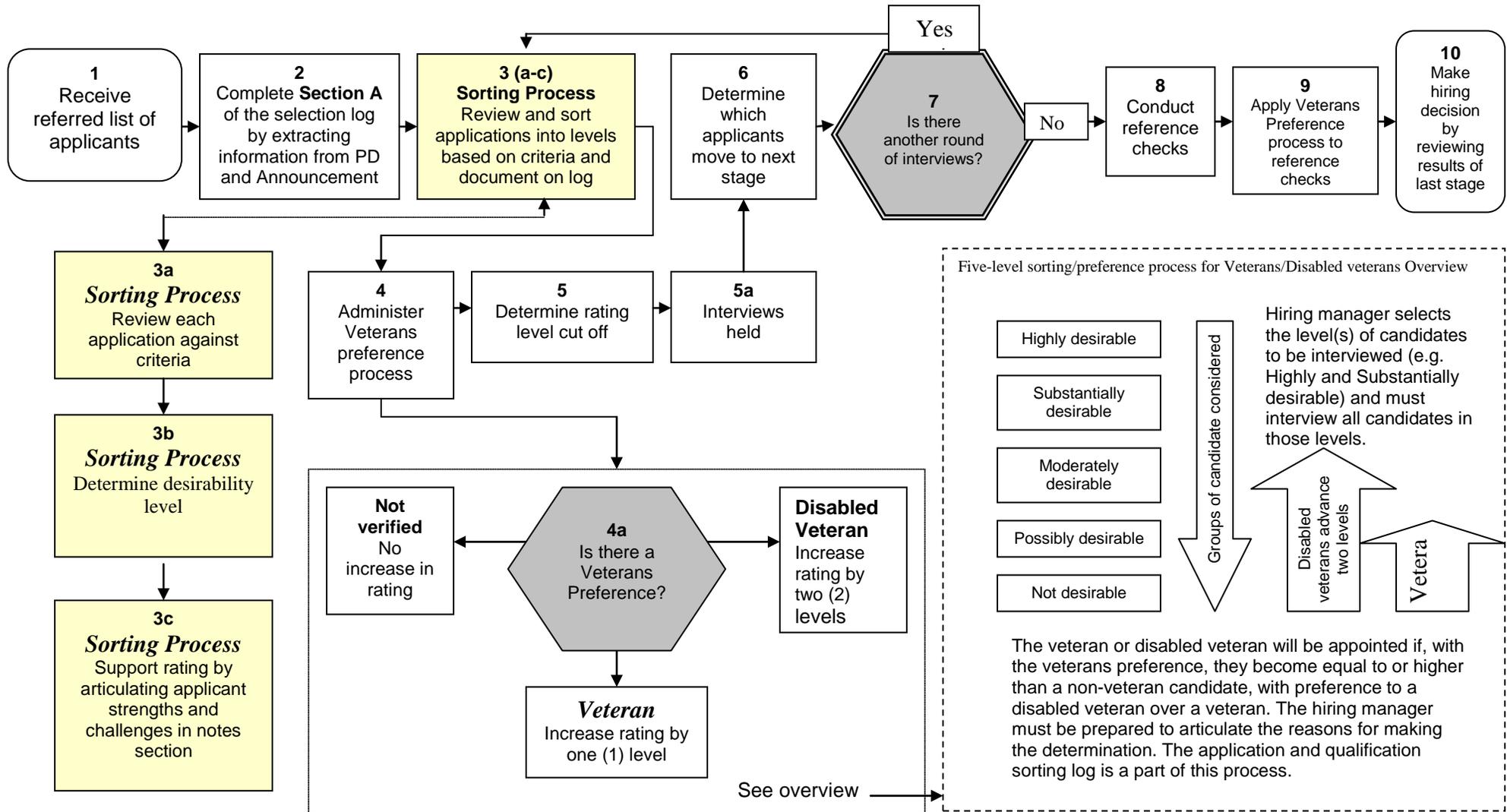
**APPENDIX B**

Personal Business Leave will be pro-rated when an Employee is hired after the start of the fiscal year (July 1). Employee starts employment in the month of:

<u>July</u>	<u>24 hours credited</u>
<u>August</u>	<u>22 hours credited</u>
<u>September</u>	<u>20 hours credited</u>
<u>October</u>	<u>18 hours credited</u>
<u>November</u>	<u>16 hours credited</u>
<u>December</u>	<u>14 hours credited</u>
<u>January</u>	<u>12 hours credited</u>
<u>February</u>	<u>10 hours credited</u>
<u>March</u>	<u>8 hours credited</u>
<u>April</u>	<u>6 hours credited</u>
<u>May</u>	<u>4 hours credited</u>
<u>June</u>	<u>2 hours credited</u>

### Applicant Sorting and Veterans Preference Process

Refer to OAR 839-006-0435



Attachment 5c

## **ARTICLE 1—PARTIES TO THE AGREEMENT/ RECOGNITION**

This Agreement is made and entered into by and between the American Federation of State, County, Municipal Employees (AFSCME), (hereinafter “the Union”) and Office of Public Defense Services (hereinafter the “Employer”).

The Employer recognizes the Union as the sole and exclusive bargaining representative for all Appellate Division attorneys including but not limited to those in the classification of Deputy Defender 1, Deputy Defender 2, and Senior Deputy Defenders, excluding temporary, managerial, confidential, and supervisory attorneys.

## **ARTICLE 2—TERM OF AGREEMENT**

This Agreement shall continue in full force and effect until the last day of the twelfth month following approval by the Public Defense Services Commission; at the end of that year, this Agreement shall terminate. Negotiations for a successor agreement will commence as mutually agreed on or after May 1, 2016.

## **ARTICLE 3—COMPLETE AGREEMENT/SEVERABILITY**

### **Section 1. Complete Agreement.**

This Agreement is the full and complete Agreement between the Employer and the Union resulting from negotiations held pursuant to the provisions of ORS 243.650 eq. seq. It is acknowledged that, during negotiations which resulted in this Agreement, each and all had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter appropriate for collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union, barring a change in controlling law, rule, or contrary Commission directive, for the life of this Agreement, each voluntarily waives the right, if any, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter whether or not it was discussed in these negotiations unless such right to mid-term negotiation is expressly created within this Agreement. In the event of such change in controlling law, rule, or directive, the affected party or parties is/are immediately relieved of the conflicting contract obligation(s), and the parties agree to meet and negotiate the effect of such change. This Agreement shall not be modified in whole or in part except by another written instrument duly executed by the parties.

### **Section 2. Severability**

In the event any provision of this Agreement is declared invalid by any court of competent jurisdiction or by ruling of the Employment Relations Board, then only such portion or portions shall become null and void and the balance of the Agreement shall remain in effect. The Employer and the Union agree to meet as

soon as possible to negotiate and agree upon one or more substitute provisions to replace the portion or portions of the Agreement so affected and to bring their practice into conformance therewith as soon as practically possible aspiring to do so within sixty (60) days after notification. Any dispute or question concerning bargaining unit composition shall be resolved by the Employment Relations Board.

## **ARTICLE 4—NO STRIKE OR LOCKOUT**

### **Section 1.**

The Union agrees that during the term of this Agreement, the Union or its bargaining unit members shall not authorize, instigate, aid or engage in any work stoppage, slowdown, sickout, refusal to work or strike against the Employer, or strike on the Employer's property.

### **Section 2.**

The Employer agrees that during the term of this Agreement, the Employer shall not cause or permit any lockout of Employees from their work. In the event Employees are unable to perform their assigned duties because equipment or facilities are not available due to a strike, work stoppage, or slowdown by any other Employees, such inability to provide work shall not be deemed a lockout.

### **Section 3.**

The Union recognizes and agrees that the Employees continue to remain subject to the Rules of Professional Conduct and that they at all times remain subject to the responsibilities placed on them by the Oregon Rules of Professional Conduct, including after the expiration of the contract. No Employee may target, picket, strike, or engage in other disruptive activity at any personal space associated with a Commission member or Employer's management team member, or at any professional space associated with a Commission member.

### **Section 4.**

Upon notification confirmed in writing by the Employer to the Union that certain bargaining unit Employees covered by this Agreement are engaging in any activity in violation of this Article, the Union shall advise such Employees in writing, with a copy to the Employer to return to work immediately. Such notification by the Union shall not constitute an admission that it has caused or counseled such strike activity.

Any alleged violation of this Article by either party may be referred to the grievance arbitration procedure or may be pursued in the Courts at the discretion of the moving party.

## **ARTICLE 5—EQUAL OPPORTUNITY**

### **Section 1.**

The Office of Public Defense Services (OPDS) offers equal employment opportunities

without regard to race, color, national origin, sex, sexual orientation, union orientation, gender identity or expression, religion, marital status, age, disability, veteran or other status protected under applicable local, state, or federal law. OPDS requires that all Employees cooperate fully to ensure the fulfillment of this commitment in all actions and decisions, including:

- Hiring, placement, promotion, transfer, and discharge;
- Recruitment, advertising, or solicitation for employment;
- Compensation and benefits; and
- Selection for training.

It is also the policy of OPDS that all Employees work in an environment where the dignity of each individual is respected. Harassment due to status protected under this policy is prohibited.

OPDS will make reasonable accommodations for the known physical or mental disabilities of an otherwise qualified applicant or Employee, unless an undue hardship would result. Any applicant or Employee who requires an accommodation in the hiring process or to perform the essential functions of a job should contact the Human Resources Manager.

## **Section 2.**

The Employer and the Union are committed to a workplace that offers equal employment opportunity in keeping with the Employer's policy and both parties will affirmatively work to ensure that the workplace operates in accordance with this policy.

## **ARTICLE 6—MANAGEMENT RIGHTS**

### **Section 1.**

Except as expressly and specifically limited and restricted by a written provision of this Agreement, the Employer has and shall retain the full right of management and of the direction of the facility and its operations. Such rights of management include, among other things, but are not limited to: the right of the Employer in its sole discretion to plan, direct, control, increase, decrease, or diminish staffing in whole or in part; to subcontract work; to direct Employees and to determine job assignments and working schedules; to change methods, strategies, techniques, and the locations where Employees work; to introduce new methods, strategies, techniques, and locations where Employees work; to direct the work of its Employees, including but not limited to the right to maintain order and efficiency; to change or discontinue any procedure used in connection with quality of or scope of legal representation offered; to hire, select, reward, transfer, evaluate, promote, demote and discharge at will subject only to constitutional constraints as provided by the Commission; to determine hours to be worked; to determine whether the whole or any part of the Employer shall continue to operate; to suspend, discharge, or take other disciplinary action against Employees; to assign work including special projects to Employees; to determine the level of support for CLE, training, and education; to lay off Employees for any reason, including but not limited to lack of work or lack of funding; to recall Employees; to add or to reduce the production

expectations, the work schedule and method of work, and number of Employees that it shall employ at any one time and the qualifications necessary to any of the jobs it shall have; in its discretion, to assign or reassign Employees and/or to assign or reassign work to Employees within the bargaining unit; to rescind, enact, or change Employer work rules and regulations, or policies, provided that such rights shall not be exercised so as to violate any of the specific provisions of this Agreement.

## **Section 2.**

The failure of management to exercise any rights shall not constitute a waiver of same.

## **Section 3.**

It is further agreed that the rights specified herein may not be impaired by an arbitrator or arbitration even though the parties may agree to arbitrate the issue involved as provided hereafter.

## **Section 4.**

Employer programs which are not provided for in this contract may be implemented, modified or eliminated without violation of this contract or negotiations with the Union. Mandatory subjects of bargaining that are expressly included in this Agreement may not be unilaterally changed.

## **ARTICLE 7—TEMPORARY INTERRUPTION OF EMPLOYMENT**

When the Employer decides that furloughs will occur due to lack of funds, the Employer will develop a furlough plan and call a meeting of the Labor Management committee to consider the effects and alternative options, if any. Such meeting must occur within thirty days of the declaration. Absent mutual agreement to the terms of an alternative, the Employer's furlough plan will be implemented.

## **ARTICLE 8—OTHER LEAVES**

### **Section 1. Leaves With Pay**

- a. **Pre-Retirement Planning Leave.** A full-time Employee with five (5) or more years employment with a PERS-covered Employer shall be granted up to 28 hours of paid pre-retirement leave. Part-time Employees shall be granted pre-retirement leave on a prorated basis. Scheduling of pre-retirement leave is subject to prior approval of the Employer. Such leave may not be converted to vacation, sick or personal leave, or to cash remuneration. Pre-retirement leave not used before retirement shall be forfeited.
  
- b. **Jury/Witness Leave.** Subject to provisions of ORS10.061 and 10.090, an Employee shall receive full pay from the Employer while on jury duty or while appearing as a subpoenaed witness (other than as a party in the action). The Employee must waive any jury fees except for expense reimbursement. Employer may request and retain a copy of the jury summons and court release, if applicable, to support the leave.

- c. **Military Training Leave.** Subject to provisions of ORS 408.240, 409.290, 399.065, 399.075, 399.230, and 659A.086, an Employee who has served with the State of Oregon or its counties, municipalities, or other political subdivisions for six (6) months or more immediately preceding an application for military leave, and who is a member of any National Guard, National Guard Reserve, or of any reserve components of the armed forces of the United States and has provided advance written or verbal notice of the absence is entitled to receive pay during an absence for annual active duty training or active duty in lieu of training. The Employee's paid leave of absence will not exceed fifteen (15) calendar days or eleven (11) work days in any federal fiscal year. If the training time for which the Employee is called to active duty is longer than fifteen (15) calendar days, the Employee may be paid for the first eleven (11) days only if such time is served for the purpose of discharging an obligation of annual active duty for training in the military reserve or National Guard.
- d. **Military Leave.** An Employee who is a member of the Oregon National Guard or other reserve component may use vacation, personal business, comp time, or leave without pay at the Employee's discretion to cover the absence to perform this duty. The Employee will provide verbal or written notice of military service. The Employee shall return to work on the next normally scheduled work day following deactivation unless otherwise authorized by the Employer.
- e. **Bereavement Leave.** Notwithstanding the Donated Leave or Sick Leave eligibility criteria of Articles 13 and 15, herein, Employees shall be granted up to forty (40) hours paid bereavement leave for the death of a qualifying family member (as defined by OFLA) , part-time employees shall be granted prorated leave. Employees shall be eligible for twenty-four (24) hours of paid bereavement leave for any other relative or person residing in the household. If additional leave is needed, an Employee may request to use accrued leave, or leave without pay at the option of the Employee for any period of absence from employment to discharge the customary obligations. The Employee must have exhausted all available accumulated leave and qualify to receive donated leave as defined in Article 13 – Donated Leave.
- f. **Service Award Leave.** Employees who have completed at least five years of nontemporary service with OPDS are eligible for service award leave. Only nontemporary continuous service with OPDS shall count toward service award eligibility. For the purposes of this Article, continuous service in a nontemporary position shall count towards an Employee's service eligibility if either:
  - a. the Employee was employed by the State Public Defender on October 1, 2001 and transferred to OPDS, or
  - b. the Employee was employed with the Oregon Judicial Department and was transferred to OPDS on July 1, 2003, or
  - c. the Employee has been continuously employed by OPDS. Time worked for OPDS before and after a break in service will be considered in

determining eligibility. Service award leave is granted in one-time intervals to full-time Employees in accordance with the following schedule:

Years Employed Service	Award Leave Granted
5	5 hours
10	10 hours
15	15 hours
20	20 hours
25	25 hours
30	30 hours
35	35 hours
40	40 hours
45	45 hours

Part-time Employees shall be granted service award leave on a prorated basis.

Service award leave must be scheduled in advance with the Employer and may be accrued. Service award leave shall not be donated or converted to cash remuneration. Service award leave not used prior to termination shall be forfeited.

- g. **Special Recognition Leave.** At the discretion of the Employer, Employees may be granted up to 40 hours paid special recognition leave per calendar year. Use of such leave shall be scheduled in advance with the Employee’s supervisor. Part-time Employees will be granted special recognition leave on a prorated basis. Special Recognition leave may not be accrued, converted to sick or vacation leave, donated, or converted to cash remuneration. Special recognition leave not used by December 31 of the year in which granted shall be forfeited.
  
- h. **Domestic Violence, Harassment, Sexual Assault or Stalking Leave.** Subject to provisions of ORS 659A.270 through 659A.290 an Employee who is the victim of domestic violence, harassment, sexual assault or stalking or is the parent or guardian of a minor child or dependent who is the victim of domestic violence, harassment, sexual assault or stalking may take up to 160 hours of leave with pay each calendar year as defined below. The 160 hours is in addition to any accrued vacation, sick, personal business or other form of paid or unpaid leave available to the Employee. An Employee must exhaust all other forms of paid leave before the Employee may use paid leave established by this policy. Use of leave will be used for the purposes defined in ORS 659A.272. Use of leave may be a block of time, intermittent or supplementing an altered work schedule. To the extent that an Employee’s need for leave under this provision is also covered by FMLA and/or OFLA, the leave types will run concurrently.
  
- i. **Parental Leave.** A parent shall be granted leave in accordance with State and Federal laws. A new parent may request additional leave time in accordance with section 2c of this article.

- j. **Family Medical Leave.** The Employer will abide by the federal Family Medical Leave Act and the Oregon Family Leave Act. FMLA and OFLA will run concurrently. OFLA and FMLA leave need not be taken all at once and can be used intermittently when required by law or, when not required by law, at the discretion of the Employer.
- k. **Red Cross Disaster Relief Services Leave.** The Employer may grant leave for relief services in Oregon. Such leave may not exceed 15 work days in any 12-month period. To qualify for such leave, the Employee must be a certified disaster services volunteer of the American Red Cross and the disaster must be designated Level II or above by the American Red Cross.

## **Section 2. Leaves Without Pay**

- a. **Military Leave.** Employees shall be entitled to military leave without pay as required by federal and state law.
- b. **Court Appearance Leave.** An Employee may request and shall be granted leave without pay for the time required to make an appearance as a plaintiff or defendant in a civil or criminal court proceeding that is not connected with the Employee's officially assigned duties. Such reduction in salary will be made in full work week increments where such leave causes an absence of one (1) of more full work weeks.
- c. **Other Leave.** At the discretion of the Employer when the work of the Agency will not be disadvantaged by the temporary absence of an Employee, the Employee may be granted a leave of absence without pay or educational leave without pay, subject to Employer's advance approval. Leave without pay shall result in a permanent adjustment of the Employee's recognized service date in accordance with ORS 238.650. Leave of up to one (1) year will not affect an Employee's salary eligibility date.

## **ARTICLE 9—CLASSIFICATION AND CLASSIFICATION CHANGES**

The Employer shall give the Union notice when it creates a new bargaining unit position that is not listed in Appendix A of this Agreement, or substantially changes the description of an existing bargaining unit job classification. The Employer and the Union shall agree upon a pay scale for such job classification prior to its implementation. In the event that the Employer and the Union are unable to agree upon a pay scale for the newly created position prior to its implementation, the Employer may set the pay scale for that position and the Union can request renegotiation of that pay scale upon expiration of the Agreement.

## **ARTICLE 10—MILEAGE AND LODGING**

When the Employer requires the Employee to travel, mileage and lodging reimbursements will be in accordance with the Oregon Accounting Manual, Policy No. [40.10.00PO](#), and its successors. Changes in this policy will be incorporated into this Article automatically.

## **ARTICLE 11—PAID HOLIDAYS**

### **Section 1.**

The Employer will observe all state holidays as defined in ORS 187.010 and 187.020:

- a. New Year's Day on January 1;
- b. Martin Luther King, Jr.'s Birthday on the third Monday in January;
- c. President's Day on the third Monday in February;
- d. Memorial Day on the last Monday in May;
- e. Independence Day on July 4;
- f. Labor Day on the first Monday in September;
- g. Veterans Day on November 11;
- h. Thanksgiving Day on the fourth Thursday in November;
- i. Christmas Day on December 25; and
- j. Every day appointed by the Governor of the State of Oregon as a holiday.

When a holiday falls on a Saturday, the preceding Friday shall be recognized as a holiday. When a holiday falls on a Sunday, the following Monday shall be recognized as a holiday.

### **Section 2.**

If the courts are closed on the Friday after Thanksgiving, that day will be considered a Holiday. If the courts are open on the Friday after Thanksgiving, Employees will be expected to work a regular day and will be granted eight (8) hours paid leave to be used as a floating holiday between the day before Thanksgiving and January 31<sup>st</sup> of the following year.

### **Section 3. Holiday Eligibility**

A full-time Employee shall be granted eight (8) hours time off with pay for each holiday. A part-time Employee shall be granted time off with pay on a prorated basis for each holiday. If a holiday falls on an Employee's regularly scheduled day off, the Employee may schedule the holiday for use on a different day during the holiday week. An Employee on leave without pay for more than 32 consecutive hours (prorated for part-time Employees) shall not be granted the paid holiday if the holiday falls during the period of leave without pay.

## **ARTICLE 12—VACATION**

### **Section 1. Monthly Accrual**

**Full-time Employees.** Full-time Employees shall accrue vacation leave at a rate based

on each full calendar month employed in accordance with the following schedule, which is based on the Employee's recognized service date.

Vacation leave shall accrue as follows

Through 5 <sup>th</sup> year	10 hours per month
After 5 <sup>th</sup> year through 10 <sup>th</sup> year	12 hours per month
After 10 <sup>th</sup> year through 15 <sup>th</sup> year	14 hours per month
After 15 <sup>th</sup> year through 20 year	16 hours per month
After 20 <sup>th</sup> year through 25 <sup>th</sup> year	18 hours per month
After 25 <sup>th</sup> year	20 hours per month

**Part-time Employees.** Part-time Employees shall earn vacation leave on a prorated basis.

**Initial Trial Service Employees.** During the initial trial service period, Employees are eligible to accrue vacation leave each month. Accrued vacation may be used at the completion of the initial trial service period. Use of vacation leave may be granted during an extension of the trial service period.

**Partial Month Accrual.** Vacation leave accrual for an Employee working less than a full calendar month in a period due to hire, termination, or leave without pay shall be computed on a prorated basis.

### **Section 2. Scheduling of Vacation.**

The time when an Employee may take vacation leave shall be subject to the approval of the Employer with due regard to the Employee and the needs of the Employer.

### **Section 3. Vacation Pay Upon Termination.**

Unless an Employee requests to transfer vacation to another State of Oregon agency, an Employee (or, in the case of death, an Employee's beneficiary or estate) shall be compensated for a maximum of 250 hours of accrued and unused vacation leave. The rate of pay for vacation payout shall be the Employee's pay rate at time of termination, exclusive of other types of compensation such as differentials.

### **Section 4.**

Vacation credit shall continue to be earned while an Employee is using paid leave.

### **Section 5.**

Vacation hours may accumulate to a maximum of three hundred fifty (350) hours. An Employee who has accrued the maximum vacation leave hours authorized may request use of vacation leave to prevent its loss.

### **Section 6. Donation of Vacation Leave.**

Vacation leave may be donated to another Employee when requested and approved for sick leave purposes. See Article 13 - Donated Leave.

## **Section 7.**

When an Employee is on vacation and circumstances arise that would qualify the Employee to use accrued sick leave, the Employee may charge that time as sick leave. If a holiday or office closure occurs while an Employee is on vacation leave, the holiday or office closure shall not be deducted from the Employee's accrued vacation leave.

## **ARTICLE 13—DONATED LEAVE**

### **Section 1.**

The Employer administers a donated leave program allowing Employees to support other Employees in serious need of leave by allowing donations of paid vacation leave. Employees may voluntarily donate accrued vacation leave in full-hour increments to another non-temporary Employee provided the requesting Employee requires leave for sick, bereavement, or military leave and meets the following requirements:

#### **SICK LEAVE**

The requesting Employee:

- a. Is absent due to his/her own FMLA and/or OFLA qualifying reason or to care for a qualifying family member (as defined by FMLA/OFLA) with a condition that qualifies as a serious health condition under FMLA/OFLA, and
- b. has exhausted all accrued paid leave, and
- c. is not receiving Workers' Compensation or Disability Income payments, and
- d. is not the subject of pending disciplinary action, and
- e. has met the sick leave requirements as determined by the Employer.

#### **BEREAVEMENT LEAVE**

The requesting Employee:

- a. meets the OFLA eligibility requirements, and
- b. is absent due to the death of a qualifying family member as defined under OFLA, and
- c. has exhausted all accrued, paid leave, and
- d. has met the bereavement leave requirements as determined by the Employer.

#### **MILITARY DONATED LEAVE:**

As prescribed in ORS659A.086, the requesting Employee:

- a. is a member of the organized militia of this state and is called in to active service of this state under ORS 399.065(1) or state active duty under ORS 399.075, or
- b. is a member of the organized militia of another state and is called into active status service by the Governor of the respective state, and
- c. holds regular status (i.e. has completed initial trial service), and
- d. is in a leave without pay status during active military duty status, and
- e. has met the military donated leave requirements as determined by the Employer.

**Section 2.**

Employees may donate leave in increments of one (1) hour or more to an eligible Employee's sick leave account, based on the conversion of the donor's base salary rate to sick leave hours at the donee's base salary rate.

**Section 3.**

Employees apply for donated leave in writing to the Agency Human Resources Manager or designee, accompanied by the treating physician's written statement or military leave orders.

**Section 4.**

Approval shall be subject to availability of donations from OPDS Employees to cover all donated leave costs. The Human Resources Manager or designee shall initiate and collect donations on a form(s) the Agency provides. The donated leave received for the illness or injury may be used intermittently, as appropriate, for related medical appointments/treatments.

**Section 5.**

The maximum amount of donated leave an Employee may receive is 480 hours per incident for sick leave purposes and 40 hours for bereavement leave purposes. For military donated leave purposes, the Employee may not receive more than the amount the Employee was earning in total compensation on the date the Employee began a military leave of absence.

**Section 6.**

The donor and recipient will hold the Employer harmless for any tax liabilities.

**Section 7.**

Unused donated leave will be retained by the donating Employee.

**ARTICLE 14—PERSONAL BUSINESS LEAVE**

**Section 1.**

Full-time Employees shall be granted 24 hours of personal business leave on July 1 of each year. Use of such leave shall be subject to prior approval by the Employer. Part-time Employees shall be granted personal business leave on a pro-rated basis. Personal Business leave accrual will be pro-rated when an Employee is hired after July 1 each year.

**Section 2.**

Personal business leave may not be accrued, donated, converted to vacation or sick leave, or converted to cash remuneration. Personal business leave not used by June 30 of each year shall be forfeited.

**Section 3.**

When an Employee from another State of Oregon agency is employed by the Employer and the other agency grants personal business leave for a fiscal year, the

personal business leave may be transferred.

#### **Section 4.**

When an Employee from another State of Oregon agency is employed by the Employer and the other agency grants personal business leave for a calendar year, the personal business leave may be transferred. Personal business leave granted by the Employer on July 1 of the calendar year in which the Employee was hired will be pro-rated so the Employee receives no more than 12 hours personal business leave for the 6-month period January through June or July through December. (See Appendix B.)

### **ARTICLE 15—SICK LEAVE**

#### **Section 1. Monthly Accrual**

Full-time Employees shall accrue eight (8) hours of sick leave for each full-calendar month employed.

Part-time Employees and Employees working less than a full calendar month in a pay period due to hire, termination, or leave without pay shall accrue sick leave on a pro-rated basis.

Trial Service Employees. During the trial service period, Employees are eligible to accrue and use sick leave. An Employee, upon initial appointment to OPDS is eligible to use an advance of forty (40) hours of sick leave provided that the Employee signs an agreement to have any used but not yet accrued time taken from the Employee's final paycheck.

#### **Section 2.**

- a) It is the Employee's responsibility to notify the Employer of the need to use sick leave. The Employee, or in emergency situations the Employee's representative shall notify the Employer at the beginning of the next scheduled work day or as soon as possible but not later than 24 hours following the Employee's scheduled work time, of the Employee's absence.
- b) If the Employee's absence is anticipated or prescheduled, the Employee shall notify the Employer at least 30 days in advance in accordance with OPDS policy Family and Medical Leave.

#### **Section 3. Use of Leave.**

- a) **Personal.** An Employee who is absent because of their own physical illness or injury, or medical or dental appointment, must use accrued sick leave for the absence.
- b) **Family.** An Employee may request, and must be allowed to use, accrued sick leave to care for a qualified family member, as defined in OPDS policy Family Medical Leave, and the Family Medical Leave and Oregon Family Leave Acts.

#### **Section 4. Exhaustion of Sick Leave**

##### **a) Personal.**

- a. An Employee who is absent due to his/her own FMLA and/or OFLA qualifying condition, and who has exhausted accrued sick leave, may request and must be allowed to use, any other form of accrued paid leave or leave without pay during the FMLA/OFLA entitlement.
- b. An Employee who is absent and does not qualify for FMLA and/or OFLA may request use of any other form of accrued paid leave or leave without pay for their absence. The use of such leave is subject to prior approval by the Employer.

##### **b) Family.**

- a. An Employee who has exhausted accrued sick leave and is absent to care for a qualified family member as defined by the FMLA and/or OFLA may request, and must be allowed to use, any other form of accrued paid leave or leave without pay during the FMLA/OFLA entitlement.
- b. An Employee who is absent to care for a family member and the leave is not qualified as defined under FMLA/OFLA, must make alternative care arrangements within a reasonable period of time.
- c) Proof Required. Unless otherwise provided in Employer policy, state or federal law (e.g. FMLA, OFLA, ADA, Workers' Compensation), the Employer may require the Employee to submit substantiating evidence for the use of sick leave.
- d) After exhausting all paid leaves, an Employee may be granted paid sick leave which has been converted from vacation leave donated by other Employees as provided in Article 13 – Donated Leave.

#### **Section 5.**

If a holiday occurs while an Employee is on paid sick leave, the holiday shall not be deducted from the Employee's accrued sick leave.

#### **Section 6.**

When an Employee accepts an appointment in another agency of State service, the Employee's unused accrued sick leave shall be transferred to the new State of Oregon Employer.

#### **Section 7.**

A former Agency Employee hired to a position in the bargaining unit with the Employer within two (2) years from the Employee's date of separation shall have previously accrued and unused sick leave restored.

#### **Section 8.**

There shall be no compensation for unused sick leave upon termination of employment. Payroll will report unused sick leave to the Public Employees Retirement System.

## **Section 9.**

Salary paid for a period of sick leave resulting from a condition incurred on the job and also covered by Workers' Compensation, shall be equal to the difference between the Workers' Compensation for lost time and the Employee's regular salary rate. In such instances, prorated changes will be made against accrued sick leave. Should an Employee who has exhausted earned sick leave elect to use vacation leave during a period in which Workers' Compensation is being received, the salary paid for such period shall be equal to the difference between the Workers' Compensation for lost time and the Employee's regular salary rate. In such instances, prorated charges will be made against accrued vacation leave.

## **ARTICLE 16—UNION SECURITY**

### **Section 1. Union Orientation**

Reasonable paid time shall be granted for a Union representative to make a presentation on behalf of the Union at new Employee orientation to identify the organization's representation status and to collect membership applications. The Employer will provide the Union reasonable notice of the place and time of meetings for the orientation of new Employees.

### **Section 2. Union Representation**

The Union will notify the Employer's Human Resources (HR) Manager in writing of its representative of the Local and Council 75, American Federation of State, County and Municipal Employees, AFL-CIO.

The representative shall have reasonable access to the premises of the Employer during working hours to conduct Union business. Such visits are not to interfere with the normal flow of work.

### **Section 3. Bulletin Board**

The Employer shall furnish the Union reasonable bulletin board space for communicating with Employees.

### **Section 4. Union Representatives**

The Union shall provide the Human Resources Manager with the names of Union Representatives, including officers and board members.

### **Section 5. Lists**

The Employer shall furnish to the Union, quarterly, a list of names, classifications and home addresses of new Employees in the bargaining unit and a listing of changes of address of bargaining unit Employees who have submitted such notice to the Human Resources Manager. The Employer shall furnish the Union with a listing of Employees who have terminated from the bargaining unit during the previous month.

Upon request and no more than once a quarter the Employer shall provide to the Union the names of any limited duration Employees subject to the bargaining unit who are hired, reason for the hire and expected duration of the appointment.

Upon request and no more than once a quarter, the Employer shall provide to the Union the names of all bargaining unit Employees in double fill positions, the reason for the double fill and the expected duration of the appointment if available.

Upon request, the Employer shall provide to the Union organization charts for the bargaining unit, showing management positions and the positions they supervise.

### **Section 6. Use of Facilities**

The Union shall be allowed the use of the facilities of the work site for meetings when such facilities are available and scheduling has been arranged.

### **Section 7. Union Dues and Fair Share**

- a. On the first pay period of each month, the Employer shall deduct from the wages of Employees in the bargaining unit who are members of the Union, and who have requested such deductions pursuant to ORS 292.055, a sum equal to Union dues. This deduction shall begin on the first payroll period following such authorization and shall continue from month to month for the life of this Agreement
- b. Employees in the bargaining unit who are not members of the Union shall make payments in lieu of dues to the Union. Payments for these non-members in lieu of dues shall be subject to Fair Share reimbursement. Effective the first of the month following the month in which this Agreement is executed and on each pay period thereafter the Employer will deduct from the wages of each bargaining unit Employee who is not a Union member the payments in lieu of dues required by this Section. Similar deductions will be made in a similar manner from the wages of new bargaining unit Employees who did not become members of the Union within thirty (30) days after the effective date of their employment. The Employer shall remit a payment of all said deductions to the Union by the 20th of the month after the deductions are made. Said payments shall be accompanied by a listing of the names and Employee Identification numbers of all Employees from whom deductions are made.
- c. During the life of this Agreement, the Union will notify the Employer periodically of individuals who have become members of the Union and to whom the Fair Share provisions of this Section will not thereafter apply.
- d. Any Employee who is a member of a church or religious body having bona fide religious tenets or teachings which prohibit association with a labor organization, or the payment of dues to it, shall pay an amount of money equivalent to regular Union dues to a nonreligious charity, or to another charitable organization mutually agreed upon by the Employee affected and the Union. The Employee shall furnish written proof to the Employer that this has been done. Notwithstanding an Employee's claim of exemption under this Section, the Employer shall deduct payments in lieu of dues from

the Employee's wages pursuant to this Section, until agreement has been reached between the Employee and the Union.

- e. The Union shall provide the Employer's HR Manager the Union application/authorization forms. The HR Manager shall supply said applications to prospective members upon request, and shall process completed applications, forwarding a copy to the Union within 5 business days.
- f. The Union agrees that it will indemnify, defend, and save the Employer harmless from all suits, actions, proceedings, and claims against the Employer, or persons acting on behalf of the Employer for damages, compensation, reinstatement, or a combination thereof arising out of the Employers implementation of this Article.

### **Section 8. Maintenance of Membership**

All members of the bargaining unit who are members of the Union as of the effective date of the Agreement or who subsequently voluntarily become members of the Union shall continue to pay dues, or the Fair Share amount, to the Union during the term of this Agreement. This section shall not apply during the 30-day period prior to the expiration of this Agreement for those Employees who, by written notice sent to the Union and the Employer, indicate their desire to withdraw their membership from the Union.

### **Section 9. Email system**

Union Board members may use the Employer's email messaging system to communicate with represented and Fair Share bargaining unit members about Union business. Employees using the Employer's email system shall have no right to or expectation of privacy regarding any message sent or received through the email system.

### **Section 10. Intermittent Union Leave**

When Union members are designated in writing by the Executive Director of Oregon AFSCME to attend AFSCME Council 75 Biennial or AFSCME International Conventions, the following provisions apply:

- a. The Executive Director of Oregon AFSCME shall notify the Employer in writing of the name of the Employee at least thirty (30) days in advance of the date of the AFSCME Convention. No more than one bargaining unit member may be designated to attend AFSCME conventions.
- b. Subject to Employer approval based on the operating needs of the Employee's work unit, including staff availability, the Employee will be authorized release time with pay.
- c. The paid release time is limited to attendance at the conference and travel time to the conference if such time occurs during the Employee's regularly scheduled working hours up to forty (40) hours per calendar year.
- d. The release time shall be coded as Union business leave or other identified payroll code as determined by the Employer.
- e. The release time shall not be considered as work related for purposes of workers' compensation.

- f. The Employee will continue to accrue leaves and appropriate benefits under the collective bargaining agreement except as limited herein.
- g. The Union shall, within thirty (30) days of payment to the Employee, reimburse the Employer for all Employer related costs associated with the release time, regular base wage and benefits, for attendance at the applicable conference.
- h. The Union shall indemnify and the Union and Employee shall hold the Employer harmless against any and all claims, damages, suits, or other forms of liability which may arise out of any action taken or not taken by the Employer for the purpose of complying with these provisions.

### **Section 11. Names of Retirees**

The Employer will send a monthly report to the Union of the names of Employees who have retired the previous month. For purposes of this Agreement, a retiree shall be defined as an Employee who has given the Employer written notice that he/she is separating from State service by retirement and that person has actually separated from State service.

## **ARTICLE 17—PERSONNEL RECORDS**

### **Section 1.**

An Employee may, upon request, inspect the contents of their official Employer personnel file except for confidential reports from previous employers. No grievance material shall be kept in the official personnel files. There shall be only one (1) official personnel file kept for each Employee.

### **Section 2.**

Effective upon execution date of this Agreement, no information reflecting critically upon an Employee shall be placed in the Employee's official personnel file that does not bear the signature of the Employee. The Employee shall be required to sign such material to be placed in his/her personnel file provided the following or substantially similar disclaimer is included:

“Employee’s signature confirms only that the Employer has discussed and given a copy of the material to the Employee, and does not indicate agreement or disagreement.”

If the Employee is not available within a reasonable period of time or the Employee refuses to sign the material, the Employer may place the material in the file provided the material has been signed by two (2) management representatives and a copy of the document was mailed to the Employee at their address of record and a copy to the Union provided the Union has given the Employer a signed release from the Employee.

### **Section 3.**

If the Employee believes that any of the above material is incorrect or a misrepresentation of facts, the Employee shall be entitled to prepare a written explanation or opinion regarding the prepared material or to file a written grievance.

This shall be included as part of the Employee's official personnel record until the material is removed.

#### **Section 4.**

Upon the Employee's written request, material reflecting caution, consultation, warning, admonishment or reprimand or any reports, correspondence or documents of an adverse nature, shall be removed from the file after thirty-six (36) months, unless the material is related to discipline for: criminal activity, substance abuse, violence, harassment, discrimination, or other such occurrences; or flagrant and repeated violations of the rules stated in the Attorney Manual or Personnel Policy. This section does not apply to performance reviews conducted pursuant to Article 21, Performance Review.

### **ARTICLE 18—GRIEVANCE PROCEDURES**

#### **Section 1.**

A grievance shall be any disagreement or dispute which arises concerning the application, meaning, or interpretation of this Agreement raised by an Employee or by the Union. The parties agree to resolve issues at the most informal level possible. If informal discussions between the Employee and Employer do not resolve an issue, a written grievance will be filed. The written grievance shall be filed using the procedure in Section 2. A grievance shall not be expanded upon after being filed at Step 2.

#### **Section 2.**

**Step 1.** Any Employee, with notice to the Union, or the Union on the Employee's behalf may file a grievance in writing with the Administrative Authority, with a copy to the Human Resources Manager within thirty (30) calendar days of the alleged action or the date the Employee and the Union knew or should have known of the alleged action; however, appeals of discipline or discharge shall be pursuant to Article 19 (Discipline and Discharge). Grievances shall be submitted on the AFSCME Grievance Form and shall contain the Articles alleged to have been violated, the specific reasons why the Employee believes the Articles were violated, and the specific remedy requested. The Administrative Authority shall respond in writing to the grievance within fifteen (15) calendar days after receipt of the grievance to the Employee, with a copy to the Union and the Human Resources Manager.

**Step 2.** If the grievance remains unresolved at Step 1, the Union may advance the grievance in writing, with a copy of the written grievance to the Executive Director within fifteen (15) calendar days following the date the response at Step 1 was due or received. The Executive Director shall respond within fifteen (15) calendar days following receipt of this Step 2 appeal. In the event the response from the Executive Director is acceptable to the Union, such response shall have the same force and effect as a decision or award of an Arbitrator, and shall be final and binding on all and they will abide thereby.

**Step 3. Submission to Arbitration.** If a Union grievance is unresolved following Executive Director review, the Union may submit in writing the grievance to arbitration. To be valid, a request for arbitration must be in writing and received by the Executive

Director within fifteen (15) calendar days after the Step 2 response was due or received.

### **Section 3. Time Limits.**

Time limits specified in the grievance procedure may be waived only by mutual written consent of the parties. Failure to submit the grievance in accordance with these time limits without such a waiver shall constitute abandonment of the grievance. Failure by the Employer to submit a reply within the specified time will constitute rejection of the grievance at that step and allow the Union to pursue the matter to the next step within the specified time limit. A grievance may be terminated at any time upon receipt of a signed statement from the Union or the Employee that the matter has been resolved.

### **Section 4. Selection of the Arbitrator.**

In the event that arbitration becomes necessary, the moving party will request within fifteen (15) calendar days from the date the Step 3 response was due or received, a list of the names of five (5) qualified Oregon Arbitrators from the Employment Relations Board, and contact the other party to strike names within thirty (30) working days after receipt of the list. The parties will select an Arbitrator by alternately striking names, with the moving party striking first, from the Employment Relations Board list one (1) name at a time until only one (1) name remains on the list. The name remaining on the list shall be accepted by the parties as the Arbitrator. Either party may request the Arbitrator provide available dates to both parties. Within ten (10) working days of receipt of the available dates, the parties shall select a mutually agreeable date and shall inform the Arbitrator.

### **Section 5. Arbitrator's Authority.**

The parties agree that the decision or award of the Arbitrator shall be final and binding on each of the parties and that they will abide thereby. The Arbitrator shall have no authority to add to, subtract from, change, or modify any of the terms of this Agreement, to change an existing wage rate or establish a new wage rate. The Arbitrator shall issue his/her decision or award in writing within thirty (30) calendar days of the closing of the hearing record.

### **Section 6.**

The Arbitrator's fee and expenses shall be paid by the losing party. If in the opinion of the Arbitrator, neither party can be considered the losing party, then such expenses shall be apportioned as in the Arbitrator's judgment is equitable. All other expenses shall be borne exclusively by the party requiring the service or item for which payment is to be made.

### **Section 7.**

Subsequent to a valid arbitration request and prior to the selection of an Arbitrator, either the Executive Director or the Union may request mediation of the grievance. If agreed by both parties, mediation will be scheduled and conducted by the Conciliation Service Division of the Employment Relations Board. Mediation is not a mandatory step of the grievance procedure.

**Section 8.**

Once a bargaining unit member files a grievance, the Employee shall not be required to discuss the subject matter of the grievance without the presence of the Union representative if the Employee elects to be represented by the Union.

**ARTICLE 19—DISCIPLINE AND DISCHARGE****Section 1.**

The principles of progressive discipline shall be used except when the nature of the problem requires an immediate suspension, termination, reduction of pay, or demotion. The Employer may take the following disciplinary actions: reprimand, suspension without pay, reduction in pay, demotion or dismissal, only for just cause. Any discipline must be provided to the Employee in writing. Verbal reprimands, warnings, work plans, coaching, counseling, evaluations and other non-disciplinary communications between Employees and the Employer are not subject to recourse under this contract.

**Section 2.**

Prior to dismissal, the Employer shall provide the Employee with a written predissmissal notice, except when the nature of the problem requires an immediate termination. Such notice shall include the known complaints, facts and charges, and a statement that the Employee may be dismissed. The Employee must continue work after receipt of the predissmissal notice unless otherwise specified in the notice. The Employee shall be afforded an opportunity to refute such charges or present mitigating circumstances to the Administrative Authority at a time and date set forth in the notice, unless a different time is requested by the Employee and/or his Union representative and agreed to by the Employer.

**Section 3.**

The dismissal of a regular status Employee may be appealed by the Union within ten (10) working days of the effective date of the dismissal directly to the Executive Director. Failure to file the appeal within the ten (10) working day period shall constitute forfeiture of the claim and the case shall be considered closed by the parties. Within fifteen (15) working days of the receipt of the Union's appeal of a case, the Executive Director will respond. Once the response is received from the Executive Director, if the grievance is not resolved the Union may appeal the case to arbitration. The parties shall select an Arbitrator and the Union will notify the Arbitrator of his or her selection. The letter shall include a calendar of potential dates. The final decision and order of the Arbitrator shall be made within thirty (30) calendar days following the close of the hearing.

**Section 4.**

The Employer will provide an Employee who receives a reprimand, reduction in pay, demotion, or suspension written notice of the discipline with the specific charges and facts supporting the discipline. The reduction of pay, demotion and/or suspension of a regular status Employee may be appealed to Step 2 of the Grievance Procedure within ten (10) working days from the effective date of the action. Failure to file the appeal

within the ten (10) working day period shall constitute forfeiture of the claim and the case shall be considered closed by the parties. The Executive Director shall respond to the grievance within fifteen (15) working days. If the grievance is unresolved, the Union may submit the issue to arbitration within fifteen (15) working days after receiving the response from the Director.

### **Section 5.**

Upon request, an Employee shall have the right to Union representation during an investigatory interview that an Employee reasonably believes will result in disciplinary action. The Employee will have the opportunity to consult with a local union steward or an AFSCME Council Representative before the interview, but such consultation shall not cause an undue delay.

## **ARTICLE 20—TRIAL SERVICE**

### **Section 1. Initial Trial Service**

All new Employees appointed to a position shall serve an initial trial service period of six (6) months with the Employer.

The Employer shall evaluate the Employee's work habits and ability to perform his/her duties satisfactorily within the initial trial service period. Where a performance deficit requires additional training time, the Employer may extend the initial trial service by written notice to the Employee. The Union will be notified of the extension by copy of the extension letter when an Employee has a release on file.

During the initial trial service period, the Employee may use accrued sick leave and/or accrued Personal Business Leave. Any other leave requires written approval by the Employer.

An Employee's trial service period may be extended in instances where an Employee has leave without pay for fifteen (15) consecutive days or more. Such a leave of absence shall extend the trial service period by the number of calendar days of the leave taken by the Employee.

### **Section 2.**

Initial Trial service shall be considered an extension of the hiring process such that Management may remove the Employee without cause.

Decisions made by Management during the initial trial service period are not subject to the grievance/arbitration procedure or to any action or complaint to the Employee Relations Board

### **Section 3. Promotional Trial Service**

All Employees promoted to a new classification shall serve a promotional trial service period of six (6) months.

The Employer shall evaluate the Employee's work habits and ability to perform his/her duties satisfactorily within the promotional trial service period. Where a performance deficit requires additional training time, the Employer may extend the promotional trial service by written notice to the Employee. The Union will be notified of the extension by copy of the extension letter when an Employee has a release on file.

Employees removed from promotional trial service shall be demoted to the classification previously held and the Employee's former salary eligibility date will be restored.

## **ARTICLE 21—PERFORMANCE REVIEW**

### **Section 1.**

An Employee's performance will be reviewed either once a year or once every two years. The evaluation will be based on the relevant performance criteria and the Employee's position description. When the Employer designates a review cycle that is less frequent than annually, the Employee may request to have an annual review.

### **Section 2.**

Proposed changes to the current procedure will be discussed in the Labor-Management Committee.

## **ARTICLE 22—RETIREMENT**

The Employer will offer the retirement plan or plans available to its Employees through PERS. In the event that the State's payment of a six percent (6%) employee retirement contribution must be discontinued, the Employer and Union agree to open mid-term bargaining as soon as practically possible over this change in a mandatory subject of bargaining.

## **ARTICLE 23—SALARIES**

### **Section 1.**

The parties agree to work together to achieve pay parity with the Assistant Attorneys General who work for the State of Oregon.

### **Section 2.**

Salaries and annual step increases will be set according to the salary schedule in Appendix A.

## **ARTICLE 24—DIFFERENTIALS**

The Employer will pay a 5% differential of base pay when it assigns in writing:

- a. In the Employee's position description, an Employee to interpret a non-English language;

- b. Additional duties that the Employer recognizes as significantly more complex than the scope of duties assigned to the Employees' classification, such as parole duties, as currently assigned to a Deputy II.

## **ARTICLE 25—HEALTH AND DENTAL INSURANCE**

The Employer will offer the plan or plans and contribution amounts available to state Employees through PEBB: <https://pebb.benefits.oregon.gov/members!/pb.main>.

## **ARTICLE 26—SALARY ADMINISTRATION**

### **Section 1. Salary on Demotion.**

Whenever an Employee demotes to a job classification in a lower range that has a salary rate the same as the previous salary, the Employee's salary shall be maintained at that rate in the lower range.

Whenever an Employee demotes to a job classification in a salary range which does not have corresponding salary steps with the Employee's previous salary but is within the new salary range, the Employee's salary shall be maintained at the current rate until the Employee's next salary eligibility date. At the Employee's next salary eligibility date, if qualified, the Employee shall be granted a salary rate increase of one (1) full step within the new salary range plus that amount that the current salary rate is below the next higher rate in the new salary range. This increase shall not exceed the highest rate in the new salary range.

Whenever an Employee demotes to a job classification in a lower range, but the Employee's salary is above the highest step for that range, the Employee shall be paid at the highest step in the new salary range.

This section shall not apply to demotions resulting from official disciplinary actions.

### **Section 2. Salary on Promotion**

An Employee shall be given an increase to the next higher rate in the new salary range effective on the date of promotion. The Employee's salary eligibility date shall be reset to equal the date of promotion.

### **Section 3. Salary on Lateral Transfer**

An Employee's salary and eligibility date shall remain the same when the Employee transfers from one position to another which has the same salary range.

### **Section 4. Effect of Break in Service**

When an Employee separates from the Employer and is rehired by Employer within two (2) years, the Employee's previous salary eligibility date shall be adjusted by the amount of break in service.

### **Section 5. Rate of Pay on Appointment from Layoff List**

When an Employee is appointed from a layoff list to a position in the same class in

which the Employee was previously employed, the Employee shall be paid at the same salary step at which such Employee was being paid at the time of layoff.

### **ARTICLE 27—TELECOMMUTE**

The Employer will maintain a telecommute policy. Qualifying Employees may telecommute one day per week. Additional telecommute days are subject to approval by the Employer.

If the Employer believes that an Employee's work out of the office is negatively affecting case management, attendance at meetings, or the goals of the office, or if the Employee fails to abide by the rules for telecommuting, the Employer may temporarily or permanently suspend the telecommuting privilege for that Employee.

### **ARTICLE 28—SAFETY AND HEALTH**

It is the intent of this Agreement that the parties will mutually strive to maintain a suitable and safe working environment for all Employees.

### **ARTICLE 29—LABOR/MANAGEMENT COMMITTEE**

#### **Section 1.**

To facilitate communication between the parties, a joint labor/management committee shall be established.

#### **Section 2.**

The committee shall be composed of up to three (3) Employee members appointed by the Union and up to three (3) members of Management, unless mutually agreed otherwise.

#### **Section 3.**

The committee shall meet when necessary, but not more than two (2) hours per meeting or more than once per calendar quarter. The first meeting shall be ninety (90) days after the parties have executed a labor contract. Subsequent meetings shall be established by mutual consent of the parties. Meetings may be longer or more frequent by mutual consent. Nothing in this Article shall prevent the Administrative Authority and Union President from addressing issues less formally as they arise.

#### **Section 4.**

The committee shall prepare a written agenda five (5) days in advance of any scheduled meeting.

#### **Section 5.**

Employees appointed to the committee shall be paid during time spent in committee

meetings. Approved time spent in meetings shall not be charged to leave credits.

### **Section 6.**

The committee shall meet and confer on issues relating to the operations of the Employer. The committee shall not have the authority to negotiate on mandatory subjects of bargaining. The committee shall have no power to contravene any provision of this Agreement or to enter into any agreements binding on the parties to this agreement.

## **ARTICLE 30—POSTING BARGAINING UNIT VACANCIES**

When the Employer seeks to fill a vacant bargaining unit position, the process will include an email from the Employer to the bargaining unit that announces the vacancy, describes the qualifications for the position, explains how to apply for the position, and identifies the closing date for applications. Management will make reasonable efforts to (1) interview every minimally qualified internal bargaining unit applicant for the position, and (2) meet with every minimally qualified internal applicant individually before announcing results.

## **ARTICLE 31—HOURS OF WORK**

Employees are exempt from FLSA overtime provisions and are expected to work a professional workweek on a salaried basis. The parties recognize that business hours for law offices and for most governmental agencies, including the courts, are from 8:00 a.m. to 5:00 p.m., Monday through Friday.

Alternative work schedules are subject to approval by the Administrative Authority. Approval for alternate work schedules will not be unreasonably withheld. Alternative schedules may be adjusted or terminated only when, in the judgment of the Employer, the needs of the Agency so require.

## **ARTICLE 32—LIMITED DURATION APPOINTMENT**

Any Employee who accepts a limited duration appointment in the bargaining unit is entitled to rights under the layoff procedure in this Agreement.

Employees accepting such appointment shall be notified of the conditions of the appointment and acknowledge in writing that they accept that appointment.

## **ARTICLE 33—LAYOFF**

### **Section 1.**

The Employer agrees to make a good faith effort to provide thirty (30) days notice to Employees and to the Union of its intent to reduce its attorney workforce through layoff as a result of inadequate funding or for operational reasons. The Employer will attempt to provide sixty (60) days notice of any such layoff.

## **Section 2.**

The Employer shall maintain a list of names of Employees in good standing who have been laid off from the Employer in the previous one (1) year period. When the Employer chooses to fill a vacant position from the same or lower classification, the Employer will recall Employees on the layoff list in the reverse order the layoff occurred. For example, the last Employee laid off will be the first Employee recalled.

If the Employer fills a vacancy that requires the performance of specialized duties, such as a JAS team vacancy, the Employer will recall out of order from the list the Employee who previously performed those duties for the Employer. In the event that no Employee on the list has previously performed those duties for this Employer, the Employer will post the position and notify Employees on the list of the vacancy.

## **ARTICLE 34—WORKERS' COMPENSATION**

The Employer agrees to follow the provisions of controlling law in regard to both processing workers' compensation claims and to reinstating an Employee injured on the job.

## **ARTICLE 35—AGENCY PERSONNEL POLICIES**

Upon request, the Agency shall provide the Union a copy of its personnel policies.

## **ARTICLE 36—EDUCATION AND TRAINING**

The Employer will pay registration for Criminal Section Attorneys to attend the OCDLA Annual Conference in Bend or the OCDLA Winter Conference. The Employer will pay registration fees for JAS Attorneys to attend the Juvenile Law Training Academy.

In addition, subject to budgetary constraints, the Employer will make available to each Employee discretionary funds for payment of registration fees for conferences and CLE programs that are directly relevant to the mission of the Agency.

## **ARTICLE 37—BAR AND PROFESSIONAL MEMBERSHIP DUES**

The Employer shall pay Oregon State Bar (OSB) and Oregon Criminal Defense Lawyers Association (OCLDA) membership dues for each Employee. Funding permitting, the Employer may pay annual membership dues for two (2) OSB sections related to the Employee's practice.

## **ARTICLE 38—SUCCESSOR NEGOTIATIONS**

The Employer will allow up to four (4) Employees to attend collective bargaining sessions as members of the Union's negotiation team. The Employer agrees to pay the affected Employees their normal salary for this time, during which they must continue to satisfy the usual work expectations of the Employer. The Union agrees to

notify the Employer in writing of its members designated as representatives for negotiations. The Employer is not responsible for travel, overtime, per diem, other benefits or compensation beyond that which the Employees would have received had the affected Employees not attended bargaining sessions.

## APPENDIX A – Salary Schedule

### Effective Date: January 1, 2015

Classification Title	Class	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8
Deputy Defender 1	D9430	5,256	5,528	5,805	6,092	6,393	6,718		
Deputy Defender 2	D9431	6,268	6,578	6,912	7,254	7,615	7,997	8,395	8,813
Senior Deputy Defender	D9432	7,364	7,730	8,114	8,520	8,944	9,390	9,860	10,355

### Effective Date: December 1, 2015 includes 2.25% Cost of Living Increase

Classification Title	Class	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8
Deputy Defender 1	D9430	5,374	5,653	5,935	6,230	6,537	6,869		
Deputy Defender 2	D9431	6,409	6,726	7,067	7,417	7,787	8,177	8,583	9,011
Senior Deputy Defender	D9432	7,530	7,903	8,297	8,712	9,146	9,601	10,082	10,588

### Effective Date: December 1, 2016 includes 2.75% Cost of Living Increase

Classification Title	Class	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8
Deputy Defender 1	D9430	5,522	5,808	6,099	6,401	6,717	7,058		
Deputy Defender 2	D9431	6,585	6,911	7,261	7,621	8,001	8,402	8,820	9,259
Senior Deputy Defender	D9432	7,737	8,121	8,525	8,951	9,397	9,865	10,359	10,879

## APPENDIX B - Personal Leave Chart

Personal Business Leave will be pro-rated when an Employee is hired after July 1.

<u>Employee starts employment in:</u>	<u>Personal Business Leave</u>
July	24 hours credited
August	22 hours credited
September	20 hours credited
October	18 hours credited
November	16 hours credited
December	14 hours credited
January	12 hours credited
February	10 hours credited
March	8 hours credited
April	6 hours credited
May	4 hours credited
June	2 hours credited

# Attachment 6

Public Defense Services Commission  
Meeting Action Item  
October 23, 2015

**Issue**

The PDSC is required by ORS 151.216(1)(e) to establish a compensation plan that is commensurate with other state agencies. Included below are summaries of compensation plan adjustments adopted by the Executive Branch and the Oregon Judicial Department, and a recommendation for 2015-17 OPDS employee compensation plan adjustments.

**Discussion**

Executive Branch agencies will be providing employees represented by AFSCME the following adjustments to compensation:

1. 2.25% COLA on December 1, 2015
2. 2.75% COLA on December 1, 2016
3. 5% employee contribution to employee benefit premiums, unless the employee enrolls in a lower cost medical plan, then the employee contribution is reduced to 1%
4. A holiday on the day after Thanksgiving
5. Regular annual salary step increases

Executive Branch agencies will be providing employees represented by SEIU the following adjustments:

1. 1.48% COLA on December 1, 2015, and a 2.75% COLA on December 1, 2016
2. The State will no longer cover the cost of the employee's 6% contribution toward employee's Public Employee Retirement System accounts (instead, employees will have that amount added to their pay, then automatically taken out through a payroll deduction)
3. 5% employee contribution to employee benefit premiums, unless the employee enrolls in a lower cost medical plan, then the employee contribution is reduced to 1%
4. An additional holiday on the day after Thanksgiving
5. Regular annual salary step increases

Executive Branch employees in management services, executive services and unrepresented employees will be provided the following adjustments to compensation:

1. 2.25% COLA on December 1, 2015
2. In order to give flexibility to address compensation issues including pay equity, compression and moving to a modern market-based compensation system for managers, no decision has been made regarding a COLA in the second year. That decision will be made no later than June 30, 2016.

3. 5% employee contribution to employee benefit premiums, unless the employee enrolls in a lower cost medical plan, then the employee contribution is reduced to 1%
4. An additional holiday on the day after Thanksgiving
5. Regular annual salary step increases

The Judicial Department will be providing employees the following adjustments to compensation:

1. 2.25% COLA on December 1, 2015
2. The Chief Justice will decide upon a 2016 COLA after the Executive Branch has announced its 2016 adjustments for employees in management services, executive services, and unrepresented employees
3. 5% employee contribution to employee benefit premiums, unless the employee enrolls in a lower cost medical plan, then the employee contribution is reduced to 1%
4. A special day of leave for use by staff in lieu of mandating closure of state courts statewide on the day after Thanksgiving
5. Regular annual salary step increases

### **Recommendation**

OPDS management recommends that the PDSC approve a compensation package with the following adjustments to the OPDS employee compensation:

1. 2.25% COLA on December 1, 2015
2. 2.75% COLA on December 1, 2016
3. 5% employee contribution to employee benefit premiums, unless the employee enrolls in a lower cost medical plan, then the employee contribution is reduced to 1%
4. A special day of leave in lieu of mandating closure of OPDS on the day after Thanksgiving
5. Regular annual salary step increases

During the 2015 Legislative Session, the Legislature passed Senate Bill 5507, which set aside a Special Purpose Appropriation to the Emergency Board for state employee compensation changes. The Department of Administrative Services will be seeking this additional funding from the 2016 Legislature for all state agencies to cover the cost of COLA increases. The distribution of these funds will be calculated at a later date by the Department of Administrative Services and then distributed to state agencies. If the amount distributed to the agency is less than the amount required to fund the COLA increases, agencies will need to fund the difference out of existing operating funds. OPDS management expects the majority of the recommended adjustments to be funded through its portion of the Special Purpose Appropriation.

The agency is also requesting the addition of two classifications to the current compensation plan, both within the Financial Services unit. Currently, all accounts payable representatives are in a classification called "Accounting Technician." Other

state agencies have different levels of Accounting Technician (1, 2, and 3). In order to allow for the development of newer employees, and to provide career progression within Financial Services, OPDS management is recommending that OPDS align its compensation plan with other state agencies and include in its compensation plan three position levels: Accounting Technician 1, 2, and 3. This change will not result in any additional cost to the agency.

**Requested Commission Action**

Vote to approve the compensation plan as described above.

# Attachment 7

**PDSC**

**2016 Draft Meeting Schedule**

January 21

ED's 2015 Annual Report to the PDSC  
Strategic Planning & Retreat?  
OPDS Monthly Report

February

No meeting (Legislative Session)

March 17

Strategic Planning Report

April 21

Contractor Comments and Commission Review of 2015-17 Draft Policy Option Packages  
Strategic Plan for 2016-21

May 19

Report on Juvenile Delinquency Representation

June 16

PDSC Review of 2015-17 Agency Request Budget

July & August

No Meeting

September 15 (Clackamas County)

Jefferson/Crook (JD 22) Service Delivery Review  
PDSC Approval of 2015-17 Agency Budget Request

October 21(location TBD; scheduled in conjunction with OCDLA Management Conference)

PDSC Schedule for 2017

November

No meeting

December 15

Clackamas County Service Delivery Review

# Attachment 8



# Oregon

Office of Public Defense Services

1175 Court Street NE

Salem, Oregon 97301-4030

Telephone (503) 378-3349

Fax (503) 378-4462

[www.oregon.gov/opds](http://www.oregon.gov/opds)

## Public Defense Services Commission

### Washington County Service Delivery Review Preliminary Report September 2015

#### I. INTRODUCTION

**Background.** The Public Defense Services Commission (PDSC) regularly holds public meetings in counties throughout the state as part of its effort to evaluate the effectiveness and efficiency of public defense services. The reports from these evaluations, called Service Delivery Reviews, are based upon interviews and public testimony from dozens of local justice system stakeholders, and focus on the structure of public defense services. The goal has been to ensure that the best type and number of public defense organizations are serving each county.

Parallel with the Commission's Service Delivery Review process, the Office of Public Defense Services (OPDS) has facilitated nearly 50 peer reviews of individual public defense providers since 2004. For each peer review, teams of public defense leaders from around the state spend several days in a county conducting interviews with justice system stakeholders in the course of examining the quality of representation provided by the entity under review. Among the primary aims of these reviews are identifying successful local policies and procedures that might be recommended to other public defense providers, and making recommendations for improvement where needed. The overarching purpose of each review is to assist public defense providers in pursuing excellence. Until recently, peer review teams produced confidential reports provided only to contract administrators and managers at OPDS.

In 2013, OPDS merged the two review processes while preserving the core purposes of each review. With the revised process, peer review teams examine providers in a county much as it would in the past, except interviewees are no longer promised confidentiality and providers and other system stakeholders are informed that the Commission will visit the county approximately one year after the peer review report issues in an effort to follow-up on the findings and recommendations of the peer review team. Prior to the Commission's public meeting in the county under review, at which it receives testimony from stakeholders, OPDS staff issue a new report based on interviews with public defense providers and county officials. After the Commission's hearing, a draft final report is prepared for Commission deliberation and approval.

**Washington County Peer Review.** The Washington County peer review team looked at the six public defense contractors providing representation in adult criminal and juvenile court cases. Those contractors included the following: Brindle McCaslin & Lee, PC (Juvenile); Hillsboro Law Group, PC (Criminal, Juvenile); Karpstein & Verhulst, PC (Criminal, Juvenile); Metropolitan Public Defender, Inc. (Criminal, Juvenile, Civil Commitment, specialty courts); Oregon Defense Attorney Consortium (Criminal, specialty courts); and, Ridehalgh & Associates, LLC (Criminal, Juvenile, specialty courts).

The OPDS Executive Director asked James Arneson to chair the evaluation team, and asked attorneys Karen Stenard, Tom Crabtree, Sarah Peterson, the Honorable Robert Selander, and Amy Miller to serve as team members. Paul Levy served as staff for the team.<sup>1</sup> The team's site visit was conducted in June, 2014, and contractors received final reports in November 2014.

Prior to the site visit, the administrator for each contractor completed a questionnaire about the operation of their entity. In addition, attorneys working with the Oregon Defense Attorney Consortium, and the attorneys and staff employed by each of the other contractors received a survey asking about their experiences working with the contractor.

Historically, peer reviews have also employed an online survey of justice system stakeholders who are familiar with the work of a contractor. However, OPDS had asked all Washington County judges, the District Attorney, and others, for comments about the contractors as part of its annual statewide public defense performance review conducted earlier in 2014. The peer review team reviewed results of that survey prior to the site visit.

The peer review team received extraordinary assistance from the Washington County courts, in particular, then Presiding Judge Kirsten Thompson, and Trial Court Administrator, Richard Moellmer, and his staff. Dee Ann Meharry, the docketing specialist with MPD, also provided invaluable assistance in scheduling interviews for the site visit.

---

<sup>1</sup> James Arneson is the head of a law firm in Roseburg that contracts with PDSC to provide representation in criminal and juvenile cases. He is a past-President of the Oregon Criminal Defense Lawyers Association (OCDLA), and also served as a lobbyist for that organization. He was the first chair of the Quality Assurance Task Force, which helped develop the protocols for peer reviews, and has served on other peer review teams. Karen Stenard is the administrator of the consortium that contracts to provide representation in juvenile cases in Lane County. She has served on past peer reviews. The Honorable Robert Selander is a senior judge who previously served as Presiding Judge in Clackamas County. He is the administrator of the consortium in Yamhill County that contracts to provide representation in criminal and juvenile cases. Tom Crabtree is the administrator of Crabtree and Rahmsdorff, a public defender office providing representation in criminal and juvenile cases in Deschutes and Crook counties. Sarah Peterson is an attorney in the Juvenile Appellate Section of the Office of Public Defense Services. Prior to working at OPDS, she was in private practice in Eugene handling appeals in domestic relations, juvenile dependency and criminal cases. Amy Miller is Deputy General Counsel at OPDS, and focuses on matters concerning juvenile dependency and delinquency representation. Previously, she was a staff attorney handling juvenile cases with Youth, Rights & Justice, and with Multnomah Defenders, Inc. Paul Levy is General Counsel at OPDS in Salem.

The Washington County peer review site visit took place on June 11, 12 and 13, 2014. Over the course of those three days, team members interviewed nearly 50 people including judges, court staff, prosecutors, Sheriff's staff, provider administrators, attorneys and staff, Juvenile Department personnel, representatives of the Probation and Parole Division, case workers with the Department of Human Services, a Court-Appointed Special Advocate (CASA) supervisor and others. Other telephone interviews were conducted after the visit.

At the conclusion of interviews, the team met to discuss preliminary findings and conclusions, and then met separately with the administrator of each contractor to provide initial feedback on the information it had received and some of the recommendations it was considering. A draft report was provided to each administrator, and after receiving comments and corrections, the team approved final reports.

**Service Delivery Review Procedure.** Over the course of three days - July 20 to July 22, 2015, OPDS Executive Director Nancy Cozine, PDSC member John Potter, and OPDS Contracts Manager Caroline Meyer, conducted follow-up interviews with Washington County justice system stakeholders and contractors to determine what developments had occurred in the county since the peer review. Nancy Cozine and Caroline Meyer held additional interviews, both by telephone and in person, on July 31<sup>st</sup>, August 13<sup>th</sup>, and August 14, 2015. All contract providers were interviewed, as well as Presiding Judge Bailey, former Presiding Judge Thompson, Chief Criminal Judge Knapp, Judge Menchaca, Trial Court Administrator Moellmer, court verification staff, District Attorney Hermann and his deputies, Sheriff Garrett and his jail commander, Juvenile Department Senior Juvenile Counselor Penny Belt and Drug Court Counselor Racheal Holley, Community Corrections Director Steve Berger and senior staff, CASA Director Lynn Travis and CASA supervisors, AAG Marcia Lance-Bump, DHS Program Managers Tom Vlahos and Shirley Vollmuller and Supervisor Katy Payne, and CRB Coordinator Sandy Berger.

The key findings and recommendations of the peer review reports, and the information gained from the follow-up interviews and meetings are related in the balance of this report. This report will be amended further following the PDSC meeting in Washington County on September 17, 2015. The report will be finalized following a subsequent PDSC meeting after deliberations on any specific findings and recommendations arising from the July meeting.

## II. WASHINGTON COUNTY

**Demographics.** Washington County has a population of about 554,996, making it the second most populous Oregon county after Multnomah (766,135). The total estimated population for Oregon in 2013 was 3,930,065.<sup>2</sup> The population of Washington County has increased about 19% between 2000 and 2010.<sup>3</sup> The county includes 15

---

<sup>2</sup> U.S. Census Bureau, State & County QuickFacts, 2013 Estimates.  
<http://quickfacts.census.gov/qfd/states/41/41067.html>

<sup>3</sup> Portland State University, College of Urban & Public Affairs: Population Research Center,  
<http://www.pdx.edu/prc/census-data-for-oregon>.

incorporated cities, including Beaverton, Hillsboro, Sherwood, Tigard, Tualatin, Wilsonville, and a portion of Portland.

According to U.S. Census data, the county is somewhat more diverse than the entire state population, with 68.9% identifying as white persons not of Hispanic or Latino origin (78.1% statewide); 2.1% identifying as black persons (2.0% statewide); 1.2% identifying as American Indian or Alaska Native (1.8% statewide); 9.3% identifying as Asian persons (4.0% statewide); and 16.0% identifying as persons of Hispanic or Latino origin (12.0% statewide). Census data also show the county has a slightly higher than statewide percent per capita of high school graduates (90.7%; 89.2% statewide), and a somewhat higher percent of college graduates (39.5%; 29.2% statewide). Nearly a quarter of persons over the age of five in the county speak a language other than English at home (14.7% statewide).<sup>4</sup>

Geographically, Washington County includes vast tracks of fertile farmland, where agriculture remains a major component of the county's economy. Elsewhere, the high-tech electronics industry is another major part of the county's economy, including the Intel Corporation, which is the largest for-profit employer in the county. Nike, Inc. is also headquartered in Washington County.

Oregon State Police profiles of index crimes for Washington County show a fairly consistent number of reported crimes over the five year period ending in 2012, with a high of 12,835 in 2008 and a low of 10,936 in 2011. Total reported crime for the county has also remained fairly constant over the same period.<sup>5</sup>

**Justice System.** With the exception of the Hillsboro and Beaverton branch offices of the Department of Human Services, and the juvenile detention facility in Portland where the county places youth in delinquency cases, the main places of business for the Washington County justice system are located close together in downtown Hillsboro. For the most part, lawyers are also within the downtown core. The Washington County Circuit Court includes 15 judges and one Juvenile Court Pro Tem Judge. Though there is a need for additional judges, space constraints in the courthouse resulted in a request for only one new judgeship, which was not funded in the 2015 legislative session.

Due to the significant demands on its limited judicial resources, the court sought and received grant funding from the State Justice Institute to engage the National Center for State Courts (NCSC)<sup>6</sup> in a "reengineering" effort. Following a 2013 site visit and report from NCSC, the Washington County Circuit Court adopted a set of guiding principles and a governance plan that set out the structure of an Executive Committee to provide input and advice to the Presiding Judge. The Executive Committee consists of the

---

<sup>4</sup> U.S. Census Bureau, *supra*.

<sup>5</sup> Oregon State Police, 2010 Annual Uniform Crime Report, [http://www.oregon.gov/osp/CJIS/Pages/annual\\_reports.aspx](http://www.oregon.gov/osp/CJIS/Pages/annual_reports.aspx). The "Crime Index" was developed to measure crime on a national scale by choosing eight offenses that are generally defined the same by each state, which are: Willful Murder, Forcible Rape, Robbery, Aggravated Assault, Burglary, Larceny (Theft), Motor Vehicle Theft, and Arson. Total reported crime was 40,942 in 2006 and 33,270 in 2010, the last year for which data are available and a low for the five-year period.

<sup>6</sup> The State Justice Institute was created by Congress in 1984 to award grants for state court improvement projects. [www.sji.gov](http://www.sji.gov). The National Center for State Courts provides court improvement services. [www.ncsc.org](http://www.ncsc.org).

Presiding Judge, the Immediate Past Presiding Judge, the three Chief Judges of the Criminal, Civil and Family Law teams, and a new position of Assistant Presiding Judge.

On June 12, 2014, during the site visit for the peer review, the Washington County Circuit Court released the results of a major NCSC review of court docket management which included numerous findings and recommendations. Among other things, the report noted that the court “falls short of the state’s ambitious felony and misdemeanor case processing time standards,” although the report observed that most Oregon courts fall short and that the court generally met the NCSC’s own case time standards. More significantly, the report noted that jury trial rates for both felony and misdemeanor cases were dramatically higher than nationally and elsewhere in Oregon. The report suggested a combination of factors contributed to the high rate, including ineffective pretrial conferences where deputy district attorneys lacked authority to engage in meaningful negotiations and defense attorneys were not sufficiently prepared; lack of meaningful judicial involvement in pretrial settlement discussions; the siphoning of easily resolved cases onto an Early Case Resolution docket; and prosecutorial overcharging. The report also noted that a significant number of cases that resolve short of trial do so only on the day of trial.

The NCSC report included a number of recommendations aimed largely at promoting timely case dispositions. These included, generally, an effort to reduce unnecessary delay by creating the expectation that case events—most importantly trials—will proceed as scheduled. Specifically, the report recommended the creation of a criminal caseflow management plan with the expectation this would ensure that scheduled events occur in a predictable fashion and that those events are meaningful. The report also recommended that system stakeholders study further how to make pretrial conferences more meaningful and increase the success of resolving cases prior to the day of trial. Overall, the report emphasized the need to include representative from stakeholder groups in discussions about improving court processes.

**Criminal Cases.** All criminal cases in Washington County Circuit Court begin with a first appearance at the Law Enforcement Center, commonly called “LEC” (pronounced like “lecture”) which is two blocks from the main Courthouse. The LEC opened in 1998 and includes the county jail and Sheriff’s offices, along with two courtrooms.

Arraignments take place each day at 8:30 am for out-of-custody cases, and 3:00 pm for in-custody. Metropolitan Public Defender (MPD) covers the arraignment docket for all providers, except for Early Case Resolution (ECR) matters, which are addressed further below. Prior to morning arraignments, MPD’s docketing specialist will have spoken with the court verifiers, who make tentative assignments of new cases to contractors based upon a rotation schedule established with OPDS. The MPD arraignment attorney and legal assistant arrive prior to out-of-custody arraignments and speak briefly with clients likely to be assigned to MPD. Obvious conflicts of interest are avoided in the pre-arraignment assignment process, but neither MPD nor the verifiers have detailed information about names of complainants and likely witnesses. When cases will not be assigned to MPD, the attorney acquires basic contact and case information but does not inquire into matters that might touch on confidential information. Working relationships among the MPD attorneys, the court, and Sheriff are described as positive, with regular communication, including both formal and informal.

For non-ECR cases, as would be expected in a high volume court, arraignments move along quickly after the persons cited to appear<sup>7</sup> have all viewed a video explaining their rights. Defendants leave court with the next court date, the name of the appointed contract entity, and instructions to contact the provider.

Prior to the 3:00 pm in-custody arraignments, MPD tries to contact likely clients, though transport and holding processes make it difficult and infrequent. During arraignment, defendants are brought to an enclosed, windowed area where they may speak with the arraignment attorney, although the setting does not permit confidential conversations. The court will not entertain release motions at arraignment, allowing release only if recommended by the release officer. Though community corrections secured grand funding to hire a second release officer<sup>8</sup>, the hiring process has been very slow, and Washington County continues to function with only one release officer. Consequently, only a limited number of individuals are interviewed by the release officer prior to arraignment. The jail population is approximately 572, and while there used to be no forced releases, the county had already processed 200 forced releases by July 2015, primarily due to a larger than anticipated female population. Defendants typically receive a preliminary hearing date about five days after arraignment, and if the attorney wishes to request release for a client, a motion must be filed and a hearing scheduled.

In 2005, Washington County implemented an Early Case Resolution program as a way to alleviate significant jail overcrowding. The PDSC described it as a model early resolution program in its 2007 Washington County Service Delivery Review report.<sup>9</sup> Approximately 33% of the county's criminal case filings are processed (although not necessarily resolved) through the ECR program.<sup>10</sup> MPD and the Oregon Defense Attorney Consortium (ODAC) cover the ECR cases, and each entity has an attorney present for ECR dockets, which are called either before or after the regular morning and afternoon arraignment dockets. Defense attorneys review the available discovery prior to arraignments, and share this and a written plea offer with the defendant. For in-custody defendants, there are two secure rooms to conduct these conferences. Some negotiation is permitted, and attorneys can request additional time to investigate. Otherwise, the options for ECR cases are to proceed to plea and sentencing on the day of arraignment or to reject the ECR offer, which results in the case being set in the normal course for either misdemeanors or felonies. Some concern was expressed during interviews regarding the inclusion of prison-bound cases in the ECR program, but interviews suggest that these cases are resolved through ECR only when particular circumstances make it the best option (such as when a defendant has an existing prison

---

<sup>7</sup> There are numerous law enforcement agencies for the various cities in Washington County, each of which will cite persons to appear for arraignment. There have been efforts to coordinate days on which particular agencies will cite persons to appear to avoid congestion on some days, but those efforts have not been especially successful.

<sup>8</sup> Greg Scholl, director of the Washington County MPD office, chaired a stakeholder group to develop the new pretrial services office.

<sup>9</sup> The Commission's report is available here:  
<http://www.oregon.gov/OPDS/docs/Reports/washcoservdelplan.pdf>.

<sup>10</sup> The DA's office controls who is given an ECR offer, which is based entirely upon the nature of the charge. The offer will take into account a defendant's record and may, in the case of felonies, call for a prison sentence.

sentence and wishes to have case resolved with an agreement for concurrent time without disruption of existing prison programming opportunities).

The court also recently added the Diversion Early Case Resolution (DECR, referred to by many as “decker”) program. Through this program, defendants can enter a plea and agree to completion of certain conditions, with disposition scheduled one year later. If the defendant has completed all conditions, the case is dismissed. The DECR program was established at the suggestion of an MPD attorney, and with the cooperation of the District Attorney’s office and Chief Criminal Court Judge Knapp. All appearances in these cases are heard by Judge Knapp. There is a 50% failure rate, but it is still seen as an effective way to resolve cases and achieve an appropriate outcome.

When they happen, preliminary hearings in felony cases, which are usually set at 11 am, 3 pm, or 4 pm, are hearings where the state calls witnesses, subject to cross examination, in order to establish probable cause. Occasionally, the state will present a plea offer in return for a waiver of the preliminary hearing. A defendant may accept the plea at the preliminary hearing or the state will leave the offer open for a time, in which case the matter proceeds to arraignment at LEC on the DA information. Discovery in felony cases is generally received prior to the preliminary hearing, though lawyers report that there is often significant delay in receiving video and other non-paper discovery. A limited number of more serious cases proceed by way of grand jury indictment.

As part of its reengineering effort, the court recently discontinued its use of pretrial conferences and now holds a Case Management Conference (CMC) three weeks after the case arraignment. CMCs are held throughout the week and are scheduled based upon each judge’s preferred times. This means that scheduled CMCs can conflict with attorneys’ other regularly scheduled court matters. If the case does not resolve at the CMC, it is assigned a trial date and a Final Resolution hearing, which takes place on Friday two weeks before the scheduled trial date. Cases can be resolved at the Final Resolution hearing. Felony cases also receive a Case Assignment Day on the Friday before the assigned trial date, at which time a trial judge is assigned.

The new CMC model is reported by most as an improvement over the old pretrial conference system, but it is somewhat dependent upon the judge’s willingness to actively participate and explore obstacles to settlement. When the court is willing to get involved in order to address issues of delayed discovery and to have realistic discussions about whether charges are likely to be proved at trial, more cases are resolved earlier. While it is still too early to determine whether the new system has decreased the number of cases proceeding to trial, interviewees did describe some improvement. The state’s trial win rate is still low relative to other jurisdictions - reportedly around 50% - suggesting that perhaps more cases could be dismissed or settled earlier in the process.

Cases that proceed to trial are assigned by the Presiding Judge on the Friday morning prior to the week in which the trial is scheduled. Trials take place each week day except Monday. Most pretrial motions are heard on the day of trial, although occasionally some are heard earlier in the process. Continuance motions are generally not entertained at case assignment and must be made earlier by written motion supported by an affidavit that includes the opposing party’s position and a waiver of the 60-day speedy trial right

for in-custody defendants. At case assignment, lawyers sign in on a docket indicating the expected length of trial, whether it will be jury or court, and whether there will be any motions for change of judge (“affidavits”), or whether the case will settle. The Presiding Judge will then make assignments, including “call backs” for cases on standby and resets when there are not enough judges available.

### **Probation Violations and Special Courts.**

Most probation violation hearings are held at the LEC where one probation officer handles court duties. While some attorneys are reported to be more prepared than others, the court indicates that most public defense attorneys handling these cases appear to meet with clients before the day of court and have contacted the court prior to hearings, when necessary, to discuss proposed resolution of cases.

Washington County has a variety of special court dockets. In addition to the ECR docket described above, it has a long-standing drug court, a DV deferred sentencing program, a DUII diversion program, a Justice Reinvestment grant program (originally part of HB 3194) called the Integrated Reentry Intensive Services and Supervision, or IRISS, program, and a mental health court.

Drug Court involves a team including the probation and parole division, a treatment provider, a deputy district attorney and a defense attorney, who is normally Greg Scholl, with MPD. The team is described as working well together with a focus on healing the client. Mr. Scholl gets very high marks for his involvement in the program. The clientele are generally high risk offenders who might otherwise be sentenced to jail or prison time.

In both the domestic violence deferred sentencing program and the DUII diversion program, defendants who are identified as eligible by the DA’s office may enter a plea of guilty and agree to successfully complete a treatment program, after which charges will ordinarily be dismissed. Failure to successfully complete treatment will result in sentencing on the charges. For both the DV and DUII programs, PDSC contracts with the Ridehalgh firm to “staff” the programs. Typically, Mr. Ridehalgh, who ordinarily handles these duties, will advise eligible program participants in a group setting prior to court. Neither the court nor Mr. Ridehalgh consider him to “represent” any individual defendants. There remains some concern regarding the extent to which defendants have an opportunity for private, confidential case-specific consultations about the advantages or disadvantages of entry into one of these programs.

The county’s IRISS program is aimed at diverting offenders from likely prison sentences into intensive probation supervision, where resources are available to assist with housing, employment, treatment and other rehabilitation services. The program is described as dependent upon good working relationships among the court, prosecutors, defense attorneys, the probation and parole division and treatment providers. A screening evaluation and comprehensive, evidence-based case plan are prerequisites for participation in the program. Defendants in pending new cases may be referred for IRISS consideration either by agreement of the defense and prosecution. Probation officers can also make referrals for current probationers who face the possibility of a prison sentence in revocation proceedings.

The county has a robust mental health court managed by Judge James Fun and a team that includes a prosecutor, a defense attorney, a probation officer with mental health training, and representatives from the jail, the Sheriff's office, and social service providers. Jennifer Harrington, an attorney with MPD who is also a Qualified Mental Health Professional, is the defense attorney for the program. Ms. Harrington consistently receives very high marks for her contribution to the program. Persons are referred to the court after having been placed on probation following conviction, or as a result of a negotiated agreement between the state and defense following "prescreening" for the program, or by agreement to divert the case. The program seeks to coordinate and facilitate the provision of a variety of services to participants who also meet frequently with the probation officer assigned to the program and with the court. A person generally must have a diagnosed mental illness to participate. Other than treatment obligations, conditions of probation are kept to a minimum with fines and fees usually converted to community services, although any restitution obligations will continue to be enforced. Although the program is structured to last one year, some participants remain in it much longer if they have difficulty stabilizing and meeting the minimum program obligations. With successful completion, probation is terminated or, for those who entered the court on diverted offenses, the charges are dismissed.

**Juvenile Cases.** All juvenile delinquency and dependency cases in Washington County Circuit Court are handled by the juvenile court. The juvenile court is located in the Juvenile Services Building, across the street from the main courthouse, and has two judges, Judge Ricardo J. Menchaca and Judge Pro Tem Michele C. Rini. Limited space at the juvenile court makes confidential attorney-client conversations, which are often necessary in a court setting, virtually impossible.

**Delinquency.** Washington County does not have a detention facility. Instead, the county contracts with Multnomah County for 14 beds in the Donald E. Long Detention Facility (DEL) on the east side of Portland.<sup>11</sup> Youth are transported from DEL to Washington County for court appearances and are placed in a holding area behind one of the courtrooms. In-custody court appearances occur every day at 1:00 p.m., immediately followed by the 1:15 p.m. "cite-in" docket, which includes out-of-custody preliminary hearings on new charges, as well as probation violations and violations of conditions of release. Other types of out-of-custody cases are then heard throughout the afternoon.

New charges are initiated by petition. Probation violations (PVs) and violations of conditions of release are initiated by affidavits to show cause. Each youth is assigned a juvenile court counselor (JCC).<sup>12</sup> The Washington County District Attorney's Office has

---

<sup>11</sup> The beds are often filled mostly by youth prosecuted in adult court on Measure 11 offenses. The only other detention facility is the Harkins House (HH), which is a juvenile shelter program located three blocks from the courthouse. HH is for youth (boys and girls, maximum capacity 14, almost always full with a two-week waiting list) who would qualify to be detained under ORS 419C.145(1) but stay at HH to stabilize while the case is pending. It is designed to be a 45-60 day program; it is level based, with school and family components. The goal of the HH program is for the youth to return home at the end of the stay there.

<sup>12</sup> Typically, the JCC decides to handle a PV or violation of conditions of release out of custody. Those appearances ("cite ins") are also included on the 1:15 docket.

two assigned juvenile court deputy DAs, who may also have certified law students assisting them.<sup>13</sup>

Some cases are resolved either informally, where a youth will never see a courtroom, or through Formal Accountability Agreements (FAAs). The JCCs advise youth of their right to counsel in connection with FAAs, and some youth request a lawyer. If a youth expresses uncertainty about whether he or she should have a lawyer, the court typically appoints counsel.

Either Judge Rini or Judge Menchaca preside at initial appearances (“prelims”). Attorneys are appointed in all delinquency cases unless a youth appears with retained counsel. On the morning of the prelim, public defense providers receive an email referral requesting confirmation that they will accept appointment to new cases. The attorneys are then present for the prelim hearing. If the youth is in custody, topics at the prelim include release and setting dates for both the pretrial conference and trial (“CJ” for contested jurisdiction) to comply with the statutory 28-day deadline. If the youth is out of custody, the court sets only the pretrial conference at the prelim (usually within 30 days); a CJ will be set, often significantly later, only if the case does not settle at the pretrial conference.

The DDA makes a settlement offer at the pretrial conference. Discovery is fairly forthcoming, and the DDA usually provides complete discovery by the time of making the offer at the pretrial conference. Sometimes the police reports are the only discovery, and they are usually attached to the petition.

The court does allow and sometimes grants motions for alternative disposition (including conversion of the petition to a dependency petition), but the court will not allow conditional postponements. In comparison, Multnomah County continues to utilize conditional postponements. Significant concern was expressed regarding pretrial advocacy for youth, particularly those charged with sex offenses. Several people suggested that lawyers may not be filing motions for alternative disposition or motions to find the youth unable to aid and assist, even when such motions are entirely appropriate.

If a youth is adjudicated, either by an admission or after CJ, there are three possible dispositions: discharge (no consequence), probation (bench, which is rare, or supervised by a Juvenile Department JCC), or commitment to the Oregon Youth Authority (OYA). An OYA commitment is either correctional (incarceration at MacLaren, etc.) or noncorrectional (in the custody of a treatment facility). As the result of a recent change by the Juvenile Department, in most cases a youth’s pre-adjudication JCC becomes his or her post-adjudication probation officer.<sup>14</sup>

Youth appearing in court while in custody are generally shackled in the courtroom, including during the hearings on their cases. The shackles consist of both leg irons and handcuffs attached to belly chains. For a time, according to the peer review, a risk assessment was employed to limit shackling to only those instances warranting

---

<sup>13</sup> The same two DDAs represent DHS in dependency matters through the jurisdictional stage.

<sup>14</sup> “PO” is sometimes used, but “JCC” is more correct.

heightened security precautions. But attorneys have become complacent, failing to challenge routine shackling, and it has once again become ubiquitous.

Washington County has a juvenile drug court program called Keys to Success. Typically, the JCC identifies whether a case qualifies for drug court and does so early on. Judge Raines runs the program out of his courtroom in the main courthouse. The program is very structured; if a youth meets certain criteria and completes certain phases, his or her case is dismissed. The drug court program has existed in some form for more than 10 years, and the more structured program has existed for approximately three to four years.

Within the year prior to the peer review, the juvenile court created the PHASE Program for gang-involved youth. Judge Menchaca runs that docket on Tuesday afternoons. The program is two and a half years into development, and lawyers at the Karpstein and Verhulst firm indicate that improvements are still being made, including the recent introduction of weekly meetings with the PHASE team. The team is described as being very committed to the program, and there is a strong desire to build its number of successful graduations.

Overall, representation in juvenile court, in both delinquency and dependency cases, is said to be good. Still, attorneys should consider continuing to pursue conditional postponements, and administrators should ensure that lawyers are filing motions seeking alternative dispositions, inability to aid and assist, and unshackling. They should also be sure that attorneys are having sufficient contact with clients. At the time of the peer review, there was significant concern about the frequency of visits to detained youth. Interviewees suggest that there has been improvement, and the Juvenile Department indicates that youth are transitioned out of detention to electronic monitoring or to a placement in Washington County as quickly as possible, reducing the need for lawyers to visit the DEL facility.

**Dependency and Termination of Parental Rights.** In Washington County, when DHS files a dependency petition, it also seeks a shelter order. Shelter hearings occur every day, in the afternoon, and Judge Rini presides over most of them. The court notifies the attorneys to be appointed by approximately 11:00 a.m., and parents are told to arrive 30 minutes before the shelter hearing to meet their attorneys. By the time of the shelter hearing, parents have received a copy of the petition. During the hearing, DHS serves parents with a summons that includes dates for the status hearing (approximately 45 days later) and “CJ” (approximately 60 days later, to meet the statutory deadline<sup>15</sup>). Issues litigated or discussed at shelter hearings include return home, other placement, visitation, and continuing jurisdiction, though fully contested hearings on the latter are infrequent. The court dismisses very few petitions at shelter hearings.

---

<sup>15</sup> 419B.305 requires, absent a good cause finding, that the court shall hold a hearing and enter a dispositional order on a petition within 60 days after the filing of the petition. In Washington County, for petitions filed between 10.1.12 and 9.30.13, 73% of petitions filed reach jurisdiction within 60 days or less of filing which is consistent with the state average of 73.18%. 17% of petitions filed do not reach jurisdiction until over 90 days which exceeds the state average of 14.94%.

According to peer review team interviews, the number of petitions filed has declined within the past year, largely because of Department of Human Services renewed emphases on their Oregon Safety Model which requires evidence of an immediate threat of harm to a child before DHS will file a petition. Even with the reduced filings, the county is very dependent upon use of a private bar list in order to provide representation for every party. Because all juvenile providers are firm providers, conflicts are common to the members of each firm. Court staff reportedly spends significant time calling lawyers on the private bar list before shelter hearings in order to find sufficient coverage. The use of private bar attorneys also makes it more challenging for system partners to distribute information to all lawyers providing court appointed representation in juvenile cases in the county, as it is an ever-changing mix of lawyers.

Admissions to allegations contained within dependency petitions most often occur at the status hearing, which occurs two weeks before the scheduled CJ.<sup>16</sup> The department provides most discovery prior to the status hearing and is seeking to routinely provide discovery, via electronic transmission, within 10 days of it becoming available.<sup>17</sup> A deputy DA represents DHS in the dependency proceeding through CJ.<sup>18</sup> Most commonly, if the court asserts jurisdiction at CJ, the court will proceed immediately to disposition. At disposition, the court sets dates for the six-month review hearing<sup>19</sup> and a later permanency hearing. At the time of the peer review, it was not uncommon for the court to enter a judgment asserting jurisdiction and ordering disposition as to one parent based on that parent's admissions, with the understanding that the judgment may have to be vacated if the other parent prevails at CJ. However, subsequent to the recent *W.A.C.* case,<sup>20</sup> this practice has all but ceased. The current procedure for handling cases in which one parent makes an admission and the other seeks CJ is slightly different depending on the judicial officer. However, both Judges advise the admitting parent that, until jurisdiction is established as to the other parent, services ordered by the court are voluntary but recommended.

The court typically reviews cases every six months, with Citizens Review Board hearings held before the first six-month court review. According to interviews, some attorneys consistently attend CRB hearings while others rarely or never do so. Many times an attorney's legal assistant will attend a hearing but not participate in any

---

<sup>16</sup> Around the time of the shelter hearing, the case is transitioned to a different DHS caseworker, the "permanency caseworker." The parties participate in a "child safety meeting" (CSM) within 30 days (that is, before the status hearing) to develop an ongoing safety plan. At the CSM, the parties are introduced to the permanency caseworker.

<sup>17</sup> Unlike delinquency cases where all discovery comes from the DDA, discovery in dependency cases appears to be compiled and distributed primarily by the assigned caseworker, which results in some significant inconsistency across cases.

<sup>18</sup> Even if the court rules to assert jurisdiction, the department is not represented by an attorney until an AAG is assigned to the case shortly before the permanency hearing.

<sup>19</sup> The court will schedule more frequent review hearings in cases that require greater oversight and attention, including when the court has made a certain order and wants to ensure that the parties comply.

<sup>20</sup> In *Dept. of Human Services v W.A.C.*, 263 Or App 382 (2014), the Court held that jurisdiction over a child may not be based on the admissions of one parent when the other parent properly contests the allegations in the petition.

meaningful way. Several people interviewed cited recent and specific instances in which a parent needed advocacy during a CRB or other non-court setting, but was accompanied by a legal assistant who said nothing. DHS court reports are generally provided at least three days in advance of the review hearing, in compliance with the requirements of ORS 419B.881(2)(a)(B). Attorneys were described as being more effective at review hearings when they had personally met with clients in advance of the hearing. Several interviewees indicated that lawyers who have their staff visit with child clients prior to the court hearing often do not have the level of detail needed to effectively represent their clients. Several interviewees suggested that while a few attorneys are effective when representing a child or parent, others seem to confuse these roles, and would do better if they represented only children or only parents.

If the department intends to seek a change in the permanency plan at the permanency hearing, the assigned AAG provides such notice approximately 30 days before the scheduled hearing. This allows the other parties time to consult with their clients and, if needed, request time for a contested permanency hearing. Prior to the AAG getting involved, discovery is inconsistent and depends on the particular caseworker. If the department does not intend to seek a change in plan, the court generally does not change the plan and, instead, schedules the next permanency hearing in approximately 90 days. In some cases, the court will continue jurisdiction until a parent obtains a custody order in a domestic relations proceeding.

If the case proceeds toward termination of parental rights (TPR), DHS includes a first appearance date on the TPR petition. At the first appearance, the court appoints counsel, schedules dates for a pretrial conference, a best-interest settlement conference (“BI/SC”) (basically, a second status hearing), calendar call (the Friday before the trial date), and trial.<sup>21</sup> If a parent fails to appear at the first appearance, the court schedules a termination-without-parent (“TWOP”) hearing about a month later, at which point, if the parent still does not appear, DHS can proceed with a “prima facie” termination case. Relinquishment of parental rights is not an option in most cases. In lieu of relinquishment, a parent stipulates to termination in a non-contested court proceeding. Stipulation to a termination of parental rights is considered by DHS to be “voluntary” and, as a result, parents are more likely to be offered mediation services with the selected adoptive resource.

About 25 to 30 percent of cases in Washington County involve a Court Appointed Special Advocate (CASA). The CASAs are regarded as well-trained, engaged in case planning and strong advocates for children. There were mixed reviews, however, regarding the effectiveness of lawyers appointed to represent children. While some attorneys are said to communicate appropriately and effectively with children, there is also a sentiment that more training is needed in how to talk to kids about legal issues in age appropriate terms. As noted above, there is also criticism of using legal assistants, rather than attorneys, for home visits with child clients, especially with teens or where a child’s capacity to make informed decisions is in question.

There is a concern, according to interviews, that attorneys in juvenile cases lack cultural competence, especially regarding Latinos. According to one person, attorneys need to

---

<sup>21</sup> The court addresses any evidentiary issues on the morning of trial.

better understand acculturation and how it affects the lives of their clients. They also need to know that even though parents may speak some limited English, an interpreter may be necessary for effective communication. Attorneys would also benefit, according to information received by the peer review team, from a better understanding of the Mexican child welfare system. Concerns were expressed that there is reluctance to place children with relatives in Mexico, which can leave children in substitute care longer than necessary. This reluctance was attributed to a lack of understanding about resources in Mexico and how to access them.

### **III. PUBLIC DEFENSE CONTRACTORS**

Detailed findings and recommendations specific to particular providers will be made in the sections pertaining to those providers. Overall, though, the peer review team found general satisfaction with the public defense providers in the county.<sup>22</sup> Some attorneys, especially those practicing as part of ODAC, are highly regarded, with appreciation for their years of service to public defense, and for their skill and professionalism in criminal cases. MPD was commended for recent improvements in its training of new attorneys and overall professionalism, though one interviewee noted that their certified law students need additional oversight. ODAC and MPD handle the vast majority of criminal cases, with the other four contractors handling some misdemeanor and minor felony criminal cases and a substantial number of juvenile cases.

There were a number of concerns about defense providers heard consistently during the peer review interviews. There was an impression among many system stakeholders that high caseloads (one judge called them “obscenely high”) are interfering with adequate client contact and case preparation. There is also concern about the turnover of attorneys, which delays case resolution (even serious in-custody cases) as they are reassigned to new lawyers. It also means that there is a regular influx of new or less experienced defense attorneys who require intensive training and supervision to achieve proficiency in their work. Further, there were concerns that some new lawyers weren’t getting adequate training and supervision.

Public defense contractors have been active participants in local justice system workgroups that pertain to both ongoing planning and consultation efforts, such as regular bench-bar meetings, or project-based efforts, such as exploration of a new pretrial services office or the court’s current reengineering effort. Typically, these efforts involve participation by a representative from MPD and/or ODAC, although other providers are involved in other justice system workgroups. Some concern was expressed, though, that information provided or received by contractor attorneys at these meetings was not always widely shared with the rest of the public defense provider community. More generally, some people, especially those working on juvenile law cases where five of the six contractors handle cases, expressed a desire for a better mechanism to easily and reliably disseminate information to all attorneys providing public defense services in the county. Currently, defense providers gather

---

<sup>22</sup> However, the Washington County results on the annual OPDS statewide public defense performance survey are less favorable than overall statewide results. On the question concerning rating of performance in criminal cases, for instance, 90% of respondents statewide said it was either excellent or good, whereas only 50% said so for Washington County. Most respondents for Washington County rated the performance good (37.5%) or fair (37.5%).

once a month at MPD to discuss issues of common concern, but the topics are generally focused on criminal cases.

#### **IV. REVIEW FINDINGS**

##### **1. THE METROPOLITAN PUBLIC DEFENDER (MPD)**

**OVERVIEW:** Founded in 1970, MPD is the oldest and largest of the not-for-profit public defender offices in Oregon. It began accepting cases in Multnomah County in 1971 and in Washington County in 1973. Although there is an office director, currently Greg Scholl, in the Washington County office, much of the MPD administrative staff, including the Executive Director, Human Resources Director, Director of Attorney Training, and IT support staff, are located in the Portland office. MPD is governed by a seven-member board of directors, four of whom are appointed by outside authorities, including the Washington County Board of Commissioners. The board meets approximately quarterly.

There are 21 attorneys in the Washington County office, supported by five investigators, 11 legal assistants, and several other clerical positions. The staff is divided among two groups of attorneys working in the criminal courts, one focused on felonies and the other on misdemeanors, a group of four lawyers working in the juvenile court, and a specialty court group that works in the ECR and arraignment courts, mental health court, LEC probation cases and a number of other matters. Each group is led by a Chief Attorney. The office director, in addition to administrative responsibilities, handles drug court and also serves as part of the MPD death penalty representation team.

Cases are assigned at MPD by their longtime docketing specialist who has information about current caseload numbers for each attorney, attorney leave schedules and major trial obligations when she distributes cases. She also works with the court to avoid appointment of cases to MPD where there will be a conflict and to quickly seek MPD withdrawal on appointed cases where conflicts become apparent during the case opening process. Once the case file reaches the assigned attorney, that person is responsible for further and ongoing analysis of possible conflicts, in consultation with his or her supervisor.

MPD frequently emphasizes its commitment to training. New lawyers participate in a multi-day in-house trial skills program. The firm provides financial support for attorneys to attend programs presented by the Oregon Criminal Defense Lawyers Association, the Oregon State Bar and other organizations. The firm employs a fulltime director of training, although this person's office is in Portland and generally visits Hillsboro only once a week for regular Tuesday one hour "brown bag" training meetings. The office also convenes an annual one-day diversity training for all staff. Most of the training that occurs, though, is "on the job" experience, with guidance and feedback from supervisors and other colleagues, and it is the quality of this mentoring that can be most critical to an attorney's development. The firm expects that supervisors will conduct annual formal evaluations of all employees, although it appears that this expectation is largely unfulfilled.

MPD attorneys and other staff have been represented by the American Federation of State, County and Municipal Employees (AFSCME) for many years. A central and controversial provision of the collective bargaining agreement between MPD and AFSCME has allowed attorneys to transfer from the Washington County office to the Portland office when openings become available only after 18 months of employment in Hillsboro. That provision had been dropped from the agreement, and lawyers began transferring to Portland even earlier. This contributed to an increase in turnover, and was noted by many as being a significant problem. Since the time of the peer review, the contract was renegotiated, and lawyers must now once again wait for at least 18 months before transferring out of Washington County. While there are still instances of turnover, it has diminished since the time of the peer review, and there is a sense of commitment to the Washington County office among many of the lawyers there.

MPD attorneys are involved in many Washington County justice system stakeholder meetings, including the Public Safety Coordinating Council, criminal and juvenile bench-bar committees, the Washington County Reentry Council, and the Drug Court Policy Committee. Firm attorneys have also participated on the OCDLA Board of Directors, the Oregon State Bar Criminal Law Section Executive Committee, and have served as faculty on numerous CLE programs pertaining to criminal and juvenile law.

**FINDINGS.** Overall, MPD and Greg Scholl, the director of MPD's Washington County office, received praise for recent improvements in professionalism and training, and for performance in some areas of representation, as well as for the abilities of specific attorneys. Of particular note, Jennifer Harrington in Mental Health Court, and Mary Bruington in juvenile court, were mentioned repeatedly as attorneys who provide valuable input in collaborative settings, zealous advocacy in the courtroom, and who demonstrate the highest level of professionalism. MPD's work in special courts, and especially in connection with drug court, mental health court and its handling of probation matters, was highly praised by judges, probation officers and others. The firm is said to work well in policy committees, in team staffings prior to court, and some commented on attorneys in the firm who are positive participants in efforts to fund raise for county programs that benefit their clients. With drug court and mental health court in particular, MPD is reported to embrace the mission and philosophy of the courts, work collaboratively with system partners, while maintaining a client-centered focus and advocacy.

The previously high rate of attorney turnover at MPD, mentioned above, was cited by many people as a factor that seriously affected the overall quality of the firm's representation. The regular departure of experienced attorneys and arrival of those with little or no experience is an obvious concern, as is the wholesale transfer of entire caseloads to new attorneys, which can cause significant delay in case resolution. While MPD has improved in this area during the last year, it is still a concern that should be consistently monitored and managed.

The MPD director seems to have responded well to the peer review team recommendation for better supervision of new lawyers. Several people interviewed noted the increased training provided to, and improved professionalism demonstrated by, MPD's newer lawyers. While there were very specific concerns about interactions between MPD lawyers and the bench at the time of the peer review, but those

interviewed were consistent in their praise for MPD's current attorney group and management team during the last year since the peer review.

## **2. OREGON DEFENSE ATTORNEY CONSORTIUM (ODAC)**

**OVERVIEW.** ODAC was formed in 2006 by Robert Harris, who heads the Harris Law Firm. The consortium consists of ten members who maintain their own private practices and the Harris Law Firm (this firm was an individual contract provider prior to 2006), from which four associates handle consortium cases. Mr. Harris administers the consortium but does not handle consortium cases. An office assistant in the Harris Law Firm performs some ODAC administrative work under the contract. ODAC is organized as a Sec. 501(c)(3) non-profit corporation and is governed by a five-person board of directors, which at the time of the peer review consisted of Mr. Harris, two consortium member attorneys, one non-member attorney and another vacant non-member position.

ODAC handles only criminal cases, including the largest share of adult Measure 11 cases in the county (for 2014, ODAC is contracted to handle 120 adult Measure 11 cases; MPD is the only other contractor handling Measure 11 cases, contracting for 108 cases, including juvenile Measure 11 cases; ODAC, however, does not contract for any murder cases, whereas MPD is contracted for 8 in 2014). By contract, ODAC shares responsibility to cover the ECR court with MPD. The consortium receives appointments to cases each morning. After staff does a preliminary conflict check and determines if a client is being or has been represented by a consortium member, Mr. Harris and his staff make case assignments to consortium members. In the process, they review member totals for previous number and type of cases assigned, and the court and vacation schedules for members, seeking to make assignments that work best for member schedules and workload.

ODAC does not have any formalized processes for attorney training, oversight, evaluation or discipline. Instead, the group relies upon its selection of excellent, experienced criminal defense attorneys. Some of the Harris Law Firm attorneys handling ODAC cases have been newer and less experienced, but they do receive training and supervision through the law firm. The model ODAC member agreement also provides for the termination of membership, which would be by action of its board, if the member "is deemed to have failed in providing services according to the requirements" of the agreement, which incorporates by reference the ODAC contract with PDSC and its performance expectations. ODAC does not sponsor its own CLE programs, but was involved in the creation of the noontime training meetings held every other month at the MPD, and remains involved in the planning and coordination of those meetings. ODAC also has its own email list for announcements and other communications among its members, and Mr. Harris initiated a similar list for all criminal defense attorneys in Washington County.

ODAC attorneys are involved in a number of Washington County justice system stakeholder meetings, including the Public Safety Coordinating Council and the Washington County Bar Association. Firm attorneys have also participated on the OCDLA Board of Directors and have served as faculty on CLE programs pertaining to criminal law. Mr. Harris worked with the Presiding Judge to restart a bench-bar

committee, drafting the group's by-laws and eventually serving as its presiding officer. It now meets quarterly and includes the Presiding Judge, the Chief Judge of the Civil, Criminal and Family Courts, and representatives from the civil and criminal bar.

**FINDINGS.** ODAC consortium members are clearly viewed as premier public defense providers in Washington County, and they were praised for their experience and skill in both settling cases and in trial practice in both criminal and juvenile cases, which some members handle on a non-contract hourly basis. Mr. Harris was also praised for his effective administration of the consortium and for his involvement in justice system management issues. Interview comments also commended Mr. Harris and members of ODAC for their commitment to the community in Washington County, as evidenced by involvement in non-legal community affairs and through their long-term relationship with the legal community there. Finally, Mr. Harris and ODAC members receive praise for their involvement in court operation workgroups and committees. Their participation is clearly valued by system stakeholders and fulfills a best practice for Oregon public defense providers. This participation can benefit all public defense providers, their clients and the justice system generally as court policies and procedures evolve with the information and expertise of respected public defense leaders.

### **3. RIDEHALGH & ASSOCIATES, LLC (R&A)**

**OVERVIEW.** The Ridehalgh law firm has contracted to provide public defense services since 2000. The firm is a limited liability company and does not have a board of directors. Ronald Ridehalgh manages the firm, which consists of himself, four other attorneys and three support staff. The firm contracts with PDSC to handle a caseload of dependency, misdemeanor, probation violation, and contempt cases, in addition to providing coverage for the DUUI diversion program and the domestic violence deferred sentencing program. The firm does not handle juvenile delinquency cases.

As the "advice attorney" for both the DUUI diversion and domestic violence deferred sentencing program, Ron Ridehalgh meets with persons determined by the DA's office to be eligible for participation, and provides both general information about the advantages and disadvantages of the programs and case-specific guidance about whether participation is advisable or not. In juvenile dependency cases, R&A attorneys are present in court for the initial court appearance of a new client and are appointed at that time. In criminal cases, where the initial arraignment is covered by MPD attorneys, a firm paralegal picks up notices of new appointments at least once each day at the LEC and then usually also visits those new clients who are in custody. Case assignments to firm attorneys are made according to a detailed flow chart that seeks, among other things, to make efficient use of attorney time by assigning particular court dockets (what the firm calls "zones") to specific attorneys, and then assigning other cases according to attorney workload and availability. Workload and case distribution information for each firm member is available in a database which is monitored by Mr. Ridehalgh but also accessible to all firm members.

Much of the firm's work processes, such as the flow chart for case assignment, are set out in a detailed employee manual. R&A relies upon the manual and mentoring by its more experienced attorneys for new attorney training, along with firm-paid attendance at outside CLE programs. There is also a weekly attorney meeting where cases are

discussed. The firm has both an intranet and a separate networked database where practice forms, manuals and other aids are available. The firm does not have a formal evaluation process. Mr. Ridehalgh is the direct supervisor of each attorney, and part of the firm's file closing protocol calls for him to personally review each file. The firm has a complaint procedure that involves a form to receive input about an attorney's performance and investigation by Mr. Ridehalgh.

R&A attorneys are involved in a number of Washington County justice system stakeholder committees, including an advisory group for the domestic violence deferred sentencing program, the local Domestic Violence Intervention Council, and the Juvenile Court Improvement Project. Mr. Ridehalgh is also a member of the county's Supplemental Local Rules committee.

**FINDINGS.** Attorneys with the Ridehalgh firm are said to be knowledgeable, prepared and committed to doing good work. Mr. Ridehalgh was specifically praised for his work with both the domestic violence deferred sentencing docket and the DUII diversion docket, and for his management of the firm. The firm's work in juvenile dependency cases was described overall as very good, and the firm was noted as one that provides excellent training and oversight. As with many of the contractor firms in Washington County, there was mention about what seemed to be high attorney turnover at the firm. This firm manages to mitigate some of the potential harm of turnover, largely because Mr. Ridehalgh is clearly committed to public defense work and has invested significant time and energy to create office systems that provide structure, training, and oversight to newer lawyers.

#### **4. KARPSTEIN & VERHULST, PC (K&V)**

**OVERVIEW.** The Karpstein & Verhulst law firm has contracted to provide public defense services since 1994. The firm does not have a board of directors. Greg Karpstein manages the firm, which consists of himself and four other attorneys and three support staff. In addition, the firm has two part-time positions called "home visitors," who maintain in-person contact with dependency clients on behalf of the assigned attorney. Mr. Karpstein has expressed his intent to transition firm leadership over the next five to seven years to two of his firm's attorneys, Nathan Law and Jacob Griffith, who joined the firm in 2012,.

The firm contracts with PDSC to handle a caseload of largely juvenile delinquency and dependency cases, in which it represents mostly children. In addition, it contracts to handle some criminal Class C felony, misdemeanor and probation violation cases. In addition to its public defense work, the firm handles a variety of privately retained cases, advertising services in business and incorporation matters, domestic relations, estate planning, real estate, and landlord/tenant cases.

In juvenile delinquency and dependency cases, K&V attorneys are present in court for the initial court appearance of a new client and are appointed at that time. In criminal cases, where the initial arraignment is covered by MPD attorneys, a firm secretary picks up notice of new appointments each day at the LEC. Case assignments to firm attorneys are made on the basis of availability, case type and level of attorney qualification, and the workload of attorneys. The firm is able to avoid some conflicts of

interest by reviewing delinquency and dependency dockets prior to the initial hearings. Otherwise, a conflict check is conducted during the file opening process.

K&V does not have any formal processes for attorney training, oversight or discipline. Instead, the firm relies upon outside CLE seminars and mentoring by senior firm attorneys to train new attorneys, in addition to the weekly staff meetings, other special firm gatherings and an open-door policy that is in place for all firm attorneys and staff. There is a general orientation for new attorneys that involve introductions to key places and players in the criminal and juvenile justice system, as well as a period of shadowing more experienced attorneys. The firm has an employee handbook that includes an evaluation form, although it is unclear if it conducts regular evaluations. Regarding attorney oversight, the firm says, in responses to the questionnaire submitted in conjunction with the peer review, that there is no formal process to gather input on attorney performance but because it is a small entity “the supervising attorney knows immediately from either judges or court staff if there is a problem.” As related below, however, this may not be a sufficient approach to quality assurance.

K&V attorneys are involved in a number of Washington County justice system stakeholder committees, in addition to participation in the Washington County Bar Association. Nate Law is the current private bar representative for the Washington County model court team, which involves regular monthly meetings, as well as attending the statewide JCIP conference. Mr. Karpstein has received professionalism awards from the Juvenile Law Section of the Oregon State Bar in 2010 and from the Washington County Bar Association in 2013.

**FINDINGS.** Overall, interviewees said that firm attorneys were generally prepared and provide good representation in public defense cases, and Mr. Karpstein has clearly earned the respect of system stakeholders. There is concern regarding the transition of the firm. Other attorneys in the firm are described as being very capable, but still in need of training in some areas, particularly around representation in juvenile delinquency cases, and especially serious case types. The firm has improved its client contact in both juvenile dependency and delinquency cases, but they can still improve in this area. Prior to the peer review team’s site visit, the team reviewed a lengthy letter from the Executive Director and the Program Director of the CASA program for Multnomah and Washington counties that detailed numerous specific concerns about the performance of K&V attorneys, in addition to a concern about insufficient contact with child clients. The firm is reported to have responded appropriately, terminating one attorney who was not providing quality representation, hiring capable attorneys, and making some improvement regarding the frequency of visits to clients. This remains an area where the firm should continue to make improvements. Reports indicate that the firm’s reliance on staff contact with clients make the lawyers less effective during court hearings, and there is very little advocacy on clients’ behalf outside of court hearings. There was also concern about lawyers having staff attend CRB reviews because the staff who attend don’t speak on the client’s behalf (several people suggested that the staff appear to be there to take notes), even when the client is clearly in need of advocacy. Finally, while firm lawyers are visiting with in-custody delinquency clients more frequently, and always prior to the first preliminary hearing, the firm continue monitor and improve upon the frequency of visits to clients who remain housed at the DEL facility. With the transition of the firm’s management responsibilities to the newer

management team, extra caution will have to be taken to ensure that attorneys receive necessary training and oversight, and that the firm's recent steps to improve representation are not lost in the transition process, but rather continually enhanced and monitored. Because the lawyers at the firm are said to be very capable and professional in their relationships with stakeholders in the county, as well as with their clients, they are in a good position to build upon their successes during the period of transition.

## **5. HILLSBORO LAW GROUP, PC (HLG)**

**OVERVIEW.** The HLG is the current iteration of a law firm that has contracted to provide public defense services in Washington County since 1994. HLG is the assumed business name of Burton McCaffery Oregon Lawyers PC, an S Corporation with three shareholders who constitute the directors of the firm. Grant Burton is the firm's managing attorney and administrator of its public defense contract. In addition to himself and the two other shareholders, the firm employs two senior associate attorneys, one who leads a criminal team and the other the juvenile team, and three associate attorneys who work in part on one of those two teams. There are five support staff employees.

The firm contracts with PDSC to handle a caseload of juvenile dependency and delinquency, Class C felony and misdemeanor, probation violation, and contempt cases. The public defense contract, however, accounts for less than half of the annual revenue of the firm, which advertises services in bankruptcy, corporate, family law, immigration, personal injury, real estate, social security and estate planning matters. Some firm members do very little or no public defense representation. At the time of the peer review, Mr. Burton was administering the firm's public defense work, and though he was providing coverage for other attorneys in his firm and had handled court-appointed work in the past, he was not handling any public defense cases. Mr. Burton explained that the firm began expanding its retained work in 2006 in order to meet overhead expenses and accelerated that expansion in 2008 when its share of public defense work was significantly reduced.

HLG attorneys are present in court for the initial court appearance of a new client in juvenile dependency and delinquency cases. In criminal cases, where the initial arraignment is covered by MPD attorneys, a firm legal assistant receives notices of new appointments and then emails the assigned attorney about in-custody clients. Case assignments are rotated among firm attorneys according to the percentage of FTE they devote to the public defense contract and the particular team, juvenile or criminal, to which the attorneys are assigned. The intent is to achieve a fair distribution of the public defense work, whether the assigned cases are above or below the expected quota.

As with other firms, HLG relies largely upon mentoring and outside CLEs for training new attorneys. In addition, there are monthly attorney and support staff lunches with the supervising shareholders. The firm uses group emails to update its teams with announcements and other messages relevant to their practice. Mr. Burton conducts formal attorney performance reviews twice a year that consist of a meeting with him and a written evaluation. He obtains input for the review from senior firm employees, clients and judges.

Much of the firm's workflow is managed through a highly customized implementation of the Time Matters software, which manages and tracks work performed on cases, the associated documents, and case outcomes. The firm also uses Time Matters to organize various documents and resources concerning office procedures and practice forms and aids. Time Matters also automates the creations of basic letters and other case related documents. In conjunction with Time Matters, the firm had been a user of Demandforce, a service that automatically sends clients email and/or text message reminders about court and office appointments, and sends them a satisfaction survey at the conclusion of the case. Mr. Burton reported that this did reduce the number of failures to appear for his firm's clients. Unfortunately, the firm's ability to use Demandforce was lost due to an incompatibility issue created during a recent Time Matters upgrade. Mr. Burton is interested in finding a solution, and has agreed to speak at the 2015 OCDLA Management Conference regarding the benefit of automated client communications.

HLG attorneys are not active participants in Washington County justice system policy and planning efforts, but they are members of the Washington County Bar Association and attend a juvenile bench bar meeting and the monthly criminal defense bar meetings held at MPD.

**FINDINGS.** The firm was reported as providing somewhat inconsistent representation at the time of the peer review, with some very good attorneys and others in need of improvement. Additionally, the firm was asked to evaluate the extent to which it was committed to providing quality public defense services. The firm has taken steps to improve its services since that time. One particularly problematic attorney was let go, and the vacancy was filled with an experienced attorney from out-of-state. Mr. Burton reports that the firm now provides Oregon and Washington County-specific training to new attorneys. Additionally, Mr. Burton started personally representing public defense clients, primarily in a small number of Measure 11, felony PV, and juvenile delinquency cases, and he reports that the firm is winning more than 50 percent of the cases it takes to trial. Mr. Burton has asked senior attorney Peter Tovey to be co-administrator of their public defense contract going forward, as Mr. Tovey does a higher percentage of public defense work. Mr. Burton is also making good use of technology to measure results and keep clients engaged. The firm should continue its efforts to ensure quality representation provided to public defense clients.

## **6. BRINDLE MCCASLIN & LEE, PC (BML)**

**OVERVIEW.** The Brindle McCaslin & Lee law firm has contracted to provide public defense services in Washington County since 1995. The firm does not have a board of directors. Louise Palmer is the contract administrator for the firm. In addition to its public defense work, the firm maintains a privately retained practice for which it advertises services in a broad range of civil and criminal matters including immigration, insurance, land use, personal injury, estate planning and real estate. Of the ten attorneys at the firm, three shareholders and three associates devote some portion of their practice to public defense cases.

The firm had contracted to provide representation in Washington County in some criminal Class C felony, misdemeanor and probation violation cases, in addition to a larger caseload of juvenile dependency and delinquency cases, but shortly before the peer review's site visit the firm agreed with OPDS that it would no longer take any criminal cases. This change was a result of serious concerns on the part of the court and others about the quality of the firm's representation in criminal cases.

Attorneys from BML are present at first appearances in juvenile dependency and delinquency cases when it is expected that they will receive an appointment by the court. According to the firm, cases are assigned to attorneys with the goal of matching both attorney interest and level of proficiency with case complexity and to achieve caseload balance among the attorneys. Since the firm's associates have relatively little experience with juvenile law, a more experienced attorney is reported to be available to assist with more complex cases.

The BML firm does not have a formal training program for new attorneys or sponsor its own CLE events. Its supervision appears to be largely an "open-door" policy where attorneys can seek guidance from other firm attorneys. The firm does have a bi-annual review for each attorney that includes completion of a self-evaluation and a "feedback session" with a firm partner.

**FINDINGS.** Interviewees consistently commented on the very high rate of turnover in this firm, the complete absence of training and supervision for new lawyers, and the continued practice of giving these new attorneys very high caseloads. Specific comments regarding the firm's representation in Washington County were uniformly negative. Even when the firm is able to recruit competent lawyers, those lawyers are overloaded with cases, receive no training, and leave in relatively short order. While Mr. McCaslin is described as being a capable lawyer, he handles public defense cases only when needed to provide coverage when attorneys leave the firm and everyone seems to be aware that he would prefer not to handle juvenile public defense cases. Louise Palmer, the contract administrator, spends her time on remaining Multnomah County cases. The firm did not provide any response to the peer review team recommendations and does not seem to have an awareness of what would be required to improve the situation.

## **V. SERVICE DELIVERY REVIEW—RECOMMENDED AREAS OF INQUIRY**

### **Quality of Representation.**

- **Contact with Juvenile Clients in Detention.** Public defense providers should ensure that they are visiting with their in-custody clients in delinquency cases within the requirements of the contract with PDSC (within 24 hours of appointment to the client) and as needed to fulfill their obligations under the Oregon State Bar *Standards of Representation for Criminal and Juvenile Delinquency Cases*, Standard 2.2, and Oregon Rule of Professional Conduct 1.4.
- **Professionalism.** ODAC was identified in the peer review and again in the service delivery review as being a provider who consistently demonstrates the highest level of professionalism. Almost all other providers, most notably MPD, made significant gains in this area between the time of the peer review and the service delivery review. All providers should be encouraged to document and

adhere to the highest standards of professionalism, and the Commission may wish to inquire about each provider's commitment to this important element of representation.

- **Client-Centered Advocacy.** ODAC and MPD were consistently identified as firms that provide zealous, client-centered advocacy. As mentioned throughout this report and in the system issues section below, other firms could benefit from increased information-sharing to ensure that all entities have an opportunity to learn about recent system developments that impact clients, and to share ideas with each other about how to provide client-centered advocacy in light of those developments.
- **Advocacy for Juvenile Delinquency Clients.** Firms should ensure that their attorneys are filing motions for alternative disposition and motions to find unable to aid and assist, and exploring ways to challenge the denial of conditional postponements. Additionally, because this is an area of rapid development, attorneys handling juvenile delinquency cases should be seeking particularized training from organizations such as the National Juvenile Defense Center.

### **System Issues.**

There are a number of other issues that are either common to all or most public defense providers in Washington County or pertain to them. Those issues are as follows:

- **Advocacy at Arraignment, specifically pretrial release.** The court's prohibition on attorneys advocating for release at the time of arraignment remains a significant concern in this county. The Commission may wish to discuss with providers whether they have considered any kind of group effort to address this issue. Clearly, it has a disproportionate impact on public defense clients (note that privately retained clients have more attorney contact prior to arraignment giving the attorney a better opportunity to work with the pretrial release officer). Studies consistently demonstrate that pretrial advocacy and the

opportunity to gain release at the first court appearance is critical to achieving procedural justice.<sup>23</sup>

- **Specialty dockets: ECR (ODAC & MPD), DUI and DV Diversion (Ridehalgh).** The Commission may wish to inquire further to determine whether clients in these programs are receiving thorough advice regarding options and collateral consequences prior to entering a plea, and whether the structure of these programs is consistent with the PDSC's *Guidelines For Participation of Public Defense Attorneys in Early Disposition Programs*.<sup>24</sup>
- **Information Sharing.** As the two largest public defense providers in Washington County, it is appropriate that MPD and ODAC be represented on major justice system workgroups pertaining to system wide policy and procedure. At the time of the peer review, there were complaints that MPD did not sufficiently share information about the proceedings of these workgroups with other public defense providers. The Commission may wish to inquire about the extent to which information is being shared with other providers.

A different but related concern is that stakeholders in the juvenile justice system, such as Juvenile Court Counsellors, CASAs, CRB, and DHS caseworkers, do not have a convenient mechanism to share information or developments concerning their agencies with the public defense community. Likewise, there appears to be some uncertainty in these agencies about whom to contact with specific concerns about the representation provided by public defense attorneys. The Commission may wish to inquire about steps providers have taken to communicate with juvenile court stakeholders and with other public defense providers to ensure there is a way for information to be easily shared when necessary, and whether stakeholders feel they have a way to provide feedback to each provider about the quality of representation in juvenile court. The Commission may also wish to consider whether the creation of a juvenile consortium, rather than the current consistent use of private bar lawyers for conflict cases, would provide a more efficient mechanism for distribution of information to juvenile providers.

- **Shackles in Juvenile Court.** Public defense providers handling juvenile delinquency cases should ensure that in-custody youth are transported to court and appear in court in shackles only when this extreme measure is required by a combination of heightened security concerns and no less onerous alternative. In light of evidence demonstrating the psychological harm that shackling can cause to youth, a growing number of jurisdictions, including in Oregon, have prohibited the indiscriminate use of shackles in juvenile court. Lawyers should contact Youth, Rights & Justice or OPDS for briefing and court orders from litigation in other counties if needed to challenge the practice in Washington County.

---

<sup>23</sup> See the latest report by the Constitution Project at: [http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL\\_3.18.15.pdf](http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf)

<sup>24</sup> The guidelines are available on the OPDS website here: <http://www.oregon.gov/OPDS/pages/pdscreports.aspx>.

## Administrative Oversight.

- **Documentation & Efficiency.** Some contractors have well-documented systems to ensure adequate attorney training and oversight and sufficient client contact. The Commission may wish to speak with providers about any efforts underway to create, or for some providers preserve and enhance, existing practices.
- **Performance Reviews.** Some providers are reportedly very consistent in providing attorneys with performance reviews, and in checking with the court and other system stakeholders to ensure that public defense clients are receiving quality representation. The Commission may wish to ask stakeholders about contractor efforts to get feedback regarding lawyer performance.

## VI. TESTIMONY AT THE SEPTEMBER 17, 2015 PDSC MEETING

Chair Ellis introduced the Commission's hearing on the Service Delivery Review by explaining that the Commission's primary interest is to learn whether it is contracting with the right number and type of public defense providers in the county and whether those providers are performing well.

**District Attorney Robert Hermann** was invited to speak first. He expressed appreciation for the opportunity to have shared his observations of how things were working in the county with PDSC staff prior to preparation of the draft report. He said that his office and the public defense community work together very well in a number of areas, including the administrative efforts needed to simply make the system work efficiently, the county's drug court, and the Early Case Resolution (ECR) program. He estimated that 20% to 30% of all criminal cases filed in the county are resolved in the ECR program. He emphasized that it is not a "rocket docket," and that attorneys can postpone resolution if additional time is required to investigate the case and consult with a client about the benefits of resolving a case through ECR. He had particular praise for the work of MPD, and its director, Gregg Scholl, in the drug court, which focuses on high risk offenders who may face substantial prison sentences.

Mr. Hermann said the public defense community was also working well with a new protocol for pre-trial conferences. The new protocol seeks to make the conferences more meaningful events where cases can be resolved in advance of the scheduled trial date and without resorting to trial. He did have one main "gripe" about MPD, although he said it was "nobody's fault." In a number of murder cases, he said, MPD has needed to withdraw when the cases were nearing trial because new witnesses, mainly other defendants awaiting trial in jail with whom MPD's clients have talked about their cases, were identified by the state. Because these new witnesses were former clients of MPD, the firm has needed to withdraw from representation, causing delay in resolving the murder cases.

Another area of concern in the past, Mr. Hermann said, was the high rate of turnover at MPD, with the attendant reshuffling of caseloads at the firm, which caused significant delay in resolving cases. But this has improved dramatically, he said.

Asked about the concern with the shackling of juveniles for transport to and from, and

during, court hearings, Mr. Hermann said he had not thought too much about the issue until reading a draft of the service delivery report, but he had to agree it's a concerning practice. He promised to raise the concern with others in his office and with the Sheriff.

Mr. Hermann said that he sees the need for more attention, planning, and resources in the area of mental health as key to diverting people from the criminal justice system or avoiding their contact with it entirely. He hopes that the defense community will be able to devote attention and resources to this area.

Commissioner Lazenby noted that Washington County is said to be the most diverse county in the State of Oregon, and he said the conversation ongoing now about over representation of minorities in the juvenile justice system will soon take place in the context of the entire justice system. He asked whether the DA's office itself reflected the diversity of the community it serves. Mr. Hermann didn't have data available to answer the question, but identified a number of attorneys and staff who were from minority communities. He also estimated that about 60% of the attorneys were men.

**Penny Belt, with the Washington County Juvenile Department,** told the Commission that both referrals to the department and delinquency petition filings had decreased in recent years. In 2012, she said, there were almost 3,200 referrals, whereas in 2014 there were fewer than 2,500 referrals. Of those referrals in 2014, which she said were the result of about 1,500 youth, only 212 of them were actually adjudicated, with the remainder handled through diversions or formal accountability agreements or in some other non-court manner. She said the average length of stay in detention is about seven days, but that number also reflects the inclusion of Measure 11 youth, who are now detained in the juvenile detention facility rather than the county jail and have much longer lengths of stay in detention.

Ms. Belt said that under a previous presiding juvenile court judge, her department developed specific criteria for when youth may be shackled. She also clarified that her department, not the Sheriff, is primarily responsible for the transportation of youth to and from court. She said in recent years her department has not been following those criteria, but until one defense attorney spoke to her about it the defense bar had not been raising any objections to the practice.

Ms. Belt concluded by saying that she wished that both defense attorneys and deputy district attorneys would do a better job of keeping the juvenile department "in the loop" on cases. Defense attorneys could also do a better job of communicating with the families of their clients, she said.

In response to questions from Commissioner Lazenby, Ms. Belt said it is very clear that there is minority over-representation in the county's juvenile justice system. She said that in addition to the Latino and African American populations, her department is having more frequent contact with the Somali community and, to some extent, with Russian families.

**Karen James** spoke to the Commission about her group, founded by parents of adults in the criminal justice system with mental illnesses, which seeks to improve conditions and services for persons in the criminal justice system with mental illness. They have focused their efforts on the Department of Corrections but have also meet with the Washington County Sheriff's Office to talk about concerns. More recently, the group

has sent a letter to Presiding Judge Charles Bailey. Locally, the group is concerned that persons in jail with mental illness are not receiving appropriate attention and resources, and that insufficient planning is occurring to transition them back into the community. Ms. James is especially concerned that some public defense attorneys are neglecting their clients with mental illness. She thinks better training and awareness of how to represent clients with mental illness will lead to better advocacy and outcomes.

**Judge Charles Bailey has been the Presiding Judge in Washington County since January, 2015.** Before he became a judge nine years ago, he was a deputy district attorney for about 10 years. He said a number of things have changed significantly, and for the better, since the 2014 OPDS Washington County Peer Review report. At the time of the report, “affidavits” for change of judge were a major cause of tension and difficulty, and that is no longer the case, which he sees as a “credit to the defense bar.” He said that turnover at MPD, which was a source of delay and difficulty in case management, has improved significantly. And thanks in large part to the “re-engineering” process facilitated by the National Center on State Courts, judges are more engaged in managing pre-trial conferences, so that Washington County’s unusually high trial rate, noted in the 2014 peer review report, has come down.

He said that overall he is very pleased with the public defense providers in the county, and with how PDSC has addressed concerns when they arise. He expressed concern, though, about compensation for the non-public defender contractors, which he said should be on an equal par with the public defender offices. The Chair clarified that this is being addressed thanks to a legislative funding package specifically for that purpose. Judge Bailey also communicated a concern from Judge Raines that the Commission continue to assure the presence of a viable non-contract private bar in juvenile cases, where they are needed for conflict cases. [A letter from Judge Raines is appended to the end of this report.] He also said that he shared the concern of Ms. James, that better attention and resources are needed to appropriately handle persons with mental health issues who come into contact with the criminal justice system.

Judge Bailey also expressed satisfaction with the courtroom work at the Law Enforcement Center, where MPD handles most of the arraignments in criminal cases and also handles, along with the consortium, the ECR program. He also expressed appreciation that he can call PDSC staff when necessary to address concerns that might arise with public defense providers in the county.

**Judge Richardo Menchaca is the presiding juvenile court judge,** who works in the small juvenile services building along with Referee Michele Rini. He said that he is trying to take inspiration from Judge Bailey and do a better job of managing the juvenile docket, which is very busy and needs to be run efficiently. He appreciates the great job of all of the juvenile defense providers, and echoed other comments about the need for a non-contract private bar presence within juvenile court. He also appreciates being able to contact PDSC staff when needed.

Regarding shackles, Judge Menchaca said he did not realize it was an issue until reading a draft of the service delivery report. He believes that shackles are used when appropriate security concerns have been identified and trusts the juvenile court staff to make decisions about when they are necessary. He said the juvenile court is a small, crowded building where it’s necessary to keep a close watch on security issues.

Chair Ellis pointed out that his assumptions about the appropriate use of shackles may be unwarranted if they are being used indiscriminately. PDSC Commissioner Welch, who was the presiding juvenile court judge in Multnomah County, shared her philosophy about shackles in the courtroom, which is that they will not be used unless she approves it based upon appropriate concerns. Judge Menchaca said that during his entire tenure on the bench he has yet to have a defense attorney or deputy district attorney express concerns about shackles. He reiterated that security is a paramount concern, especially since a number of juvenile court cases concern gang-involved youth.

Asked about over-representation of minorities in juvenile court, Judge Menchaca said that as an Hispanic judge, who experienced racial bias growing up, he will not allow racial intolerance in his courtroom. But he acknowledged that over-representation occurs in both the criminal and juvenile justice systems. He is very proud, though, of the juvenile “gang court,” which seeks to avoid commitment of high-risk youth to the Oregon Youth Authority’s correctional facilities. Commissioner Lazenby said that the issue of over-representation is likely to demand increased attention of every justice system partner and will require a concerted effort in order to see improvement.

**Sandy Berger, the field manager for the Citizens Review Board** in Washington County, told the Commission that she sees a real benefit in those cases where attorneys are present at CRB reviews. She has the benefit of having previously worked as the CRB field manager in Klamath County, where the public defense providers employ case managers to work closely with parents and children, and those case managers appeared for the attorneys at CRB hearings and were able to provide valuable information. She thought that system worked very well. But in Washington County, when attorneys cannot appear at CRB hearings they send legal assistants, who mainly take notes and only occasionally relay information from attorneys about their clients. She thinks outcomes would improve if attorneys were consistently present at the hearings, especially since parents may be under significant stress and not able to express themselves well on their own.

**Lynn Travis is the program director and program attorney for the CASA program** in Washington County, which advocates for the best interests of children in juvenile dependency cases. She told the Commission that there is a need to “shift the locus of advocacy” with the advent of managed health care. Under the Oregon Health Plan, all Coordinated Care Organizations (CCOs) are now required to provide wraparound services for most children in foster care. Whereas in the past, she said, most advocacy focused on services provided by the Department of Human Services, now critical decisions will be made at CCO staffings. Thus, advocacy concerning visitations, transitions home, and transitions out of more restrictive levels of care will need to occur at these CCO staffings in order to achieve better outcomes for children.

**Gregg Scholl, the director of MPD’s Washington County office,** told the Commission that the county is a very good place to be a criminal defense attorney in part because it can also be a difficult place to practice criminal defense. He said that the high rate of turnover that his office had experienced has improved significantly, in part because of a new policy negotiated with the union representing MPD employees concerning when transfers can occur between MPD’s Hillsboro and Portland offices. But he also said that he thinks the Hillsboro office is seen now as a very good place to work, in part because of a new training regimen for new lawyers. The office has also

developed a strong commitment to zealous advocacy, which fulfills the classic public defender ethic of challenging authority. But he insists that this be done professionally and with purpose.

He emphasized the he has an excellent working relationship with District Attorney Hermann, and that the office has good relationships with the Sheriff, with the jail command staff, with community corrections, and even with the county's administrator. In addition, the office has a seat on the local Public Safety Coordinating Council, on the OCDLA Board of Directors, on the Supplemental Local Rules Committee, and the Oregon State Bar's Criminal Law Executive Committee. He also appreciates that because the office can be relied upon for good work, OPDS will call on it to undertake representation in cases in other counties, in addition to the work they do around the state in aggravated murder cases.

Mr. Scholl also praised the county's drug court. He said that graduates of the program have paid around \$120,000 in restitution, and the 90% of them are now employed, many full-time. He also praised the attorneys in the juvenile section of his office, calling one of them the person most knowledgeable about the juvenile code in the state, and saying another is considered a model juvenile court defense attorney.

He also addressed the concerns about "affidavits." He said his office has never had a policy that lawyers should file them when assigned to certain judges. In fact, he says, new lawyers are trained to see for themselves whether a judge can be fair, even ones that have been historically difficult in criminal defense cases. He thinks this has contributed to the decrease in the use of affidavits, but so too has the fact that judges have changed their own behavior and lawyers are now more comfortable having their clients appear before them.

**Lane Borg, the executive director of MPD**, also addressed the affidavit issue, and said he thinks the controversy died down in part because, after a judge filed a bar complaints against an MPD attorney concerning the practice, the Oregon State Bar wrote a comprehensive opinion finding no misconduct on the part of the MPD attorney.

Both Mr. Borg and Mr. Scholl addressed a question from Chair Ellis about how MPD operates now with two offices. They both expressed satisfaction with having most administrative functions located in Portland, especially since key administrators, including Mr. Borg, the training director, and others, are usually present in the Hillsboro office at least once a week. Lane Borg also noted that the size of the Hillsboro office has grown steadily and dramatically, so that it is foreseeable that each office will eventually have about the same number of employees.

Mr. Borg also addressed the turnover issue and the attendant reshuffling of caseloads that District Attorney Hermann said had been a problem but was much improved. He said that the problem wasn't primarily that lawyers were moving from Hillsboro to Portland, and simply abandoning their Hillsboro clients. He said that there had been a great many new hires into the Hillsboro office and that some of those attorneys simply didn't perform well and left the firm entirely.

He also addressed Mr. Hermann's complaint that MPD has needed to withdraw from a number of murder and aggravated murder cases because of conflicts of interest. He said that it was his belief that these conflicts were created by the DA's office through

intentionally targeting current or former MPD clients to become informants, thereby requiring that MPD withdraw from the cases. In one instance, MPD insisted that the state had no real intention of calling the informant as a witness, which the state denied. Yet when the case did come to trial, with different attorneys, in fact the state did not call the witness. He said that MPD is now more vigilant when it appears that the state might be creating a conflict simply to have the firm removed from a case. Mr. Borg also made clear that he was not accusing Mr. Hermann of misconduct, saying that he is an honorable and good man. But Mr. Borg said the same cannot be said for some of the deputy district attorneys in Washington County.

In response to a question from Commissioner Lazenby about the diversity of the attorneys in the Washington County office, Gregg Scholl that three or four of the 20 attorneys employed by the firm are minorities. He said there is more diversity among the support staff. **Ellen Johnson, who is appointed by the Washington County Commissioners to the MPD Board of Directors** and serves as the chair of the board, said that overall five percent of the entire firm's attorneys are African American and about one to two percent are Hispanic, which she said mirrors the population of the Oregon State Bar. She said that the MPD board is in the process of examining both the firm and the broader justice system through an equity lens.

**Rob Harris, the executive director of the Oregon Defense Attorney Consortium (ODAC)**, began his appearance before the Commission with praise for the work of Gregg Scholl and MPD for leadership in the county's criminal justice system. In response to a question from Chair Ellis, he described a number of ODAC members who formerly were MPD attorneys. He said he looks for good experienced attorneys to bring into ODAC, who need to also be good at managing their own businesses and workloads, especially since ODAC is appointed to some of the most serious cases, other than murder, that can be brought. He said that ODAC is losing two very experienced attorneys, one to retirement and to other to focus more on federal appointed work. But he has recruited some good attorneys in recent years, whom he described to the Commission. He also manages his own 11-attorney law firm, which is a part of ODAC. New lawyers in that firm do some public defense representation, with the opportunity to also work in other areas of the law involving litigation.

The chair asked how the consortium handles concerns about attorney performance. Mr. Harris described one recent instance where he was able to find a more appropriate caseload for one attorney, and said that the membership of another attorney was terminated. Most of Mr. Harris's time, in connection with consortium matters, is devoted to administration and providing some limited coverage, although he expects in the next year to handle a number of major felony cases in order to remain fully acquainted with the issues facing other ODAC members in their criminal defense representation.

In response to a question from Commissioner Potter, Mr. Harris said that he does not have any immediate plans for retirement, but he is preparing for long-range transitions both by bringing younger attorneys into ODAC who may have an interest in taking over his administrative responsibilities, and by bringing a minority shareholder into his firm who can eventually become its managing owner.

**Ron Ridehalgh** heads a one of the law firms that contracts with PDSC. The chair noted that the draft service delivery had good comments about the work of his firm. Mr.

Ridehalgh said he appreciated those comments. At this point, the Commission was running late on its agenda, so it quickly moved on to the remaining invited guests.

**Grant Burton** is the managing attorney at the Hillsboro Law Group. He too complimented MPD as the “vanguard” of public defense in the county, but he said that his firm also provides a place for talented attorneys who may wish to practice both criminal defense and work in other practice areas. In fact, because his firm has a broad multi-area practice, it is not dependent upon public defense to remain viable, which provides flexibility in contracting with PDSC. He said that the firm will continue to contract for public defense work only if the terms are fair and work for the firm. For instance, he said, the firm needs to be paid enough to afford to adequately pay a felony-qualified attorney.

Mr. Burton also noted, following up on earlier comments, that he believes race to be a clear factor in criminal justice outcomes in the county. He said that more data is needed in order to determine causation.

**Nate Law** appeared before the Commission for the Karpstein and Verhulst firm, which contracts to handle, along with MPD, the bulk of juvenile dependency cases, along with some lesser criminal cases. He said that Greg Karpstein is transitioning management of the firm to himself and Jake Griffith, another younger attorney. They both are excited about providing new leadership for the firm. He also addressed the shackling issue, saying he was alarmed to hear Judge Menchaca say that defense attorneys were not raising concerns with him. In fact, according to Mr. Law, he has been working behind the scenes with the juvenile department on this issue. But he sees now that much more work remains.

The chair then invited **Louise Palmer**, with the Brindle and McCaslin and Lee firm, to speak to the Commission. When she did not respond, the chair noted for the record that she had been previously invited to attend the meeting and address the Commission.

## **VII. A SERVICE DELIVERY PLAN FOR WASHINGTON COUNTY**



WASHINGTON COUNTY CIRCUIT COURT  
Judge Keith R. Raines

September 15, 2015

Ms Caroline Meyer  
PDSC  
Hand delivered on 09-17-15

Dear Ms. Meyer,

I am sorry to miss the PDSC meeting. I have asked Presiding Judge Bailey to deliver this letter in my stead.

I am the Chief Family Judge overseeing the family and juvenile court judges. I have consulted with my colleagues and we speak with one voice in this matter.

The private component of juvenile court representation is vital to our success in the juvenile court. Our private component provides more than just the conflict representation which is so regularly needed; our private members are some of the most experienced members of our Bar at large. They are able to provide effective and aggressive representation for their clients while bringing wisdom about children's developmental needs and the best way to support them to their clients. They seem to pull the most difficult of clients and manage them with, in Judge Thompson's words "aplomb".

We need to make sure that our private bar component stays vitally involved by expressing our appreciation for their representation and assuring that they will be adequately compensated and supported with services as needed.

Thank you for your consideration.

Very truly yours,

Keith R. Raines

cc: Washington County Family Court Team  
Washington County Juvenile Bench Bar Committee

## Howard L. Moran

Attorney at Law

P.O. Box 230134

Tigard, OR 97281

Telephone: 503-590-2545 Facsimile: 503-590-2820

October 16, 2015

Barnes H. Ellis, Chairperson  
Public Defense Services Commission  
1175 Court Street N. E.  
Salem, OR 97301

Nancy Cozine, Executive Director  
Office of Public Defense Services  
1175 Court Street N. E.  
Salem, OR 97301

RE: Private Bar Attorneys - Washington County Juvenile Court

Dear Mr. Ellis and Ms. Cozine:

I was unable to attend the meeting of the Public Defense Services Commission ("PDSC") on September 17, 2015, and would request you accept this letter in lieu of my personal appearance.

In October 2007, PDSC issued its first Service Delivery Plan for Washington County. Included in that plan was the following:

"The delivery system in Washington County should continue to include a role for private bar attorneys. These attorneys, who prefer not to be under contract with PDSC, appear to be serving an essential function in the juvenile system in the county. As both the hourly rate attorneys and representatives of the court and the juvenile system noted, they bring to their work on behalf of juvenile clients broad knowledge and experience in related areas of law that many full time public defense attorneys may not possess. Their participation in the system can benefit not only their clients but the entire legal community by expanding the cumulative knowledge and experience of that community. While their participation may mean that fewer cases are assigned to some contract offices, in view of the relative quality of representation provided by these attorneys it is important to preserve a role for them." Washington County Service Delivery Plan, October 12, 2007, Page 27.

I would urge the PDSC to again adopt a service delivery plan in Washington County that includes a vigorous private bar component.<sup>1</sup> Moreover, as set forth in a letter from

---

<sup>1</sup> It is not entirely clear to me the plan as adopted in 2007 was ever fully implemented. I am unaware if fewer cases were assigned to contract offices for the purpose of maintaining the

Judge Keith R. Raines, dated September 15, 2015, a copy of which is attached, private bar counsel are relied upon to provide “more than just the conflict representation which is so regularly needed,” and I would ask the PDSC to assure a meaningful caseload is available to private bar attorneys over and above conflict representation. This will be crucial if the PDSC decides to let a contract for juvenile cases to a consortium; absent reservation of a significant caseload for private bar attorneys, virtually all juvenile cases - including conflict cases - will never reach private bar counsel. One possible way to do this is to allow private bar counsel to assume a substantial portion of the juvenile caseload of Brindle & McCaslin, a previous contract provider that will no longer be providing indigent representation in Washington County.

The private bar in Washington County operates to the benefit of the court and clients, not only in the more “routine” cases, but certainly in those matters that are legally and factually complex.<sup>2</sup> Private bar attorneys regularly handle matters in which their client’s are in state or federal custody (sometimes in another state and occasionally in a foreign country), individuals with profound mental health and/or developmental issues - sometimes of the ilk necessary to appoint a guardian *ad litem* - clients that suffer from addictions of a magnitude that has rendered them unable to care for themselves, much less their children, and clients that are terminally ill, just to name a few circumstances. Private bar attorneys are skilled in representing parties in cases involving the Indian Child Welfare Act (ICWA), the Interstate Compact on the Placement of Children (ICPC), the Interstate Compact on Juveniles (ICJ), the child refugee act, and matters in which the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is an issue.

I, and other private bar attorneys, together with our respective staffs, have developed positive working relationships with corrections officials, treatment providers, Native American

---

private bar, or if subsequent contracts were negotiated in compliance with the 2007 service delivery plan.

<sup>2</sup> As an example, of a legally and factually complex case, I presently represent a parent in an ongoing dependency/termination matter. In the course of my representation, I have raised a federal question involving service of a foreign national - that portion of the case is presently before the Oregon Court of Appeals and was the subject of a petition for issuance of a writ of alternative mandamus before the Oregon Supreme Court, the State having conceded it did not comply with international treaties as relates to this issue - have participated in days long contested hearings related to the establishment of jurisdiction and change of the permanency plan, and have secured the services of interpreters/translators, investigators, and expert witnesses to assist in representation of my client. I believe it would be helpful to the PDSC to understand that, at one point, this matter was before the Oregon Supreme Court, the Oregon Court of Appeals, and trial was ongoing in the juvenile court, all at the same time.

tribes, the Attorney General's office, the District Attorney's office, foreign consulate personnel, juvenile counselors, and Court Appointed Special Advocates (CASA's). While it is certainly true that private bar counsel and other attorneys and interested parties in any particular case are not always of one mind, I believe those individuals would tell you our interactions are always professional and respectful. Counsel who appear in the Washington County Juvenile Court enjoy a collegial relationship which permits parties with the same/similar interests to work together for the benefit of their respective clients.

I know one concern of the PDSC is the "greying" of the indigent defense bar. I am pleased to report that a number of very fine younger lawyers have joined the ranks of private bar counsel in the Washington County juvenile court. Some of these attorneys previously worked for contractors and brought with them not only a good understanding of issues facing the court and clients in juvenile matters, but great enthusiasm and strong advocacy skills. These lawyers have experience in other areas of law that benefit not only the court and clients, but benefit attorneys as well.<sup>3</sup>

I would now like to address some of the contents of the September 2015, Preliminary Report concerning the Washington County Service Delivery Plan, and other issues that I have become aware of.

First, at this time I hereby enter my guilty plea to being the individual who sought input from the Court regarding private bar attorneys. I took this step after an inquiry was made to the Office of Public Defense Services ("OPDS") regarding private bar attorneys in Washington County and was advised that OPDS did not intend to recommend private bar attorneys continue in their present role, as the same was established in the 2007 service delivery plan. The reasons given for this included the need for contractors to receive the number of cases for which they contracted, and that the court no longer expressed a "robust" support for the private bar.<sup>4</sup> Regardless of the position OPDS may have held prior to September 17, 2015, it is clear the private bar does indeed have the unwavering support of the Court, as reflected in the testimony of Judges Bailey and Menchaca, and the letter from Judge Raines.

---

<sup>3</sup> As an example, one of the private bar attorneys does not take many trial level cases; however, this attorney does accept juvenile appellate cases and brings to the table considerable knowledge regarding appellate procedure and issues.

<sup>4</sup> In speaking with various judges, I repeatedly heard from them that they did not recall being asked about private bar attorneys. Based on my conversations with the court, it is my view the court felt this issue was resolved in 2007, and was unaware of the need to again advocate for the private bar attorneys.

Next, I'd like to address the issue of withdrawing cases from private bar counsel so that contractors may be appointed to the set number of cases they have contracted with the State to receive. I will admit to being puzzled as to why this issue lingers - it has long been known by all stakeholders that the number of juvenile cases available in Washington County has, for various reasons, been "flat." With that knowledge, it would seem prudent for OPDS to reduce the number of juvenile cases made available to contractors. If that reduction has indeed taken place and contractors are still falling behind in the number of cases they receive - and my colleagues who hold contracts for juvenile cases tell me the shortfall is significant and occurs annually - then it seems a review of how OPDS is arriving at the number of available juvenile cases may be worthwhile. In any event, there certainly is no support from the court to reduce the number of private bar cases; moreover, given my understanding of the shortfalls experienced by contractors, the number of private bar cases would not serve to make a substantial difference in the contractor's case load.

I've also been made aware that OPDS is perplexed as to why so many juvenile cases in Washington County are assigned to private bar attorneys. The answer to that question is twofold: First, in instances where the Court knows a matter is legally or factually complex, or that a party to the case is particularly difficult, it appoints a private bar attorney. This obviates the need for multiple withdrawal motions and the time, money, and delays inherent with multiple withdrawals. Second, as a result of a truly remarkable staff, the court is able to identify conflicts and other issues, typically at the onset of a case, that require additional attorneys be appointed.<sup>5</sup> I do note in the Preliminary Report a discussion regarding the machinations court staff go through to appoint a private bar attorney and I would suggest that exercise simply stop. To the best of my knowledge, all the private bar attorneys receive the same e-mail(s) each day as the contractors relating to cases opened/shelter care hearings scheduled for that day, including which firm/attorney is appointed to represent the parties. Upon receipt of the e-mail, counsel is expected to review the same and immediately advise the court if representation of a particular party is not appropriate. It does not make sense to me that private bar counsel ought to be held to a lesser standard. Going forward, I would suggest the onus of advising the court an appointment

---

<sup>5</sup> For example, if a case is opened in which there is a Mother, Father(s), and multiple children ranging in age from pre-school/early elementary school to teenager, it is clear the interests of the youngest children are not likely the same as the child who may well age out prior to the conclusion of the case. The court's staff recognizes this issue and appoints counsel for those children who are younger and another attorney for the older children, in addition, of course, to all the parents.

cannot be accepted rests with the attorney/firm (including private bar counsel). If any private bar attorney feels the process of effectively communicating with the court is unduly burdensome, then perhaps that attorney(s) needs to consider limiting his/her participation in private bar appointments.

Apart from the issue of effective communication with the court, I note in the preliminary report there is an expressed concern regarding the impact of private bar attorneys on communication between system partners. Absent specifics, I can only tell you that I've found communication between this office and other system partners to be very effective. To the extent my experience differs from others, I would suggest specific issues be disclosed so that they may be appropriately addressed. Perhaps some of these issues can be resolved if/when OPDS elects to interview members of the private bar the next time it conducts a review in Washington County. In addition, there is a regularly scheduled Bench/Bar meeting in the Washington County Juvenile Court, which would provide a forum for discussion and resolution of any identified systemic problems. Moreover, while I certainly cannot speak for the Court, I cannot imagine a set of circumstances in which the Court would not support additional communication between system partners to address any outstanding issues.

Lastly, the PDSC should be aware that a number of private bar attorneys responded to OPDS' request for proposals ("RFP") in 2010 and 2013 to provide indigent defense services as a consortium and under contract with the State. At that time, the proposed consortium was advised there was simply no place in Washington County for an additional contractor, even one that would take the juvenile cases being assigned to private bar attorneys. Given that response and the time and effort necessary to complete an RFP for a consortium, the interested private bar attorneys did not respond during this latest contract cycle. Therefore, I was very surprised to see a suggestion in the Preliminary Report that, "The Commission may also wish to consider whether the creation of a juvenile consortium, rather than the consistent use of private bar lawyers for conflict cases, would provide a more efficient mechanism for distribution of information to juvenile providers." Apart from the issue of distribution of information discussed above, I will confess to being truly baffled by OPDS in this regard. OPDS has made clear by word and deed it has no interest whatsoever in private bar attorneys continuing to provide services in the

Washington County Juvenile Court, or certainly not at the level supported by Judge Raines and his colleagues. However, OPDS twice had an opportunity to do the very thing it is now suggesting the PDSC consider, and elected not to enter into a contractual relationship with interested private bar attorneys. I believe I can safely say the private bar attorneys who work in the Washington County Juvenile Court are willing to work with OPDS to the extent reasonably possible; however, it is not at all clear exactly what OPDS wants, except as noted above. Of course, the time to respond the OPDS' most recent RFP has long since come and gone, and I would suggest going forward that OPDS can do a much better job of interacting with the private bar regarding what it views as communication issues and its wishes regarding a consortium comprised of private bar attorneys.<sup>6</sup>

To conclude, I urge the PDSC to adopt a service delivery plan in Washington County that includes a meaningful caseload for private bar attorneys that is not limited to conflict cases alone, perhaps assigning a portion of the juvenile caseload of a prior contractor to private bar attorneys.

Thank you for your time and consideration in this matter. If you have any questions or I can provide additional information, please do not hesitate to contact this office.

Very truly yours,



Howard L. Moran

HLM:jmt  
enclosure (as stated)  
0004687.jmt

---

<sup>6</sup> I say that understanding the OPDS cannot compel any person or entity to respond to an RFP at any time. However, had the private bar been aware of OPDS' position, it could well be that interested private bar attorneys would have responded to the most recent RFP issued by OPDS.