

OFFICE OF PUBLIC DEFENDER SUPPLEMENTAL PROPOSAL

A Report Prepared for the
Legislative Finance Committee

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SUMMARY OF REQUEST

On March 10, 2014, the Legislative Fiscal Analyst received a letter dated March 7, 2014, from the Governor's budget director providing notice of his concurrence in a proposed supplemental appropriation request to transfer up to \$1.6 million in general fund authority from FY 2015 to FY 2014 for the Office of State Public Defender. Staff has reviewed the proposed transfer and raises concerns with this proposal. The notification letter from the budget director states that the office has taken steps to reduce expenditures for FY 2014, but does not specify what these steps have been to avoid a supplemental situation. Furthermore, the plan provided by the office to control FY 2015 expenditures within remaining appropriations after the authority is transferred from FY 2015 to FY 2014 does not appear feasible to prevent the office from exceeding biennium appropriations.

BACKGROUND

According to information provided by the office to the Public Defender Commission on February 24, the factors driving the need for the supplemental appropriation are as follows:

- Turnover of attorney positions in the office has decreased since the legislature funded a career ladder for attorney positions and the office provided career ladder increases for the salaries of attorneys. The lower turnover has adversely impacted the office's attainment of vacancy savings. The legislature applied a 4% vacancy savings rate to the office (4% vacancy savings is \$543,000 per year)
- The office has had expenditures toward five capital defense cases this fiscal year and has depleted nearly all of the capital defense case funding authorized for the entire biennium (\$500,000 for the biennium approved as a biennial appropriation), with three of the cases still unresolved. One of these cases, Rodney Allen Smith appeal, has seen minimal expenditures
- Caseloads have continued at slightly above the 2013 biennium levels, which reflect double digit growth rates from the previous biennium. The funding for contracted services authorized by the 2013 Legislature has been depleted and the additional funding for 8.00 FTE added have not proven sufficient to keep up with costs associated with caseloads such as contracts, filing fees, expert witnesses, and the like

STATUTORY REQUIREMENTS FOR APPROVAL

The following sections discuss two issues raised by staff with the submission.

UNFORESEEN OR UNANTICIPATED EMERGENCY

The law that allows the approving authority to authorize an agency to make expenditures during the first fiscal year of the biennium from appropriations for the second fiscal year of the biennium also implies a threshold upon which the approving authority may submit the plan for legislative review. The threshold is that the reason for the shortfall in the first fiscal year is due to an unforeseen and unanticipated emergency.

Double digit caseload growth was being experienced during the 2013 biennium and has somewhat leveled off in FY 2014. This growth was discussed during the 2013 legislative budget hearings and so anticipated expenditures are neither unforeseen nor unanticipated. The executive indicates in the notification letter that the office took expenditure mitigation actions but does not specify the actions taken. Likewise, the only capital cases currently being funded by the office are those discussed during 2013 legislative budget hearings.

SECOND YEAR EXPENDITURE MITIGATION PLAN

Statute requires any agency proposing a supplemental to submit and to the extent feasible implement a plan for maintaining FY 2015 expenditures within appropriations after the proposed fiscal year transfer has been implemented. The stated mitigation plan appears to fall short of absorbing the shortfall. The total projected shortfall is \$2.4 million for FY 2014. Appendix A illustrates the 2015 biennium funding and FY 2014 projected

shortfall for the office. Appendix B contains the statutes associated with approval of a transfer of budget authority from the second year to the first year of a biennium.

SB 410 Funding

To help address caseloads, the executive has authorized \$625,000 in SB 410 funding to add 9.18 modified FTE in FY 2014 and 16.50 modified FTE in FY 2015. Seeking further SB 410 funding in FY 2015 to fund the 16.50 modified FTE in FY 2015 or eliminating the positions has been stated as the first option for maintaining FY 2015 expenditure within appropriations. However, the FTE and their funding are from a separate funding source and cannot be counted as an option for containing HB 2 expenditures within HB 2 funding.

Request Courts to Cease Appointing Cases

The second option proposed by the office to maintain FY 2015 expenditures within appropriations would be to reduce contract expenditures. Contract expenditures would have to be reduced by 25% of the budgeted amount to stay within the reduced FY 2015 appropriation. The legislature increased funding for contracts by \$1.8 million each year to address caseload growth over the previous biennium. The office proposes to reduce contract expenditures by filing motions in courts around the state that, according to the office's mitigation plan, "would ask courts to cease appointing the agency to represent clients until it can secure the resources necessary to represent them." The office had earlier attempted similar motions in multiple Lewis and Clark County courts that were rejected.

COMMITTEE OPTIONS

As directed in statute, the Legislative Finance Committee has the following options for this supplemental appropriation request:

- Provide a written report to the Governor. This report could contain any comments pertaining to the proposal, including any concerns, or could simply acknowledge receipt of the report. If the committee provides a written report to the Governor, the Governor may, upon receipt of the report approve or deny the request, regardless of the committee's position. The written report, if directed, must be provided within ten days after committee consideration
- Do not provide a written report. If the committee takes no action to direct a report to the Governor, the Governor may not approve or deny the supplemental request until 90 calendar days have passed. However, after 90 calendar days from the date the proposed supplemental appropriation request was forwarded to the committee, the Governor can either approve or deny the request.

Options

The committee may take one of three actions for this transfer:

- 1) Report to the Governor that the committee does not raise any issues of statutory compliance with the proposed transfer;
- 2) Report to the Governor of statutory compliance issues with the proposed transfer; or
- 3) Do not report. If the committee chooses this option, the executive must wait 90 days to process the transfer.

APPENDIX A

OFFICE OF STATE PUBLIC DEFENDER BUDGET AND SHORTFALL ILLUSTRATION

Office of State Public Defender 2015 Biennium Budget and Shortfall (in Millions)		
	FY 2014	FY 2015
Legislative total funds budget		
HB 2	\$26.4	\$26.5
HB 13	0.4	1.0
HB 454	<u>0.1</u>	<u>0.1</u>
Total legislative budget available	\$27.0	\$27.6
Budget actions already taken		
Fiscal year transfer of capital case funding from FY 2015	0.3	(0.3)
Total fund budget currently available	<u>\$27.2</u>	<u>\$27.4</u>
Projected expenditures	\$29.6	
Projected shortfall	2.4	
Proposed funding for shortfall		
Personal services contingency	0.2	
SB 410 agency transfer	0.6	
Fiscal year transfer	<u>1.6</u>	(1.6)
Total shortfall funding	\$2.4	
Total funds budget after fiscal year transfers	<u>\$29.6</u>	<u>\$25.8</u>

APPENDIX B

RELEVANT MONTANA CODE ANNOTATED CITATIONS

17-7-301. Authorization to expend during first year of biennium from appropriation for second year -- proposed supplemental appropriation defined -- limit on second-year expenditures. (1) An agency may make expenditures during the first fiscal year of the biennium from appropriations for the second fiscal year of the biennium if authorized by the general appropriations act. An agency that is not authorized in the general appropriations act to make first-year expenditures may be granted spending authorization by the approving authority upon submission and approval of a proposed supplemental appropriation to the approving authority. The proposal submitted to the approving authority must include a plan for reducing expenditures in the second year of the biennium that allows the agency to contain expenditures within appropriations. If the approving authority finds that, due to an unforeseen and unanticipated emergency, the amount actually appropriated for the first fiscal year of the biennium with all other income will be insufficient for the operation and maintenance of the agency during the year for which the appropriation was made, the approving authority shall, after careful study and examination of the request and upon review of the recommendation for executive branch proposals by the budget director, submit the proposed supplemental appropriation to the legislative fiscal analyst.

(2) The plan for reducing expenditures required by subsection (1) is not required if the proposed supplemental appropriation is:

(a) due to an unforeseen and unanticipated emergency for fire suppression;

(b) requested by the superintendent of public instruction, in accordance with the provisions of 20-9-351, and is to complete the state's funding of guaranteed tax base aid, transportation aid, or equalization aid to elementary and secondary schools for the current biennium; or

(c) requested by the attorney general and:

(i) is to pay the costs associated with litigation in which the department of justice is required to provide representation to the state of Montana; or

(ii) in accordance with the provisions of 7-32-2242, is to pay costs for which the department of justice is responsible for confinement of an arrested person in a detention center.

(3) Upon receipt of the recommendation of the legislative finance committee pursuant to 17-7-311, the approving authority may authorize an expenditure during the first fiscal year of the biennium to be made from the appropriation for the second fiscal year of the biennium. Except as provided in subsection (2), the approving authority shall require the agency to implement the plan for reducing expenditures in the second year of the biennium that contains agency expenditures within appropriations.

(4) The agency may expend the amount authorized by the approving authority only for the purposes specified in the authorization.

(5) The approving authority shall report to the next legislature in a special section of the budget the amounts expended as a result of all authorizations granted by the approving authority and shall request that any necessary supplemental appropriation bills be passed.

(6) As used in this part, "proposed supplemental appropriation" means an application for authorization to make expenditures during the first fiscal year of the biennium from appropriations for the second fiscal year of the biennium.

(7) (a) Except as provided in subsections (2) and (7)(b), an agency may not make expenditures in the second year of the biennium that, if carried on for the full year, will require a deficiency appropriation, commonly referred to as a "supplemental appropriation".

(b) An agency shall prepare and, to the extent feasible, implement a plan for reducing expenditures in the second year of the biennium that contains agency expenditures within appropriations. The approving authority is responsible for ensuring the implementation of the plan. If, in the second year of a biennium, mandated expenditures that are required by state or federal law will cause an agency to exceed appropriations or available funds, the agency shall reduce all nonmandated expenditures pursuant to the plan in order to reduce to

the greatest extent possible the expenditures in excess of appropriations or funding. An agency may not transfer funds between fund types in order to implement a plan.

17-7-311. Proposed fiscal year transfer supplemental appropriation -- procedure. (1) A proposed supplemental appropriation to transfer appropriations between fiscal years of a biennium and all supporting documentation must be submitted to the legislative fiscal analyst. The governor may not approve a proposed fiscal year transfer supplemental appropriation until the governor receives the legislative finance committee's written report for that proposed fiscal year transfer supplemental appropriation unless:

(a) the report is not received within 90 calendar days from the date the proposed fiscal year transfer supplemental appropriation and supporting documentation were forwarded to the legislative finance committee, in which case the governor may approve the proposed fiscal year transfer supplemental appropriation; or

(b) there has been a waiver of the review and report requirements, as provided in subsection (4).

(2) The legislative fiscal analyst shall review each proposed fiscal year transfer supplemental appropriation submitted by the governor for compliance with statutory requirements and standards and to determine the expenditures that will be reduced in order to contain spending within legislative appropriations. The legislative fiscal analyst shall present a written report of this review to the legislative finance committee. Within 10 days after the legislative finance committee's consideration of the proposed fiscal year transfer supplemental appropriation, the legislative fiscal analyst shall submit the legislative finance committee's report to the governor.

(3) Upon receipt of the legislative finance committee's written report, the governor may approve or deny the proposed fiscal year transfer supplemental appropriation or may return the proposed fiscal year transfer supplemental appropriation to the requesting agency for further information. If the governor has returned the proposed fiscal year transfer supplemental appropriation to the requesting agency and the requesting agency resubmits the proposed fiscal year transfer supplemental appropriation to the governor, all procedures provided in this section apply to the resubmitted proposed fiscal year transfer supplemental appropriation.

(4) (a) If an emergency occurs that poses a serious threat to the life, health, or safety of the public, the legislative fiscal analyst may waive the written review and the legislative finance committee's written report required by this section. After a waiver, the legislative fiscal analyst may complete the written review.

(b) Upon receipt of the waiver, the governor may approve the proposed fiscal year transfer supplemental appropriation.

(c) A waiver affects only the legislative fiscal analyst's written review and the legislative finance committee's written report on the proposed fiscal year transfer supplemental appropriation. All other proposed fiscal year transfer supplemental appropriation requirements and standards remain in effect.

(5) Nothing in this part confers on the legislative finance committee authority to approve or deny a proposed fiscal year transfer supplemental appropriation.