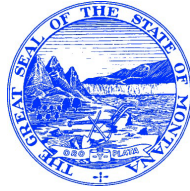


LEGISLATIVE AUDIT DIVISION

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MEMORANDUM

TO: Legislative Audit Committee Members

FROM: Alyssa Sorenson, Management and Program Analyst Supervisor

CC: Brett Schandelson, Director, Office of State Public Defender
Brian C. Smith, Public Defender Division Administrator
Chad Wright, Appellate Division Administrator
Eldena Bear Don't Walk, Conflict Defender Division Administrator

DATE: September 2022

RE: Performance Audit Follow-Up 22SP-11: *Public Defender Workforce Management* (orig. 19P-04)

ATTACHMENTS: Original Performance Audit Summary

Introduction

The *Public Defender Workforce Management* (19P-04) report was issued to the Legislative Audit Committee in September 2020. The audit included eight recommendations to the Office of State Public Defender (OPD). In September 2022, we conducted follow-up work to assess implementation of the report recommendations. This memorandum summarizes the results of our follow-up work.

Overview

Our audit of Public Defender Workforce Management recommended OPD improve their workforce health by evaluating attorney performance, planning ways to improve recruitment and retention, taking steps to address low OPD attorney pay, increasing flexibility of moving cases between divisions, improving attorney time-tracking, and developing and implementing a data management program and policy. We also had two contractor specific recommendations: one that the department assess the need for higher contract attorney rates and another that they increase centralized oversight of contractor billing. Over the past two years OPD has made significant progress addressing all recommendations and has seen meaningful improvements in their workforce health as a result. Some changes include, but are not limited to, the consistent use of attorney evaluations, more competitive pay for attorneys, and a new case management system to help collect and track data. Only one recommendation has not been fully implemented. The second recommendation relating to developing a recruitment plan is partially implemented, as they do not have a written plan. They have however made formal changes to their recruitment practices to allow for more flexible hiring practices that have led to improvements in their recruitment. Overall, OPD's actions since the audit have resulted in significant recruitment and retention gains.

Background

The Sixth Amendment of the U.S. Constitution guarantees a right to counsel, requiring states ensure the provision of indigent defense. In Montana, that responsibility is carried by the Office of State Public

Defender. OPD's mission is to provide effective professional legal services with equal access to quality client-centered representation. State law outlines expectations for state public defense, including that public defender services be delivered fairly and consistently throughout the state by qualified and competent attorneys. It also requires that the system be adequately funded and managed in a fiscally responsible manner.

OPD represents indigent clients on over 35,000 new cases each year. The agency was appropriated \$38.5 million for fiscal year (FY) 2022 from the General Fund. As of FY 2022, OPD was allotted 302.44 full-time equivalent (FTE) staff, including 183 staff attorney and manager positions. They also use the services of around 215 contract attorneys each year.

Audit Follow-Up Results

The following sections summarize the progress toward implementation of the report recommendations. OPD has made significant progress to implement or make progress toward implementing all eight recommendations and there have been noticeable effects on agency workforce health.

RECOMMENDATION #1

We recommend the Office of State Public Defender improve centralized oversight to ensure effective counsel is provided by attorneys performing public defense work by:

- A. Updating, communicating, and enforcing a policy for performance evaluations to be used consistently across the state for evaluating the performance of staff attorneys.**
- B. Continuing to evaluate contract attorneys on a biennial basis and use the results to determine whether MOUs should be renewed or if remedial action is required.**
- C. Clarifying, communicating, and enforcing the client grievance tracking policy and procedures.**

Implementation Status – Implemented

During the original audit, we found OPD did not effectively monitor attorney performance to ensure effective indigent counsel. Managers rarely completed evaluations for staff attorneys, contrary to OPD policy. OPD now uses the Department of Administration's Talent system to track employee's evaluations. In the fall of 2021, training was provided to managers on how to complete evaluations in the system. The first employee evaluations were completed by the end of that year. OPD now requires managers to complete quarterly check ins and annual evaluations. The next round of evaluations will be completed at the end of 2022. The HR administrator reported 90 percent completion of evaluations for the previous calendar year. The remaining noncompliant cases were checked and found not complete. Reasons for noncompletion included staff being out on long-term leave, imminently departing the agency, or only recently joining the agency.

At the conclusion of the audit, contract attorney evaluations had recently been established and used to inform the renewal of contractor memorandums of understanding (MOUs), but the process was still in flux. To ensure contract evaluations are complete for all contractors each biennium, OPD has now made it a requirement they be completed in the last 90 days prior to the end of the contractor's MOU. Evaluations must be completed prior to a new contract being closed or renewed. Under the new system, staff indicate they have not had any problem completing these evaluations to comply with statute and policy. A review of a sample of contractor evaluations during follow up work showed the effects of contractor evaluation process changes, such as one evaluation completed in the system a few days after the renewal of the MOU and one evaluation anniversary not lining up with MOU renewal dates. However, the new process set up for the evaluations appears to include controls to no longer allow for evaluations to not be completed prior to the renewal or closure of an MOU.

Client grievances were previously inconsistently entered by regional staff into the case management system and difficult to review for patterns of concern on a statewide or individual level. Client grievances are now tracked through a new case management system. The new system is more streamlined, includes more detailed information tracking, and allows clients an option to submit complaints online. Staff showed auditors examples of the different ways they can now centrally view and monitor grievance data, including by attorney, by office, and by region according to complaint matter type, outcome, and whether a new attorney was assigned. The new system allows easier central analysis of statewide patterns of complaints. Complaints are all fed directly to direct supervisors for review, while discrimination-related complaints are sent directly to HR. Management also stated that one result of the online portal option is regional offices are less able to gatekeep the entering of grievances into the system.

RECOMMENDATION #2

We recommend the Office of State Public Defender develop a targeted recruitment plan to provide incentives to recruit and retain attorneys, expand recruitment efforts, and restructure the recruitment process to increase ease of participation for applicants and provide more flexible ability to extend job offers.

Implementation Status – Partially Implemented

Initial audit work found recruitment and retention were major challenges to OPD's ability to provide effective counsel. At the time, we determined there was not a strategic or targeted approach to recruitment to meet regional needs, and needs varied greatly by location. In an interview with HR staff, we learned OPD still does not use a written recruitment plan outside of formally negotiated arrangements with the union, but they experiment with new methods every few months. Since the audit's publication, OPD has tried targeted efforts to attract attorneys to their highest need office in Billings, such as relocation bonuses, bar admission stipends, and higher entry level salaries. While some of these have since expired, salaries have recently increased in a uniform manner for attorneys across the state.

OPD has been more flexible in its recruitment practices, including hiring law students during their final year of law school on the presumption that they will pass the bar at a later date. Previously they were unable to make offers to these individuals. They also have targeted job announcements to recruit these individuals. They have also restructured their internships to better serve as pipelines to recruit permanent staff, including changing the clinical law school internship to focus more on trial experience, and creating a new summer internship. Additionally, they have now changed their practices after negotiating with the union to allow for year-for-year pay for non-direct experience for attorneys to join midcareer.

OPD administration and management say that the resulting increase in salaries, flexible hiring practices, and improvements to caseloads have led to meaningful improvements in retention of attorneys and ease of recruitment. One manager said after large losses in their local office last year they are now fully staffed. Statewide vacancy data shows after rising for over a year, vacancies have dropped by over 28 percent in the past few months.

RECOMMENDATION #3

We recommend the Office of State Public Defender investigate and propose methods to the legislature to address excessive differences in pay between OPD staff attorneys and other public attorneys.

Implementation Status – Implemented

Audit work determined OPD staff attorney wages were significantly below other public attorney wages, including other state attorneys and county attorneys. In spring of 2022, OPD announced they successfully negotiated for an increased pay structure for attorneys. The largest increase was made for entry level

attorneys. OPD managers report that a few months after increasing wages and continuing efforts to manage caseloads, it appears as if both recruitment and retention issues are significantly improving. Staff indicated OPD experienced rising vacancies prior to these changes, peaking at over 30 vacancies earlier this year and a turnover rate of 26 percent. Now they hope to hold the number of vacant positions potentially around ten. Staff report that these increases have also improved their recruitment pool. Management hears from mid-career attorneys the salary increases will help them stay at the agency longer than they would have otherwise. Several attorneys that left the agency have recently returned due to the improvements in salaries and in caseloads. OPD management did express the need for OPD to keep up with the ever-changing salary demands and FTE requirements in the field moving forward.

RECOMMENDATION #4

We recommend the Office of State Public Defender assess the need for an increase of the contract professional or travel rate to attract willing and competent attorneys in high-demand areas of the state.

Implementation Status – Implemented

We found in previous audit work that a lack of contract attorneys in high-demand areas of the state could be addressed by increasing the contract rate to a more competitive rate. OPD was able to use America Rescue Plan Act funding to pilot higher contract rates in Billings and found it did help increase the amount of work taken on in that area. In Billings after increasing the contract rate and setting up a flat rate contract for the Municipal court, the percentage of cases assigned an attorney within five days jumped from 25 percent to over 87 percent. As of April 1, 2022, OPD announced they were increasing the contract rate statewide from \$56 an hour to \$71 an hour for all non-capital work. The OPD Compensation Schedule does reflect these changes and includes a provision that the agency may offer incentive rates based on certain criteria or agency need, formalizing the potential for variable local rates in the future. In addition, they have started several flat fee contracts for certain courts, such as all municipal court cases in Billings, which OPD management reports has made a large difference in their ability to assign cases to contract attorneys in a timely manner.

RECOMMENDATION #5

We recommend the Office of State Public Defender establish and implement policy for moving cases between divisions to increase the use of the Conflict Division for select case overflow relief for nonconflict cases.

Implementation Status – Implemented

One key component of providing effective counsel is the need to maintain reasonable caseloads. One means we identified through previous audit work of regulating caseloads was using the Conflict Division for overflow relief for the Public Defender Division. OPD staff report that they developed and began implementation of a process they refer to as Ethical Case Management (ECM) to better ensure equitable and reasonable workloads for all OPD FTE attorneys. The practice will be formalized in OPD policy in 2023. One aspect of this process allows for a non-conflict office to overflow cases to Conflict Division offices for assignment if there is capacity for the Conflict Division to take on more cases. So far 328 cases with a case weight total of 3,891 hours have overflowed to the Conflict Division using ECM. Management described the number of cases overflowed as limited due to recent staffing shortages in the Conflict Division.

RECOMMENDATION #6

We recommend the Office of State Public Defender improve agency time-tracking completeness and accuracy by:

- A. Increasing centralized oversight of the completeness and accuracy of time-tracking by monitoring frequency of submissions and quantity of time.**
- B. Enforcing the requirement that managers review and approve time each week.**
- C. Improving the ease of time-tracking by exploring easier methods of electronically entering and tracking time and incorporating tracking into daily workflow processes.**

Implementation Status – Implemented

During original audit work, we found that OPD attorneys were not consistently following public defense best practices or OPD policy of accurately tracking time spent by case type and court. We found some attorneys did not enter time, while other attorneys entered impossibly high time due to data entry errors. Time-tracking is now required for all attorneys to the individual case level. The new case management system has several functionality changes that improve both attorney capability to track time as well as managers' ability to ensure consistent tracking of time. During follow-up work, OPD management showed the auditor several of the new tools that were available to officers to ease the data entry burden of entering their time. Management is receiving ongoing feedback from attorneys regarding improvements and new features that can help automate time-tracking and reduce the burden of data entry. During follow-up work, management also showed the auditor several dashboard metrics used to track timekeeping and identify noncompliance. If attorneys do not record time, managers first follow up to see what issues they are having recording time. If there is continued noncompliance, they issue "expectation letters" by the fifth of each month to staff about the policy. Management says they have enforced this requirement, with time-tracking even being a contributing factor in recent terminations. Metrics provided by OPD show timekeeping compliance is now high, at FY2022 average of over 82 percent of attorneys recording at least 140 case hours per month. Actual compliance is even higher due to the system not capturing use of leave time and making some attorneys incorrectly appear noncompliant.

RECOMMENDATION #7

We recommend the Office of State Public Defender increase centralized oversight of contracting billing on an agency level to improve efficiency and consistency in contractor billing by:

- A. Reviewing aggregate agency-wide billing data relative to assigned cases, case weight hours, and expected work hours for a given time period during the biennial contractor evaluation process to determine whether to renew each MOU,**
- B. Providing guidance for regional managers regarding appropriate and inappropriate contractor billing circumstances to increase consistency between regions,**
- C. Revising the contracting policy to specify aggregating time billed for each OPD client to the nearest one-tenth hour by contractors, and**
- D. Communicating the option to use assistants for certain tasks, revising policy to allow work to be completed under the attorney's supervision and MOU at the assistant rate, and considering an increase in the assistant rate.**

Implementation Status – Implemented

We found a need for OPD to increase centralized oversight of contractor billing due to inconsistent billing practices across the state, some of which appeared inconsistent with the number of workhours in a time period or the number of case weight hours assigned to the attorney. OPD has developed extensive reporting options in their contractor evaluations, including several metrics associated with contractor billing, such as the number and percent of assigned cases that exceeded billing standards, how contractors

compare with each other, the largest and average claim amount, number of claims returned/rejected, and number of months they billed over 150 hours. It also shows the number of hours billed by month compared to the average monthly hours of all contract attorneys.

OPD has also made changes to contractor policy intended to increase the accuracy and efficiency of contractor work billed. First, policy now specifies that contractors are to aggregate the amount of time spent on OPD clients rounded to the nearest one-tenth hour rather than charging one-tenth hour per task. Second, policy now allows attorney's assistants' time to be billed for under the supervising attorney's MOU at an assistant rate to encourage more cost-efficient billing. OPD contract bureau staff are also actively communicating the availability of this option, as many contractors were not aware they were able to use assistants and bill their time separately. These staff say that they have seen an increase in the use of assistants as a result.

To overall improve the consistency in contractor management between regions, OPD is centrally assigning cases from a newly established centralized contracts program. This program is intended to decrease competition between offices for contractors, allow for more efficient assignment patterns to decrease travel time paid to contractors, and improve support for contractors. OPD indicated they are now hiring another staff person in this program which will allow them to also begin to centrally approve all contractor billing as well.

RECOMMENDATION #8

We recommend the Office of State Public Defender develop and implement a data management program and policy to:

- A. Identify data needs for measuring agency performance,**
- B. Specify staff responsibilities for implementation,**
- C. Develop controls and automation to improve ease of data entry and accuracy,**
- D. Establish data-based performance measurements and targets,**
- E. Develop reports or products to inform staff and stakeholders of performance metrics,
and**
- F. Pursue future integration or data warehousing with other justice-related state entities to
improve data access and decrease manual entry.**

Implementation Status – *Implemented*

Audit work found a need for OPD to identify data needs to track and monitor performance and identify resource needs, more consistently use information available to analyze its operations, and improve data access and entry. OPD has completed many officewide changes and took part in larger statewide data conversations to implement this recommendation. Since the audit's completion, OPD has implemented a new case management system. During the implementation of this system, they took the opportunity to identify the data elements they required to measure agency performance, identified means of automating data entry, and set up a means of reporting on and monitoring performance metrics. They also created a Development and Operations Bureau which includes a Data Management Program. This bureau ensures that data controls are enforced, addresses data integrity issues, and creates reporting and tools for data management. The bureau is currently working with the Governor's Office of Budget and Program Planning data staff to develop additional tools to use their newly collected data to project future FTE and other resource needs based on incoming cases. Over the past biennium, OPD has also participated in a legislative interim committee study of criminal justice system data.