PROBATION REVIEW COMMITTEE

FEBRUARY 11, 2021

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AGENDA

BOARD OF PROFESSIONAL SURVEYORS AND MAPPERS

PROBATION REVIEW COMMITTEE

(IMMEDIATELY FOLLOWING THE GENERAL BUSINESS - PART I MEETING)

FEBRUARY 11, 2021

MEMBERS: Michael Zoltek, Chair
Nick Campanile
Ia Hall

I. **CALL TO ORDER/ROLL CALL**

II. **REVIEW AND APPROVAL OF OCTOBER 2020 PROBATION REVIEW COMMITTEE MINUTES**

III. **REVIEW AND APPROVAL OF JANUARY 21, 2021 SPECIAL PROBATION REVIEW COMMITTEE MINUTES**

IV. **PROBATION SUMMARY** – Liz Compton

V. **PROBATION PROCESS DISCUSSION**

VI. **OLD/NEW BUSINESS**

VII. **PUBLIC COMMENT**

VIII. **ADJOURN**

PROBATION REVIEW COMMITTEE

Virtual Meeting

January 21, 2021

The meeting was called to order by Mike Zoltek, Committee Chair at 9:05 a.m.

COMMITTEE MEMBERS PRESENT

Mike Zoltek, Committee Chair
Nick Campanile
Ia Hall

OTHERS PRESENT

Christopher McLaughlin, Board Member
Steven Hyde, Board Member
Keith Fountain, Board Member
Liz Compton, Executive Director
Regenia Lee, Government Analyst
Amanda McKibben, Board Counsel
Olorunfunmi Ojetayo, Prosecuting Attorney
Corey Fedrick, Investigator
Steve Sharpe, Expert Consultant
Joe Boggs, Expert Consultant
Steve Kellogg, Expert Consultant

Executive Director Liz Compton began by explaining the sole purpose of the meeting was to discuss changing the procedure for survey reviews of probationers, turning the review process over to expert consultants instead of board committee members.

Olorunfunmi Ojetayo, Prosecuting Attorney says as a litigator he looks at a case as to whether it is something that will stand up in court and he can be successful in litigation. He indicated in looking at internal processes and rules there are seeming arbitrariness and inconsistencies of having three different people doing survey review and based on their expertise deciding whether something passes or fails. This can create problems as lawyers in court when questions arise about what standards were applied and were, they consistent from one reviewer to the next and what was the decision-making process in determining pass or fail. So, an idea was to limit the number of people doing survey review and it seems consistent and common sense to pass it on to one of the current slate of experts who already do survey reviews. Board rules do allow that. But a question is about the cost is to do that. Mr. Ojetayo says in the past it seems we have unduly burdened the board members with the costs of survey review to the boon of probationers and shouldn't have been because the rule clearly states the cost of the review should be paid to the consultant or the board. He says the board has been burdened with the time and responsibility without compensation for the hundreds of hours spent on this work. The question remains how we pass the cost on to the licensee even though our rules allow that. If the board

decides to retain control, he suggests it develop some tool to standardize the review amongst members so there is consistency and more likely to stand up in court.
He explained the reasons behind the proposed change as being there are inconsistencies of having three different people do reviews based on their expertise and this raises questions about what standards were applied and were, they consistent. Whoever does it how do we ensure licensees are able to bear the costs. There are benefits to the licensee if they get an advance report and they are able to prepare and come to the committee meeting to make their case so there is the issue of discovery. The licensee would still present why they should be passed but they would have already been armed with what reviewers have used to come to a decision on whether something meets the standards of practice. Mr. Ojetayo said there have been concerns of previous board attorneys about survey review and the preference to not do survey reviews. But if the board wants to continue them, changes should be made.

Mike Zoltek asked whether board counsel had a recommendation for using expert consultants as opposed to board members. Does he have opinion for a preferred method for the board's protection and the protection of the probationer? The board should provide information to the probationer prior to coming to the meeting.

Mr. Ojetayo said his preference is expert consultants should do it. He is not a subject matter expert and relies on expert consultants when putting together probable cause cases. He says if we keep doing things the same way he is not comfortable it would stand up in court.

Mike Zoltek inquired as to whether the board members or public had any issues with it.

Nick Campanile said he is open to it and there are a lot of issues involved to discuss. Important to know every step of every process. Says discovery is fair and reasonable.

Keith Fountain said what he is hearing is the change may produce a better evidentiary record in the event of conflict down the road. Said getting with expert may produce better evidentiary record if a case goes to court. He asked what the legal basis for the recommendation is.

Mr. Ojetayo stated when applying the legal standard for any agency final action its looked at to see whether it was arbitrary and capricious or abuse of discretion in accordance with the law. He says we have already had a case where we were ruled against because some of the processes have been deemed to be arbitrary. It is his opinion that having three different members apply three different approaches and those reviews not being open creates appearance it is arbitrary.

Joe Boggs stated there is inconsistency when a probationer's 3 surveys go to three different reviewers and a solution is to have one reviewer do all three surveys.

David Schryver agreed and said there needs to be developed a format for consistency.

Liz Compton stated she didn't think there would be any final decisions during this meeting and that this would be an ongoing process and there would be more meetings.

Mike Zoltek responded he agrees there are things to work out but thinks if there is a consensus among board to use consultants that is the decision that must be made first. Agrees the three surveys should be done by same person. He asked whether if in court it is better to have one person do review of the three surveys.

Mr. Ojetayo responded it would have to be one person reviewing the surveys. With three different reviewers we have all three reviewers have a different approach and different testimony and an attorney could say “who are we to believe…they can’t even all agree so how can they say my client didn’t pass”? Even if we stay with board review, we still have issue of the burden on the board member doing three reviews. It also creates a problem with that reviewer being conflicted out from voting and could create some procedural issues.

There was further discussion about using one reviewer for three surveys versus three reviewers doing one survey and the consensus was one reviewer should do all three surveys regardless of whether it is done by an expert consultant or board members

Steve Hyde said he liked the idea of using consultants but asked if we are going to go with one person could be limited to one or two surveys.

Mr. Campanile said the rule states the surveys will be given to a consultant selected by the board or “a” member. So, it already is restricting review to one reviewer whether it is a consultant or member.so have we been doing it, right?

Mr. Zoltek inquired whether there is anyone who has an issue with moving forward with directing Funmi to provide three surveys to the same person be it a consultant or board member.

Liz Compton inquired as to whether we need a full bord vote.

Mr. Zoltek responded we don’t need the full board to offer an opinion to counsel and defer to counsel’s opinion. He asked counsel if three should go to the same person for review?

Mr. Ojetayo indicated based on the rule the language is in the singular, so three surveys need to be reviewed by one person.

Mr. Campanile stated that the rule itself implies one individual should do all three reviews.

Mr. Ojetayo said the rule does say surveys should go to one person. It isn’t up to the committee, it’s the rule. The question is whether they should go to consultant or board member.

Mr. Campanile said he has always believed that everything goes to the full board for ratification or approval and said he thinks that will be done during a committee report in GB. He says this is something that affects the full board and committee members change so it’s something we need their approval as well.

Mr. Zoltek inquired whether Nick thinks we need the full board vote for Funmi to follow his interpretation of the rule or to just inform the board it is prosecutor’s opinion we need to more closely follow the rule.

Mr. Campanile stated the committee is going to dissect this and try to figure out the details, but this is something ultimately need to have approval of the full board.

Amanda McKibbon responded that the rule gives options and as committee chairman, Mike Zoltek has the authority to direct his committee on how to do survey reviews. She says we will certainly present the findings to the full board at the meeting. If the board wants to overrule that, we will consider it at that time. It is wise to get everyone’s input like we are doing now.

Mike Zoltek made a motion to have the same individual do all three survey reviews of a probationer. After some discussion about the review procedure, the committee agreed.

Mir. Zoltek brought up the next issue about whether expert consultants or board members should conduct the survey reviews. He indicated Funmi believes it should be a consultant so there is a standard review report that is provided to committee members and also the probationer prior to the meeting, so board members involved in PCP don't have to recuse themselves from portions of the board meeting and so that board members are not subsidizing probation review by doing unpaid reviews as the rule says probationers should pay the cost of the reviews.

Ia Hall said she is not sure how much time it takes to do a survey and are we doing it correctly? Are we looking at the same things in a survey, so it isn't arbitrary? Do we have a process like a checklist. If there is a process, she is ok with one reviewer. Ms. Hall also indicated based on Funmi's recommendation she thinks a consultant should do the review; they already have a system in place.

Mr. Zoltek responded we do have a checklist so there is a level of consistency. The next question is do we have consultant or board members do re=view. We already heard from Funmi about the benefits of having a consultant do a review. How they do the reviews we can address later.

.Ia Hall also indicated based on Funmi's recommendation she thinks a consultant should do the review; they already have a system in place.

The issue of whether the expert consultants need to attend meetings was raised. Mike Zoltek didn't think the consultant should be there, that their report should be relied upon and the probation committee's analysis is what counts. He asked if it could work like the probable cause panel which relies on a written report.to make a decision.

Mr. Ojetayo responded consultants wouldn't have to be there, it can work like PCP. He would take report from consultant and give to the committee. They see the report and make the ruling accordingly. He said he can see where there may be questions about the method or means or conclusions. But the committee would have seen report prior to the meeting and can submit any questions that arise from the report can be submitted to staff and receive answers in writing. That would be more efficient and cost effective.

Mr. Campanile asked if the probationer disagrees with the violation and presents information to be debated would that be handled between the probationer and the consultant or the committee which has not done the review?

Mr. Zoltek said the committee should get the report in time to be familiar with it, we should be familiar enough to know what happened.

Mr. Campanile asked if a committee member doesn't agree with the report or with another member does that present an issue? Trying to make it bulletproof as best we can. If expert is not present, we have to be familiar with the survey and review, yet we removed ourselves from survey review. He doesn't find that to be something that is perfect and consistent.

Mike Zoltek responded that if you have more than one person making a decision it will never be perfect, but the current process is not defensible. He says they take a vote whether they are on

or off probation. He asked Nick Campanile whether he saw a downside to having a consultant do the review and Nick responded no.

Mike Zoltek told Mr. Ojetayo the committee agrees to change the process to have one reviewer do all the three surveys and then the report goes to the committee to decide a final action. They also think consultants should do the reviews. He said it is incumbent on the committee to be familiar with all the surveys and the review. Committee needs to get same data the consultant gets to determine if they agree or not.

Mr. Zoltek indicated an action item is for him to draft some procedures and bring them back before the committee in a future meeting. Once the committee has an outline of recommended procedures, they can bring it back before the board,

Steve Sharpe said once a surveyor failed to pass a first survey review, he thinks the board should qualify that into batches of three so they wouldn't be constrained to use the same consultant on the 2nd survey review.

Mr. Zoltek agreed and said that would eliminate the concern of one reviewer being biased. He said they don't necessarily want to have a reviewer who fails the first set to do the second. He said they don't want the same reviewer who does a case for the PCP to do the same surveys for probationer because it might appear if he fails the first time, he is going to fail him the second time. That is why diversity with experts. If multiple experts have issues with one probationer's surveys, that is defensible.

Chris McLaughlin said we are trying to solve two problems. One, he doesn't think they ever picked up before that the rule said "a" member of the committee would do survey review. In the Minder case they brought up Mr. Minder was never provided for rebuttal a written report for identifying the factual basis for each alleged deficiency or describing the internal review procedures the committee observed to ensure fairness and objectivity. Mr. McLaughlin referred to information he posted in the chat.(see below) He points out the rule says whoever does the review is supposed to provide an evaluation report to the board for review. He says they never did this as a board unless you interpret this as a verbal report which is valid, but there was never any written report given to the board by the person doing the review. Mr. McLaughlin indicated an evaluation report needs to be provided regardless of who does the review. He says the review and the discussions at the meetings are two different things and they have been piling them together. We are trying to ensure the fairness and the ability for probationers to defend themselves. The only on the spot portion would be what's discussed.

CHAT

5J-17.085 Survey Review.
(1) A probationer submitting surveys for review shall:
…
(c) Attend the Probation Committee meeting at which the SURVEYS ARE TO BE REVIEWED;
(d) Repeat paragraphs (a)-(c), once if required by the Probation Committee at the meeting where the SURVEYS ARE REVIEWED AND DISCUSSED.
(2) Upon receipt of the signed and sealed surveys and other documents by the Board, either a surveying and mapping consultant selected by the Board or a member of the Probation Review Committee of the Board shall conduct a review of the surveys supplied by the licensee and

PROVIDE AN EVALUATION REPORT TO THE BOARD FOR REVIEW, with all costs associated with said review and report paid to the consultant or the Board by the licensee.

END CHAT

Mike Zoltek says what they are trying to do here is separating those two things and it gets convoluted when board members are doing part one (review) and doing part two. (discussion). Doing the right thing for probationers, giving them their day in court, protecting the board and putting Funmi in the best position to do his job. He says they need to follow the rule. He says they are not here to cost or save the probationer money, or to save board members time, they are here to follow the rule. He says this supports the idea of having consultants do the review, keeping the committee clean to do part two, keeping Funmi clean to do what he needs to do should someone not agree with the board decision. He says they have to remember just because they make a pass/fail decision as committee it still goes before the full board. The full board will hear everything and may not agree with the committee and that allows them to be fair. He says the past processes have not been very transparent.

Mr. Zoltek says his takeaway is that Funmi should send all surveys to one reviewer if there is a survey review and that reviewer at least for now should be the consultant. They have to work out some things. He has an action item to prepare some generalized procedures and will have Liz arrange a special meeting of the committee.

Mr. Ojetayo says his role in probation committee is limited. Says he is here because this discussion of course, has bearing on any possible litigation that comes thereafter that he would have to prosecute.

Mike Zoltek says when Liz gets surveys, she would send to committee members but also to expert consultant to do review.

Mr. Ojetayo says the committee would get consultant report, all the surveys and everything would go to the committee to discuss whether it passes or fails. Also, this is not a quasi-judicial hearing so it's not that the l probationer gets to question the expert and there is a cross examination…they can ask questions to the committee.

Amanda Mckibbon says she agrees with Funmi.

Mike Zoltek says this answers the question is do they have to have the consultant there and they get to argue points of fact and the answer is no. The discovery and the facts are given to the board.

Mr. Campanile indicated his experience has been that things come to light when there is discussion.

Mr. Zoltek says there is the ability for discussion and probationer to have a chance to discuss the facts before they make a judgement because context is important, and they may be able to shed some light on what happened. That is intent of an open meeting, they can change the committee members 'minds.

Liz Compton says she was under impression no decisions would be made and is confused about whether we will present this to full board. She said we do have one person who is about

to submit survey list for review and legal may not have included enough in AC to cover expert consultant expenses.

Mr. Zoltek says they are not making changes, they are asking Funmi to follow the rule better than it has been followed earlier.

Amanda Mckibbon says we will run into issues with that if we charge for things not in the FO. She says she wrote FO prior to discussion about having experts doing survey review. In the future she can write FOs that expressly say probationers have to pay for expert consultant review. She says she does have to put a dollar amount in there or they will appeal, and judges aren't going to like it if no set costs.

Liz Compton says we are not making changes (to rule) but this is a huge change in procedures.

Joe Boggs says they already have a checklist to review surveys but suggest members get with Funmi to get a report outline to standardize the reports for these probation committee reports.

Mr. Zoltek says that is in the works already. Mr. Ojetayo is working on template.

Alvin Gloer says he can see all sorts of questions coming up. Who would the respondent contact after they get the report if they want to send additional information?

Mike Zoltek says they come to the meeting prepared to defend and be heard.

Mr. Gloer says they are independent reviewers. with the PCP and if something is missing, he contacts Corey Fedrick, Corey reaches out to the LS and gets information or if not available it might be a violation. He says if they are going to do this with a one-shot report, he would not get that opportunity and that puts him at a little bit of a disadvantage if the probationer has information he didn't send. He thinks the committee is a little too quick on this. He thinks this is the best way to do it, but it seems like they are getting quick on this.

Mike Zoltek responded if they can't get information back to the probationer in plenty of time to prepare, they put it on a future docket. He says they have to play that by ear. Currently, if he gets a package and they don't have things, he asks for them.

Liz Compton expressed concern that while they have the authority, she thinks they are moving too fast with major process changes.

The meeting concluded at 11:25 a.m.

MINUTES

BOARD OF PROFESSIONAL SURVEYORS AND MAPPERS

PROBATION REVIEW COMMITTEE

VIRTUAL MEETING

THURSDAY, OCTOBER 29, 2020

The meeting was called to order by Michael Zoltek, Committee Chair, at 10:57 a.m.

COMMITTEE MEMBERS PRESENT

Michael Zoltek, Committee Chair
Nick Campanile
David Schryver

OTHERS PRESENT

Frank Conkling, Board Member
George Grubbs, Board Member
Christopher McLaughlin, Board Member
Steven Hyde, Board Member
Ia Hall, Board Member
Keith Fountain, Board Member
Liz Compton, Executive Director
Regenia Lee, Government Analyst
Amanda McKibben, Board Counsel
Olorunfunmi Ojetayo, Prosecuting Attorney
Corey Fedrick, PSAM Investigator
Robin Petzold
Howard Ehmke
Willis R. Howell
Lou Campanile
Joshua Lee
Brian Bellino
Alvin Gloer
Dennis Layton
Gail Oliver
Don Elder

REVIEW AND APPROVAL OF THE JULY 2020 PROBATION REVIEW COMMITTEE MINUTES

After review and discussion, the following motion was made:

MOTION: Mr. Schryver made a motion to approve the July 2020 Probation Review Committee minutes.
SECOND: Mr. Campanile seconded. ACTION: The motion passed unanimously.

PROBATION SUMMARY

Ms. Compton reported that at the meeting in July 2020, there were 2 probationers removed from probation as they have met their requirements. She stated that the only probationer at this point is Mr. Branson whose requirements are to provide proof of insurance (received), pay fine and costs and to take continuing education and SOP courses.

OLD/NEW BUSINESS

NONE

PUBLIC COMMENT

NONE

ADJOURNMENT was at 11:01 a.m.