

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 1225

(Delegate Dumais, *et al.*)

Judiciary and Health and Government
Operations

Judicial Proceedings and Budget and Taxation

Compensation to Individual Erroneously Convicted, Sentenced, and Confined or
Whose Conviction or Adjudication is Reversed

This bill makes several changes to existing provisions pertaining to payments by the Board of Public Works (BPW) to individuals erroneously convicted, sentenced, and confined under State law for a crime the individual did not commit. Among other provisions, the bill (1) requires, rather than authorizes, BPW to make these payments; (2) establishes standards for determining the amount of compensation BPW must provide; (3) requires BPW to provide the individual with specified services free of charge; and (4) establishes a subtraction modification against the State income tax for the amount of compensation and the value of services provided. **The bill applies prospectively to compensation awarded by BPW on or after the bill's July 1, 2018 effective date. The bill's subtraction modification applies to all taxable years beginning after December 31, 2017.**

Fiscal Summary

State Effect: Potential significant increase in general fund expenditures for BPW. General fund expenditures for the Comptroller increase by \$36,000 in FY 2019 only. Revenues are not anticipated to be affected, as discussed below.

Local Effect: Minimal decrease in local expenditures if the State assumes payment of refunds paid by local jurisdictions. Any additional workloads for State's Attorneys can be handled with existing budgeted resources. Local revenues are not affected.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

BPW Authority and Compensation Amounts

The bill requires, rather than authorizes, BPW to compensate a person erroneously convicted, sentenced, and confined under State law for a crime the individual did not commit who meets statutorily specified requirements. Compensation must be equal to the greater of (1) \$50,000 for each year that the individual was in custody or (2) the actual damages sustained by the individual, including the amounts of any fines, governmental fees, costs, and restitution previously paid by the individual and determined by a court to be owed to the individual. In addition to this compensation, BPW must compensate the individual a reasonable amount for payment of the individual's living expenses on release from confinement, not to exceed \$10,000.

BPW may provide additional compensation for appropriate counseling, including financial counseling, to the individual erroneously convicted.

Eligibility for Compensation

The bill establishes that an individual is eligible for compensation if a State's Attorney certifies that the individual's conviction was made in error and removes the requirement that the certification comply with § 8-301 of the Criminal Procedure Article.

Maintenance of Separate Legal Action

An individual who seeks compensation from BPW is prohibited from filing or maintaining a separate legal action for compensation from the State or a local government for an erroneous conviction, sentence, or confinement. However, if BPW denies the individual's application, the individual may maintain such a separate legal action.

Services to Compensation Recipients

BPW must direct the appropriate State agency or service provider, or contract with the appropriate entity, to provide the following to a compensation recipient free of charge:

- a State identification card and any other document necessary for the individual's health or welfare on the individual's release from confinement;
- housing accommodations available on the individual's release from confinement for up to five years;

- life skills education and training and job/vocational training until the recipient elects to no longer receive the education and training;
- health care and dental care for at least five years after the individual's release from confinement; and
- access to enrollment at and payment of tuition and fees for attending a public senior higher education institution, a regional higher education center, or the Baltimore City Community College for a period of enrollment of up to five years.

Reentry Plans

BPW must contact a compensation recipient before the recipient's release from confinement to develop a plan for providing the aforementioned services. The purpose of the plan is to ensure that the individual is able to successfully reenter and reintegrate into the community after the individual has been released from confinement.

Payments to Others by BPW

The bill repeals statutory prohibitions on BPW payments to a person other than the erroneously convicted individual but retains an existing statutory prohibition on a compensation recipient paying another person for services rendered in connection with the collection of the compensation from the compensation received. The bill clarifies that despite this prohibition, an individual may contract for legal services to determine the individual's innocence, obtain a pardon, obtain the individual's release from confinement, or obtain BPW compensation.

Reporting Requirements

By December 31, 2018, and annually thereafter, BPW must submit a report to the General Assembly on any compensation awarded and services provided to erroneously convicted individuals.

Payments for Court-ordered Refunds of Fines, Fees, Costs, or Restitution

With respect to an individual who does not receive compensation from BPW as described above, if a court reverses finally the conviction or adjudication of the individual and orders the refund of fines, governmental fees, costs, or restitution paid by the individual in connection with the conviction or adjudication, BPW must compensate the individual for the amount associated with the court-ordered refund.

Current Law: A person charged by indictment or criminal information with a crime triable in circuit court and convicted of that crime may, at any time, file a petition for writ

of actual innocence in the circuit court for the county in which the conviction was imposed if the person claims that there is newly discovered evidence that (1) creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined and (2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331.

In ruling on a petition, the court may set aside the verdict, resentence, grant a new trial, or correct the sentence, as the court considers appropriate. The court must state the reasons for its ruling on the record. A petitioner in a writ of actual innocence proceeding has the burden of proof.

Section 8-301 of the Criminal Procedure Article authorizes a State's Attorney, upon request of a petitioner for a writ of actual innocence, to certify that a conviction was in error if (1) the court grants the petitioner's petition for relief; (2) the court sets aside the verdict or grants a new trial when ruling on the petitioner's petition for writ of actual innocence; and (3) the State's Attorney declines to prosecute the petitioner because the State's Attorney determines that the petitioner is innocent.

BPW may grant payments to an individual erroneously convicted, sentenced, and confined under State law for a crime the individual did not commit. BPW is authorized to grant an amount commensurate with the actual damages sustained by the individual but is also authorized to grant a reasonable amount for any financial or other appropriate counseling for the individual due to the confinement. An individual is eligible for these payments if (1) the individual has received from the Governor a full pardon stating that the individual's conviction has been shown conclusively to be in error or (2) the State's Attorney certifies that the individual's conviction was in error under § 8-301 of the Criminal Procedure Article.

BPW must make payments from money in the General Emergency Fund or money that the Governor provides in the annual budget. BPW may only make payments to the erroneously convicted individual, and the payments can be made in a lump sum or installments.

An individual is prohibited from paying any part of a received payment to another person for services rendered in connection with the collection of the payment. An obligation incurred in violation of this prohibition is void, and a payment made in violation of this prohibition must be forfeited to the State. However, an individual may contract for services to determine the individual's innocence, obtain a pardon, or obtain the individual's release from confinement.

Background: According to the Judiciary, there were 194 petitions for writs of actual innocence filed in the State's circuit courts between fiscal 2014 and 2016. There were 64 petitions filed in the State's circuit courts (excluding Montgomery County) during

fiscal 2017. None of the State’s jurisdictions maintains data on the number of petitions for writs of actual innocence granted or denied.

The Maryland State’s Attorneys’ Association advises that it does not have information on any State’s Attorney certifying that a conviction was made in error since the effective date of legislation establishing that authority (October 1, 2017). However, BPW advises that it has received one grant application for \$1.2 million from an applicant who has a certificate of a conviction made in error from a State’s Attorney.

BPW Payments

Exhibit 1 contains information on BPW payments from 1984 through 2004 (the year of the most recent payment) as well as the base payment amounts proposed under the bill.

Exhibit 1
BPW Actual Payment Amounts and
Base Payment Amounts under the Bill

<u>Year</u>	<u>Incarceration Period</u>	<u>Actual Amount of BPW Award</u>	<u>Base Amount Proposed*</u>
2004	26 years, 10 months	\$1.4 million	\$1.34 million
2003	19 years, 8 months	900,000	983,333
1994	9 years	300,000	\$450,000
1987	11 years	250,000	550,000
1984	11 months	16,500	45,833

BPW: Board of Public Works

*Based on a rate of \$50,000 per year the individual spent in custody. Does not include living expenses and services required under the bill. An individual may receive a higher base amount if the individual’s actual damages total an amount greater than \$50,000 per year the individual spent in custody.

Source: Department of Legislative Services

BPW advises that payments are made in lump sum payments or installments. Initial payments are made from BPW’s contingency fund (also known as the General Emergency Fund), which is usually budgeted at \$500,000 annually and from which payment in full or an initial installment payment may be made. Future installments are made from BPW’s Settlement and Judgments Fund. The fund is usually not funded unless a specific amount has been authorized. The last time that fund received an appropriation was fiscal 2015.

Pardons and Exonerations

Pardons are granted at the discretion of the Governor. Being erroneously convicted, sentenced, and confined under State law for a crime the individual did not commit is not a prerequisite for a gubernatorial pardon. Data is not immediately available on the number of individuals erroneously convicted, sentenced, and confined under State law for crimes they did not commit.

The National Registry of Exonerations is a project of the University of California Irvine Newkirk Center for Science and Society, the University of Michigan Law School, and the Michigan State University College of Law. The registry, which is based on publicly available information, collects, analyzes, and compiles information about known exonerations of innocent criminal defendants since 1989. The registry lists information for 25 exonerations in Maryland.

Task Force to Study Erroneous Convictions and Imprisonment

Chapter 800 of 2017 established the Task Force to Study Erroneous Conviction and Imprisonment, which is staffed by the Governor's Office of Crime Control and Prevention. The task force must (1) study the process for establishing an erroneous conviction; (2) study the processes and standards for designating an erroneous conviction in other states; and (3) make recommendations on whether the State should create and implement a new process to designate an erroneous conviction and determine innocence. The task force was required to report its findings and recommendations to the Governor and General Assembly by December 15, 2017; however, the final report has not yet been issued. The task force terminates September 30, 2018.

Recent Supreme Court Activity

In *Nelson v. Colorado*, 581 U.S. ___ (2017), the U.S. Supreme Court held that Colorado's Compensation for Certain Exonerated Persons Act (Exoneration Act) violates the right to due process under the Fourteenth Amendment. The petitioners in the case both had their convictions reversed and/or vacated through postconviction review. One of the petitioners was acquitted of all charges on retrial, and the state elected not to appeal or retry the other petitioner's case. Following invalidation of their convictions, both petitioners made motions in the applicable trial courts for refunds of the costs, fees, and restitution they had paid. One petitioner had her motion denied in the trial court while the other petitioner was granted a refund of costs and fees but not restitution.

The Colorado Court of Appeals determined that both petitioners were entitled to pursue refunds of their costs, fees, and restitution. However, the Colorado Supreme Court reversed that decision and held that Colorado's Exoneration Act was the sole authority for

these refunds and because the petitioners had not filed claims under that statute, the court could not order refunds for them. The court also determined that the statute did not present a due process issue, even though it authorizes the state to keep conviction-related assessments paid by a prevailing defendant, unless the defendant pursues an independent civil proceeding in which the defendant must prove his/her innocence by clear and convincing evidence. The U.S. Supreme Court conducted its own due process analysis and subsequently reversed the Colorado Supreme Court's decision. According to the court, even though the petitioners made their various payments when their convictions were in place, they were presumed innocent once their convictions were erased. Thus, Colorado cannot deem them presumed innocent under one scenario but guilty for the purposes of monies paid in connection with those convictions. The concurring opinion agreed with the decision but disagreed with the methodology used and the lack of distinction in the majority opinion between restitution and the other types of payments made.

The court released its opinion on April 19, 2017. However, on March 23, 2017, Colorado's governor signed into law legislation granting defendants whose convictions are overturned under specified circumstances the right to a refund of monetary payments made relative solely to the conviction, subject to specified procedures. Colorado's law took effect September 1, 2017.

State Revenues: Establishing a subtraction modification against the State income tax for the amount of a compensation and the value of any services provided by BPW is not expected to materially affect State revenues. Based on currently available information, it appears that these payments are not included in federal adjusted gross income under the Internal Revenue Code and are, therefore, exempt from State income taxation.

State Expenditures: General expenditures increase, perhaps significantly, for BPW to provide compensation and fund and/or provide services in accordance with the bill's requirements. General fund expenditures increase minimally due to BPW payments for court-ordered refunds of conviction-related fines, fees, costs, and restitution paid by an individual whose conviction has been reversed. General fund expenditures decrease minimally for the Judiciary to the extent that BPW assumes payments of refunds currently paid by the Judiciary in applicable cases. BPW can develop procedures to implement the bill's provisions using existing resources. In addition, general fund expenditures for the Comptroller increase by \$36,000 in fiscal 2019 only for one-time updates to relevant tax forms and instructions.

The magnitude of the bill's overall effect on general fund expenditures cannot be reliably determined at this time and depends on the (1) number of individuals awarded BPW compensation as a result of the bill; (2) the effect of the bill's minimum award calculation on compensation amounts; and (3) the need for services by compensation recipients and the costs associated with those services.

This estimate does not address:

- the feasibility of BPW to comply with the bill's timelines and any issues with provision of services according to the timelines prescribed in the bill for a compensation recipient who has already been released from confinement;
- any overlap or conflict of services or reentry plans provided by BPW with existing prisoner reentry programs, procedures, and services; and
- the eligibility of compensation recipients for services under existing programs that are required to be provided/coordinated by BPW under the bill.

Eligibility for Compensation

The bill expands the pool of eligible applicants by removing compliance with § 8-301 of the Criminal Procedure Article for a certificate of a conviction made in error from the eligibility requirements for BPW compensation. Section 8-301 requires that the following criteria be met before a State's Attorney can certify that an individual's conviction was made in error: (1) the individual was granted a petition for writ of actual innocence; (2) the court set aside the verdict or granted a new trial in response to the petition; and (3) the State's Attorney declined to prosecute the petitioner because the State's Attorney determined that the person is innocent. By removing the application of § 8-301 for compensation eligibility purposes, the bill expands the number of individuals who may be able to apply and qualify for compensation based on a certificate of a conviction made in error, depending on prosecutorial discretion.

The bill also *requires*, rather than *authorizes*, BPW to compensate eligible applicants. BPW advises that it has never rejected an eligible grant applicant. (Under current law, BPW awards grants; the bill amends statute to replace the term "grant" with the term "compensation.") However, prior to 2017, grant eligibility was based on an applicant obtaining a pardon. It is unclear what, if any, effect the bill's provision has on future compensation given the lack of experience under the 2017 statutory changes. As previously noted, BPW has received one application for a grant under the 2017 statute. The amount requested in the application is \$1.2 million.

Amounts of Compensation Awarded

The bill establishes a minimum base compensation amount of \$50,000 per year the individual was in custody (unless the individual's actual damages are greater) and requires BPW to fund and/or provide additional services. BPW advises that it does not have a particular formula that it uses in determining grant awards. However, based on information provided by BPW and included in Exhibit 1, the minimum base amount established under the bill increases general fund expenditures for compensation.

The bill removes the prohibition on payment of a grant to a person other than the erroneously convicted individual. This is likely to increase the amount of compensation requested and overall compensation amounts awarded.

The bill's requirement that BPW fund and/or provide specified services also increases general fund expenditures, potentially significantly. The magnitude of the increase in general fund expenditures depends on the need for services among compensation recipients, the length of services provided, the way in which services are implemented, and costs associated with those services. Although a reliable estimate of any increase in costs to fund and/or provide services cannot be made, *for illustrative purposes only*, the following examples illustrate the types of costs that may be incurred under the bill.

- Health care costs (required for at least five years after release from confinement): approximately \$10,000 per year based on the purchase price of a “silver plan” on the State’s health exchange for a 40-year old man, including the cost of the deductible but excluding dental care. Costs are expected to increase by at least 10% per year.
- Tuition and fees for fall 2017 at Baltimore City Community College: \$3,196.
- Average proposed fall 2018 tuition and fees at a public four-year institution of higher education: \$9,618.

BPW Implementation of Bill

The bill requires BPW to report annually on compensation awarded and services provided under the bill. BPW can handle the bill’s reporting requirements with existing budgeted resources. However, the bill also requires BPW to provide/coordinate services and develop reentry/reintegration plans for compensation recipients – both of these functions are outside the scope of BPW’s existing functions and require additional personnel. As a result, general fund expenditures for BPW increase by \$42,114 in fiscal 2019, which accounts for a 90-day start-up delay. This estimate reflects the cost of hiring one part-time social worker to assist and coordinate the development of plans and the provision of services under the bill. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Position	0.5
Salary and Fringe Benefits	\$36,911
Operating Expenses	<u>5,203</u>
Total FY 2019 State Expenditures	\$42,114

Future year expenditures reflect a full salary with annual increases and employee turnover and ongoing operating expenses.

Refunds of Costs, Fees, and Restitution

Assuming that the District Court currently pays for court-ordered refunds of costs, fines, and fees imposed in convictions rendered in that court, then BPW assumes payment of funds currently paid by the State (via the District Court) and possibly payments by local jurisdictions in circuit court cases, as discussed below. It is unclear if a victim who has received restitution must refund those funds if a court orders a refund of restitution upon reversal of the applicable conviction. If that is the case, then BPW assumes payment of refunds of restitution in District Court and circuit court cases. If the State (via the District Court) currently pays refunds of restitution in District Court cases, then the bill shifts responsibility for these payments between State-funded entities.

This estimate assumes that:

- relatively few convictions are reversed each fiscal year;
- the amounts associated with court-ordered refunds of fines, fees, costs, and restitution *actually paid* by individuals whose convictions are reversed does not rise to a significant level; and
- the bill does not increase the frequency with which courts order refunds.

The Judiciary advises that, barring a case-by-case analysis, information is not readily available on the number of convictions reversed. However, the Colorado experience may provide some context. According to the fiscal analysis for the recent Colorado legislation, Colorado's Judiciary Department advised that the Colorado Court of Appeals overturned 45 criminal cases on direct appeal. The analysis also noted that, according to a legal opinion in *People v. Nelson* (one of the lower court cases leading to the U.S. Supreme Court case), the department estimated that, as far back as 2005, the number of overturned cases in Colorado has not exceeded 67 per year. However, the Colorado analysis noted that information was not available on how many of the overturned cases involved dismissals of charges or acquittals upon retrials (two criteria included in the Colorado statute) or the number of restitution orders. The estimate was also unable to estimate the cost of future refunds.

Local Expenditures: Local expenditures decrease minimally to the extent that the bill results in BPW assuming payments for refunds currently paid by local jurisdictions in circuit court cases.

Small Business Effect: The bill may have a meaningful impact on attorneys and other small businesses that are able to receive compensation from BPW as a result of the bill.

Additional Comments: The bill requires BPW to meet specified requirements prior to an erroneously convicted individual being released from confinement. The extent to which BPW can meet this requirement is unclear at this time. According to BPW, most of these individuals are released immediately (same day/night) following the determination that they are wrongfully confined (which is the basis of an individual's eligibility for BPW compensation). Every BPW award in Exhibit 1 was made following a gubernatorial pardon, which occurred after the recipient had been released from confinement.

Additional Information

Prior Introductions: None.

Cross File: SB 987 (Senator Kelley, *et al.*) - Judicial Proceedings and Budget and Taxation.

Information Source(s): Comptroller's Office; Maryland State's Attorneys' Association; Maryland Higher Education Commission; Baltimore City Community College; University System of Maryland; St. Mary's College of Maryland; Department of Public Safety and Correctional Services; Board of Public Works; National Registry of Exonerations; Department of Legislative Services

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