

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 191 (Senator Kelley, *et al.*)
Judicial Proceedings

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 coordinate or contract for the provision of specified services to the individual 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, 2019 effective date. The bill's subtraction modification applies to all taxable years beginning after December 31, 2018.**

Fiscal Summary

State Effect: Potential significant increase in general fund expenditures for BPW. General fund expenditures for the Comptroller increase by \$37,000 in FY 2020 only. Revenues are not anticipated to be affected, as discussed below.

Local Effect: Potential significant decrease in local expenditures if BPW pays claims that might otherwise be brought against local governments. Any additional workloads for State's Attorneys can be handled with existing budgeted resources. 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; the bill 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.

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.

Regulations and Reporting Requirements

By September 1, 2019, BPW must adopt regulations to establish procedures for an individual who seeks compensation for an erroneous conviction. By December 31, 2019, 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:

BPW Payments

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.

Certification of Conviction in Error

On written request by the petitioner, the State's Attorney may certify that a conviction was in error if (1) the court grants a petition for writ of actual innocence; (2) in ruling on a petition for writ of actual innocence, the court sets aside the verdict or conviction or schedules the matter for trial or grants a new trial; and (3) the State's Attorney declines to prosecute the petitioner because the State's Attorney determines that the petitioner is innocent.

Writ of Actual Innocence

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:

- if the conviction resulted from a trial, creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined; or
- if the conviction resulted from a guilty plea, an Alford plea, or a plea of *nolo contendere*, establishes by clear and convincing evidence the petitioner's actual innocence of the offense or offenses that are the subject of the petitioner's motion; and
- could not have been discovered in time to move for a new trial under Maryland Rule 4-331.

If the conviction resulted from a trial, in ruling on a petition for writ of actual innocence, the court may set aside the verdict, resentence, grant a new trial, or correct the sentence, as the court considers appropriate.

If the conviction resulted from a guilty plea, an Alford plea, or a plea of *nolo contendere*, when assessing the impact of the newly discovered evidence on the strength of the State's case against the petitioner at the time of the plea, the court may consider admissible evidence submitted by either party in addition to the evidence presented as part of the factual support of the plea that was contained in law enforcement files in existence at the time the plea was entered. If the court determines that, when considered with admissible evidence, in addition to the evidence presented as part of the factual support of the plea, that was contained in law enforcement files in existence at the time the plea was entered, the newly discovered evidence establishes by clear and convincing evidence the petitioner's actual innocence of the offense or offenses that are the subject of the petitioner's motion, the court may:

- allow the petitioner to withdraw the guilty plea, Alford plea, or plea of *nolo contendere*; and
- set aside the conviction, resentence, schedule the matter for trial, or correct the sentence, as the court considers appropriate.

When determining the appropriate remedy, the court may allow both parties to present any admissible evidence that came into existence after the plea was entered and is relevant to the petitioner's claim of actual innocence. In any event, the court must state the reasons for its ruling on the record.

If the petitioner was convicted as a result of a guilty plea, an Alford plea, or a plea of *nolo contendere*, an appeal may be taken either by the State or the petitioner from an order entered by the court.

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. In fiscal 2018, 47 writs of actual innocence were filed in the circuit courts. Information is not readily available on the number of petitions for writs of actual innocence granted or denied.

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 29 exonerations in Maryland. Four of the exonerations occurred on or after April 21, 2018.

In May 2018, Baltimore City agreed to pay one of the exonerees \$9 million to resolve a lawsuit that had lasted seven years; he was convicted in 1988 and released from prison in 2008. In November 2017, a federal jury awarded another one of the exonerees \$15 million for his wrongful conviction for the murder of his girlfriend.

Baltimore City Gun Trace Task Force

The Gun Trace Task Force was created in 2007 as an elite unit within the Baltimore City Police Department intended to pursue violent criminals and persons illegally possessing and using guns. In 2017, eight of the nine members of the task force were charged with crimes including racketeering, robbery, extortion, overtime pay fraud, and filing false paperwork. The officers allegedly pocketed hundreds of thousands of dollars discovered while searching the homes and cars of criminals and some innocent civilians. All eight members who were indicted either pled guilty or were convicted of several federal charges.

According to news reports, an estimated 1,700 cases may have been affected by the task force's activities. The Office of the State's Attorney for Baltimore City is reviewing past cases where task force officers were material witnesses to determine if convictions need to be vacated. The officers involved may have committed crimes as far back as 2008. According to a December 2018 news report, city prosecutors have vacated 225 convictions.

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 was required to (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 issued its final report on December 1, 2018. The recommendations of the task force are reflected in this bill.

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 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 fund expenditures increase, perhaps significantly, for BPW to provide compensation and fund 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 \$37,000 in fiscal 2020 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; (3) the amount of actual damages claimed and paid; and (4) 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 coordination/provision of services according to the timelines prescribed in the bill for a compensation recipient who has already been released from confinement;
- any overlap of services funded/coordinated by BPW with existing prisoner reentry programs, procedures, and services;
- the eligibility of compensation recipients for services under existing programs that are required to be funded/coordinated by BPW under the bill; and
- any conflict between eligibility requirements for programs (including compliance requirements for federal funding received by programs administered by the Department of Labor, Licensing, and Regulation) and the bill's requirement that compensation recipients receive specified services.

This estimate assumes that BPW pays for services provided by State agencies/entities that are directed by the board to provide services to a compensation recipient.

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. According to BPW, between 1980 and 2017, the board received five petitions for relief, with awards totaling \$3,214,000. In the 15 months since the effective date of the 2017 legislation expanding eligibility for BPW awards, the board has received five more petitions. All five of the petitions were from individuals with a certificate of a conviction made in error.

The pending petitions seek more than \$11.1 million on the basis of being commensurate with actual damages. BPW has not made determinations on these requests. Those requests do not account for any of the services BPW is required to coordinate or provide under the bill.

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 contract for 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 coordinate specified services also increases general fund expenditures, potentially significantly. The magnitude of the increase in general fund expenditures depends on (1) the need for services among compensation recipients; (2) the length of services provided; (3) the way in which those agencies directed to provide services actually implement those services; and (4) the 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 2019 at Baltimore City Community College: \$3,196; and
- five years of housing costs (based on median monthly rent in Baltimore according to U.S. Census Bureau data): \$60,000.

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. The two main administrative tasks for BPW are the determination of actual damages and the coordination of services for compensation recipients. BPW advises that in order to complete these tasks, it requires one social worker and one hearing officer, with costs ranging from \$176,666 in fiscal 2020 to \$245,380 in fiscal 2024.

However, the Department of Legislative Services advises that, while claims for actual damages need to be vetted, due to the lack of clarity at this time about the volume of claims and the process that needs to be implemented, it is possible that the duties of the hearing officer could be handled by the Office of Administrative Hearings (OAH), with BPW paying OAH for its share of the office’s case volume. Furthermore, while the initial volume of requests for compensation may be high, it is likely to stabilize over time, at which point BPW can reevaluate its staffing needs. Thus, this estimate includes the cost of hiring one contractual social worker to coordinate services for compensation recipients. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Contractual Position	1
Salary and Fringe Benefits	\$62,850
Operating Expenses	<u>5,515</u>
FY 2020 BPW Admin. Expenditures	\$68,365

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

This estimate does not include any health insurance costs that could be incurred for specified contractual employees under the State’s implementation of the federal Patient Protection and Affordable Care Act.

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 has historically advised 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 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 a related 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, perhaps significantly, if individuals pursue compensation from BPW in lieu of litigation against a local government and BPW pays claims that might otherwise be filed against a local government. Under the bill, an individual who seeks compensation from BPW cannot maintain a separate legal action for compensation from the State or a local government for an erroneous conviction, sentence, or confinement. Local expenditures decrease further to the extent local governments avoid litigating claims as a result of the bill. 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 Information

Prior Introductions: HB 1225 of 2018, a similar bill, passed the House with amendments and was referred to the Senate Judicial Proceedings and Budget and Taxation committees. No further action was taken. Its cross file, SB 987, received a hearing in the Senate Judicial Proceedings Committee. No further action was taken.

Cross File: HB 1184 (Delegate Dumais) - Judiciary and Health and Government Operations.

Information Source(s): Carroll, Queen Anne's, and St. Mary's counties; Board of Public Works; Department of Labor, Licensing, and Regulation; Comptroller's Office; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State's Attorneys' Association; Maryland State Department of Education; Maryland Higher Education Commission; Baltimore City Community College; University System of Maryland; Morgan State University; St. Mary's College of Maryland; Maryland Department of Health; Department of Housing and Community Development; Maryland Insurance Administration; Maryland Department of Transportation; U.S. Census Bureau; *Baltimore Sun*; *Chicago Tribune*; AP News Service; National Registry of Exoneration; Department of Legislative Services

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