

Department of Legislative Services
 Maryland General Assembly
 2021 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 14

(Senator Kelley, *et al.*)

Judicial Proceedings

Judiciary

Compensation to Individual Erroneously Convicted, Sentenced, and Confined
(The Walter Lomax Act)

This bill makes several changes to existing provisions pertaining to payments by the Board of Public Works (BPW) to an individual erroneously convicted, sentenced, and confined under State law for a crime the individual did not commit. Among other things, the bill modifies the procedures and criteria for eligibility, including requiring an Administrative Law Judge (ALJ) in the Office of Administrative Hearings (OAH) to make specified findings related to eligibility and compensation. The bill applies retroactively to any application for compensation or benefits pending on or after the bill’s effective date. Notwithstanding any prior compensation awarded, the bill must be construed to apply retroactively to allow a person to apply for modification of any compensation awarded by BPW between January 1, 1984, and July 1, 2005, inclusive. **The bill takes effect July 1, 2021.**

Fiscal Summary

State Effect: General fund expenditures increase by at least \$3.0 million in FY 2022; future years cannot be estimated. Reimbursable fund expenditures increase by as much as \$219,900 in FY 2022; future years reflect ongoing costs. Reimbursable fund revenues increase beginning in FY 2024.

(in dollars)	FY 2022	FY 2023	FY 2024	FY 2025	FY 2026
ReimB. Rev.	\$0	\$0	-	-	-
GF Expenditure	\$2,976,100	-	-	-	-
ReimB. Exp.	\$219,900	\$199,600	\$205,800	\$213,100	\$220,600
Net Effect	(\$3,196,000)	(-)	(-)	(-)	(-)

Note: () = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: The bill is not expected to materially affect local finances or operations.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: The bill repeals provisions regarding BPW's discretion to grant payments to an individual erroneously convicted, sentenced, and confined in the State for a crime the person did not commit. The bill also repeals eligibility based on a certification from a State's Attorney under specified statutory provisions that a conviction was in error. Instead, BPW must compensate such an individual upon receipt of an order from an ALJ granting a petition for eligibility.

Petitions for Eligibility Determinations

An ALJ must issue an order that an individual is eligible for compensation and benefits from the State/BPW for being erroneously convicted, sentenced, and confined (as described below) if:

- the individual has received a full pardon from the Governor stating that the individual's conviction has been shown conclusively to be in error; or
- the ALJ finds by clear and convincing evidence that (1) the individual was convicted, sentenced, and subsequently confined for a felony; (2) the individual's conviction for the felony was reversed or vacated *and* either the charges were dismissed or the individual was found not guilty on retrial; (3) the individual did not commit the felony for which they were convicted, sentenced, and subsequently confined and was not an accessory or accomplice to the felony; and (4) the individual did not commit or suborn perjury, fabricate evidence, or by the individual's own conduct cause or bring about the conviction, which specifically does not include making a false confession or false admission or entering a guilty plea.

In determining the weight and admissibility of evidence presented by the parties, an ALJ may, in the interest of justice, give due consideration to the passage of time, death or unavailability of witnesses, the destruction of evidence, or any other factor.

An individual may petition/file a request with OAH for an ALJ to issue an order of eligibility within two years after the date on which the Governor issued a pardon, the criminal charges against the individual were dismissed, or the individual was found not guilty on retrial. If the individual is deceased, the individual's personal representative or the executor of the individual's estate may request an order of eligibility. An individual convicted, confined, and released from confinement before July 1, 2021, who has not previously received compensation from BPW, may petition for an order of eligibility no later than June 30, 2023. An individual who was awarded compensation from BPW on or before July 1, 2005, may request an order for supplemental compensation in the amount authorized under the bill on or before July 12, 2023.

A petition for an order of eligibility must be served on the State's Attorney in the county in which the conviction occurred and the Attorney General, or their designees. The State (represented by the Attorney General or designee), the State's Attorney of the county where the crime was committed, or their designees must be parties to a proceeding before the ALJ. The decision to grant or deny an order of eligibility may be appealed by either party.

If an ALJ issues an order of eligibility, the order must include the monetary award owed the individual; reasonable attorney's fees and expenses associated with the eligibility determination action; benefits to be awarded to the individual, as described below; and, if the ALJ determines that it is in the interests of the individual, a recommendation for an expedited payment schedule. A copy of the order must be delivered to BPW and any State agency or service provider ordered to provide benefits.

Calculation of Compensation and Benefits – Base Payment

BPW must compensate an individual found to be eligible in an amount equal to the total number of days of wrongful confinement after the erroneous conviction multiplied by a daily rate based on the State's most recent median household income in the year the order of eligibility is issued, as published in the American Community Survey of the U.S. Census Bureau, as specified. However, the individual may not receive compensation for any period of confinement during which the individual was serving a concurrent sentence for another conviction for which the individual was lawfully convicted and confined.

Additional Benefits

The ALJ may also direct the appropriate State agency or service provider to provide the following to the individual, 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;
- education and training relevant to life skills, job/vocational training, or financial literacy 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;
- 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 (BCCC) for a period of enrollment of up to five years; and

- reimbursement for court fines, fees, and restitution paid by the individual for the relevant crime.

Adjustments for Other Funds Received

If an eligible individual previously received a monetary award from a civil suit or entered into a settlement agreement with the State or a political subdivision of the State for the erroneous conviction, sentence, or confinement, the amount owed to the individual must be reduced by the amount of the monetary award or settlement, less any amount paid for attorney's fees and costs for litigating the award or settlement. The individual must reimburse the State for an equivalent amount if the individual receives such a monetary award from a civil suit or enters into such a settlement agreement after receiving compensation under the bill. However, the amount of the reimbursement required may not exceed the amount of the monetary award received for damages in the civil suit or settlement agreement. The State may obtain a lien against the monetary award from a civil suit or settlement agreement to satisfy this obligation.

BPW Payments of Compensation

After receiving an order of eligibility issued by an ALJ, BPW must pay the compensation, with an initial payment equal to the annual amount of the State's most recent median household income to be paid within 60 days after receiving the ALJ's order. Following this initial payment, BPW must pay the remainder of the compensation in installments paid over no more than six fiscal years or in accordance with an expedited payment schedule recommended by the ALJ.

The bill repeals provisions prohibiting BPW from paying any part of a grant to an erroneously convicted individual to any person other than the individual and prohibiting any recipient of a grant from using any part of the grant funds to pay another person for services rendered in connection with collecting the grant. The bill specifies that (1) an individual is not prohibited from contracting for services to obtain BPW compensation and (2) a person who provides these services may not charge, demand, receive, or collect payment other than reasonable attorney's fees and expenses associated with the action for compensation; otherwise, the incurred obligation is void. The bill establishes that if the eligible individual is deceased, the individual's estate has standing to be compensated.

Regulations and Reporting Requirements

By December 31, 2022, and annually thereafter, BPW must report to the General Assembly on any compensation and services awarded to erroneously convicted individuals. OAH, in consultation with BPW, must adopt regulations to govern the procedures and practices in cases brought under the bill.

Current Law: 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.

State Expenditures: General fund expenditures increase, perhaps significantly, for BPW to provide compensation in accordance with the bill's requirements, including approximately \$3.0 million in fiscal 2022 for modifications to previous grants. Reimbursable fund expenditures for OAH increase by as much as \$219,879 in fiscal 2022 for personnel to conduct hearings and implement the bill; future years reflect ongoing expenditures.

Modifications of Prior Awards/Supplemental Compensation

General fund expenditures for BPW increase by approximately \$3.0 million in fiscal 2022 for modifications to BPW awards made between January 1, 1984, and July 1, 2005 (see **Exhibit 1**).

This estimate (1) assumes that individuals who are eligible for modifications of prior awards will file and be awarded compensation in fiscal 2022; (2) is based on the most recent figure on the State's median household income in 2019 inflation-adjusted dollars from the U.S. Census Bureau (\$86,738 per year); and (3) does not account for the value of the U.S. dollar at the time of the original award.

Exhibit 1
BPW Actual Payment Amounts and
Modified Base Payment Amounts Under the Bill

<u>Year</u>	<u>Incarceration/ Confinement Period</u>	<u>Actual Amount of BPW Award</u>	<u>Modified Base Amount Under Bill*</u>	<u>Difference Between Actual Amount and Modified Amount</u>
2004	26 years, 10 months (9,794 days)	1,405,000	2,327,446	922,446
2003	19 years, 8 months (7,178 days)	900,000	1,705,780	805,780
1994	9 years (3,285 days)	300,000	780,647	480,647
1987	11 years (4,015 days)	250,000	954,125	704,125
1984	11 months (335 days)	16,500	79,609	63,109
		\$2,871,500	\$5,847,607	\$2,976,107

BPW: Board of Public Works

*Calculated using most recently available figure for Maryland median household income from the U.S. Census Bureau. Does not account for the value of the U.S. dollar at the time of the original award.

Source: Department of Legislative Services

The bill authorizes an individual who was awarded compensation from BPW on or before July 1, 2005, to request an order for supplemental compensation *in the amount authorized under the bill* on or before July 12, 2023. The bill also contains provisions regarding the amount of an initial payment, deadlines for subsequent payments, and the ability for an ALJ to authorize an expedited payment schedule. However, it is unclear if the reference to “the amount authorized” also requires that these timing provisions apply to awards for supplemental compensation. If the timing provisions do apply to awards for supplemental compensation, then BPW payments of the \$3.0 million for supplemental compensation/modifications of previous awards will be distributed among future fiscal years in accordance with the bill (one initial payment equal to the State’s most recent median household income and future installments paid within six fiscal years) or any expedited payment schedule recommended by ALJs. The actual timing of supplemental compensation payments may also vary due to the July 12, 2023 deadline for those requests.

Payments of Future Erroneous Conviction Awards Under the Bill

The bill (1) removes BPW discretion to deny or alter awards and (2) creates an opportunity for a direct path to eligibility through an independent ALJ determination. Accordingly, general fund expenditures for BPW increase, perhaps significantly, in future years if the bill results in expanded eligibility for awards. Expenditures may be mitigated to the extent that recipients receive monetary awards through related litigation and are required to reimburse the State, as specified in the bill.

BPW advises that the median amount of time subject to compensation for the 10 modern petitions granted by the board is 9,925 days. It is unclear at this time if individuals who are determined to be eligible as a result of the bill (and would not be eligible absent the bill) present claims of this magnitude. However, *for illustrative purposes only*, if even one individual with this type of claim is determined eligible as a result of the bill’s provisions, applying a median household income of \$86,738 per year to this time of confinement results in increased expenditures of \$2.4 million.

The calculation of the base award under the bill appears to be generally consistent with the approach used by BPW since 2019. However, the bill (1) allows for payments of attorney’s fees and expenses and (2) allows eligible individuals to receive additional benefits, many of which are tailored to newly released individuals and are of limited duration beginning with an individual’s release from confinement.

With respect to additional benefits, while the bill requires OAH to direct an appropriate State agency or service provider to provide these benefits free of charge, it is unclear if BPW is to reimburse these agencies and providers for services rendered, if the appropriate agency is to absorb the cost, or if another agency related to the service is to reimburse

private service providers for services rendered. Listed below are some examples of additional benefits available under the bill:

- tuition and fees at BCCC for one year, based on 30 credits per year for a State resident: \$4,400;
- participation in vocational training: at least \$5,000 (based on EARN Maryland); and
- five years of housing costs (based on median gross monthly rent in Maryland from 2014 to 2018, according to U.S. Census Bureau data): \$81,420.

This fiscal and policy note does not address any conflict between eligibility requirements for programs (including compliance requirements for federal funding received by programs administered by the Maryland Department of Labor) and the bill's requirement that compensation recipients receive specified services.

BPW Fund Balances

This estimate does not address the potential effect of the bill on BPW fund balances. Currently, BPW pays grants from erroneous convictions in installments, with the initial payment coming from BPW's contingency fund (also known as the General Emergency Fund), which is usually budgeted at \$500,000 annually; 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 bill requires BPW to pay compensation with an initial payment equal to the State's most recent median household income to be paid within 60 days after receiving the ALJ's order. Following this initial payment, BPW must pay the remainder of the compensation in installments paid over no more than six fiscal years, unless the ALJ recommends an expedited payment schedule.

BPW has historically advised that if the board has to make 10 initial payments from the fund in a given year, then the entirety of the fund will have been absorbed by the initial payments, leaving no additional funding for any other use that the contingent fund may otherwise have been put to. However, the extent to which this may occur cannot be reliably determined at this time and can only be determined with actual experience under the bill. The bill's requirement that BPW make payments in accordance with an expedited payment schedule if recommended by an ALJ further limits BPW's discretion to manage cash flow requirements.

Determinations of Eligibility

Data is not readily available on the number of requests for eligibility determinations that may be initiated under the bill. Information on caseloads and payments (other than adjustments to previously BPW payments) can only be determined with actual experience under the bill and will depend on the unique circumstances of each case. However, the Conviction Integrity Unit of the Office of the State’s Attorney for Baltimore City received approximately 170 applications in 2019, and according to news reports, convictions were vacated in approximately 800 cases involving the Baltimore City Gun Trace Task Force. Caseloads may be higher during the two-year window of eligibility for older cases established and may stabilize over time.

Office of Administrative Hearings

Reimbursable fund expenditures for OAH increase by *as much as* \$219,879 in fiscal 2022, which accounts for the bill’s July 1, 2021 effective date (but does not factor in any potential start-up delay). This estimate reflects the cost of hiring one ALJ and one docket clerk to assist with cases presented to OAH under the bill. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. OAH advises that the agency requires additional personnel should it experience an increase in the number of hearings of more than 140 cases per year. Given the potential number of statewide *applicants* (regardless of the merit of claims), this estimate assumes that OAH meets this threshold and needs additional personnel.

Positions	2
Salaries and Fringe Benefits	\$208,389
Operating Expenses	<u>11,490</u>
Total FY 2022 OAH Expenditures	\$219,879

Future year expenditures reflect salaries with annual increases and employee turnover and ongoing operating expenses.

To the extent that actual caseloads are below the 140-case threshold, then the addition of OAH personnel may allow for the development of more expertise in erroneous conviction cases.

Board of Public Works and Other Agencies – Participation in Proceedings

General fund expenditures increase, beginning in fiscal 2024, for BPW to make payments to OAH for hearings, as described below. Similarly, the bill may have an operational effect on other affected State agencies (*e.g.*, the Office of the Attorney General (OAG)) that

may/must be parties to OAH proceedings. OAH charges agencies for hearings based on two years of arrears.

State Revenues: OAH reimbursable fund revenues increase, beginning in fiscal 2024 (based on OAH billing practices), from payments from BPW for cases conducted by OAH. While the bill specifies that “the State” is a party to an OAH proceeding and designates OAG or a designee as the State’s legal representation, this estimate assumes that BPW is the designated State agency for OAH billing purposes.

OAH advises that it determines the billing rate for an agency after conducting an extensive study of the complexity of and time required to handle an agency’s cases, at which point the agency’s cases are incorporated onto OAH’s funding matrix. OAH further advises that because the cases presented under the bill are unique for the agency, OAH cannot predict the amount of time required to handle an erroneous conviction case.

Local Expenditures: The bill is not expected to materially affect State’s Attorney caseloads. This estimate assumes that the bill does not alter the inclination of individuals eligible for BPW payments to sue local jurisdictions for erroneous convictions, sentences, or confinement.

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 Budget Reconciliation and Financing Act (BRFA) of 2021 (House Bill 589/Senate Bill 493), as introduced, amends § 10-501 of the State Finance and Procurement Article by establishing that, for all settlements entered into beginning in fiscal 2021, a local government must be responsible for 50% of any payments owed by BPW to an erroneously convicted individual under Title 10, Subtitle 5 of the State Finance and Procurement Article. The bill specifies that compensation and benefits awarded in accordance with an ALJ’s order are to come from the State. However, this does not appear to preclude the State from seeking repayment from local jurisdictions under the provision proposed in the BRFA. Regardless, this analysis does not address any fiscal impact from this proposed provision.

Additional Information

Prior Introductions: Similar bills have been introduced during prior legislative sessions. HB 985 of 2020 passed the House with amendments and passed second reading in the Senate with amendments. Its cross file, SB 797, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. SB 191 of 2019 received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. Its

cross file, HB 1184, received a hearing in the House Judiciary Committee, but no further action was taken. HB 1225 of 2018 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, but no further action was taken.

Designated Cross File: HB 742 (Delegate Dumais) - Judiciary.

Information Source(s): Governor's Office; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland State's Attorneys' Association; 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 Department of Labor; Department of Public Safety and Correctional Services; Board of Public Works; Maryland Department of Transportation; Office of Administrative Hearings; Health Benefit Exchange; *Baltimore Sun*; Department of Legislative Services

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