MARYLAND OFFICE OF THE PUBLIC DEFENDER

PAUL DEWOLFE
PUBLIC DEFENDER

Paul B. DeWolfe, Public Defender of Maryland
Testimony in Opposition to HB 1277

I respectfully submit this testimony in opposition to HB 1277, which would change the classification for assistant public defenders from at-will appointments to merit-based employees.

The Office of the Public Defender is the largest law office in the state and we take pride in the caliber of our staff and services. Our agency includes dedicated, passionate attorneys who could earn more money in private practice, but remain with OPD for their entire career in part because of the opportunities and environment that we provide. More than 40% of our attorneys (226) have been with the agency for over 10 years. Most have started as line attorneys and either advanced to a supervisory or other leadership position, or determined that their passion for clients and/or litigation would make a managerial role less satisfying for them. Importantly, though, these were individualized decisions that balanced attorney interest, commitment, and skills with agency and client needs.

Because this bill significantly impacts my agency's operations and the majority of our staff, I have carefully reviewed the bill's language, conferred with the heads of departments and districts throughout my agency, spoken with colleagues in other public defender offices who have encountered similar proposals, and consulted with the Department of Budget and Management on the effects of this proposed legislation. I also reached out to all OPD staff, relaying the concerns raised below. As you likely know, this bill comes from an outspoken segment of passionate and dedicated public defenders who have partnered with AFSCME. At this time, this organization has not been elected as the exclusive representative of any bargaining unit, and does not speak for all OPD employees. Equally passionate dedicated public defenders expressed their concern about how this change may negatively impact their work and office. Several remain undecided. The leadership throughout our twelve districts and five statewide divisions share the concerns raised by this letter.

HB 1277 proposes shifting assistant public defenders from "appointed" to "employed," removing at-will employment, and placing all staff in the State Personnel Management System. On their face, these provisions appear to provide a more objective hiring process and protections for attorneys who fear discipline or reprisal but are not comfortable with current grievance avenues. However, based on the experiences of public defender offices in jurisdictions with merit-based attorney classifications, and Maryland agencies within the State Personnel Management System, I have serious concerns about the full impact of converting attorneys to merit employees and the limitations that may place on our practice and strategic advancements.

Among other things, this proposed legislation is an effort to allow for assistant public defenders to unionize with our non-attorney staff and to join the collective bargaining process for state

employees. As early as 1947, the ABA held that joining a union would violate Canon 35 (intermediaries)[1] and potentially Canon 37 (confidences).[2] ABA Formal Op. 275 (Sept. 20, 1947). It subsequently issued an informal opinion applying Formal Op. to attorneys seeking to join a labor union of government employees. ABA Informal Op. 917 (Jan. 25, 1966). In 1967, the ABA modified its stance to recognize that "lawyers who are paid a salary and who are employed by a single client employer may join an organization limited *solely* to other lawyer employees of the same employer for the purpose of negotiating wages, hours, and working conditions with the employer …." ABA Informal Op. 986 (July 3, 1967) (emphasis in the original). However, it continued to remain steadfast that attorneys who represent individual clients could not unionize and that single-client attorneys could only organize with other attorneys who represent that same employer and not with non-attorney coworkers.

Following the adoption of its Code of Professional Responsibility, which replaced the Canons of Ethics in 1983, the ABA noted that the disciplinary rules no longer prohibited union membership, but that ethical concerns may still be implicated, particularly with respect to EC 5-13:

> 'A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.'

ABA Informal Op. 1325 (March 31, 1975). Integrating lawyers in the State Personnel Management System implicates all of the ethical concerns raised throughout the ABA's history of considering these issues. Consistent with these concerns, attorneys with the State are predominantly excluded from the State's bargaining units, and for agencies that function similar to law offices, like OPD and the Attorney General's office, the statute protects against these concerns.

---

[1] "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries." ABA Canon of Professional Ethics, Canon 35. The Canon of Professional Ethics was replaced by the Model Code of Professional Responsibility in 1969.

[2] "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information." ABA Canon of Professional Ethics, Canon 37.

The specific implications of merit employment status, regardless of collective bargaining, will also hamper the progress that OPD has made in becoming one of the foremost public defender offices in the country. In 2012, we embarked on a strategic plan, which engaged all segments of the agency to establish our guiding pillars: to foster a culture of excellence, be united in our mission, and provide client-centered representation with tenacious and zealous advocacy. With this focus and unified mission, we have implemented measures such as strategic recruitment, hiring, training and advancement efforts, and individualized personnel decisions that have been consistently popular and successful. This includes:

- Securing the highest quality candidates outside of the point ranking process, such as providing early offers to law students prior to their graduation and bar admission;
- Providing cross-district collaboration opportunities, such as the Police Violence and Misconduct Litigation Team, Immigration Team, and the Bring Your Own Case Trainings, that allow for participation based on interest and skill rather than seniority;
- Providing opportunities for early advancement and exposure, such as allowing for misdemeanor attorneys to second seat a felony trial prior to transferring to circuit court practice;
- Establishing in-house faculty for nationally lauded training programs Gideon's Promise and the Juvenile Training Immersion Program (JTIP) that includes mid-level leaders;
- Creating specialized team assignments, such as the emerging adults teams for juvenile and felony attorneys in some jurisdictions, and the IT team assignments for core staff statewide;
- When caseloads and jurisdictional needs allow, facilitating office transfers to meet personal and agency needs – such as allowing an attorney to change jurisdictions due to a residential move; authorizing relocations to fill urgent office needs and reduce caseload disparities; and permitting staff to move to an office with a culture that better fits their personality without waiting for an open job announcement.

The merit employee system, which was not created for a legal professional environment, will jeopardize these advancements in hiring, advancement, and retention. We have recently been placing dedicated resources on identifying ways to improve our diversity in hiring and promotion, and are particularly concerned at how a merit system might counteract these efforts and, through grievances and appeals, potentially increase the racial disparities that we are working to address. The flexibility to demote and make leadership changes when needed will also be limited and time-consuming – meaning that troubled offices will have even greater barriers to improving their culture and environment.

Every year, when we present our budget to the Senate Budget and Taxation Committee and the House Appropriations Committee, our office needs are largely quantified based on caseloads. Indeed, where we deploy resources, how we determine individual case assignments, and how we identify and articulate the gaps in resources and needs are primarily based on caseloads. An overarching concern is that the merit system processes and priorities will ultimately increase

caseloads. Without the ability to make swift and nimble decisions, current employees will have to take on the cases that must be reassigned because of slower hiring processes, appeals, and protracted disciplinary actions. The merit review process and time periods for taking corrective action in the merit system may also require more intense supervision than the latitude that is now afforded to our attorneys.

Increased staffing to effectuate compliance with the extensive documentation and other protocols of the merit system will also complicate where limited budget funds are allocated. As noted in the information we provided for the fiscal note, consistent with other Maryland agencies whose staff are predominantly merit employees, we will need to establish a labor relations division -- with an estimated seven new staff positions needed. The additional supervisory documentation and monitoring required will also necessitate increasing the grade/step level of several current mid-level supervisors as well as retaining approximately 23 additional supervisors. Grievance processes will also have increased costs. In total, this will require an estimated $3 million per year.

While HB 1277 appears to intend to place assistant public defenders in the State's existing merit employment system, some of its language creates unique exceptions here that likely require amendment. This includes:

- The "for cause" language proposed at 16-203(c)(3)(I) and 16-203(f)(2), which is not included in Title 11 of the State Personnel and Pensions Article, and would make Assistant Public Defenders unique among merit employees;
- Applying the change to merit employee status retroactively, rather than the usual practice of a phase-in;
- Classifying our attorney supervisors, deputies, and team leads as professional service positions, resulting in a large portion of management and leadership converted to merit employees.

Other states have addressed the prospect of its public defenders unionizing with mixed results. Similar to Maryland, Massachusetts law would require a statutory amendment to allow for public defenders to unionize, which has yet to pass. Individual offices in large cities, such as New York, Philadelphia, and Los Angeles have unionized. These efforts have not been a cure-all for the concerns of their staff and it will not be here. As you are aware, funding and salary levels are separate from the merit process. The lack of step advancements statewide is a frustration for all agencies and nothing in HB 1277 will improve the insufficient compensation for our staff. A more rigid, bureaucratic process for personnel decisions that shifts away from our focus on client-centered representation will thwart creative efforts to reduce caseloads, slow down filling open positions, and require diverting pins and resources to fulfill these bureaucratic needs.

I remain committed to serving our clients, supporting our staff, and improving our agency with whatever outcome results from this bill. However, in all of their best interests, I urge you to issue an unfavorable report on HB 1277.

After separate review of HB1277/SB757 by the Board of Trustees for the Public Defender System for the State of Maryland, T. Wray McCurdy, Board Chair, requested the following appendix to the above testimony:

> After deliberation, debate, and thoughtful consideration, by the unanimous vote of the Board of Trustees of the Public Defender System for the State of Maryland, we are in agreement with The Office of Public Defenders position in opposition to this bill. Please note our opposition in your consideration of this bill. Thank You,
>
> Board of Trustees of the Public Defender System for the State of Maryland.
>
> | | | |
> |---|---|---|
> | T. Wray McCurdy, Esq., Chair | Kevin B. Collins, Esq. | Philip T. Cronan, Esq. |
> | Justin M. Holliman, Esq. | Renee Hutchins, Esq. | Victoria J. Lobley, Esq. |
> | Susan F. Puhala, Esq. | Andrew Radding, Esq. | Steven W. Rakow, Esq. |
> | William J. Shelton, Esq. | | |