

SB0757-483323-01.pdf

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SB0757/483323/1

AMENDMENTS
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BY: Senator Carter
(To be offered in the Finance Committee)

AMENDMENTS TO SENATE BILL 757
(First Reading File Bill)

AMENDMENT NO. 1

On page 1, in line 18, after “law;” insert “repealing a provision of law that excludes attorneys in the Office from certain grievance procedures in the State Personnel Management System;”; and after line 27, insert:

“BY repealing and reenacting, with amendments,
Article - State Personnel and Pensions
Section 12-102
Annotated Code of Maryland
(2015 Replacement Volume and 2020 Supplement)”.

AMENDMENT NO. 2

On page 4, after line 2, insert:

“Article – State Personnel and Pensions

12–102.

(a) Except as otherwise provided by law, this title applies to all employees in the State Personnel Management System within the Executive Branch and independent personnel systems.

(b) This title does not apply to:

(1) an employee who is appointed by the Governor whose appointment requires the Governor’s approval;

(2) an employee in the executive service of the State Personnel Management System;

(Over)

- (3) a temporary employee;
- (4) an attorney in the Office of the Attorney General [or the Office of the Public Defender];
- (5) a State Police officer;
- (6) an employee under § 7-601 of the Transportation Article who is subject to a collective bargaining agreement that contains another grievance procedure;
- (7) an employee, including a member of a faculty, who is subject to a contract or regulation governing teacher tenure;
- (8) a member of the faculty, an officer, or an administrative employee of Baltimore City Community College;
- (9) a student employee;
- (10) an individual who, as an inmate or patient in an institution, is employed by the State; or
- (11) an administrative law judge in the Office of Administrative Hearings.”.

Testimony_JPC_SB0757.pdf

Uploaded by: Carter, Jill

Position: FAV



THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

**Testimony of Senator Jill P. Carter
In Favor of SB0757 - Office of the Public Defender (OPD)
Attorney Placement into State Merit-Based System
Before the Judicial Proceedings Committee
on March 4, 2021**

Mr. Chairman, Vice chair, and Members of the Committee:

The Office of the Public Defender (OPD) has the largest number of “at will” employees in the Executive Branch of Maryland State Government. Under the bill, OPD would be required to classify Assistant Public Defenders into the Professional Service category under the State Personnel Management System (SPMS). It would also place Deputy Public Defenders in the Executive Service and District Public Defenders in the Management Service under the SPMS.

In most of state government, employees are categorized as Executive, Managerial, Professional and Skilled. While Executive and Managerial employees are “at will” and serve at the pleasure of the Appointing Authority, the Professional and Skilled employees are protected from discipline and termination without cause.

Assistant Public Defenders with the OPD are currently categorized as “special appointees” which means they can be terminated at any time, and for no reason. This legislation attempts to bring the OPD in line with the rest of the state by requiring that state employees who would typically be described as professional, management or executive service be so categorized at the OPD. For Assistant Public Defenders, a move into the professional service would mean that they could only be hired based on merit and terminated or disciplined “for cause”.

Assistant Public Defenders meet the definition of the professional service under the State Personnel Management System in the same way Social Workers in their Office do—who have already been appropriately categorized as professional service.

Under State Personnel Law, Professional Service is defined in SPP 6-402 as follows:

(a) Except as otherwise provided by law, a position in the Executive Branch of State government is in the professional service if the position:

(1) requires knowledge of an advanced type in a field of science or learning customarily acquired by a course of specialized intellectual instruction and study; and

(2) normally requires a professional license, advanced degree, or both.

(b) The professional service includes any other position that is determined by the Secretary to be in the professional service.

This bill is important. If an employee is constantly looking over their shoulder with the thought that they could be terminated without just-cause, they are less likely to have high morale; they become more fearful on the job, and they know there are minimal protections from being terminated for reasons completely unrelated to their job performance. It is one thing to ask high-level state officials to take this risk. It is something else to impose that risk on professionally qualified, long-term employees with non-political jobs.

We do have one technical amendment which was left out of the original draft. It provides access to the grievance procedure for attorneys in the OPD which is in line with the original intent of the Bill.

SB 757 is common sense, and it is the right thing to do for these state employees. Assistant Public Defenders fulfil the duty of ensuring all Marylanders have access to indigent defense, regardless of who is Governor. That's how we should want this system to work. Let's make sure our Public Defenders have the opportunity to serve out their careers as other state employees do, without the fear of being terminated for no reason at all.

For these reasons, I ask for a favorable report on SB 757 from this committee.

Respectfully,

A handwritten signature in blue ink that reads "Jill P. Carter". The signature is written in a cursive, flowing style.

Jill P. Carter

SB757_AFSCME3_FWA.pdf

Uploaded by: Gilmore , Denise

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Patrick Moran - President

Testimony
SB 757 - State Personnel Management System - Office of the Public Defender – Placement
Favorable with Amendment

AFSCME Council 3 supports SB 757. This legislation addresses the large number of “at-will” state employees in the Office of the Public Defender. SB 757 would provide that assistant public defenders who would otherwise be described as “professional” under the State Personnel Management System (SPMS) be removed from the category of “special appointee.”

Under State Personnel Law, a “Special Appointee” is described under 6-405 in SPP as:

- (1) a position to which an individual is directly appointed by the Governor by an appointment that is not provided for by the Maryland Constitution;
- (2) a position to which an individual is directly appointed by the Board of Public Works;
- (3) as determined by the Secretary, a position which performs a significant policy role or provides direct support to a member of the executive service;
- (4) a position that is assigned to the Government House;
- (5) a position that is assigned to the Governor's Office; and
- (6) any other position that is specified by law to be a special appointment.

The employees that this bill addresses fit in #6. While there may be reasons for the other 5 types of employees to be “special appointees”, it is hard to find one for the assistant public defenders.

There are roughly 425 assistant public defenders in Maryland, all of whom are categorized as “special appointees.” This means that they can be terminated at any time, and for no reason or regard for their job performance. Similarly situated state employees with professional licenses and advanced degrees fall under the “professional” service category under the SPMS; including psychologists in other state agencies or social workers in the OPD who all already have merit status. It is also worth noting that in 2010, the Maryland Senate passed SB 97 by a vote of 45-0 which repealed the “at-will” status of the Public Defender. This Bill was enacted under chapter 223 (2010) and now the Public Defender himself can only be terminated “for cause.”

This Bill is important because when employees are forced to operate in constant fear of being terminated from their job without just-cause, they are less likely to have high morale which diminishes their ability to have positive relationships at work. This Bill also requires merit-based hiring for assistant public defenders which will help to alleviate issues with transparency in the hiring process for these positions and will promote more equity.

There is a technical amendment needed in the Bill to ensure that these employees also have access to the grievance procedure under SPP 12-102.

Our assistant public defenders are dedicated professionals who deserve equal treatment in the workplace as other state employees. Please support SB 757.

Every AFSCME Maryland State and University contract guarantees a right to union representation.
An employee has the right to a union representative if requested by the employee.
800.492.1996

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OPD Position on SB 757.pdf

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Position: UNF



**Paul B. DeWolfe, Public Defender of Maryland
Testimony in Opposition to SB757**

I respectfully submit this testimony in opposition to SB 757, which would change the classification for assistant public defenders from at-will appointments to merit-based employees. This bill significantly impacts my agency's operations and the majority of our staff, so 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.

SB757 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,

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

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.

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;

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.

- 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 SB 757 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 -- particularly budgetary limitations and the challenges raised by COVID -- and it will not be here. However, I remain committed to serving our clients, supporting our staff, and improving our agency with whatever outcome results from this bill.

After separate review of 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
Justin M. Holliman, Esq.
Susan F. Puhala, Esq.
William J. Shelton, Esq.

Kevin B. Collins, Esq.
Renee Hutchins, Esq.
Andrew Radding, Esq.

Philip T. Cronan, Esq.
Victoria J. Lobley, Esq.
Steven W. Rakow, Esq.

SB 757 SMPS-Office of Public Defender-Placement (C

Uploaded by: Wilkins, Barbara

Position: INFO



Maryland

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AND MANAGEMENT

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Governor

BOYD K. RUTHERFORD
Lieutenant Governor

DAVID R. BRINKLEY
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MARC L. NICOLE
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SENATE BILL 757 State Personnel Management System – Office of the Public Defender –Placement (Carter)

STATEMENT OF INFORMATION - AMENDMENT REQUESTED

DATE: March 4, 2021

COMMITTEE: Senate Finance

SUMMARY OF BILL: SB 757 removes the assistant public defenders and all other positions in the Office of Public Defender from appointed positions to appropriate employment categories in the State Personnel Management System (SPMS). The Deputy Public Defender is in the executive service of the and the district public defender is in the management service. Employees in the professional or skill service categories may only be terminated for cause. By January 1, 2022, the Public Defender shall assign each appointee or employee of the Office to the appropriate employment category.

EXPLANATION: SB 757 converts assistant public defenders and other positions in the Office from at-will employees to merit protected employees.

A long-standing practice in the State is to not simply convert at-will employees to merit protected positions without a competitive recruitment. Typically, these positions are only converted to merit upon vacancy. Incoming employees would then gain merit-protected status after going through the state's competitive selection process. Typically, similar legislation has included provisions that make employees merit protected only upon vacancy, including Ch. 690 of 2009 that repealed the automatic at-will status of a number of groups of employees throughout State government.

The Department respectfully suggests that such an amendment is appropriate and requests that it be added to SB 757.

On page 5, strike lines 3-5, and substitute:

“SECTION 2. AND BE IT FURTHER ENACTED, That a position identified to change employment category as a result of Section 1 of this Act shall remain an at-will position until the position becomes vacant.”

**For additional information, contact Barbara Wilkins at
(410) 260-6371 or barbara.wilkins1@maryland.gov**