REPORT TO THE

UTAH LEGISLATURE

Number 2006-11

A Performance Audit

of

Post-Retirement Re-employment

December 2006

Audit Performed By:

Audit Manager	Tim Osterstock
Audit Supervisor	Maria Stahla
Audit Staff	Aaron Eliason
	Tim Salazar

Table of Contents

Table of Contents (Cont.)

Digest of A Performance Audit of Post-Retirement Re-employment

The intent of Utah's post-retirement re-employment statutes has been bypassed by select departments for select employees. This practice is not statewide; it stems from an inconsistently applied misinterpretation of statutory intent that primarily benefits a select group of professional staff. Utah's post-retirement re-employment restrictions, while more liberal than those of other states, are intended to minimize state costs for the retirement system by limiting retirees returning to work with the Utah Retirement Systems (URS). According to URS' actuary, the practice of allowing return to work within the system is costly and "particularly susceptible to abuse."

The Legislature should consider tightening the statutory restrictions of post-retirement re-employment to ensure that retirees are not allowed to immediately return to their same departments. This action will strengthen the actuarial soundness of the system and bring re-employment practices back into line with legislative intent by:

- requiring a complete break in service,
- prohibiting part-time work from qualifying as part of the six-month waiting period, and
- requiring employers to contribute to the URS system instead of to the 401(k) accounts of rehired retirees.

Chapter I: Introduction

Contrary to what the Legislature has been told in the past, reemploying retired employees is not cost neutral—it has a cost. It provides a financial incentive to employees to retire as soon as possible so they can both receive retirement payment and be reemployed, in their pre-retirement position and in their department. Actuaries in other states are finding that there is a cost to their post-retirement re-employment programs because employees are retiring earlier than they would have in the absence of the program.

We believe that some employees are retiring earlier than they would have in the absence of the program because they can return to state employment. This activity violates post-retirement re-employment

restrictions which are in place to discourage employees from retiring with the intention of returning to state employment immediately.

Chapter II: Post-Retirement Re-employment Practices Violate Legislative Intent

Of greatest note is the Utah Department of Corrections' (UDC) misinterpretation of the legislative intent of the post-retirement re-employment statute. Since 1995, departmental practice has allowed 35 employees, primarily professional staff, to bypass post-retirement restrictions and receive salary and retirement benefits concurrently. To a lesser extent, the Department of Public Safety (DPS) uses this same interpretation of the statute. For these two departments, URS has questionably allowed the statute to be interpreted on a divisional rather than a departmental separation of service level.

In contrast, URS has questionably allowed this interpretation for one employee in all other state departments. For the most part, retirees from other departments must abide by one of the three post-retirement re-employment restrictions: reemploying in another department, reemploying in the same department on a part-time basis, or reemploying in the same department six months after retirement.

Chapter III: Manipulating the Waiting Period Restrictions Violates Legislative Intent

Some departments are violating the intent of the post-retirement re-employment statute by allowing retirees to work part-time for six months and then returning full-time to the same department—usually to the same job. The financial incentive of collecting a retirement benefit in addition to a full-time salary encourages employees to retire earlier and then return to work. Unfortunately, retiring earlier and returning to full-time employment in the same job, even with six-months of part-time work, increases the cost of retiree benefits. Statute allows part-time work and full-time work after a six-month "cooling-off" period but does not intend that the part-time work be used as a bridge to return to work full-time in the same department.

Many state departments allow retirees to return to work part-time, often to complete projects or train their replacements. The practice of returning to work part-time after retirement is not problematic unless the practice is used as a way of holding a position open during the statutory waiting period. Since the statute was changed in 2000 there have been 18 retirees who moved to full-time positions in their same department after being part-time for exactly six months. Twelve of the 18 retirees were in the Department of Alcoholic Beverage Control (DABC). DABC's manipulation of retirement restrictions resulted in most of the 12 returning to their pre-retirement positions. Additionally, other

organizations have taken advantage of the statute, most notably Valley Mental Health, with a continuing re-employment program.

Chapter IV: Post-Retirement Re-employment Increases System Costs

Uncontrolled post-retirement re-employment increases overall costs of retirement systems because it encourages earlier retirement. Actuaries have shown that employees retire earlier when either provisions encouraging re-employment are passed or adequate controls are not in place. Clearly, violations of Utah's legislative intent bypass URS' controls and increase total system costs. A number of re-employment control mechanisms used by other states could be used by Utah to reduce costs. Actuaries from two other states estimate costs to their retirement systems, ranging from $39 million in the first 15 months to $105 million annually, that relate directly to these states loosening re-employment restrictions.

Recommendations

1. We recommend the Legislature consider clarifying the language in the post-retirement re-employment restrictions that defines *agency*.

2. We recommend the Legislature consider changing the post-retirement re-employment statute to prohibit any work, inclusive of part-time and contract work, from qualifying as part of the six-month waiting period to return to full-time employment.

3. We recommend the Legislature consider either changing the waiting period for full-time employment from 6 months to 12 months or eliminating the ability to return full-time to the same department without suspension of retirement benefits.

4. We recommend the Legislature consider amending the Post-Retirement re-employment statute to require employers to contribute to URS' defined benefit plan instead of making contributions to the personal 401(k) accounts of rehired retirees.

5. We recommend the Legislature consider requiring URS to provide the Legislature with cost estimates for any legislation considering post-retirement re-employment policy changes.

This Page Left Blank Intentionally

Chapter I
Introduction

The Legislature should review and strengthen the statutory restrictions on post-retirement re-employment.

Utah's post-retirement re-employment statutes have been bypassed by select departments for select employees. This practice is not systemwide; it is an interpretational problem that primarily benefits a select group of professional staff. Unlike other states, Utah's practices allow some retirees to return to their jobs and departments and keep their retirement benefits and do not require a complete break in service or suspension of retirement benefits when state retirees are reemployed in the state. In addition, Utah's required employer contribution to a 401(k) (defined contribution plan) for rehired retirees, due to cost, is not done in other states' systems. According to Utah Retirement Systems' (URS) actuary, the practice of allowing return to work within the system is costly and "particularly susceptible to abuse." The Legislature should consider tightening the statutory restrictions of post-retirement re-employment by adding clarifying statutory language that does not allow retirees to immediately return to their same department, requiring a complete break in service, prohibiting part-time work from qualifying as part of the six-month waiting period, and requiring employers to contribute to the URS system instead of to the 401(k) accounts of rehired retirees.

Contrary to what the Legislature has been told in the past, reemploying retired employees has a cost. It provides a substantial financial incentive to employees to retire as soon as possible and be reemployed. Actuaries in other states are finding that there is a cost to the post-retirement re-employment program because employees are retiring earlier than they would have in the absence of the program. We believe that some employees in Utah are retiring earlier than they would have in the absence of the program and are returning to state employment.

Restrictions Serve a Critical Purpose But Have Been Loosened

Professional staff benefit from interpretation of post-retirement re-employment restrictions.

Post-retirement re-employment restrictions are intended to control the costs of providing retirement benefits. The financial soundness of URS is based on actuarial assumptions, including when and how long benefits will be paid. Although post-retirement employment restrictions are in statute and in URS rules, some departments have more favorable

interpretations of the restrictions and rules. These interpretations substantially increase the compensation of some staff (mainly professional staff) and lead to complaints of favoritism and "double dipping" by other agency employees and the public.

Some departments' interpretations of post-retirement re-employment provisions benefit a selected group of professional staff—not every employee. Being allowed to keep retirement benefits while earning a salary and a contribution to their 401(k) accounts is a financial incentive for employees to retire as soon as eligible and return to state employment. Without restrictions in place, an employee could earn about 170 percent of his pre-retirement salary by retiring as soon as eligible and continuing to work in the same job, collecting a retirement benefit, a salary, and a generous contribution to his 401(k) account.

Re-employment Restrictions Are Set in Statute and Are Necessary

Utah Code 49-11-504 requires that URS cancel the retiree's allowance and reinstate the retiree to active member status and that the member and employer resume contributions to the URS system unless the re-employment meets one of the restrictions listed in Figure 1.1.

Post-retirement restrictions apply when retirees within the URS system wish to return to work for another URS employer.

Figure 1.1 Reemployment of a Retiree Restrictions in *UCA* 49-11-504. To return to work full-time and keep their retirement benefits, retirees must meet one of three restrictions.

- The retiree goes to work for another agency.
- The retiree is retired for at least six months and then returns to the same agency.
- The retiree is reemployed at the same agency on a part-time basis (less than 20 hours per week) and earns less than the Social Security earnings limit.

According to URS' actuary whose insights helped URS and the Legislature design the restrictions:

> These restrictions are intended to minimize abuses, while still allowing retirees who have had a genuine change of heart and wish to return to work to do so. Without these restrictions, many retirees would "retire" upon becoming eligible for an unreduced pension and would

then immediately return to work at the same position and salary. This would result in retirements occurring earlier, and would make the retirement system more expensive.

Requiring a significant period away from the job makes it more likely that the original retirement was genuine, not simply a maneuver to double dip. A member who changes agencies is presumably not in a position to manipulate the employment.

Although the restrictions are very important, the Legislature has loosened the restrictions over the past few years with the understanding that the changes were cost neutral. In 1995, when retirees were first allowed to reemploy full-time within the URS system and keep their retirement benefits, the Legislature was told by the former URS executive director that the change would be cost neutral to the system. Our position is that the change has not been cost neutral and should not have been represented as such. Costs increase when restrictions are loosened.

Post-Retirement Re-employment Restrictions Have Been Loosened

The Legislature has loosened restrictions to the post-retirement re-employment program several times, allowing more employees to retire, rehire, and keep their retirement benefits. Prior to 1995, retired public employees were prevented from returning to work for an employer within URS without loss of the retirement benefit. Returning to full-time work within the same retirement system would result in cancellation of a retiree's retirement benefits. The employee would return to active status, earning additional years-of-service credit. Returning to work part-time (less than 20 hours per week) within the same system would limit the employee's earnings up to the amount of earnings exempt from Social Security taxes. If the retiree earned more than that amount, 25 percent of the retirement benefit was suspended for the remainder of the year. If the retiree returned to work within a different system, the retiree would be subject to the same restrictions as an employee returning to part-time work within the same system.

After 1995, retirees could return to work post-retired and keep retirement benefits if returning to a different agency.

In 1995, retired public employees were allowed to work full-time in a different agency without loss of benefits. A retiree still could not return to work within the same agency without having his retirement benefit suspended and receiving additional service credit. What was considered

an agency was somewhat defined in 1995 in the form of a descriptive list. However, the list did not subordinate levels to clearly show the legislative intent of defining *agency* by the largest organization. Subordination to the largest listed organization has always been the case for counties and school districts.

In 2000, retired employees were allowed to return to full-time employment with the same agency after six months. The 2000 law made it possible for retired employees, after a six-month cooling-off period, to work again full-time for the same agency from which they retired. Also, an additional monetary benefit was included which required employers to make contributions into a 401(k) account for the retiree, rather than be paid to URS' defined benefit system.

Each of the changes to the post-retirement re-employment statute is detailed in the Appendix.

Allowing All Employees to Retire and Be Reemployed Will Increase Costs

According to URS' actuary, Utah's retirement plans are designed and funded with the assumption that not all employees will retire as soon as they are eligible. Some employees will continue working in state government and earn additional years of service. Some believe that everyone who earns 20 years of service in the Public Safety Retirement System and 30 years in the Public Employees' Retirement System should be allowed to retire because they have earned their retirement and subsequently return to work if they wish. However, Utah's retirement plan is not funded with the assumption that all employees will retire at first eligibility. Utah's retirement plan would be more expensive to fund if the assumption was made by the actuary that all employees would retire as soon as they had 20 years of service in the Public Safety Retirement System and 30 years of service in the Public Employees' Retirement System. According to URS' actuary, costs will increase if the existence of a return-to-work program changes the behavior of employees and they retire earlier than they would have in the absence of the program.

Currently, selected departments allow selected employees to retire and immediately return to full-time work, thereby treating the retirement as a years-of-service benefit.

Retire/Rehire Is a National Issue

Retire/rehire laws exacerbate state retirement unfunded liability.

Rehiring retired employees is one of the more controversial issues for public retirement systems because it gets to the heart of what a retirement system is for—is it to provide income when an employee finally stops working, or is it a reward for a specific number of years worked and, therefore, a salary supplement while the employee continues to work? The number of rehired employees continues to increase as the number of public employees eligible to retire substantially increases. In the past decade, several states have loosened their restrictions on post-retirement employment, as has Utah. However, states are now finding there is a cost to their retirement systems because employees are retiring earlier than they would have in the absence of return-to-work provisions. The retire/rehire phenomenon is exacerbating the concern over unfunded actuarial liabilities of states' retirement plans. Two states recently issued reports detailing the cost of the post-retirement re-employment programs.

A Washington Study Shows Post-Retirement Employment Increases Cost of Pension System

Several reports have been completed by groups trying to quantify the cost of rehiring retirees. One study completed in November 2005 by the State of Washington's Office of the State Actuary (OSA) concluded that post-retirement employment increases the state's pension obligations by boosting the number of early retirees. According to OSA, the expansion of the retire/rehire program has encouraged earlier retirement and greater use of retire/rehire opportunities.

Retire/Rehire will cost the state of Washington $101.5 million over the next 25 years.

The study shows that the 2001 retire/rehire expansion has a projected fiscal impact of $101.5 million over the next 25 years. If greater-than-anticipated retirement continues, the cost of the post-retirement employment program will be even higher. With the pension system already facing a $4 billion unfunded liability, Washington's lawmakers must balance the demographic challenges of an aging workforce with budgetary realities.

According to the Washington report:

> Thus, **the conclusion of the study is that the retire-rehire program has an effect on retirement behavior.** The effect is that members are retiring earlier, and earlier retirement has a retirement system cost. Why is there a cost? When retirements that were assumed and funded

to occur at a later date occur earlier, the attendant retirement benefits must be paid sooner than expected and over a longer period of time. Also, there is a loss of expected member contributions to the retirement system.

North Carolina Found That Lifting Their Salary Cap May Encourage Workers to Retire Earlier

Any policy that changes retirement behavior ultimately impacts the retirement system.

Another report, completed in February 2005 by the North Carolina Department of State Treasurer, found:

> Lifting the [salary] cap potentially encourages workers to retire earlier than they would otherwise. This poses a financial threat to the state retirement system's pension funds. Any policy that changes retirement behavior ultimately impacts the retirement systems.

Furthermore, the report stated:

> There is evidence to suggest that lifting the salary cap does in fact alter retirement behavior. The Retirement Systems' analyses of the salary cap exemption for teaching indicated that lifting the cap and allowing retirees to return to work and earn both a pension and a full salary led to accelerated retirement rates among active teachers.

The state actuary determined that there was a significant cost generated by lifting the salary cap.

Audit Scope and Objectives

This audit was requested by Speaker Curtis who had specific questions regarding the Utah Department of Corrections' retirement and rehiring process. Specifically we were asked to determine the following:

- How many employees have retired and gone back to work at the department?
- What is the cost of this policy?
- Does this policy encourage retirement and is there an increased cost to the state?
- Is this policy consistent with state policy?

After a preliminary review of the Department of Corrections' post-

retirement employment practices, we were asked to expand our review to determine the number of state employees who have used the post-retirement employment program to retire and return to government employment.

This study only reviews employees who are categorized as full- or part-time employees in state government. It does not include retirees who could potentially return to government employment on contract.

Some departments are manipulating the legislative intent of the post-retirement re-employment statutes. In Chapter II we will show that employees are bypassing legislative intent by retiring, changing divisions within a department, and immediately returning to full-time employment. In Chapter III we will show that employees are bypassing legislative intent by retiring, working part-time for six months, and then immediately returning to full-time work in the same job. In Chapter IV we will show the costs of post-retirement employment.

This Page Left Blank Intentionally

Chapter II
Post-Retirement Re-employment Practices Violate Legislative Intent

Utah Retirement Systems (URS) and the Utah Department of Corrections (UDC) have bypassed the legislative intent of the post-retirement re-employment statute. Departmental practice allows higher-level professional staff primarily to bypass post-retirement restrictions and receive salary and retirement benefits concurrently. To a lesser extent, the Department of Public Safety (DPS) has also bypassed the legislative intent of the statute. In contrast, URS has only allowed one employee in all other state departments to bypass the re-employment restrictions. For the most part, employees in other departments must abide by one of the three post-retirement re-employment restrictions—going to work for another agency, being retired for at least six months, or working part-time.

Regarding the requirement to work in a different agency, URS' actuary made the following comment:

> We have never previously seen a provision like the one in URS that allows a retired member to return to full-time employment with a different covered employer the day after retirement with no suspension of his retirement benefits. . . . The practice in Utah of treating different agencies within state government as different employers appears to us to be particularly susceptible to abuse.

"The practice in Utah of treating different agencies within state government as different employers appears to us to be particularly susceptible to abuse." –URS Actuary

We agree with the actuary that some actions allowed by Utah departments do appear, in our opinion, to be abusive. The practice of allowing re-employment within the same department has substantially increased the compensation of a small group of staff and has led to complaints of favoritism and "double dipping" by both line employees and the public.

Liberal Interpretation of Restrictions Benefits UDC and DPS

UDC and URS liberally interpret the post-retirement re-employment statute. UDC believes that transferring divisions within UDC meets the statutory requirement and USR has allowed them to do so. Thirty-five current employees (mostly professional staff) are reemployed retirees from the department. The retirees were rehired in a different division of the department and receive their retirement benefits along with their full-time salaries. DPS also bypasses the statutory requirements, allowing retired employees to immediately return to full-time work. However, DPS utilizes this practice less frequently than UDC; only six current DPS employees, mostly managers, are rehired retirees.

The Legislature never intended for employees to return to the same department.

The legislative intent of ***Utah Code*** 49-11-504(2) is to allow retirees to return to state employment and keep their retirement benefits, if they change departments. The intent was established in this bill's floor debate during the 1995 general legislative session.

URS allows UDC and DPS employees to retire from one division and be immediately rehired to another, within the same department, and still keep their retirement benefits. Allowing employees to retire and be immediately reemployed in another division increases the cost of the retirement system. Knowing that they have another job in the department has created an incentive for employees to retire earlier than they would in the absence of the rehire program. URS allows UDC and DPS retirees to be reemployed without a six-month break if they can show, on a departmental organizational chart, that the retiree changed divisions.

Inconsistent Application of Statute

Utah Code 49-11-504 is the statute governing re-employment of URS retirees. The statute requires that the retirement benefit be suspended and that the employer resume contributions, unless the re-employment meets one of the following exceptions:

- The retiree goes to work for another agency.
- The retiree is retired for at least six months and then returns to the same agency.

Interpretation of Utah's post-retirement statute hinges on the word *agency*.

- The retiree is reemployed at the same agency fewer than 20 hours per week (part-time), or if a teacher, less than a half-time teaching contract, and earns less than the Social Security earnings limit.

Utah Code allows a retiree of an agency to return to work at a different agency and not be subject to any post-retirement re-employment restrictions. Interpretation of Utah's post-retirement statute hinges on the word *agency*. ***Utah Code*** 49-11-102(4) defines what constitutes an agency as:

> (a) a department, division, agency, office, authority, commission, board, institution, or hospital of the state;
> (b) a county, municipality, school district, or special district;
> (c) a state college or university; or
> (d) any other participating employer.

Plain Language of Statute Defines Agency. Agency as used in section (a) must mean the highest category in the list. If a department is an agency, then a division within that department cannot logically also be an agency. A division is a subset of a department, not another agency. Likewise, an office within a division cannot also be an agency. However, under the interpretation used by UDC, DPS, and URS, each entity listed in section (a) is considered a stand-alone unit of government. Again, logically, this interpretation does not make sense. Following this logic makes the list inconsequential because only the smallest unit on the list would have any importance.

URS' interpretation allows self-naming of governmental units and disregards the stand-alone units in existence when the statute came into effect. For example, currently most highway patrol troopers are in the Highway Patrol Division of DPS—in separate regions. Troopers cannot retire and rehire within the same division. However, using URS' interpretation, if DPS renamed each of their highway patrol regions "offices" instead, URS says they would allow highway patrol officers to retire and be reemployed in a different regional office and keep their retirement.

URS has told us that their interpretation of the term *agency* is based on ***Utah Code*** 49-11-103 (2) which says:

> This title shall be liberally construed to provide maximum benefits and protections consistent with sound fiduciary and actuarial principals.

URS believes that the above statute gives them the charge to interpret the meaning of agency as liberally as possible to provide maximum benefits to the employees. We disagree with their use of this provision and believe that such a liberal interpretation of the statute defining *agency* could lead to negative consequences for the system.

Legislative Intent Requires Retirees to Change Departments in State Government. The intent of HB 107, passed during the 1995 session, was to allow retirees to return to state employment and keep their retirement benefits if they changed departments within the state. According to the floor senate debate in 1995, immediately preceding the vote, the Senate sponsor stated the following:

> This bill will basically remove some of the restrictions of our state employees from being able to compete fairly and effectively with other out-of-state employees. An example of this would be that presently if a person, for example, were to retire from the Highway Patrol and move to rural Utah and the rural community needs a police chief or sheriff or something of this nature a person from California could come in and take that job but a person in Utah would have to give up their retirement which creates an unlevel playing field.

The Senate sponsor continued by saying:

> I do stress the issue that it does restrict anybody from going back into the same job or even the same department that they left at retirement as a state employee.

The House sponsor's testimony during the floor debate is less clear because he uses the generic word *agency*. However, we contacted the House sponsor and he told us that the intent of the legislation was absolutely not to allow re-employment within the same department. Re-employment within the same department was never intended or even discussed. He said it was quite clear that state retirees would only be allowed to be reemployed if they changed departments. There was never any consideration of allowing retirees to be reemployed within the same department. The Senate sponsor concurs with this interpretation.

In our opinion, it is clear from both the House and the Senate sponsors that the legislative intent meant that retirees would need to change departments to keep their retirement benefits. The reason that other units of government (e.g., division, agency, office, authority, commission, board, institution, or hospital) are listed in the code is for those stand-alone units of government that are not located within departments. Such units of state government in 1995 would include: the Office of Education, the Office of the Court Administrator, the Office of the State Treasurer, and the Tax Commission.

URS Application of the Statute Is Inconsistent. URS has allowed employees to move from one division to another in UDC and DPS without loss of retirement benefits. UDC and DPS have pushed very hard, and consequently, they have generally been the only ones to be able to do this.

With other departments, URS has generally maintained that employees need to change departments to maintain their retirement benefits. Human resources managers in other departments told us that URS has refused to allow their employees to move from one division to another and keep their retirement benefits. However, in one case, URS allowed an employee to move to another division within their departments and keep their retirement benefits, as shown in Figure 2.1.

DHRM records show that 3,209 state employees retired between January 1, 1999, and June 30, 2006. Of these, 593 employees returned to work within state government. Forty-six of the rehires did not comply with the intent of post-retirement restrictions because they returned to the same department, full-time, within six months. The number of rehires by department is detailed in Figure 2.1.

Figure 2.1 Retirees Who Returned to the Same Department Full-Time Within Six Months of Retirement and Kept Their Retirement Benefits (1/1/99 – 6/30/06). The majority of employees who were allowed to retire, return to the same department within six months and keep their retirement benefits were in UDC and DPS.

State Department	Number of Employees
Utah Department of Corrections (UDC)	37
Department of Public Safety (DPS)	8
All Other State Departments	1*
Total	**46**

** A senior manager in the Department of Health.*

Figure 2.1 shows that 37 employees in UDC and eight employees in DPS were allowed to retire, immediately return to full-time employment in another division, and keep their retirement benefits. Most of these rehires were professional staff. In contrast, URS has only allowed one employee in all other state departments to immediately return to work full-time within the same department and keep his retirement benefits.

URS recognizes multiple agencies within UDC and DPS, so there is no suspension of benefits for employees.

Agency Reading Is Different from Legislative Intent. UDC and DPS state that to qualify for re-employment without suspension of retirement benefits, their employees must simply change divisions within the departments. They have used this argument with URS for many years, and it has now become the practice for URS to allow employees to return to immediate full-time employment in UDC or DPS without suspension of retirement benefits.

Post-Retirement Re-employment Facilitated By Close Organizational Relationships

An employee returning to the same department does not have the uncertainty and risk associated with competing for a job since he knows the supervisors, employees, and institutional culture. In contrast, an employee who leaves a job for another department assumes a certain amount of risk. The risk is the inability to find a suitable job with compensation, conditions, and environmental considerations. Furthermore, the employee is unfamiliar with the supervisors, colleagues, and processes for the new agency. The actuary states, "A member who

changes agencies is presumably not in a position to manipulate the employment." We believe that at the department level, manipulation of employment can take place.

This practice encourages employees to retire and rehire as soon as they have their required years of service.

Employees within UDC and DPS do not assume the risk of re-employment when retiring and being rehired within the same departments. The actuarial assumptions are based on employees remaining system members until they are ready to leave their current employment. These examples show that the changing of divisions within the department is a simple administrative function; as a result, employees have no risk and have a financial incentive to retire sooner than actuarially assumed.

At UDC, the transferability of job titles across division lines can be seen by looking at employees who have maintained the same job titles after retirement. Since 2001, five employees transferred divisions within UDC while maintaining the same job title. The longest period of separation for these five employees was four days, with two returning the day after their official retirement date. Out of these five employees only one was a line-staff employee.

For example, one UDC employee went through an internal recruitment to change divisions with the intent of retiring. He was selected for the new job in a different division but was transferred prior to his retirement. This prevented him from retiring since he was now assigned to the division he intended to work in after retirement. Without demonstrating a change in division he is not eligible to earn a full salary and receive his full pension. It is unclear how long this employee was at his new job; however, prior to his official retirement he was reassigned to his old job in the old division, where he officially retired. After retirement he was promptly rehired to the job he had applied for. Since he officially retired from his initial position his rehire was across divisions on the organizational lines, and he was not subject to statutory restrictions on his retirement benefits.

The close relationship between UDC and BOP allowed two employees to bypass the post-retirement re-employment restrictions.

In addition to moving among UDC divisions, employees also frequently move between UDC and the Board of Pardons (BOP). There is a close relationship between UDC and BOP, and employees move freely between the two groups. For example, early in 2002, an employee left UDC for a position in BOP and was there for seven months. He was allowed to return to UDC for 23 days, retire, and then immediately return to his original job at BOP. It appears the employee only

transferred to UDC to show the change in agency at retirement. The employee could not have retired from BOP and kept his job. As a side note, UDC claimed they saved $72,000 for encouraging this employee to retire. Because of the claimed savings the employee was given an $8,000 retirement incentive by UDC.

Another example also shows the close relationship between UDC and BOP and an inappropriate use of transfers that relates to post-retirement restrictions. An Adult Probation and Parole (AP&P) officer was voluntarily reassigned to BOP on November 27, 1999, where she worked as a case analyst and then a correctional specialist II. On August 30, 2003, she was transferred back to AP&P as an AP&P officer where she retired after 16 days. Immediately upon retirement, she was rehired by the BOP as a correctional specialist II, the same position she had before retirement.

Current Post-Retirement Practices Favor Professional Staff at UDC

Professional staff are more likely to receive retire/rehire opportunities than line staff.

Some UDC employees retire and immediately return to work within the UDC or the BOP. Usually these employees have agreements in place prior to retirement ensuring them another job within the department. The employees also have assurance from URS that their retirement benefits will not be adversely affected. Typically, employees retire as soon as they have 20 years of service and after they have secured another job in the department.

The number of retirees rehired by UDC and BOP has trended upward since 1995 when the Legislature liberalized the post-retirement statutes, allowing employees to work post-retired with a different agency and keep their retirement benefits. In 1995, two employees pushed to retire and be rehired by UDC. In 2005, eight employees retired and were immediately rehired. The majority of employees who retired from UDC and were rehired within six months, whether to UDC or BOP, were more likely to retire as professional staff and return as professional staff. In contrast, those employees who either changed departments or had a separation from service for more than six months were more likely to be line staff.

For the purpose of this report, department management, supervisors, and administrative staff in professional positions are classified as

professional staff. All other staff are classified as line staff and are predominately corrections and AP&P officers. These classifications are important because it is clear that professional staff have opportunities to change divisions within the department more easily than line staff.

Employees Typically Have New Placement Prior to Retirement

Employees can easily retire from one division and immediately return to work in another of UDC's five divisions—Administrative Services, AP&P, DIO, Executive Offices, and Utah Correctional Industries (UCI). Since 1995, 35 UDC employees retired and immediately returned to another division of UDC or BOP without honoring the six-month waiting period. The largest movement was to BOP and the executive office of UDC. Specifically, 13 of the 35 (37 percent) of the retirees moved to BOP or the executive office. BOP is included because of its close affiliation with UDC and its work with the same population. There is historically a natural movement from UDC administration to BOP. Our examples earlier in the chapter illustrate this relationship.

Moves between UDC divisions are allowed by UDC.

When employees approach the 20 years of service requirement for an unreduced retirement, they begin looking for another position in another division within the department. This process can take place in several ways. An employee can get a promotion to a managerial position, or the employee can apply for an internal recruitment position posted on the department job board. The employee can also leave the department and return as a line-staff employee. When an employee retires and returns within six months to a different division, an organizational chart is sent to URS showing the change, and the employee requests verification that his retirement benefits will not be cancelled.

Employees return to work immediately after retirement, which shows that they had a position secured prior to retirement. The employees leave their current jobs on the official day of their retirement and immediately return to new positions in different divisions. Figure 2.2 shows the number of days between official retirement and rehire.

Figure 2.2 Number of Days Between Official Retirement and Return to Work for UDC and BOP Employees Returning in Less Than Six Months. The majority of retirees return to full-time employment within a week of retirement.

The majority of UDC retirees return to work within a week of retirement.

Days Between Retirement and Rehire	Number of Employees	Percent of Total
0-7	26	74%
8-14	5	14
15-30	2	6
31-180	2	6
Total	**35**	**100%**

We found that some UDC employees contacted URS within days of being approved for positions in different divisions of the department. In contrast, employees from other departments or government entities typically contact URS at least six months earlier than their anticipated retirement date. Members usually have several contacts with URS leading up to the actual retirement. We believe that UDC employees contacting URS within days of their approval for new jobs suggests that they were taking advantage of re-employment opportunities and, therefore, this changed their behavior toward retirement.

As an example, UDC's former executive director offered an employee a promotion and wrote a letter describing the promotion on June 11, 2003. The day before, the employee contacted URS and said he was retiring and needed to have a rush put on his retirement. The employee told URS that an organizational chart showing that he was moving to a different division would be sent, and the member said he wanted approval of the rehire without the six-month waiting period. Since then, the system has paid approximately $136,000 in retirement benefits for this individual. Additionally, the system has forgone $69,000 in contributions that it would have received had the employee remained an active member over these three years. We estimate the total financial impact to the system from this one employee to be $205,000 over three years.

Professional staff are much more likely than line staff to bypass the six-month statutory waiting period and immediately return to the same

agency, as shown in Figure 2.3. This practice confirms the staff's perception at UDC that professional staff receives special favors.

Figure 2.3 Position in Organization of Employees Who Retired And Were Rehired within UDC and BOP, CY 1995-2006.
Retirees in professional staff positions typically return to work immediately without abiding by the six-month waiting period.

Position Rehired To	Did Not Meet Statutory Six Month Waiting Period	Percent of Total	Met Statutory Intent	Percent of Total
Professional staff	25	71%	4	31%
Line Staff	10	29	9	69
Total	**35**	**100%**	**13**	**100%**

Figure 2.3 shows 35 retirees returned to the same agency without abiding by the intent of the statute, which requires a six-month waiting period before returning to the same agency. Twenty-five of 35 employees (71 percent) were in professional positions and returned to professional positions. The remaining 10 retirees returned to line-staff positions. Only 5 of the 35 positions came back as correctional officers, the position in greatest need in the department. Conversely, 13 rehires met the statutory six-month waiting period. Nine of the 13 retirees (69 percent) were rehired as line-staff. Only 4 of the 13 were rehired as professional staff.

Management Uses Retirement as an Incentive

Rehired employees have told us that the retirement and re-employment program is used in certain circumstances as an incentive program. The retire/rehire provision's ability to improve an employee's financial circumstances has been used by the department in negotiations. For example, an employee being promoted was given two options. He could take either take the promotion or be allowed to retire and be rehired at a lower full-time salary. This employee chose the retire/rehire option because he went from approximately $77,000 per year to an estimated $133,000 per year with his full-time salary and retirement compensation.

Another example of management use of retirement for professional staff is the reclassification of a position for a senior manager. A previous merit position was reclassified as an investigator III position that the retired manager did not have to compete for through an open recruitment environment. He was given the highest step available, contrary to the standard practice of rehiring employees at midrange regardless of years of service.

In contrast, another employee retired as a line staff from AP&P and was also hired in an investigator III position at the same level in the UDC organization's executive office. She went through a recruitment and was brought in at midrange. Both positions have the same job title, both are in the executive offices, and both rehires happened at relatively the same time, March 2005. The major difference in these examples is that one employee was a senior manager at retirement while the other was a line staff with AP&P.

UDC's practice to retire and rehire department employees without the six-month waiting period is also seen, to a lesser extent, at the Department of Public Safety (DPS).

Liberal Interpretation Benefits Professional Staff In The Department of Public Safety

DPS managers do not wait six months before returning to full-time employment.

Eight DPS employees retired and were immediately rehired within the department, bypassing the six-month statutory waiting period. DPS and URS used the same interpretation as UDC to avoid the six-month waiting period by stating that the employees were moving from one division to another. Also, the DPS commissioner used the justification that his appointees are exempt from the six-month cooling-off period. However, the appointive officer exemption does not apply as DPS has used it.

DPS Employees Move to a Different Division Or Position and Keep Their Retirement Benefits

Eight DPS managers and employees retired and immediately returned to work within another division of DPS. In all cases, these employees had agreements in place prior to retirement ensuring them another job with the department. They also had assurance from URS that their retirement benefits would not be cancelled.

Figure 2.4 Number of Days Between Official Retirement and Return to Work for DPS Employees Returning in Less than Six Months. DPS retirees return to full-time employment within a week of their retirement.

Days Between Retirement and Rehire	Number of Employees	Percent of Total
0-7	6	75%
8-14	1	13
15-30	1	13
Total	**8**	**100%**

Figure 2.4 shows that the majority of employees retired and returned to full-time work immediately. Three returned to different divisions as managers, two moved to different divisions as trainers, two moved to different divisions as technical support people, and the eighth employee was shown to move to a different division for only six months before returning to his previous position. DPS has several divisions, and employees moved from one to another. We saw the most movement to the Division of Homeland Security.

Retire/Rehire Program Was Used to Move Employees Around the Department

The former DPS commissioner used the retire/rehire program to move people around the department and used the justification that he appointed his senior staff and they were, therefore, exempted from the six-month cooling-off period. In other cases he moved people for various reasons.

Appointive Officer Exemption Is Not Applicable. In discussing the circumstances of the retire/rehire with each employee and the commissioner, we found that in three of the eight cases the employees told us they were interested in retiring and told the commissioner of their retirement plans. They told us the commissioner asked them to stay on in the department and he said would allow them to retire and be rehired if they could get URS to approve the retire/rehire. In these cases, the commissioner believed that since he appointed these individuals, they were exempt from the six-month restriction.

We believe the commissioner was trying to use the exemption in the post-retirement employment restrictions that allows appointive positions to be exempted. However, according to URS, appointive positions are only those positions that are for a fixed term of office. The appointive officer exemption does not apply as DPS has used it. It does not apply to appointments made by a department head.

HB 253 in the 2004 General Session added "appointive officers" to elected positions as exempt from the six-month same employer restrictions. ***Utah Code*** 49-11-102 states:

> (8) "Appointive officer" means an employee appointed to a position for a definite and fixed term of office by official and duly recorded action of a participating employer whose appointed position is designated in the participating employer's charter, creation document, or similar document, and who earns during the first full month of the term of office $500 or more, indexed as of January 1, 1990, as provided in Section 49-12-407.

In another case, a division director wanted to make management changes in his division and wanted to replace a bureau chief. The division director told the employee that she was going to be replaced. A few weeks later, the employee was told that she was to retire and she would be rehired into a lesser position in the organization. The employee was reluctant to retire but she said she was forced into retirement.

In the other three cases, department employees applied for and got jobs in different divisions and worked through their human resources department and URS to retire and keep their retirement benefits.

In Order to Satisfy URS' Requirements, the Department Maneuvered Divisional Changes. To accommodate an employee and satisfy URS' requirements that the employee change divisions, the department created a new position on the organizational chart under a different division chief and paid the employee from a different division account. The employee had many of the same responsibilities and the same staff as he had before retirement. After six months, DPS again paid his salary from his initial division. The employee stated that he received additional duties during the six-month period.

One DPS manager had the same responsibilities and staff after retirement.

DPS' human resources staff sent a post-retirement form and an organizational chart to URS showing that the employee moved from a division director in DPS to a policy specialist position under the deputy commissioner. DPS requested and got an e-mail from URS showing that moving from one division to another would not affect his retirement.

The employee told us he felt justified to do this because he had 31 years of service and was considering retirement because he had maximized his retirement benefits. (In the Public Safety system, benefits are capped at 70 percent of salary after 30 years of service.) The employee told us he did not know about the workings of the retire/rehire program but had seen others do it both inside and outside of the department and wanted to do it. He contacted URS and was told there was a required six-month break in service. The employee told us he could not take a six-month break in service so he did not pursue retirement. The employee told us that the commissioner wanted him to stay and offered to let him retire and be rehired if he could get URS to approve it. The employee contacted URS several times until they finally approved the retire without a six-month break in service because he demonstrated to URS that he was moving divisions.

Currently, only a small number of employees are retiring and being rehired by UDC and DPS. As we have shown in this chapter, it is mainly professional employees who have been allowed to retire and be immediately rehired. Even with the small numbers thus far, there has been an associated cost to the system. If the practice continues to grow, there will be greater costs to the retirement system and to taxpayers.

This Page Left Blank Intentionally

Chapter III
Manipulating the Waiting Period Restrictions Violates Legislative Intent

Some departments are violating the intent of the post-retirement re-employment statute by allowing retirees to work part-time for six months and then return full-time to the same department—usually to the same job. Legislative intent was to allow employees to return to work full-time after a six-month waiting period. The financial incentive of collecting a retirement benefit in addition to a full-time salary encourages employees to retire earlier and then return to work. Unfortunately, retiring and returning to full-time employment in the same job, even with six months of part-time work, increases the cost of retiree benefits. Statute allows retirees to return to work part-time after retirement and also allows retirees to return full-time after a six-month cooling-off period. However, part-time work was not intended to be used as a bridge to returning to work full-time.

Many state departments allow retirees to return to work part-time, often to complete projects or train their replacements. The practice of returning to work part-time after retirement is not problematic unless the practice is used as a way of holding a position open during the statutory waiting period. Since the statute was changed in 2000, 18 retirees have moved to full-time positions in their same departments after being part-time for exactly six months. Twelve of the 18 employees were in the Department of Alcoholic Beverage Control (DABC). Six employees in two other departments also moved into full-time positions. Additionally, other organizations have taken advantage of the statute, most notably Valley Mental Health (Valley), with a continuing re-employment program.

To prevent such actions, other states require a complete break in service before a retiree can return to full-time employment. Legislative action is required to address allowing part-time employment, the statutory waiting period, and employees returning to the same position.

Statutory Requirements and URS Rules Are Intentionally Bypassed

The six-month waiting period, put into statute to discourage retirees from returning to work in the same agency, can be easily bypassed. The law currently does not require a complete break in service. Employees can work part-time for six months and still have those six months count toward the six-month waiting period. As a result, URS finds it difficult to stop agencies from violating statutory intent by immediately rehiring retired employees to part-time and ultimately returning them to full-time employment in their old positions. URS has a list of re-employment requirements but allows agencies a great deal of latitude in their interpretation of these requirements. We believe the result is a number of violations of legislative intent.

Post-Retirement Re-employment Statute Was Further Amended in 2000

Utah Code 49-11-504, the statute governing re-employment of URS retirees, was further amended in 2000. That year, HB 272 allowed retirees to return full-time, to the same agency, after a six-month cooling-off period. This legislation further relaxed post-retirement re-employment restrictions, put in place in 1995, that allowed retirees to work full-time after retirement for a different agency.

According to the House sponsor, the intent of the bill was to allow employees to return to full-time employment in the same department after a six-month break. It was never his intention that employees would work part-time during the six-month break and then get their old jobs back.

URS' Actuary Says a Complete Break From Service Is Needed

According to URS staff, the actuary has said that a six-month period would be sufficient to ensure that so-called "back room deals" to guarantee the worker future employment would not be struck between the agency and the retiring employee. The assumption was that the agency could not afford to leave a needed position empty for six months, and an individual needing income could not wait that long for re-employment.

"Requiring a significant period away from the job makes it more likely that the original retirement was genuine, not simply a maneuver to double dip."–URS Actuary

The actuary describes the purpose of the waiting period as follows:

> Requiring a significant period away from the job makes it more likely that the original retirement was genuine, not simply a maneuver to double dip.

The actuary also describes the need for at least a six-month break in service:

> The waiting period must be long enough to provide a disincentive for the employee to retire while all along intending to return to work at the end of the waiting period. . . . We believe few employees who are not really intending to retire will leave URS employment for six months to be able to draw a benefit and pay simultaneously. Giving up the job, pay, and benefits for this long, we believe, is a significant disincentive.

While the actuary described a complete break in service of six months before re-employment, statute and URS rules do not specify a break-in service. Current statute only says retirees will lose benefits if they come back full-time within six months. We believe the law needs to be changed to require a complete break in service.

URS Rules Can Be Circumvented

In 2003, the URS board passed a resolution which added four restrictions to re-employment within the same agency. According to URS' attorney, the resolution was passed after URS became aware of Valley Mental Health's rehire policies that were described in Audit Report 2003-05, *Utah's Local Mental Health Systems*.

URS resolution 03-19 stated:

- Whereas the Utah Retirement Act requires than an employee cease working for a participating employer and provide evidence of such termination prior to being eligible to retire; and

- Whereas UCA 49-11-504 prohibits a retiree from being reemployed by the same agency within six months of the retirement date unless the retiree works less than 20 hours per week; and

- Whereas, it was the intent of 49-11-504 to ensure that retirees actually terminate from their employment and not simply terminate in name

only and then return to a position with the participating employer; and

- Whereas, if the six-month prohibition is not followed there is a potential increase in the actuarial cost of providing retirement benefits.

- Now, therefore be it resolved that to comply with the provisions of 49-11-504 the following requirements apply when a retiree is re-employed by the same agency within six months of the retirement date.

Figure 3.1 URS Requirements When a Retiree is Reemployed By the Same Agency Within Six Months of Retirement. URS' board created four requirements that apply when a retiree is reemployed by the same agency within six months of the retirement date.

1. The job duties for the six-month period immediately following retirement must be distinctly different or sufficiently reduced from the pre-retirement job duties.

2. Within those newly-defined job duties, the employer cannot require or expect the retiree to work 20 hours or more per week.

3. There can be no guarantee or agreement, written or verbal, with the retiree that at the end of the six-month post-retirement period that there will be full-time employment.

4. Recruitment for the position must commence as soon as possible after the retirement announcement of the retiree. Such recruitment must be consistent with the procedures typically followed by the employer in recruiting for similar positions.

The board further resolved, "that if the proceeding requirements are not met, the Retirement Office will cancel the member's retirement allowance in accordance with 49-11-504."

The requirements can be easily manipulated by agencies. Employees can return to substantially the same job after retirement and meet the first two requirements by working part-time. Departments argue that part-time work duties are distinctly different or sufficiently reduced. The third requirement is met by the rehiring department and the retiree not having an agreement. The fourth requirement is bypassed by state agencies

prolonging the recruitment period. Employees can retire, be immediately rehired part-time in a reduced role of their original positions, and, at the end of the six-month waiting period, go back to full-time employment in their original positions.

DHRM records show that 3,209 state employees retired between January 1, 1999, and June 30, 2006. Of those, 593 returned to work usually part-time. The majority remain part-time. In Figure 3.2 we show the number of cases we found of retirees who returned to work full-time just after the six-month anniversary of their retirement.

Figure 3.2 Retirees Who Immediately Returned to the Same Job After Retirement Returned to Full-Time Just After the Six-Month Anniversary of Their Retirement, and Are Currently Employed. (1/1/00 - 6/30/06). Some employees retire, immediately return part-time to the same job, and are rehired full-time on the six-month anniversary of their retirement.

State Department	Number of Employees
Department of Alcoholic Beverage Control (DABC)	12
Department of Natural Resources (DNR)	3
Department of Transportation (DOT)	3
Total	**18**

Figure 3.2 shows that 18 employees returned to full-time employment at the six-month anniversary of their retirement and after having worked part-time during the six-month cooling-off period. In our opinion, these cases appear to be situations where employees used the part-time statutory allowance as a bridge to full-time work. We will discuss DABC's situation since they had the most cases.

DABC Bypassed the Intent of the Post-Retirement Re-employment Restrictions

Part-time employment is used as a bridge to full-time employment six months later.

Since 2000, 12 retirees have returned to full-time positions at DABC after the six-month cooling off period—the majority in their same job positions. The retirees used the statutorily allowed part-time employment

as a bridge to full-time employment six months later. Although the department sees the rehires as a cost savings, retiring and returning to full-time employment in the same job after six months of part-time work substantially increases the value of the benefits for the retiree and the cost to URS and to taxpayers. We believe the actions of these employees demonstrate that they did not intend to leave state employment. They retired early because of the financial incentive provided by re-employment.

URS Was Concerned about DABC's Use Of the Program but Could Not Stop the Use

In 2000, two senior DABC employees retired, worked part-time during the six-month cooling-off period, and were placed into their previous positions on the six-month anniversary of their retirement. There was no recruitment for the positions because the positions were exempt. Other employees did the same in subsequent years. Seven more employees retired on December 16, 2005, and were immediately rehired in part-time positions. On the exact six-month anniversary of their retirement, six of the seven returned to work full-time, most in the same position they held prior to retirement. The seventh employee quit at the end of the six-month cooling-off period.

URS became concerned in December 2005 when they received post-retirement forms from DABC stating that seven employees were retiring, returning to part-time work, and that DABC was not recruiting for the positions for six months. URS, concerned with the number of retirees and rehires from a small state department, believed DABC was circumventing the post-retirement employment rules and asked DABC for more information. The human resources manager of DABC wrote a three-page letter to URS' attorney justifying the part-time rehires and stating in part:

> I want to emphasize that there has been no written or verbal agreement with regards to rehiring these individuals that would constitute an implied or actual employment contract. All individuals were told that there would be a public recruitment initiated at the end of the six-month period and that they would have an opportunity to apply for the open position just as anyone else would. We have followed DHRM Rule 477-4-7 (Rehires) . . . to the letter and want to remain in compliance in all aspects of hiring.

URS did not cancel the retirement benefits of the retirees. Instead, they simply provided a written reprimand to DABC which read in part:

> You have been very straightforward in stating that DABC's intentions were to create a process that complied with all applicable rules but that made it possible for long term DABC employees to retire and return to employment with DABC. Since the purpose of DABC's rehiring policy is in conflict with the spirit of the post-retirement restrictions, DABC may want to revisit those policies in the future.

DABC's Claim of Cost Savings Is Incorrect

DABC claims a cost savings because they usually rehire retirees at the salary midpoint—which is usually lower than what the employees were making before they retired, and they do not have to pay the insurance premiums for the retirees. DABC's human resources manager, thinking only of his agency costs, believes that the rehires will be a cost savings, stating:

DABC's use of part-time employment allows the inappropriate return to full-time status.

> Most of the negative aspects regarding the rehiring of post retirement individuals have originated from misinformation, prejudices and misreporting by the press which in turn has raised the ire of the general public. In truth, the rehire provision is a benefit to the state in many areas and ultimately is a cost saving measure.

We disagree with the human resources managers' comments that there is ultimately a cost savings. DABC may save salary and insurance premiums for some retirees; however, the cost to the retirement system outweighs the savings to the department. URS' actuary clearly states that there is a cost to the system when employees retire early for the purpose of returning to full-time work in the system.

We reviewed DABC's cost savings claim. They claim they rehire retirees at the midpoint of the salary range. We reviewed the rehires and found that almost half had no change in salary and one was rehired at a higher level position with a salary increase, as shown in Figure 3.3.

Figure 3.3 Recap of Salary Action for DABC Employees Who Retire, Rehired Part-Time During the Six-Month Restriction Period, and Then Returned to Full-time Positions (1/2000 - 6/2006). Only half of the rehired retirees were brought back at lower salaries; the other half were brought back at the same or a higher salary.

Salary Adjustment at Full-Time Rehire	Number of Employees
Rehired at a lower salary and/or longevity step	6
No change to salary at rehire	5
Salary increase at rehire	1
Total	**12**

Only half of the rehired retirees were brought back at lower salaries; the other half were brought back at the same or a higher salary.

DABC's Delayed Recruitment Policies Are Questionable

The fact that so many management employees of this agency have been allowed to retire, work part-time for six months, and then immediately return to full-time employment gives the appearance that the agency is attempting to manipulate the intent of the law. In our opinion, it is contrary to the intent of the legislation to allow employees to retire but hold their position open while they work part-time (thus helping them to meet the mandatory six-month waiting period) so they can compete for their old position.

According to URS' actuary, the six-month restriction was put in place to deter individuals who want to stay in their same positions from retiring.

DABC allowed four senior employees to retire, return part-time for six months, and then return to their old positions on the six-month anniversary of their retirements. DABC did not recruit for these positions because they were exempt. The financial benefit to the retirees was so substantial that at least one purchased years of service in order to retire and get the post-retirement re-employment benefit. DABC conducted a public recruitment for the eight positions lower in the organization. However, the recruitment was held after the six-month cooling-off period expired for the incumbent. DHRM reviewed all the rehires and showed numerous applicants (between 25 and 198) for each position; four to six people were interviewed for each position.

DABC believes they met the letter of the law because the individuals worked part-time for six months and were then rehired using a competitive recruitment process. Although there are no restrictions prohibiting what they did, they bypassed the intent of the post-retirement employment restrictions. In this case, when it came time to do the competitive hiring, the incumbents were the applicants chosen because they were in the positions already and had proven work histories and knowledge of the agency's processes.

In our opinion, it is questionable to keep the positions open for six months while the incumbents, working part-time, fill the positions. Based on the number of applicants that were categorized as best qualified and well qualified, it appears there were many people who could have filled the positions.

Regarding the 2005 rehires, DABC did not abide by the first portion of URS' requirement that requires recruitment to commence as soon as possible after the retirement announcement and to be consistent with the employer's recruiting procedures for similar positions. The recruitment did not commence as soon as possible after the retirement announcement. For the most recent retirements and rehires, the retirements started on December 16, 2005, but the recruitment did not commence until June 2006. DABC justified the six-month delay in recruiting for the positions by stating:

> [The] timing worked well for us to delay recruitment for six months because the retirement of these individuals mentioned below occurred after our seasonal rush. . . .
>
> Our work environment and culture is very close and almost that of a family organization. Staff members are willing to pick up any slack and help out where needed. We all wear several "hats" in our organization so for us to fill-in or go the extra mile isn't looked at as a burden. I bring this up because . . . other staff members have willingly volunteered to absorb some of the responsibilities until the recruitment process is complete.

It is concerning that senior level managers were able to work part-time for six months.

DHRM states there is no state requirement that an agency needs to recruit as soon as someone retires. However, it appears to us that good management practice calls for an agency to keep management positions filled if the positions are really necessary. We question whether DABC really needs all the positions if they are able to keep six management

Underfilling key management positions raises questions.

positions part-time for six months by spreading the work among the remaining employees. At the least, it is questionable if the organization really needs full-time employees if part-time employees could perform all the necessary duties.

It is an inappropriate and costly practice to allow employees to retire, immediately rehire them into part-time positions, and then hire them full-time after the waiting period. We believe that the actions of DABC do not meet the legislative intent of the six-month waiting period. The ability to work part-time was not meant to be a way to hold a position open during the waiting period.

Other Organizations' Use of Retire/Rehire Is Concerning

Two other state departments and another organization, notably Valley Mental Health (Valley), have taken advantage of the statute to allow retirees to rehire part-time and then return full-time at the end of the six-month cooling-off period. In our opinion, working part-time during the waiting period and then returning to work full-time bypasses legislative intent. It goes against the six-month waiting period described by the actuary. We believe the legislature did not intend part-time employment to be a bridge to full-time.

Valley Mental Health's Use of Retire/Rehire Was Questioned in 2003

In our June 2003 report 2003-05, *Utah's Local Mental Health Systems,* we found that six senior Valley employees were allowed to retire, return to part-time work for six months, and then return to full-time work after the six-month waiting period. In response to the audit, the board of directors of Valley noted that all retirement practices were board approved and, in their opinion, were statutorily allowed. Board documents identify Valley's program as a retention mechanism that was intended to keep key employees past retirement to train their replacements. We recommended that URS study the issue of retention incentives and report back to the Legislature. URS disagreed with some of Valley's claims and had Valley alter the program to better reflect URS' interpretation of the restrictions.

Although we did not again review the retiring/rehiring practices at Valley, we did review URS data and found that 12 current Valley employees are rehired retirees earning a salary, retirement, and a generous 401(k) contribution.

Other Departments Have Allowed a Few Employees to Work Part-Time Then Full-Time

Three employees in the Department of Natural Resources (DNR) retired, immediately returned to work part-time and, at the end of the six-month cooling-off period, returned to full-time employment. The post-retirement employment forms sent to URS stated that the employees worked part-time and then became full-time. One employee retired as a project manager with management duties then worked for two additional years as a working level biologist—a lower level position with no management duties. Another worked full-time for an additional year and retired again. One is still on the state payroll as a full-time water commissioner; however, his salary is paid through water assessments.

We were able to identify three Department of Transportation (DOT) employees who worked part-time and then returned to full-time work after the six-month period. DOT only sent documentation to URS on one of the three rehires. It is not clear why DOT did not send a post-retirement form on the other two employees.

Agencies need to do a better job of succession planning.

It appears to us that agencies allow some employees to retire and have additional years of service post-retirement, in the same agency, thus receiving both retirement benefits and salaries. In our opinion, agencies are delaying the inevitable, the hiring and training of new employees. Agencies need to do a better job of planning for employees' retirement rather than delaying the hiring and training of new employees.

This Page Left Blank Intentionally

Chapter IV
Post-Retirement Re-employment Increases System Costs

Uncontrolled post-retirement re-employment increases overall costs of retirement systems because it encourages earlier retirement. Actuaries have shown that employees retire earlier when either provisions that encourage re-employment are passed or adequate controls are not in place. Actuaries from two other states estimate costs to their retirement systems, ranging from $39 million in the first 15 months to $105 million annually, that relate directly to these states loosening re-employment restrictions. Although Utah's current costs due to re-employment policy changes and bypassing controls are not in that range, clearly, violations of Utah's legislative intent increase total system costs. URS' actuary estimates that the maximum exposure to the Public Safety and Public Employees' Retirement Systems would be $63 million annually if every employee retired as soon as eligible and immediately became reemployed. A number of re-employment control mechanisms used by other states could be used by Utah to reduce violations.

Actuaries Have Shown Increased System Cost of Re-employment

There are tangible costs associated with liberal post-retirement re-employment policies.

Costs are lower when employees maintain their employment past retirement age instead of retiring. Studies by actuaries in Washington, North Carolina, and Utah have shown that costs increase when people retire earlier because of changes to re-employment policies. Utah's actuary estimated that annual employer retirement contributions to the system would increase if members of URS' Public Employee and Public Safety Retirement Systems retired immediately upon reaching the appropriate years in service and were rehired in the system.

Basic Premise of Lower Costs Is to Maintain Employment

According to actuaries, retirement system costs increase when a retirement program changes the behavior of participants so that they retire earlier. Employers often view reemploying retirees as a cost savings because they see less money coming out of their budgets. They save

money because they do not have to pay the retiree's health insurance and/or can pay a lower salary. However, they do not take into consideration the increased costs on the retirement system, which usually outweigh any cost savings by the department.

Retirement system costs will generally be lower when employees are employed for longer. This is because the system receives more inflows (employer contributions) and pays out fewer outflows (benefit payments). When a person maintains continued employment without retiring, employer contributions continue to come into the retirement system from the employer as long as the employee works. In addition, benefit payments do not start until retirement, so the system pays out fewer payments.

Deviations from System Design Have Proven Costs

When changes are made to post-retirement re-employment policies, there is usually a corresponding change in cost. Two states that have relaxed post-retirement restrictions have found, through actuarial studies, that costs increase when employees retire earlier. In Utah, the URS' actuary has also identified that there is a cost per beneficiary to post-retirement re-employment policy changes that result in encouraging earlier retirement.

Other States Have Found That Changing Their Systems Affects Their Costs. The State of Washington found that costs increased because people retired 2.5 to 3 years earlier than expected when the number of hours public employees and teachers were allowed to work after retirement was changed from 840 hours to 1,500 hours. The actuary calculated that costs to the retirement system increased by about 30 percent of an employee's salary for each year he retired earlier than expected, or about $73,000 per early retiree. For all employees retiring early, the cost in the first 15 months of the program amounted to $39 million. Since then, the law was changed to create a lifetime limit on the number of annual hours beyond 867 public employees could work post-retirement. However, even with the new limit, the actuary estimates that the program will still cost $7.5 million in the 2007-2009 biennium and $101.5 million over the next 25 years.

North Carolina found that permanently removing salary cap restrictions for post-retired reemployed teachers would cost the state an additional $28 million annually because, based on past experience, teachers do retire earlier when given such an incentive. They also found that permanently removing post-retirement salary cap restrictions for all state government employees would increase costs by $75 million annually. North Carolina estimates that, if their break-in-service requirement was reduced as well, annual costs would increase by $39 million for teachers and $105 million for all state employees.

"If the existence of the return-to-work program changes the behavior of the members, encouraging earlier retirements, costs can increase."–URS Actuary

URS Actuary Confirms Return-to-Work Programs Have a Cost. According to the URS actuary, "If the existence of the return-to-work program changes the behavior of the members, encouraging earlier retirements, costs can increase." As an example of how a post-retirement re-emplyment program could lead to higher system costs, he discusses a teacher retiring three years earlier than originally planned who then goes to work in another school district. His analysis states:

> By retiring at 55, instead of waiting until 58, she increases the value of her benefits and the costs to URS. This is true because she will begin drawing her benefits three years earlier and on average will draw benefits for three more years. These factors outweigh the fact that she will be giving up three years of service and a presumably higher Final Average Salary in the calculation of her benefit.

One in five state employees are reemployed by the state after retirement.

In state government, about 18 percent of retirees are reemployed within the state system. This number excludes those who find post-retirement work with local governments or other URS entities. While it is not known how many of these employees retired earlier because of the availability of post-retirement re-employment, it is clear that one in five state retirees have returned to work for the state.

To understand better how costs throughout the retirement system could be affected by earlier retirement behavior, we asked URS' actuary to identify how much costs would increase if all members, upon reaching the appropriate years of service in the Public Safety and the Public Employees' Retirement Systems, retired immediately and were rehired in the system.

The actuary's calculations reveal that contributions would increase significantly. The study also showed that 66 percent of the increase in

employer contributions would be money going into individual accounts for employees instead of into the retirement system.

Diversion of Employer Contributions Is Costly to System

In March 2000, the law mandated that employers contribute to the retired employee's 401(k) account at the same rate they would have paid in the retirement system. This retirement bill had no fiscal note because the bill was amended the last day of session, after the fiscal note had been written. There is a cost, however.

Making contributions directly to a retirees' individual account is unique compared to other states and is expensive to the retirement system. URS, their actuary, and the National Association of State Retirement Systems were not aware of another state that follows this practice.

The state will pay about $9.2 million in 2006 directly to rehired retirees' 401(k) accounts.

According to URS records, employer contributions for all retirement systems that were deposited directly into employee's 401(k) accounts increased from $2 million in 2001, the first full year of the program, to $9.2 million in 2006 (half-year annualized), a 360 percent increase. Most of this amount represents the amount of employer contributions that has gone to employees' 401(k) accounts that would have gone into the defined benefit retirement system if these employees were not retired. The number of reemployed retirees getting this benefit increased from about 550 employees in 2001 to about 1,300 employees in 2006. If the trend of retiring and being rehired continues, it could prove to be even more costly in years to come.

Violations of Legislative Intent Increase System Costs and Bypass Controls

When the retirement behavior of employees changes, there is an associated cost. In the case of retiring earlier than expected, costs increase because of (1) increased payouts to the retiree, and (2) decreased system contributions from the employer. In short, when employees retire earlier than they would have, the retirement system must pay out more benefits and do so with fewer funds than it would have if the employees had stayed in the system and retired at a later date.

Retiree Re-employment Costs Result from Increased Payout and Decreased Contributions

Earlier retirement causes increased payouts from the system. When an employee retires earlier, retirement benefits are paid earlier and for a longer period. For example, if an employee retires at age 55 instead of age 58 and lives to age 80, the employee will receive benefits for 25 years instead of 22. The increase in years of payout is exacerbated by the time value of money; the additional three years comes before the anticipated beginning of the original payout and the system will forgo the interest that could have been earned on those funds.

Earlier retirement also causes decreased contributions to the system. When an employee retires earlier, there are fewer employer retirement contributions going into the system. Using the same employee as above, assuming that the person begins working at age 25 and retires at age 58, employer retirement contributions are paid into the retirement system for 33 years. However, if the person retires at age 55, the retirement system would only receive 30 years of contributions. Not only does the system lose three years of contributions, it loses the interest earnings on those contributions.

Other system participants pay for those who bypass system controls.

Although there is a cost to early retirements, the impact on the system may not be immediately seen. Eventually, however, once retirement behavior changes enough to be actuarially significant, the increased cost from earlier retirements would be paid for by all the employers within a given fund, even those without earlier retirements, in the form of contribution rate increases.

URS has not taken the effect of early retirements and re-employment into consideration because they have not seen a critical mass of people retiring and being rehired. Nor has URS provided feedback to the Legislature about how the re-employment plan could affect contribution rates. URS feedback is critical because the Legislature relies on URS' expertise to make long-lasting policy decisions.

Furthermore, the Legislature has been told by URS that there is no cost to recent post-retirement re-employment legislation, although it seems clear to us that there is a cost. In our opinion, any policy decision that could reasonably give employees an incentive to retire earlier must have an associated cost and a fiscal note attached. Legislative decisions should be based on accurate information. The Legislature needs to be

told by URS that there are tangible retirement costs that accompany post-retirement re-employment policy changes.

According to URS, when they say a policy option has no cost, they mean that there is no appropriation needed for the current year or that the policy option does not affect current contribution rates because the number of people affected has not reached a critical mass. We think their definition of costs can be misleading to legislators.

Retiree Re-employment Is Beneficial for Employees and Employers But Has a Cost

Costs to the system are increased by individuals retiring earlier.

Employees retire earlier and return to work because it is financially beneficial for them. Post-retired reemployed employees receive the retirement benefit, salary, and a 401(k) contribution. In some cases, a post-retired reemployed employee working full-time can make more than 170 percent of his pre-retirement income.

While it is difficult to isolate the exact financial impact one earlier retirement has on contribution rates, the cost effect on the system can be estimated. The example below is our estimate. Contrary to URS' assertions that there is no cost to Utah's re-employment program, our analysis shows that there is a system cost when employees retire earlier than they normally would have and are reemployed in the system.

Figure 4.1 compares the cost effect on the system of one public safety employee either retiring at 20 years and being reemployed for 10 years or working for 30 years before retiring. This example, using a 45-year-old with an additional 35 years of life expectancy, shows that a person who retires at 20 years costs the retirement system 67 percent more than a person who continues to work for 30 years. The present value of the future benefits paid less the future contributions received increases substantially the earlier he retires because of the two reasons mentioned above—an earlier and longer payout period and fewer contributions into the system. In terms of value today, the 20-year career employee's retirement and re-employment will have a net cost to the system of $364,000, while the 30-year career will have a net cost of only $218,000.

Figure 4.1 Costs in the Public Safety Retirement System: 20-Year Retirement with Re-employment compared to 30-Year Retirement. The net present value of the future benefits paid less the future contributions received for an employee with a final average salary of $50,000 is 67 percent more when an employee retires after 20 years of service and is reemployed for 10 years than when he continues to work for the state and retires after 30 years.

		20-Year Career with 10-Year Re-employment	30-Year Career
Present Value of Future Defined Benefits Paid		$ (364,000)	$(332,000)
Present Value of 401(k) Benefits Paid		(114,000)	0
Net Present Value: Employee Perspective		**(478,000)**	**(332,000)**
Present Value of Future Employer Contributions	To Retiree's 401(k)	114,000	0
	To Defined Benefit System	0	114,000
Net Present Value: System Perspective		**$ (364,000)**	**$(218,000)**

Note: The Net Present Value is the present value of the future benefits paid less the future contributions received. It is the amount URS should have on hand currently to pay for these future obligations. An 8 percent discount rate was used. The Final Average Salary for the employee who works beyond 20 years is assumed to increase by 4.75 percent annually. An annual 2.5 percent simple Cost of Living Adjustment (COLA) for retirement benefits is also included in the calculations. The assumed contribution rate is 26.75 percent, the 2006-2007 public safety contribution rate for the state.

Figure 4.1 shows that earlier retirement with re-employment costs the overall retirement system approximately 67 percent more. The first line, present value of future benefits paid, shows that the value of pension payments for the person who retires after 20-years and is reemployed for 10 years costs about 10 percent more than if the employee stayed employed for 30 years before retiring. The second line, the present value of 401(k) benefits paid, shows that for the reemployed retiree receiving the 401(k) contributions is financially the most valuable part of reemploying. Taking into account both the pension and the 401(k) payments, the benefit present value created by re-employment is 44 percent greater.

Figure 4.1 also shows that future employer contributions are used for

different purposes. The $114,000, in the case of the reemployed retiree, goes into the retiree's 401(k) account. In the case of the employee working for 30 years before retiring, however, the $114,000 is instead a contribution to the defined benefit program.

URS' actuary suggests another approach to compare costs between 20-year retirements and 30-year retirements. Using this approach, he estimates that retirement costs would be 35-45 percent higher staffing a position over a 60-year period of time with three consecutive 20-year careers rather than two consecutive 30-year careers.

We believe that both the actuary's review and our review of analyzing costs are evidence of the additional costs of earlier retirements. They are, however, different measurements. We looked at the net effect of both future benefit payments and future employer contributions from year 20 forward for one reemployed retiree while the URS actuary looked at the effect of future benefit payments from year one forward but for multiple employees for a longer period of time.

If an employee retires earlier, the system must pay the retiree longer. According to URS' actuary:

Allowing retirees to draw their retirement benefits while continuing to work makes a plan much more expensive.

> If employees can retire earlier than they would have, and can receive their pension while continuing to work in covered employment, then there is a cost. It is true that an employee who retires early receives a smaller retirement benefit, because he will have less service and usually a smaller final average salary, but he will receive the benefits over a longer period of time on average. In most cases, once the employee is eligible for an unreduced retirement benefit, earlier retirement is more expensive for the system than later retirement. . . . Allowing employees to draw their retirement benefits while continuing to work, without putting in any restrictions, makes a plan much more expensive.

State agencies have told us that rehiring retired employees is crucial to their success as an agency because they rehire employees with the skill set and institutional memory necessary to complete the work. We believe, in some situations, short-term re-employment may be helpful to the agency in finishing projects, but the practice of long-term re-employment is problematic.

System Controls Are Intended to Minimize Behavior Changes

Re-employment system controls are necessary to maintain employee behavior patterns identified by system actuaries. Even slight changes can affect system costs. For Utah, actuaries call for controls that keep employees from leaving their existing jobs by attaching a relative level of risk to gaining future re-employment, in the system, after retirement. The federal government and other states also attach risk but often, at a higher level than currently done in Utah.

URS' Actuary Explains the Importance of Post-Retirement Re-employment Restrictions, Including Having a Break in Service. Post-retirement re-employment restrictions are essential to control increasing retirement costs. URS' actuary said that if controls are circumvented, allowing employees to retire earlier than they would have, there is an increase in cost. Speaking of the restrictions to (1) work for another agency, (2) be retired for six months, or (3) work part-time, URS' actuary made the following comment:

> These restrictions are intended to minimize abuses, while still allowing retirees who have had a genuine change of heart and wish to return to work to do so. Without these restrictions, many retirees would "retire" upon becoming eligible for an unreduced pension and would then immediately return to work at the same position and salary. This would result in retirements occurring earlier, and would make the retirement system more expensive.
>
> Requiring a significant period away from the job makes it more likely that the original retirement was genuine, not simply a maneuver to double dip.

Speaking specifically of the waiting period, the actuary said:

> Why six months? . . . The waiting period must also be long enough to provide a disincentive for the employee to retire while all along intending to return to work at the end of the waiting period. . . . We believe few employees who are not really intending to retire will leave URS employment for six months in order to be able to draw a benefit and pay simultaneously. Giving up the job, pay and benefits for this long, we believe, is a significant disincentive. . . . . . A three-month waiting period, in our view, would be disastrous, and would lead to a very significant number of members retiring and returning to work, with a corresponding cost increase for URS. . . . . . In our view, the six-month period is adequate, although our preference is for a twelve-month period.

The Federal Government Reduces Pay, Making Re-employment in Their System Unattractive. The federal government's post-retirement re-employment policy allows full-time or part-time work after retirement, but in reality it discourages the practice. The federal government retirement system does not allow employees' total salary and retirement benefit earnings to exceed their full-time salaries. When a retired federal employee returns to work for a system employer, either part-time or full-time, his pay is reduced by the amount of annuity paid for the period he works. Also, retirement contributions will still be withheld from employees' pay. This in effect results in a retired member only earning what he would have had he not retired.

Other States Control Costs of Re-employment by Requiring a Break in Service or Using Other Mechanisms. Other states have many different approaches for minimizing costs of their re-employment programs. These include prohibiting full-time re-employment, putting annual limits on how much a person can work, and requiring complete breaks in service before full-time re-employment is allowed.

Most surrounding western states either do not allow an employee to return permanently to work full-time and keep his retirement benefits, or they require a complete break in service before returning. Although each has a different time requirement, none of these surrounding states allows permanent full-time re-employment immediately after retirement.

Colorado, Idaho, and Nevada each do not allow full-time permanent re-employment after retirement. New Mexico and Wyoming have 90-day and six-month break-in-service requirements respectively, which means that a retiree must work neither part-time nor full-time during that break in service in order to be eligible for re-employment. In Arizona, a retiree must wait 12 months from the date of retirement before being reemployed full-time, but the employee can work part-time in the system during that period.

Recommendations

Recommendations

1. We recommend the Legislature consider clarifying the language in the post-retirement re-employment restrictions that defines *agency*.

2. We recommend the Legislature consider changing the post-retirement re-employment statute to prohibit any work, inclusive of part-time and contract work, from qualifying as part of the six-month waiting period to return to full-time employment.

3. We recommend the Legislature consider either changing the waiting period for full-time employment from 6 months to 12 months or eliminating the ability to return full-time to the same department without suspension of retirement benefits.

4. We recommend the Legislature consider amending the post-retirement re-employment statute to require employers to contribute to URS' defined benefit plan instead of making contributions to the personal 401(k) accounts of rehired retirees.

5. We recommend the Legislature consider requiring URS to provide the Legislature with cost estimates for any legislation considering post-retirement re-employment policy changes.

This Page Left Blank Intentionally

Appendix

This Page Left Blank Intentionally

Appendix
Post-Retirement History—Public Employees and Public Safety Retirement Systems

Year of Passage	Change	Bill Number (Notes)	Fiscal Note
1995	A retiree could return to work for a **different** agency, even a participating employer within URS, without restrictions. The definition of agency was put in statute.	HB 107 "Post-Retirement Employment"	No significant fiscal impact.
2000	A retiree could return to work with the same agency after a six-month cooling-off period. Additional monetary benefit was included which required employer contributions for the employee to be deposited directly into a 401(k).	HB 272 "Retirement Office Amendments"	No significant fiscal impact.
2003	Changed the definition of full-time from "compensation for 20 hours" to "20 hours of work."	HB 246 "Retirement Office Amendments"	No fiscal impact.
2004	Added "appointive officers" to elected positions as exempt from the six-month same employer restrictions.	HB 253 "Retirement Office Amendments"	Can be handled within existing budgets of the URS.
2005	Removed "appointive officers" from the list of employees not affected by the post retirement restrictions.	HB 180 "Retirement Office Amendments"	May result in some savings but such savings cannot be determined.
2005	Allowed the Commissioner of Public Safety to retire from the Public Safety Contributory Retirement System or the Public Safety Noncontributory Retirement System, to receive a retirement allowance, and continue in the appointed position.	HB 217 "Public Safety Retirement– Exemption of Certain Employees"	No fiscal impact on URS.

This Page Left Blank Intentionally

Agency Responses

I. Introduction

This agency response (Response) to Report 2006-11 of the Utah Legislative Auditor General's Office, *A Performance Audit of Post-Retirement Employment* (Report), allows the Utah Retirement Systems (URS) the opportunity to comment on the timely and important topic of post-retirement restrictions placed on URS retirees. URS appreciated the opportunity to meet and discuss this report with the staff of the Office of Legislative Auditor General (OLAG) and OLAG's consideration of issues raised by URS.

II. Post-Retirement Restrictions Nationally

The topic of post-retirement employment is being reviewed by many public pension plans around the country since public employers are facing potential shortages of key employees. This report can be used as a starting point for that discussion here in Utah. The Report espouses one perspective in the discussion surrounding post-retirement restrictions, namely, tightening restrictions which would make it more difficult for retirees to return to public employment with the same entity from which they retired. As the Report points out, the Legislature has loosened these restrictions over the years. The Report concludes that there have been abuses of the loosened restrictions and that such abuse should be curbed by tightening the restrictions.

It should be noted that there is a trend among legislatures and public pensions plans to loosen post-retirement restrictions. The National Conference of State Legislatures reports on legislation that is passed by the various states. One of the areas reported on is "Pension and Retirement Plan Enactments" and is further broken down by sub-heading, one of which is "Reemployment after Retirement." In reviewing the reports for the years 2005 and 2006, the vast majority of changes in this area have been to loosen restrictions on post-retirement employment. However, each state and each plan may have unique conditions to which it must respond and the existence of a trend is not necessarily relevant to every other state and plan.

In deciding policy in this area, the Legislature should also consult those stakeholders who are directly impacted such as the public employers and public employee associations. Some public employers are concerned that they will have, or are having, a difficult time filling positions that are necessary to the functioning of their operations.

III. Tenor of the Report

We believe an initial comment about the tenor of the Report is an appropriate place to begin. The Report emphasizes the worst case scenarios with out giving any context or balance. Not every rehired retiree is an abusive case. In URS' experience it is common for an employee to retire and then find out that, for a variety of financial and personal reasons, that retirement is not right for them.

As discussed below, accusatory tone of violating "legislative intent" and the presence of exorbitant costs inflates the severity of a problem, if a problem exists at all.

IV. Specific Responses to the Recommendations and Report

1. The Recommendations

URS is not opposed to Recommendations 1 through 4 as these are policy decisions squarely within the Legislature's domain. In addition, these Recommendations would provide greater clarity in administering post-retirement employment and, therefore, would ease URS' burden. The only caveat is that, as discussed above, these Recommendations represent one perspective among numerous valid perspectives on how post-retirement employment should be handled.

URS also does not oppose Recommendation 5, in so far as meaningful cost estimates can be produced. As will be discussed below, the idea of "costs" associated with post-retirement employment must be correctly understood for such calculations to provide a meaningful basis for analysis. URS fully supports the principle behind Recommendation 5, that of providing meaningful information to the Legislature when legislation in this area is proposed, and URS believes it has done this in the past.

URS also believes that prioritizing the Recommendations will give the Legislature additional information on which to base its decision. URS will give its perspective on how the Recommendations should be prioritized in the event the Legislature decides to adopt one or more of them.

2. Analysis and Conclusions of the Report

URS appreciates the time and effort that OLAG has put into the Report. As discussed above, post-retirement employment is an issue that is getting much attention around the country as public employers deal with the policy and reality of filling essential public employment positions. About the time that Rep. Donnelson drafted his bill in this area in anticipation of last year's legislative session, URS began hearing of employee morale problems in certain state departments associated with whom was being allowed to come back to work after retirement. Much of the Report deals with the specifics of those situations. URS has no comment on either the analysis or conclusion of those portions of the Report as those issues are completely outside of URS' authority or core competencies.

However, URS believes that some comment is appropriate as it pertains to the critique of how URS has administered post-retirement restrictions on employment. Without taking the time to address each of the specific questionable comments in the Report, there are three general themes where URS believes that further comment will assist the Legislature in understanding how post-retirement employment is currently administered and which will give the Legislature a broader context in which to discuss

the policy of post-retirement restrictions. The three themes are: (a) the actuarial impact or "cost" of post-retirement restrictions, (b) the consistency of administering the program, and (c) the "legislative intent" of the current law. Each of these will be discussed below.

(a) Actuarial Impact or "Cost" of Post-Retirement Employment

The Report correctly states the general actuarial principle that, generally, a smaller retirement benefit that is paid out over a longer period of time results in more benefits to the retiree than a larger benefit that is paid out over a shorter period of time. However, depending on the assumptions used and the specific facts of each retirement, a larger benefit paid out over a shorter period of time may have the same or even greater value. Assessing the true impact of post-retirement employment requires a thorough actuarial review.

The implication is that any retirement policy that encourages an employee to retire earlier has the *potential* to increase the costs to the retirement system in the form of increased contribution rates, but may not necessarily do so. Whenever bills have come before the legislature that create this kind of encouragement to retire earlier than an employee otherwise may have (i.e., the bills that allowed sheriffs, chiefs of police and the commissioner of public safety to retire and stay in the same position), URS has told the Legislature that the potential of higher contributions exist if a critical mass of employees is allowed the opportunity to retire earlier than they otherwise would have.

However, it is incorrect to state that there has been a "cost" to URS in the form of increased contributions as a result of the current post-retirement restriction laws. URS has received no indication, from the actuary or any other source that contribution rates have increased due to the post-retirement program**.** In fairness, the Report does not claim that there has been an increase in contribution rates due to post-retirement employment, but the repeated allegation that there has been an increase in "costs" without an equal explanation of how OLAG has decided to use the term "cost" gives the perception that public employers have been required to pay more in contributions than they otherwise would have, and to date we have received no information saying that is the case.

A couple of brief examples from the text illustrate how the Report infers that the current post-retirement employment law requires increased contributions from employers. The second paragraph of *Chapter I – Introduction* states:

> Contrary to what the Legislature has been told in the past, reemploying retired employees has a cost. It provides substantial financial incentive to employees to retire as soon as possible and be reemployed. Actuaries in other states are finding that there is a cost to the post-retirement reemployment program because employees are retiring earlier than they would in the absence of the program. We believe that some employees in Utah are retiring earlier than they would have in the absence of the program allowing them to return to state employment.

A few things are striking about this paragraph. First, it implies that URS has misled the Legislature about the financial impact on post-retirement restrictions. It should go without saying that URS denies this allegation and believes that its history of working closely and candidly with the Legislature belies any attempts to impugn its character.

Second, there is no attempt to put the term "cost" into any type of relevant context or explain that there is no increased contribution rate to the State or other public employers. Since this language is in the Introduction section, this paragraph sets the tone for the entire Report and that tone is that the post-retirement employment program is costing the State money.

Third, although URS' actuary is cited repeatedly throughout the Report as the authority on URS and costs resulting from post-retirement employment, this paragraph cites to actuaries in other states that have post-retirement restrictions significantly different from Utah. It is curious that URS' actuary is not cited here**.**

One of the paragraph headings, in bold, from *Chapter IV – Post-Retirement Reemployment Increases System Costs*, states "URS Actuary Confirms Return-to-Work Programs have a Cost." This statement is true, in the hypothetical case that is discussed in the text following the headline, but is misleading. The quote from the actuary is that costs "can increase" not that they necessarily will increase or have increased. To be balanced and give the Legislature a context in which to make informed decisions, one would expect a discussion of the range of possible costs. Unfortunately, no such range exists in the Report. The Report goes on to discuss the worst case scenario, the cost if **all** employees retired at the earliest possible date and were immediately rehired within the system. But the Report does not attempt to balance the discussion with any reasonable forecast of actual retirees or provide a low end to the range of costs.

(b) Consistency of Administration

One of the bolded headlines in *Chapter II – Post-Retirement Reemployment Practices Violate Legislative Intent* states "URS Application of the Statute is Inconsistent." Again, it should go without saying that URS denies that it has applied the post-retirement employment scheme inconsistently. There is absolutely no motive for URS or its staff to do so. Inconsistent application would do nothing but cause problems for URS.

The Report states that "Human resources managers in other departments told us that URS had refused to allow their employees to move from one division to another and keep their retirement benefits". This comment came as a surprise to URS staff as they have always tried to be fair and consistent in administering this and other aspects of the retirement program. However if URS was making a mistake in how it administered the program, it wanted to know.

URS staff asked OLAG for the contact information for those human resource managers cited in the report and then contacted those managers to discuss this issue.

Interestingly, two of the three managers told the URS Executive Director and URS staff that they had never contacted URS to discuss the issue, but had received information from other people. They did not believe that URS had given them inconsistent information. The third contact indicated that he was well aware of the issues surrounding post-retirement employment and that individuals could come back to work in the same department. Although he did not agree with how some departments used the program, he said he never received inconsistent information from URS.

When OLAG was informed of how the contacts had responded to URS they said that it is interesting how people will give different answers, depending on who asks the questions. While this may be true, citing to these three contacts as the basis for a declaratory statement like the one quoted above is shaky at best and does not serve the Legislature's best interest of providing accurate, unbiased information upon which to make policy decisions.

The Report also cites to statistics which supposedly show that over a 6 year period, 37 employees retired and rehired within the Department of Corrections, 8 retired and rehired within the Department of Public Safety and only 1 other employee was allowed to retire and be rehired within the same department. When questioned why there was such a difference between Corrections, Public Safety and all other State departments, URS told OLAG that it was because the other departments did not ask for such arrangements nearly as often. Another obvious reason is that Corrections and Public Safety personnel participate in the retirement systems that only require 20 years of service for a full benefit. Since these individuals can retire earlier, in some cases as early as their early 40's, they have a significant number of years until a more traditional retirement age.

A brief review of URS records found at least five other individuals who retired and appear to have been rehired within the same department at the State. While there is still a significant difference between Corrections, Public Safety and other departments, if a brief review of retirement records finds a 500% increase in the number of people from other departments, the fact finding process used to create the statistics is suspect. In light of the questionable corroboration from human resource managers cited above, it is difficult to rationally reach the conclusion that the statistics indicate inconsistent application

(c) "Legislative intent"

A pervasive theme of the Report is that there is a clear, universally accepted "legislative intent" behind the post-retirement employment scheme and that URS and State agencies have violated it. The key section deals with the definition of an "agency", since an employee is permitted to retire from one agency and return to work for another agency without restrictions.

When informed that the concept of "legislative intent" might be more malleable than the Report contemplated and subject to judicial scrutiny, OLAG responded that it

was not concerned with how the courts would look at this issue since they were not attorneys. Therefore, the Report's analysis and discussion of "legislative intent" is divorced from any practical application. While it is understood that the Report is not meant to be a legal opinion, URS and other entities subject to the statutes of Utah do not have the latitude that OLAG apparently has to disregard the analysis used by courts to determine "legislative intent."

URS asked OLAG to consider whether the report could simply compare and contrast the different readings of the definition of "agency" rather than determine that URS and others had violated legislative intent, but OLAG refused. The following is an analysis of why the Report's analysis of "legislative intent" is flawed and, therefore, not workable as a matter of administration since it likely would not withstand judicial scrutiny and doesn't take into account other indicia of possible meanings. URS believes that such a perspective is important for the Legislature in order to decide on a workable policy decision.

When interpreting a statute, the Utah Court of Appeals recently stated "[w]e give effect to the legislative intent, as evidenced by the [statute's] plain language, in light of the purpose the statute was meant to achieve." *Lewiston State Bank V. Greenline Equipment, L.L.C.*, 2006 UT App. 446, ¶ 12 (Utah Ct. App. 2006).

In 2002, the Utah Supreme Court stated:

> Legislators may decide that a statute should be passed for myriad, often even different, reasons, but where the legislative purpose is expressly stated and agreed to as part of the legislation, we do not look to the views expressed by one or more legislators in floor debates, committee minutes, or elsewhere, in determining the intent of the statute."

Wood v. University of Utah Medical Center, 67 P.3d 436, 445 (Utah 2002).

Therefore, in determining the legislative intent of a statute, there are three levels of analysis and the courts will not continue beyond the level that first yields a reasonable interpretation. First, courts look to the plain language of the statute. Second, if necessary, the courts will look to the stated purpose of the statute as agreed to in the statute itself. Finally, the courts will look to legislative history only when a reasonable interpretation cannot be found in the language with the stated purpose. The following is a brief analysis of the legislative intent behind the definition of "agency."

(i) "Plain Language"

The definition of "agency" is found at Utah Code Ann. §49-11-102(4) and states:

> (4) "Agency" means:
> (a) a department, division, agency, office, authority, commission, board institution, or hospital of the state;

(b) a county, municipality, school district, or special service district;
(c) a state college or university; or
(d) any other participating employer.

URS has interpreted and administered the post-retirement program by treating all of the entities listed in (a) as co-equal. Therefore, a department is an agency, a division is an agency, an agency is an agency, an office is an agency, etc. Indeed, that is the function of the term "or", to make a list of equivalent alternatives. There is no implicit or explicit hierarchy of items. One of the listed items is not more or less preferred than another. *Webster's New Riverside Dictionary* defines "or" as "1.a. An alternative, [usually] only before the last in a series. b. the second of two alternatives. 2. an equivalent expression."

OLAG's interpretation would insert a hierarchy or preference of one term over the others. Under this interpretation, the term "division" is excluded from the definition if the "division" happens to be part of a "department." OLAG's interpretation reads "division" out of existence if certain preconditions are met. Under this reading, "agency" doesn't mean a "department or division", "agency" really means "a department or a division, but only if the division is not part of a department." By extension, OLAG's reading of the statute is akin to saying, "Agency means any of the following entities, unless one of the listed entities is part of, subject to, or subsumed by one of the other listed entities, then that entity is not an agency."

There is nothing wrong with that type of definition as long as it is drafted more artfully than this example. But the point is that nowhere does the text even hint at such a complicated and convoluted reading. The Utah Code is full of well drafted statutes that make fine distinctions like those proposed by OLAG, and it is probably safe to assume that those drafting the definition of "agency" could have made those fine distinctions. If a "division" was truly not intended to be an "agency", the word "division" could simply have been left out.

(ii) Legislative Purpose

URS believes there is a very good chance that the analysis of the definition of "agency" ends with the plain reading of the statute and that a "division" is an "agency". However, even assuming that the next step of analysis must be taken, we then look to the stated purpose of the statute. Utah Code Ann. §49-11-103(2) entitled "Purpose – Liberal Construction" states, "This title shall be liberally construed to provide maximum benefits and protections consistent with sound fiduciary and actuarial principles."

The interpretation of "agency" as used by URS provides a more liberal interpretation, while that urged by OLAG is restrictive. Fewer people would be able to maximize their benefits under OLAG's interpretation than under URS' interpretation.

URS must also comply with "sound fiduciary principles." One of the primary common law fiduciary duties, as codified in Utah Code Ann. §75-7-802, is called the

"duty of loyalty" and states, "A trustee shall administer the trust solely in the interests of the beneficiaries." As applied to this situation, it is fiduciarily sound to protect the interest of the beneficiaries by interpreting the statute as URS has done.

The purpose section of Title 49 also requires that URS apply "sound actuarial principles." As discussed above in the section dealing with "costs", URS has never received any indication that the post-retirement employment program has resulted in an actuarial impact on the system. Therefore, the post-retirement program as administered has been actuarially sound.

(iii) Legislative History

Finally, if it became necessary to actually look at legislative history to try to define legislative intent, the history surrounding this statute is anything but clear on what that intent was. As discussed by the Utah Supreme Court in the quote above, individual legislators may have very different ideas in mind when voting for legislation. Also, in addition to floor debates, other pieces of legislative history must be considered.

In the official Minutes of the Retirement Interim Committee for Monday, December 19, 1994, Ms. Rebecca Rockwell reviewed the proposed legislation. The relevant part of the minutes state:

> Ms. Rebecca Rockwell, Associate General Counsel, reviewed the proposed legislation with the committee. She explained that under the legislation that "Agency" means a department, division, agency, office, authority, commission, board institution, or hospital of the state. It may also include a county, municipality, school district, or special district, or any other individual employing unit that participates in the system. The legislation provides that a member of any system administered by the board that has retired from any agency and who returns to work for [a] private employer or at a different agency from which the member retired, is not subject to reemployment restrictions.

It is interesting to note that there is no discussion or explanation that this legislation has a meaning different than the plain meaning as discussed above. If the legislation is truly designed to have implicit exceptions and conditions placed on the list of entities that are agencies, this is the place in the legislative history that such distinctions would be fully discussed and understood by the committee. There should be some explanation of that type of unusual reading, but there is none.

In the 1995 Interim Reference Bulletin found on the Utah Legislature Home Page, under the title *POSTRETRIEMENT RESTRICTIONS*, there is a summary of the minutes cited to above. The first sentence under the heading "Committee Action" states "The committee reviewed legislation that would lift the postretirment restrictions in most cases." By acknowledging that post-retirement restrictions would be lifted "in most

cases", this piece of legislative history clearly indicates an intent to read the legislation liberally.

When looked at in total, the legislative history surrounding this bill does not give a single, universally accepted "intent" on how this legislation was to be interpreted. This should not come as a surprise because most histories surrounding proposed legislation will have similar conflicting perspectives. This is one of the reasons why courts primarily rely on the language of the statutes rather than attempting to resolve all of the opinions and statements made during the process of drafting, arguing and voting on a piece of legislation.

3. Conclusion

As stated above, URS does not oppose the Recommendations found in the Report, and they do provide a series of actions which, in URS' opinion, would clarify the post-retirement employment scheme and ease the burden of administering the program. However, since there are various stakeholders who have valid opinions in this area, the Recommendations should be taken as a starting point in the discussion, not necessarily an ending point. URS will be happy to provide additional information and assist in other ways if the Legislature desires.

The following is a list of the Recommendations in the order that URS believes would be most effective at reducing the number of rehired retirees:

1. Require that contributions go into the Defined Benefit Plan rather than into the retiree's 401(k);
2. Prohibit any employment with the agency from which the employee retired for a period of six months, including part time or contract work;
3. Amend the definition of "agency";
4. Extending the waiting period from six to twelve months; and
5. Providing additional cost estimates on legislative proposals.

As it has always done in the past, URS will administer the rules given by the Legislature to the best of its ability. Obviously, the clearer the rules the easier it is for URS to administer. URS welcomes the opportunity to discuss the operations of the various retirement systems with the Legislature and will use this and every opportunity to improve its service the employees and employers in the future.

_____

Daniel D. Andersen
Counsel, Utah Retirement Systems

_____

Date

State of Utah

JON HUNTSMAN, JR
Governor

GARY HERBERT
Lieutenant Governor

Department of Public Safety

SCOTT T. DUNCAN
Commissioner

November 24, 2006

Utah State Legislature
Office of the Legislative Auditor General
W315 State Capitol Complex
SLC, UT 84114-0151

The Office of the Utah Legislative Auditor General recently completed an audit report, in which Chapter II is entitled "Post-Retirement Reemployment Practices Violate Legislative Intent." On behalf of the Utah Department of Public Safety (DPS), I would like to respond to the recommendations made in the final report.

Prior to making any remarks, however, I would like to make it known that all decisions regarding post-retirement reemployment practices engaged in by DPS and discussed in the audit were made by a previous commissioner. In saying that, I am not second-guessing his decisions—I just want the record to show that all of the incidents cited in the audit happened before my appointment to commissioner.

I also want to make it clear that I fully agree with the findings of the Legislative Auditor and, since being appointed, have tried to "fix" some of the problems pointed out in their report. My only concerns surround some of the recommendations made by the auditors. I will address each of these recommendations.

1. *We recommend the Legislature consider clarifying the language in the post-retirement reemployment restrictions that defines "agency."* I absolutely agree with this recommendation. I believe it was the different ways individuals defined (and interpreted) the word "agency" that started the problems identified in the audit report.

2. *We recommend the Legislature consider changing the post-retirement reemployment statute to prohibit any work, inclusive of part-time and contract work, from qualifying as part of the six-month waiting period to return to full-time employment.* Again, I agree with this recommendation. I believe it would take away the perception that someone was trying to manipulate the system.

3. *We recommend the Legislature consider either changing the waiting period from 6 months to 12 months or eliminating the ability to return to the same department without suspension of retirement benefits.* I believe if the recommendation made in #2 is adopted that this recommended change would not be necessary. The original intent of the Legislature seemed to be to allow a break in service of not less than six months (making it less likely that someone was manipulating the system). After that, if a person had something to offer the

people in this state, then she should not be penalized if she is hired back by the same agency.

4. *We recommend the Legislature consider amending the Post-Retirement reemployment statute to require employers to contribute to URS' defined benefit plan instead of making contributions to the personal 401(k) accounts of rehired retirees.* Once again, I believe this is penalizing the employee who chooses to retire and is eventually hired back to the same agency. If the ability to manipulate the system is fixed, then any employee who abides by that system should not be penalized. The contribution to the 401(k) is a good tool to use to recruit and retain good people (true public servants). The amount contributed to the URS' defined benefit plan would be minimal, if the loopholes were fixed that allowed employees to manipulate the system.

5. *We recommend the Legislature consider requiring URS to provide the Legislature with cost estimates for any legislation considering post-retirement reemployment policy changes.* I agree. I think this is just sound fiscal policy.

Finally, I would recommend that regardless of what changes the Legislature decides to make to the post-retirement reemployment statutes that they not be retroactive. The employees who took advantage of retirement that were audited in this study did so under the direction of the URS and with their department head's advice. They made good faith life-altering decisions about their future based on advice given them by those who should have known the rules and laws (and the legislative intent of those same rules and laws). Please don't punish them.

Sincerely,

Scott T. Duncan
Commissioner
Utah Department of Public Safety
(801) 965-4463
sduncan@utah.gov

State of Utah

JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

Department of Corrections

SCOTT V. CARVER
Executive Director

CHRISTINE MITCHELL
Deputy Director

December 4, 2006

John Schaff
Legislative Auditor General

Dear Mr. Schaff:

Corrections appreciates the opportunity to reply to the Legislative audit on post-retirement reemployment practices. Our response addresses the issues raised in Chapter 2 about the Department of Corrections and the recommendations of the report.

Chapter 2
Post-Retirement Reemployment Practices Violate Legislative Intent

Corrections has not knowingly violated legislative intent in its post-retirement employment practices. The Department has proceeded on the belief that the interpretation of the statute that allows staff to retire and rehire is within the law. The interpretation has been in place for more than 10 years and has been supported by Utah Retirement Systems (URS). All retire-rehires have been cleared by URS and no effort has been made to hide the practice. To our knowledge, no one in Corrections' current management was involved in the initial decisions made by URS in 1995 that have allowed this practice.

A similar interpretation of the law was made by URS for staff of the Department of Public Safety. The greater number of retired-rehired staff in Corrections is probably a result of the much larger employee pool in Corrections. Corrections has approximately twice as many FTE as Public Safety.

Which staff benefit?
The audit incorrectly asserts that retire-rehire policies have benefited mostly “higher level professional” staff. The following statistics describe the rehire positions of the 29 staff members studied by the audit who had less than 6 months between their retirement and rehiring with Corrections.

- 23 (79%) had no staff supervision responsibilities

- 24 (83%) of the positions are considered hourly workers by the State for Fair Labor Standards Act purposes
- 19 (66%) were paid less than $40,000 a year in spite of having more than 20 years experience with the state.
- Only 4 (14%) were rehired to positions within management

The auditors included positions such as our Correctional Specialists (6 of the rehires) as higher level professionals. While we agree that all our staff are professionals, these positions cannot be described as "higher level." They are one step above our Correctional Officers and, with a few exceptions, do not supervise other staff. All of these staff members were given salaries of less than $40,000 a year when they rehired. In addition, their salary range is lower than that of agents who are being considered line staff by the audit.

The auditors claim (which Corrections does not dispute) that five employees have retired from one Division and gone to the same title in another. Their claim is that only one of these employees is a line level staff member. Actually, one was a Correctional Officer and the other four were Correctional Specialists who, as we explained above, cannot be considered "higher level" employees.

We suggest that the correct interpretation of Figure 2.3 (with regard to the Department of Corrections alone) would be:

Position Rehired To	Less than 6 months after Retirement	Percent of Total	More than 6 Months After Retirement	Percent of Total
Management	4	14%	2	20%
Mid-level or Administrative	7	24%	1	10%
Line level	**18**	**62%**	**7**	**70%**

The following offers important information to be considered in determining how to categorize the rehire positions of these staff:

1. Correctional Specialists--6 staff members (21% of the rehires within 6 months) were rehired as Correctional Specialists (also Correctional Habilitative Specialist which was combined in the title reduction efforts of several years ago).
    - This position is one step above Correctional Officer and rarely has any staff supervision responsibilities.
    - Staff in these positions are at least 5 levels below a warden in the prison.
    - They are considered hourly workers under the Federal Fair Labor Standards Act, not professional staff.
    - All were hired at less than $40,000 a year in annual salary.

- Their salary range is lower than that of agents who are being considered as line staff by the audit.

2. Correctional Security Enforcement Officer—1 staff member (3%) was rehired in this title. This is equivalent to a Correctional Officer and has no supervisor responsibilities.
    - This individual was rehired at a Correctional Officer salary and the pay range on the position is identical.
3. Social Workers and Substance Abuse Workers—2 staff members (7%) were rehired in these titles.
    - These staff do not supervise any other staff members.
    - They deliver direct treatment and case work services to offenders.
    - They are generally several levels below management.
    - They are considered professional, but not managerial staff.
    - Both were hired at salaries less than $35,000 a year.
4. Facilities Coordinator—1 staff member (3%) was rehired.
    - This is considered to be a technician position and has no supervision responsibilities.
    - It is the lowest level in its Bureau and reports to a Bureau Chief who reports to a Division director.
    - The position is considered to be an hourly worker under FSLA.
    - The staff member was rehired at less than $35,000 a year.
5. Investigator—3 staff members (10%) were rehired as investigators.
    - These staff have no supervision or management responsibilities.
    - The position is considered to be an hourly worker under FSLA.
    - Corrections does view these staff (as it does all its staff) as professionals, but not management.
6. Auditor—1 staff member (3%) was rehired as an auditor
    - This position has no supervision or management responsibilities.

What is the re-employment process?

The audit correctly states that employees can initiate the retire-rehire process by applying for an advertised merit position, being selected through a competitive process, and then retiring. Twenty-five of the 29 staff members who retired and were rehired in less than 6 months went to a merit position. These staff members went through a **competitive** recruitment and were selected for a new merit position, they were not transferred or assigned to their new position.

Do staff retire sooner?

The auditors claim that this retire-rehire policy “allows employees to retire earlier than they would...” p. 10. The right to retire at a certain point in their careers is given to employees by statute. The retire-rehire policy does not “allow” them to retire.

The policy does assist Corrections and Public Safety in retaining well-qualified and experienced staff who would otherwise leave the agencies at 20 years. While the staff must change Divisions to take advantage of this option, the Department is able to keep their very valuable skills by hiring them to fulfill other functions. Because of the financial nature of the retirement system, most employees feel that they are losing money if they do not retire when they reach eligibility. Without the retire-rehire policy that allows staff to

retire if they change Divisions within the Department, most of these employees would leave our Departments at 20 years at a great loss to the State.

Does the State benefit?
Corrections believes that the State benefits from this interpretation of the statute by making it possible to retain well-qualified and experienced staff who would otherwise retire and leave our agency. Corrections has more than 100 vacancies in Correctional Officer positions alone and finds it increasingly difficult to recruit and retain staff. While retire-rehire staff members make up a small percentage of our total workforce (about 1%), we look for every possible means of attracting and retaining qualified individuals.

How common is this practice?
As mentioned, approximately 1% of our workforce is made up of retired-rehired staff.

Is the Audit interpretation of the statute correct?
Corrections believes that the Legislature is the body that should clarify the statute and determine under what circumstances a retired employee can rehire with the state.

Recommendations

Audit Recommendation 1. We recommend the Legislature consider clarifying the language in the post-retirement reemployment restrictions that defines agency.

Corrections' response.
Corrections agrees that the Legislature is the appropriate group to clarify this language.

Audit Recommendation 2. We recommend the Legislature consider changing the post-retirement reemployment statute to prohibit any work, inclusive of part-time and contract work, from qualifying as part of the six-month waiting period to return to full-time employment.

Corrections' response.
Corrections has no objection to this recommendation.

Audit Recommendation 3. We recommend the Legislature consider either changing the waiting period from 6 months to 12 months or eliminating the ability to return to the same department without suspension of retirement benefits.

Corrections' response.
Corrections disagrees with this recommendation and believes that the state would lose well-qualified and experienced staff who could continue to contribute to the effective operation of government.

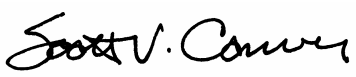
Audit Recommendation 4. We recommend the Legislature consider amending the Post-Retirement reemployment statute to require employers to contribute to URS' defined benefit plan instead of making contributions to the personal 401(k) accounts of rehired retirees.

Corrections' response.
We disagree with the recommendation because it would eliminate another benefit from employees.

Audit Recommendation 5. We recommend the Legislature consider requiring URS to provide the Legislature with cost estimates for any legislation considering post-retirement reemployment policies.

Corrections' response.
This is not applicable to Corrections.

Sincerely,



Scott Carver
Executive Director

Appendix A
Retire-rehire staff positions studied by the auditors

Staff who returned to employment in under 6 months

Rehire Job Title	# of staff	Job Category
AP&P Agent	4	Line (AP&P entry level)
Auditor	1	Administrative—no supervision of other staff
Facilities Coordinator	1	Administrative—no supervision of other staff
Deputy Director of Corrections	1	Management
AP&P Supervisor	1	Supervision of line level—no management responsibilities
Correctional Specialist I and II	4	Line
Correctional Habilitative Specialist	2	Line
Correctional Captain	1	Supervisory
Correctional Assistant Director	1	Management
Investigator	3	Administrative
Office Specialist	1	Line
Security and Enforcement Officer	1	Line
Social Worker	1	Line
Correctional Substance Abuse Counselor II	1	Line
Correctional Administrator V	1	Management
Correctional Officer	4	Line (DIO entry level)
Correctional Industries Operations Director	1	Management
	29	

Only 4 of the 29 are management positions. 7 more are supervisory or administrative. This means that 18 out of 29 were line level positions with no management or supervisory responsibilities (62%).

Staff who returned to employment in more than 6 months

For the 10 staff who had more than 6 months between retirement and rehiring, 5 were Correctional Officers, 1 was an agent, 1 was clerical, 1 administrative, and the remaining 2 were management. For these 10, 70% were line level positions.

December 8, 2006

John M. Schaff
Auditor General
Office of the Legislative Auditor General
W315 Utah State Capitol Complex
PO Box 145315
Salt Lake City, UT 84114-5315

RE: Performance Audit of Post-Retirement Reemployment (Report No. 2006-11)

Dear Mr. Schaff:

We appreciate the opportunity to respond to Chapter III of the above-referenced performance audit report. Thank you for allowing us to study that portion of the draft of the report, and to meet with you and your staff last week.

We have reviewed Chapter III of the draft carefully. Attached is a copy of our response.

As always, feel free to contact me if you have any questions.

Sincerely,

Kenneth F. Wynn
Director
Department of Alcoholic Beverage Control

UTAH DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
RESPONSE TO THE LEGISLATIVE AUDITOR GENERAL'S REPORT
DECEMBER 8, 2006

Our department is in receipt of Chapter III and the recommendations of your audit report relating to post-retirement re-employment issues. The report recommends certain amendments to Utah Code Ann. §49-11-504 – a statute that (1) expressly allows a retiree of an agency to be re-employed by the same agency within six months of retirement on a part-time basis; (2) expressly provides for a financial penalty in retirement benefits if the retiree's earnings exceed a certain amount during that part-time employment period; (3) expressly allows a retiree of an agency to be re-employed by the same agency after six months on a full-time basis without any post-retirement restrictions other than a loss of additional service credit; and (4) expressly provides procedural guidelines and notice requirements for such re-employment. Several agencies of government including ours are criticized in the audit report, not because we followed this law, but because we purportedly violated the "intent" or "spirit of the law."

1. LEGISLATIVE "INTENT".

The report is based not on the clear statutory language of §49-11-504, but on what legislative auditors, and an actuary of the Utah Retirement System (URS) now "believe" was the statutory intent of the law.[1] The portion of the report we have been furnished provides no legislative history, floor debates, interim committee meetings or reports, or documents that may have been circulated during the 2000 legislative session by the URS or the bill's sponsor to indicate what the legislative intent was when the bill was enacted. The report's view of legislative intent is couched in speculative phrases such as "it is our opinion" or "we believe" the legislature intended such and such.

H.B. 272 amended Utah Code 49-1-505 (now 49-11-504) effective March 16, 2000. The language of that legislation has remained the same and is clear and unambiguous. The Utah Supreme Court has repeatedly recognized that if a law is clear and unambiguous, the search for further legislative intent from secondary sources is unnecessary. The Court says that when faced with a question of statutory construction, and in attempting to determine legislative intent, it first looks to the plain language of the statute. In construing a statute, the Court assumes that each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable. Only if the Court finds some ambiguity in the statute's plain language does the Court look further, and only then will the Court seek guidance from the legislative history and relevant policy considerations. It will not look beyond the language to "divine" legislative intent.[2] Neither should governmental agencies be expected to do so.

---

[1] *The report also references current comments of the house sponsor of the bill that the intent of the law was to allow employees to return to full time in the same department after a six month break, but not that they work part-time during the six-month break and get their old job back. Yet the law allows for such part-time employment, and full-time re-employment with the same department without any restrictions as to job duties.*

[2] *See Flake v. Flake, 71 P.3d 589, 598 (Utah 2003) and cases cited therein.*

Nevertheless, we have tried to review the legislative history of the bill, and could find only one meeting of the Retirement Interim Committee on October 27, 1999. The bill's sponsor was not present at that meeting, and there is no indication that materials on the bill were distributed to the committee or that there was any discussion of the bill. We could find no further information from floor debates during the 2000 session other than the concern of some legislators about the unfairness of certain departments rehiring retirees but failing to pay into their 401k at the same rate as they were paying into other employee's retirement benefits.[3]

When two of our employees were considering retiring nine months after the H.B. 272 was enacted, we sought out the expert advice and assistance of representatives from URS, the DHRM, and PEHP to make sure we understood the intent and all aspects of the new law, and to be guided through the process. Special meetings were arranged at our department with representatives of DHRM and URS. We fully disclosed during those meetings and in numerous communications with high-level representatives of these agencies our desire to rehire these two employees to their prior positions on a part-time basis for six months, and hire them back full-time to those positions after the six-month period. At no time did anyone express concern, or raise any issue about "legislative intent". Indeed, we received encouragement to go forward.

What we were told is that H.B. 272 was enacted in response to complaints from school districts and state department heads about the outward migration of their talented and skilled employees who qualified for retirement, but only had the option of re-employment if they went to work for another government entity. Examples were given of retired teachers leaving one school district to find employment in another, and outstanding IT employees that left their own department to work for another. These employees would have preferred to remain with their agencies and their agencies wanted to keep them, but the employees were precluded from doing so.

We were told by representatives of URS that their own actuaries had thoroughly researched the issue and found H.B. 272 was financially sound and that it would actually save money for the state. Indeed, the Office of the Legislative Fiscal Analyst reported that H.B. 272 had "no significant fiscal impact." We were told that the URS was processing a lot, perhaps hundreds, of these rehire requests in other agencies. And we were told by URS to refer all inquiries about the rehires to them because H.B. 272 was their bill.

If H.B. 272 was enacted to stop the outward migration of skilled retiring employees, then the premise of the current audit report is wrong. H.B. 272 expressly authorized retired employees to work part-time for their own agencies during the six-month period before they could be re-employed by those agencies full-time. Yet the report claims the "intent" was that there be a six-month "cooling off" period and "break" in employment. The statute contains no restrictions on employees returning to their former positions. Yet the report claims the "intent" was to stop retiring employees from doing so. The report claims that there was an "intent" that the part-time work <u>not</u> be used as a bridge to returning to full-time work, or that the part-time work be used only in extraordinary cases to allow retiring employees to complete existing projects or to train others to take their jobs. This was not part of the legislation, and it makes little sense if the intent of H.B. 272 was to stop their outward migration. Moreover, keeping a

---

[3]*There are only two audio recordings of floor debates held on February 22 and March 1, 2000, neither of which supports the audit report's current claims of legislative intent.*

skilled employee in the prior position, even part-time, may be better for the agency than bringing someone else in to train. The level of actual productivity may be higher due to the abilities of the skilled worker.

It also makes little sense when they are rehired full-time after six months to require them to take positions other than the ones in which they have developed their level of expertise and skill. The very purpose of H.B. 272 would be defeated by such logic. We consulted with a deputy director of DHRM in the fall of 2000, and were specifically told that retiring employees could be hired back at their same job descriptions (same personal control number – PCN).

2. THE REPORT WRONGLY ASSESSES BLAME ON OUR DEPARTMENT THAT SOUGHT ADVICE AND DIRECTION FROM URS, DHRM, AND PEHP, WAS FORTHRIGHT AND OPEN IN THE PROCESS, AND FOLLOWED THE LAW AND ADVICE WE WERE GIVEN.

In 2000, when the department considered the rehire of the two DABC employees, everything was done openly with full, meticulous, consultation with URS, DHRM, and PEHP. This was a major decision for the department and these employees, and we needed the assurance that everything was done "by the book" to ensure full compliance with H.B. 272 and any guidelines that had been enacted to implement it.

In 2000, there was never any hint that the employees' job duties during the six-month part-time employment period had to be distinctly different, sufficiently reduced, or "newly-defined" from their normal job duties (other than the requirement that they not work more than part-time.) We were never advised of any of the concerns now raised in the current URS guidelines referenced in Figure 3.1 of the audit report. The four URS requirements listed in Figure 3.1 were <u>not</u> required by the URS board until December 11, 2003 when URS resolution 03-19 was passed. Thus, the retirees rehired prior to that date were not governed by or expected to follow those guidelines. They simply did not exist. *(Copies of the materials distributed by URS in 2000 have previously been supplied to your office).*

Five years later, when other retiring employees sought rehire because of the impact of H.B. 213 (discussed below), our department again reviewed the statutes and the newer URS guidelines to ensure compliance. We openly and candidly discussed the situation with URS. Contrary to what the audit report labels as a "written reprimand" to the DABC, the URS recognized that our department had been "very straightforward" with them. Had the URS concluded that the DABC acted inappropriately, it could have cancelled the retirement benefits of these employees. It chose not to do so. It merely urged the DABC to revisit our rehiring policies in the future based on the URS' conclusion that they were in conflict with the "spirit" of the post-retirement restrictions.

The statutory requirements of the rehire laws were <u>not</u> bypassed. The DABC has followed them to the letter. The report concedes that no laws were violated, but then engages in a condemnation of the department and retirees who followed the law on the advice of URS and others.

The report recognizes that the current statute and URS rules "intentionally" allow for retirees to be rehired part-time, but speculates that this was only intended for extreme cases of finishing incomplete projects or replacement training – two purposes totally contrary to what we were told was the intent of the H.B. 272.

The report should not condemn loyal, dedicated, and skilled public servants who have

served government well, earned their retirement benefit, and desired to continue to serve under the provisions of laws that allow them to do so. The governor has gone on record supporting the rehire of such retirees. Yet, the report implies an improper motive of those who applied for re-employment after 30 years of faithful service to the state. Moreover, the re-employment of some was certainly not without risk. Some gave up their "grandfathered" merit status and returned to exempt positions where they now serve at the pleasure of their departments. They gave up group life insurance coverage and benefits during the six-month period. Upon their rehire full-time, they could no longer build sick-leave for paid up health care benefits, and any accumulated sick leave will be forfeited when they leave employment. They returned with no accrued sick or annual leave, they were not eligible for Long Term Disability until a twelve month employment history was logged, and they were not eligible for Social Security Disability benefits until disabled for six months.

3. THE ONE-TIME IMPACT OF H.B. 213 SHOULD BE CONSIDERED.

The report fails to assess the one-time impact of the passage of H.B. 213 in 2005 which resulted in a mass outward migration of employees who would have remained employed but for the tremendous potential loss of their health benefits. This should be considered in any cost-analysis of the impact of H.B. 272. Indeed, the DABC had received only two requests for rehire in five years prior to the enactment of H.B. 213. We certainly had not over-used the post-retirement law. Agencies faced with vast outward migration in 2005 were put under tremendous pressure. Our department was no exception. We are a relatively small department with a very low personnel turnover rate. As a result, we had a significant number of employees with 30 or more years of service. H.B. 272 provided a partial means to potentially retain skilled employees.

4. COST SAVINGS ANALYSIS.

The report criticizes the DABC's human resources manager's comments that the rehire laws can result in a cost savings to the department (some employees are rehired at a lower salary level; the department no longer has to pay their insurance premiums; etc.).[4] The report says this analysis is nearsighted because the cost to the retirement system outweighs the savings to the department. Yet the portion of the report DABC has been furnished fails to identify how those costs increase. It merely says the *"URS' actuary clearly states that there is a cost to the system when employees retire early for the purpose of returning to full-time work in the system."* There is no further elaboration. The actuary's quote would seem to apply equally to situations where employees retire early and go to work for an entirely different agency within the system – a situation that has long been recognized, approved by the URS, and allowed by law without such criticism.

---

[4]*The report makes much of the fact that only six of the twelve employees were brought back at lower salaries. Again, the rehire law leaves salary level totally to the discretion of each department director. The DABC director appropriately did an assessment on a case-by-case basis, and decided to bring back half at a lower salary level. When HRM and URS met with our department in 2000, they advised us that employees could come back at the highest step in the range, and that some returning employees in other agencies were actually seeking to be paid more to off-set their loss of medical benefits.*

We have previously noted that upper management representatives of the URS repeatedly advised us in 2000 that the new rehire law had been meticulously reviewed by their actuaries and that they determined that it would save the state money. This claim is supported by the Office of the Legislative Fiscal Analyst's report that H.B. 272 had "no significant fiscal impact."

In any event, our department's assessment of cost savings to the department by rehiring under H.B. 272 shows fiscal responsibility.

5. DABC'S DELAYED RECRUITMENT POLICIES.

The report condemns the retirement, part-time employment, and full-time re-employment of several management level employees as giving *"the appearance that the agency is attempting to manipulate the intent of the law."* The rehiring of the first two in 2000 has already been addressed. There was no manipulation. The department and the employees sought out the advice of URS, DHRM and PEHP and worked closely with them in processing these rehires. Every aspect of their rehire was fully disclosed. Not once did any representative of those agencies indicate any perceived violation of any "intent" of the law. To the contrary, they indicated that this was precisely what the law was intended to allow.

The employees that retired in 2005 because of the impact of H.B. 213, did so with no guarantee of rehiring to the same position or any other position. When an employee expressed a desire to consider retiring and told management that they would like to continue to work part-time, management handled each case individually. At the very least, all retiring employees responsibilities were distinctly different or sufficiently reduced. All retirees knew that they might not have a full-time job to return to at the end of the six-month part-time employment period. No guarantees or agreements, written or verbal, were made between management and the retirees.

Recruitment for the retirees positions was consistent with the department's recruiting procedures for similar positions. The interviews for positions at the office and the store levels were done by the same people who normally interview for those positions. There were no special instructions given to the interviewers by management.

It appears that the only element of the four newer provisions to be met for post-retirement employment under URS resolution 03-19 that is under question has to do with leaving the vacant position open for six months or to have the position vacated by the retiree only to be filled by an AJ, part-time employee. While it is true that the DABC usually recruits for open positions in less than six months, there are a number of positions that have remained unfilled for extended periods of time. We are a small agency and do a lot of cross-training. We were able to leave the positions open the same way we leave open positions for our employees who are called to active duty military service for over a year. Had this retirement process been initiated in the third quarter rather than at the beginning of the year, it would not have been possible to leave these positions unoccupied. The seasonal rush puts a great demand on staff and taxes all areas of the agency. After the first of the year, retail business slows substantially thus allowing us to keep these position open longer. The rationale behind this was to allow the retirees the opportunity to apply for their previous positions held through the competitive hire process through Utah Job Match. Each retiring employee was called in by the Human Resources Manager and told on a "one-on-one basis that there was no guarantee they would get their job back and that the most qualified individuals would be hired through the competitive hire process. The various risks were discussed with each employee such as the loss of leave time, loss of life insurance benefits,

ineligibility for Long Term Disability and a six month waiting period through the Social Security Administration if there happened to be a significant or protracted medical condition. No promises were ever made for rehire to any employee.

SUMMARY. In closing, the DABC has followed the current post-retirement law upon the advice and direction of those agencies most responsible for implementing it. If those agencies – specifically the URS – feel the need to revise the law, it should be done legislatively, not by URS board resolution, or opinions of staffers attempting to "divine" prior legislative intent. If the law is changed, we intend to fully comply with it. We welcome legislative clarification of this law.