

September 5, 1996

Speaker Melvin R. Brown
House of Representatives
318 State Capitol Bldg
Salt Lake City UT 84114

Subject: **Exempt Positions** (Report #96-04)

Dear Speaker Brown:

At your request, we have collected information about the expanded definition of exempt positions resulting from the implementation of House Bill 330 in 1994. We noted that the definition for Schedule AR, which allows an exempt classification if the position has statewide policy-making authority, was interpreted broadly and differently by departments. These different departmental interpretations may have exempted positions not intended by the Legislature. As a result, it is possible that the Legislature might wish to write a more specific definition for Schedule AR exemptions or instruct the Department of Human Resource Management (DHRM) to do so. Because of House Bill 330's expanded definition of exempt positions, an increase of 88 exempt positions occurred. Since exempt positions are considered by employees to have a greater risk of removal than career service positions, the Legislature instructed the DHRM to provide incentives to encourage affected employees to voluntarily change from career service status to exempt status. Since July 1994, these incentives have cost the state \$104,600 in on-going and one-time costs. In addition, the state has also incurred, since July 1994, \$65,800 in severance costs resulting from employees being discharged without cause from their exempt position. The fiscal note on House Bill 330 did not anticipate any implementation costs.

There are currently 18 exempt schedules (Schedule AA through schedule AR). These different exempt schedules define employees who work in a particular department (e.g., Schedule AN defines employees of the Legislature) or who work in a particular type of job (e.g., Schedule AJ defines seasonal employees). To be exempt means that an employee is not covered by career service provisions and can be hired and fired at will. House Bill 330 modified the executive branches' Schedule AD exemption definition and created the Schedule

AR exemption for the executive branch. As a result, we limited our focus to these two executive branch exempt schedules. Schedule AD now allows an exempt classification based on a direct reporting relationship to an executive director of a department which is also of a confidential nature. Schedule AR allows an exempt classification if the position has statewide policy-making authority. Department directors favor exempt positions because exempt positions can be hired and fired at will by the departmental director. As a result, it is easy to place people who are supportive of the departmental director's long-range plan into these positions.

As stated on the enrolled copy, the intent of House Bill 330 was to “... *exempt department directors, division directors, and assistant directors from career service status.*” However, Representative Karen Smith, the sponsor of House Bill 330, spoke in broader terms when introducing the bill on the House floor. In the 1994 Legislative House Floor debate, Representative Smith stated that House Bill 330 was the Governor's bill and its purpose was to increase the number of exempt employees. She stated that in order for the policies and vision of a new administration to be effectively implemented, it is important that positions that influence the implementation of that vision be responsive to the new Governor, either directly through the Governor or through the department director. She indicated that under this bill, a position would be classified as exempt based on (1) its place in the organization or (2) its statewide policy-making authority.

Prior to the passage of House Bill 330, **Utah Code 67-19-15** defined schedule AD exempt positions as follows:

Except as otherwise provided by law...the following positions are exempt from the career service provisions of this chapter:

- (d) division directors, heads of institutions, and heads of major offices who are appointed by the department head or commissioner, and those other appointees who are in a personal and confidential relationship to that department head or commissioner, designated as Schedule AD.*

House Bill 330 modified the statutory language by changing the Schedule AD definition and adding the Schedule AR exemption. The revised statute reads as follows:

Except as otherwise provided by law...the following positions are exempt from the career service provisions of this chapter:

- (d) employees who are in a confidential relationship to a department head or commissioner and who report directly to, and are supervised by, a department*

head, commissioner, or deputy director of a department or its equivalent, designated as Schedule AD...

(r) employees who make statewide policy, designated as Schedule AR.

As can be seen, prior to House Bill 330 the definition of the AD exemption was more position specific. After the passage of House Bill 330, the definition of AD exempt no longer identified specific positions as criteria for exemption but instead identified reporting relationships as criteria for exemption. In addition, an exemption for positions that make statewide policy (Schedule AR) was also added. By making reporting relationships rather than specific positions the criteria for an exemption plus adding the criterion regarding making statewide policy, the language regarding exemptions was broadened. This broader language resulted in more positions being classified as exempt. However, it may not have been the intent of the Legislature that some of these positions become exempt. Also, it is possible that departmental interpretations of this new, broader statute may cause problems involving inconsistent treatment of employees among departments.

The passage of House Bill 330 required a re-analysis of state positions to determine whether the new requirements for AD or AR exemptions were met. The DHRM was responsible for this analysis. The DHRM began the process by analyzing all existing AD positions in terms of the new criteria established by House Bill 330 (a direct reporting relationship and a confidential relationship). Using the new criteria and each department's existing organizational structure, the DHRM challenged 47 existing AD positions as not meeting the new AD requirements and proposed 75 other positions as meeting the new AD requirements. The DHRM expected that departments not happy with the outcome of this analysis would reorganize their reporting structures to retain those positions that the department wanted to retain as exempt.

While the AD criteria were relatively clear-cut to the DHRM, the AR criterion was not. The DHRM did not feel qualified to determine when a departmental position made statewide policy. As a result, the DHRM let each department define what it means to make statewide policy and then to identify those positions that met the departmental definition. The DHRM did review all departmental proposals for AR status and did challenge some of the departmental proposals. However, if the department director was willing to state in writing that the requirements of any given position called for making statewide policy, then the DHRM allowed the status change. Because each department was allowed to make their own interpretation of the AR exemption, there existed the possibility of different interpretations among departments and, in fact, this is what we found.

Departments Interpreted Schedule AR Exemption Differently

Departments had differing interpretations of what it means to make statewide policy. These different interpretations allowed departments to reach different reporting levels in their organizations with their AR exempt positions. In addition, these differing interpretations may have facilitated department directors in making positions exempt that did not meet the AD criteria but that the department director felt needed to be made exempt. However, while departmental interpretations of Schedule AR may have aided the DHRM in its analysis, these differing interpretations may have led the DHRM to treat departments inconsistently. If the Legislature is unhappy with the outcome of the schedule AR analysis, they may either want to develop a more specific definition for Schedule AR exemptions or direct the DHRM to do so.

The DHRM allowed each department to define for itself what it means to make statewide policy. We reviewed three large departments' definitions and noted that all three definitions are different. First, the Department of Corrections' interpretation involved a position having a significant impact on statewide policy. The executive director indicated to us that his management style is participative. While the executive director has final say on departmental policy, both regional administrators and wardens review and either approve or suggest modifications to policy that will be applied statewide. As a result, the executive director believes that these positions, in effect, make statewide policy. Second, the Department of Public Safety's interpretation focused on whether a position has the final or near-final say regarding departmental policy or policy that affects outside agencies. Third, the Department of Human Services' interpretation focused on whether a position had statewide impact.

Because of these differing interpretations, departments reached into differing levels in their organization to identify AR positions. Corrections and Public Safety, which together have over 80 percent of the current Schedule AR positions, went the deepest into their organizations. Within Corrections, all employees with the generic title of Correctional Administrator III or IV were classified as Schedule AR. These two generic titles cover both regional administrators and prison wardens. Some of these employees are four reporting levels from the Executive Director. Within Public Safety, the generic title of Captain or the equivalent was either made schedule AD or AR exempt. We noted that those employees who hold a Captain or equivalent position and who were made AR exempt are three reporting levels from the Commissioner of Public Safety. Human Services, which identified three AR positions, went two reporting levels into its organization.

It is possible that some department directors used their schedule AR interpretations to facilitate exempting positions that they felt strongly needed to be exempt but that did not meet the new, broader AD criteria. We believe that some departmental directors viewed House Bill 330 as a means to increase the number of departmental exempt positions and, more to the point, increase the number of positions wherein employees could be hired and fired at will.

However, with the new AD definition in House Bill 330, this did not always occur. As a result, the AR exemption was sometimes used to cover those positions that Schedule AD could not. For example, one department director we interviewed spoke incredulously of the fact that the initial impact of House Bill 330 was to reduce the number of exempt employees in his department. He indicated that he had to work very hard just to retain the number of exempt employees that he had had, much less add the exempt positions that he wanted. He accomplished this by reorganizing and covering as many positions as possible under Schedule AD. Those positions that could not be covered under Schedule AD were made Schedule AR even though the positions' authority to make statewide policy was debatable.

While DHRM allowed departmental interpretations of Schedule AR as a means of aiding the re-analysis effort, these differing definitions may have resulted in inconsistent treatment of departments by DHRM. Specifically, one department may have been successful at getting some positions classified as AR exempt while another department was unsuccessful at getting comparable positions so classified. For example, it is the recollection of the former Deputy Director of Human Services that Human Services tried to get their regional administrators classified as Schedule AR. Human Services has a participative management style as does Corrections and believes that its regional administrators are equivalent to Correctional Administrators III's and IV's, which were given AR exempt status by DHRM. However, Human Services was denied AR exempt status by DHRM for their regional managers. Human Services does not understand why they were denied while Corrections was approved. DHRM states that Human Services either tried to have unqualified positions classified as AD or Human Services must not have used the right verbiage with them when presenting their justification for AR status. Inconsistent treatment among departments could be a problem. Legislative counsel has indicated to us that the Department of Labor views the state as a monolithic hiring entity. As a result, it is important that personnel policies be applied consistently from department to department. Given the above example, we believe that it is possible that **Utah Code 69-19-15(r)** is not applied consistently from department to department.

Legislative counsel indicated that **Utah Code 69-19-15 (r)** which defines the Schedule AR exemption is written broadly. However, there were some within the legislative branch who believed that either the Governor's Office or the DHRM would develop a more specific definition of what it means to make statewide policy. This did not happen. If the Legislature is unhappy with the departmental interpretations of "makes statewide policy" or is concerned with the possibility of inconsistent treatment among departments, the Legislature could consider clarifying **Utah Code 69-19-15(r)** so that legislative intent is clear. As another option, the Legislature could direct the DHRM to develop a more specific definition of what it means to make statewide policy.

Regardless of what definitional changes the Legislature may make in the future, the implementation of House Bill 330 had the result Representative Karen Smith identified as the bill's purpose. Specifically, the number of exempt positions was increased statewide.

House Bill 330 Increased the Number of Exempt Positions

As a result of the broader exempt definitions contained in House Bill 330, there was an increase of 88 additional exempt positions as of June 1996. This increase is made up of 62 AD positions and 26 AR positions.

In analyzing AD positions, DHRM compared the existing 222 positions against the new criteria laid out in House Bill 330. Based on the new criteria, DHRM proposed 75 positions as meeting the new criteria but which were not currently classified as AD and challenged 47 positions as not meeting the new criteria. DHRM's proposed AD positions are shown in Figure I. DHRM expected departments not happy with this analysis to reorganize their reporting structure to retain desired exempt positions.

Figure I		
Composition of Final Changes in AD Positions		
Origion of Positions	DHRM Proposed AD Positions July 1994	Final AD Positions June 1996
Existing Positions	222	155
DHRM Proposed Positions	75	63
New Positions	0	56
DHRM Challenged Positions	(47)	10*
Total AD Positions	250	284
* <i>These 10 positions were originally challenged. However, through departmental reorganization they were retained as AD positions. Thus, they add to the final AD position count.</i>		

The final composition of AD positions is also shown above in Figure I. As can be seen, prior to the implementation of House Bill 330, 222 AD positions existed throughout all state departments. Following the DHRM's analysis, 284 AD positions existed throughout all state departments, an increase of 62 AD positions. Making up the current 284 Schedule AD

positions are: 155 of the original 222 Schedule AD positions; 63 of the 75 positions proposed in DHRM's analysis as meeting the new AD criteria but that were not, at the time of analysis, Schedule AD positions; 56 new positions that were not formerly Schedule AD but that did meet the new criteria following departmental reorganization; and 10 positions originally challenged by DHRM as not meeting the new Schedule AD criteria but that did meet the new criteria following departmental reorganization. While more positions were moved from career service status to exempt status, there were, according to DHRM officials, at least 27 positions that were moved from an AD exempt status to a career service status. However, as can be seen, the net effect was an overall increase in AD exempt status positions. None of these affected positions are confirmed by the Senate.

In addition to the increase in AD exempt status positions, there are now 26 positions classified as Schedule AR. Of these 26 positions, 15 used to be career service positions and 11 were former AD positions that no longer met the new AD criteria. It should be noted that there are currently only four departments that have AR exempt positions: Corrections, Public Safety, Education, and Human Services. In addition, as noted earlier, Corrections and Public Safety have over 80 percent of the current AR exempt positions. As is the case for the above AD positions, none of these affected positions are confirmed by the Senate.

Since people in exempt positions can be hired and fired at will, exempt positions are considered more risky than career service positions. Thus, to encourage a career service employee working in a position newly classified as exempt to accept the new exempt status, the DHRM was required in the **Utah Code** to offer monetary incentives to implement House Bill 330.

House Bill 330 Had Implementation Costs

To provide incentives for employees to voluntarily change from career service status to an exempt status, the state incurred, since July 1994, \$104,000 of on-going and one-time incentive costs. In addition, the state has incurred, since July 1994, \$65,800 in severance costs resulting from employees being discharged without cause from their exempt position. These costs were not anticipated when House Bill 330 was reviewed by the Fiscal Analyst's office.

Incentive Costs. On-going and one-time incentive costs of \$104,000 were incurred by the state as a result of affected employees voluntarily converting from career service to exempt status. Career service employees in positions newly classified as exempt were not required to become exempt employees. Instead, the employees status conversion was voluntary. To encourage voluntary conversion, the Legislature believed that incentives should be offered since an exempt position is considered more risky by employees than a career service position. Exempt positions are more risky because: (1) an exempt employee can be fired at will and (2)

an exempt employee does not have access to the grievance process as does a career service employee. Thus, section 67-19-15.1(4) of the **Utah Code** required DHRM to develop financial and other incentives to encourage voluntary conversion. It should be noted, however, that while exempt positions are generally considered more risky than career service positions, **Utah Code** 67-19-17 provides that if a career service employee converts to an exempt position and is then discharged from that position without cause, that employee shall be appointed to any career service position for which they are qualified in a pay grade comparable to the one the employee last held in career service. As a result, the actual risk to a career service employee may be less than perceived.

To comply with **Utah Code** 67-19-15.1(4), the DHRM developed the following incentives. First, employees not on longevity could receive between a one-to three-step incentive salary increase upon conversion, at the employer's discretion. Second, employees on longevity could receive an incentive bonus payment equal to between a one-to three-step increase. Third, employees were offered additional life insurance equal to approximately three times their salary without being required to demonstrate insurability. Employees considering a change to an exempt status had 60 days to decide and be eligible for an incentive. After 60 days, the employee could make a status change, but the incentives would be no longer available.

From July 1994 to June 1996, the state has incurred a total of \$104,600 to encourage employees to voluntarily convert to exempt status. Specifically, 29 employees voluntarily changed from career service status to exempt status during their 60-day window. Of these 29 employees, 25 received on-going step increases. Most of these increases were three-step increases. As a result, the state incurred on-going salary increase implementation costs of a little over \$85,700 per year. In addition, four employees received one-time bonuses equivalent to a three-step percentage increase. As a result, the state incurred one-time bonus costs of a little over \$18,900. If other positions are changed to an exempt status, the implementation costs could increase if the employee changes within the 60-day window.

Severance Costs. In addition to the above incentive costs, the state has also incurred \$65,800 of severance costs. Human Resource Management Rule R477-7-7.1 states that all AB, AC, AD, and AR exempt positions are entitled to severance pay at termination unless the employee is discharged for cause or retires. To date, six employees from the executive branch whose positions were AD or AR have been terminated without cause. The severance pay for these employees totaled a little over \$65,800. Since AD and AR exempt employees can be discharged at any time, this amount will change.

Again, severance pay is given when an employee is involuntarily terminated from an exempt position without cause. However, it is possible for an employee to be involuntarily terminated from an exempt position and be re-employed by the state in another position. In

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fact, **Utah Code 67-19-17** requires that any career service employee who accepts an appointment to an exempt position and is discharged without cause will be appointed to a career service position for which they are qualified and that is comparable in pay to their last career service position. In the case of an employees' involuntarily termination from an exempt position and subsequent state re-employment in another position, severance pay will still be awarded the employee. In fact, of the above six employees discharged, three were rehired by the state. In all cases the rehire wages were at least 24 percent lower than the employees were making in their former exempt positions.

In summary, we found that the DHRM allowed departmental definitions of the Schedule AR exemption. As a result, departments had different definitions of what it means to "*make statewide policy*". If the Legislature is unhappy with this, the Legislature can further define the Schedule AR exemption itself or require the DHRM to do so. In addition, the implementation of House Bill 330 produced the effect that Representative Karen Smith stated as the bill's intent. Specifically, House Bill 330 increased the number of exempt positions. In implementing House Bill 330, the state incurred \$104,000 of incentive costs and \$65,800 of severance costs.

Recommendations:

We recommend that the Legislature review those positions currently designated as AR and determine if legislative intent was met. If legislative intent was not met, we recommend that the Legislature more specifically define the intent of the Schedule AR designation.

We hope this letter addresses your concerns. A response letter from the Department of Human Resource Management is attached. If there is any additional information you need or if you have any further questions, please feel free to contact our office.

Sincerely,

Wayne L. Welsh
Auditor General

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