

Office of Research and Policy Analysis

HJR 35 White Paper: Bonus Pay Policy and Practices in Montana State Government

A REPORT TO THE STATE ADMINISTRATION AND
VETERANS' AFFAIRS INTERIM COMMITTEE

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INTRODUCTION AND BACKGROUND

By adopting House Joint Resolution No. 35, the 61st Montana Legislature requested an interim committee to examine the application and administration of "bonus pay" among state government employees. The study was assigned to the State Administration and Veterans' Affairs Interim Committee (SAVA) in June 2009, and staff for the SAVA proposed a study outline to the Committee members at the June 26, 2009, SAVA meeting.

The HJR 35 study was prompted in large part by the actions of a statewide elected official who was defeated at the November 2008 poll and had awarded bonuses to several of his exempt staff immediately before he left office.¹ The newly-elected and incoming elected official cancelled the bonuses after a Department of Administration attorney had determined them to be illegal.²

The law upon which the attorney mainly determined the bonuses to be illegal is section 2-18-621, MCA.

2-18-621. Unlawful termination -- unlawful payments. (1) It is unlawful for an employer to terminate or separate an employee from employment in an attempt to circumvent the provisions of 2-18-611, 2-18-612, and 2-18-614. If a question arises under this subsection, it must be submitted to arbitration as provided in Title 27, chapter 5, as if an agreement described in 27-5-114 is in effect, unless there is an applicable collective bargaining agreement to the contrary.

(2) (a) An employee who terminates employment is entitled to receive only:

(i) payments for accumulated wages, vacation leave as provided in 2-18-617, sick leave as provided in 2-18-618, and compensatory time earned as provided in the rules or policies of the employer; and

(ii) if the termination is the result of a reduction in force, severance pay and a retraining allowance as provided for in 2-18-622.

(b) An employee who terminates employment may not receive severance pay, a bonus, or any other type of monetary payment not described in subsection (2)(a)(i) or (2)(a)(ii).

¹ "Secretary of state: Brad Johnson bonuses put on hold", by Charles S. Johnson, Jan. 10, 2009, in *The Missoulian*. Secretary of State Brad Johnson had lost his reelection bid in November 2008 and the nine employees were all "exempt", personal staff who served at the pleasure of the Secretary of State.

² "State lawyer says bonuses illegal", by Charles S. Johnson, January 15, 2009, in *The Montana Standard*. Section 2-18-621, MCA, had been amended in the 2007 Session as well, for circumstances different from those causing the then-recent kerfuffle. See Ch. 341, L. 2007; (SB 219, 2007).

- (3) Subsection (2) does not apply to:
- (a) retirement benefits;
 - (b) a payment, settlement, award, or judgment that involves a potential or actual cause of action, legal dispute, claim, grievance, contested case, or lawsuit; or
 - (c) any other payment authorized by law. (*Emphasis added.*)

Although the proposed bonuses were illegal and never paid, three members of House of Representatives introduced legislation to further restrict the payment of bonuses to state employees: HB 358 (Bergren), HB 576 (Warburton), and HB 594 (Hunter). Each of the bills was heard by the House State Administration Committee during mid-February 2009. The three bills each addressed the issue of bonus pay in a slightly different manner from the others. In short:

- SB 358 would have prohibited a statewide elected official from paying the official's [exempt] personal staff any type of bonus, termination pay, performance pay, or other special compensation between the date of the general election immediately preceding the expiration of the official's term and the date that the official's term expires.
- HB 576 would have prohibited the governor, the lieutenant governor, the attorney general, the secretary of state, the state auditor, or the superintendent of public instruction from paying to an employee in an "exempt position" a bonus, a monetary payment, or a salary increase, other than a statutorily prescribed increase during the fiscal year in which the state officer is seeking reelection or election to another state office.
- HB 594 would have prohibited a state officer or state employee, including those employees otherwise exempted under section 2-18-103, MCA, from receiving a bonus or any type of monetary payment, other than normal salary or wages, in excess of \$1,000 during a fiscal year.

None of the three bills passed. Instead, the House State Administration Committee commissioned LC 2325, which became HJR 35.

The original study outline for HJR 35 proposed a multi-phased study by which the SAVA would establish a foundation of facts and understanding regarding bonus pay as a concept and, subsequently, the ways in which bonus pay is applied and administered within Montana State Government.³

³ *Proposed Study Outline for HJR 35: A Study of Public Employee Bonuses*, by Dave Bohyer, Research Director, Legislative Services Division, June 10, 2009, pp 8-9.

- Phase I. Build a foundation of facts and evidence regarding public employee compensation defined, described, or recognized as bonus pay, performance-based pay, merit pay, competency-based pay, incentive pay, statutory pay (increases), and the like.
- Phase II. Identify and analyze specific factors perceived by the Committee to be relevant to further discussion of state employee compensation referred to as bonus pay, performance-based pay, merit pay, competency-based pay, incentive pay, statutory pay (increases), and the like.
- Phase III. Develop, through Committee discussion and action, findings and conclusions about the policy principles upon which Montana's public policies and practices should be centered as those policies and practices address employee compensation generally referred to as bonus pay, performance-based pay, merit pay, competency-based pay, incentive pay, statutory pay (increases), and the like. Included in this phase should be Committee findings and conclusions regarding the potential fiscal and administrative implications of those policy principles.
- Phase IV. Identify, through Committee discussion and action, legislative options for addressing the fiscal, administrative, and ethical soundness of any "bonus-type" of compensation for Montana state employees.

After discussing the impetus for and underpinnings of HJR 35 and the Committee's options for limiting the amount of staff and Committee time to be invested in the study, the SAVA members directed staff to focus efforts on identifying "best practices" regarding bonus pay and to compare and contrast the state's practices to those identified as the "best practices".⁴ Staff's efforts would be reduced to a written report to be provided to SAVA members, stakeholders, and others. At an appropriate meeting, staff would orally review the report and the Committee would allow comments from anyone interested in the topic. From there, the SAVA would ask questions, discuss the information presented, and determine what, if any, additional research the members believe should be undertaken or if any legislative options should be pursued.

Therefore, the remainder of this report attempts to focus on: (1) best practices regarding bonus pay as compensation; and (2) process and procedure in Montana state government regarding bonus pay as compensation.

⁴ *Minutes*, State Administration and Veterans' Affairs Interim Committee, June 26, 2009, on the Internet at http://leg.mt.gov/css/Committees/Interim/2009_2010/State_Administration_and_Veterans_Affairs/; audio archive at 5:10:40.

Working Definitions

In developing a common understanding of and appreciation for seemingly small, semantic differences, it is worthwhile to note the differences between the definitions of "bonus" pay and other terms that connote additional, incentive pay for performance.

Webster's defines "bonus" as follows:

bo-nus Pronunciation: \bō-nəs\. Function: *noun*. Etymology: Latin, literally, good — more at bounty . Date: 1773

: something in addition to what is expected or strictly due: as **a**: money or an equivalent given in addition to an employee's usual compensation **b**: a premium (as of stock) given by a corporation to a purchaser of its securities, to a promoter, or to an employee **c**: a government payment to war veterans **d**: a sum in excess of salary given an athlete for signing with a team⁵

Comparatively, *Webster's* defines "incentive" as follows:

in-cen-tive Pronunciation: \in-'sen-tiv\ Function: *noun*. Etymology: Middle English, from Late Latin *incentivum*, from neuter of *incentivus* stimulating, from Latin, setting the tune, from *incentus*, past participle of *incinere* to play (a tune), from *in-* + *canere* to sing — more at chant. Date: 15th century.

: something that incites or has a tendency to incite to determination or action **synonyms** see motive. — **incentive** *adjective* ⁶

The subtle difference between a bonus and an incentive in the context of pay is that a bonus is something to which the recipient is not entitled and does not expect, while an incentive is something that is used to promote or reward certain behavior or results and that the recipient can anticipate following the required behavior or results. Therefore, a bonus is typically awarded *ex post facto* for performance or results perceived as superior by the grantor of the bonus, whereas incentive pay is typically defined in advance of performance or results and is earned by the recipient for meeting or exceeding certain performance benchmarks or results preestablished by the grantor.

Therefore, for the purposes of this paper, a "bonus", in the context of public employee compensation, is: "**... an element of compensation that consists of a one-time, lump-sum payment made to an employee. It is not part of base pay**". ⁷

The distinction is important because the literature a number of references to "best

⁵ *Merriam-Webster Online Dictionary*. 2010; <http://www.merriam-webster.com/> .

⁶ *Ibid*.

⁷ This definition is taken nearly verbatim from Title 5, Code of Federal Regulations (CFR), 9901.304 - Definitions, and is the definition used for federal government employment pay administration.

practices" for various pay-for-performance or "incentive" compensation plans, but is sorely deficient when it comes to best practices regarding "bonus" pay.⁸

UNIVERSAL BEST PRACTICES

It seems that no individual nor any organization has identified or advocated for any particular "best practices" for the design, implementation, or administration of "bonus pay". Rather, bonus pay is most commonly considered but one among several types of "variable pay" that are identified as options within pay-for-performance pay plans or systems. Consequently, the practices or policies recommended for the design, implementation, and administration of pay-for-performance plans/systems in general will have to suffice as a surrogate for "best practices" regarding bonus pay.

Performance Pay Practices in the Private Sector

Although it has been reported that nearly all private sector organizations appraise employee performance,⁹ it is increasingly the case that employee performance is tied directly to compensation, including bonus pay.¹⁰ For good or ill, there doesn't seem to be much literature (not counting news reports) on the subject, nor apparently has much empirical research been performed. However, in 2005, the consulting firm of Zweig-

⁸ My search for "best practices" regarding bonus pay for public employees began with an inquiry to the National Conference of State Legislatures (NCSL). My NCSL contact, Brian Weberg, conducted his own search, which included an inquiry to NCSL's "human resources" contacts in all 50 states. The HR contact from Utah was the only response Mr. Weberg received from the states. My internet searches were only slightly more successful, identifying a guide for architectural/engineering firms and a series of reports produced by, respectively, the General Accountability Office (GAO) and the Congressional Research Service (CRS), on various "pay-for-performance" initiatives undertaken in the federal civil service. The internet searches also provided links to various sites discussing "pay-for-performance" process and practice in the private sector, primarily for entities involved in manufacturing, sales, or finance. None of the sites references focused specifically on bonus pay, *per se*. I also e-mailed various private consulting firms seeking their notions of best practices regarding bonus pay for public employees, but received only one response. Perhaps tellingly, the sole response I received stated simply, "Sorry, Dave, I don't [have] such data for you. Unfortunately, the words "bonus" and "government employee" are not usually found together." (E-mail from Mark Lipis, *Lipis Consulting*, Feb. 17, 2010.)

⁹ See, e.g., *Pay for Performance: Evaluating Performance Appraisal and Merit Pay*, Commission on Behavioral and Social Sciences and Education, 1991. "Between 93 and 99 percent of private-sector organizations use performance appraisal plans for their exempt and nonexempt salaried employees." at page 103.

¹⁰ For certain professional occupations in the private sector, specifically architecture and engineering, bonus pay is widespread, with approximately 90% of A/E firms having some type of a bonus program. Among large, U.S. companies, about three-fourth have at least one type of variable pay plan. See *A/E Incentive Compensation Cookbook*, Zweig-White, Natick, MA, 2005; pp. 8, 53.

White researched, wrote, and published the *A/E Incentive Compensation Cookbook* (primarily for architecture/engineering firms) asserting that the book, "...will be a valuable resource for both firm leaders looking to create an incentive compensation program from scratch and for firm leaders who are looking to revise or expand their current incentive compensation program".¹¹

Zweig-White noted, importantly, that increases in base salaries in 2006, i.e., before determining any form of incentive pay, were estimated at 3.6%.¹² The *Zweig-White Cookbook* goes on to say that, "Money alone can't bring in the top talent and keep key employees motivated, but it sure is a critical factor".¹³

The *Cookbook* devotes two chapters to the structure of pay-for-performance plans. One of those chapters focuses on the "elements" of an incentive compensation program and the other on "keys" to a successful incentive compensation program. According to the Zweig-White chefs, there are nine "elements" and 15 "keys" to a successful program. The elements and keys identified by Zweig-White might be characterized as "best practices" and used to compare practices and procedures regarding compensation, including bonus pay, among Montana state government employees.

Although the elements and keys to a successful compensation program as outlined in the *Cookbook* are aimed at architecture and engineering (A/E) firms, many and perhaps most of the elements and keys could apply equally to any organization composed largely of professional practitioners, e.g., attorneys, accountants, actuaries, surveyors, doctors, et al., whose products or outputs are often intangible and qualitative rather than quantitative.

¹¹ *A/E Incentive Compensation Cookbook*, Zweig-White, Natick, MA, 2005;, in the Foreword..

¹² *Ibid.*, p. 9.

¹³ *Ibid.*

**Ingredients of Successful Incentive Compensation Programs
from the Zweig-White Cookbook**

| Elements¹⁴ | Keys¹⁵ |
|---|--|
| Designate the project team | Don't rush to establish a plan |
| Establish the compensation philosophy and goal(s) | Establish benchmark for entity |
| Select the appropriate plan(s) | Meet or exceed medians |
| Identify eligible employees | Involve employees in program design |
| Establish performance metrics | Tie incentive compensation to strategic goals |
| Determine payout size | Keep the program as simple as possible |
| Determine payout timing/frequency | Establish clear, objective criteria for payout |
| Administer the plan | Set appropriate performance goals |
| Communicate | Consider frequent payouts |
| | Don't necessarily wait to be profitable to pay out bonuses |
| | Tie compensation to team or entity performance |
| | Reward top performers |
| | Communicate plan details to employees |
| | Practice open-book management |
| | Constantly review the plan |

Among A/E firms researched by Zweig-White, 90% reported having a bonus plan and about two-thirds included the cost of bonuses in annual budgets.¹⁶ Zweig-White also reported that 60% to 70% of engineers in private firms received bonuses in 2005,

¹⁴ Ibid., pp. 37-44.

¹⁵ Ibid., pp. 45-50.

¹⁶ Ibid., p. 55.

ranging from a median of \$1,500 for newly-minted engineers to \$8,000 for the most senior engineers.¹⁷ As a percentage of salary, the average bonuses ranged from a low of 3.4% to a high of 8.8%.

Among all A/E firms in the industry, Zweig-White reported the median bonus in 2005 of \$4,387 per employee, equivalent to 9.1% of total labor costs and 5.3% of total costs.¹⁸ By comparison, a 2005 study by Hewitt Associates found that spending among U.S. companies on "variable pay" to salaried, exempt employees was 11.4% of compensation.¹⁹

Among the management teams of A/E firms surveyed, rather than among the engineers only, Zweig-White found similar participation levels, 76% in 2005, and a somewhat broader range of bonuses (\$2,500 to \$11,250; 3.4% to 9.5% of salary).

Performance Pay Practices in the U.S. Civil Service

The General Accountability Office (GAO) has regularly examined and reported on various aspects of pay and compensation in the federal civil service. The GAO's reports on pay-for-performance go back to at least the late-1970s following passage of the Civil Service Reform Act of 1978.²⁰

More recently, i.e., within the past 10 years or so, several federal departments or agencies within departments either have begun to design and implement pay-for-performance systems or have been authorized to design and implement such systems. Many of those systems include provisions allowing "bonus" pay as part of total compensation and they also allow other types of enhancements to base pay. The GAO, in examining how various federal civil service pay systems were designed, implemented, and administered, took steps to identify "human capital" guidelines that underlie such plans. A passage from one of the relevant GAO report characterized one of the steps taken during pay-for-performance design/review as follows:

¹⁷ Ibid., pp. 55-56.

¹⁸ Ibid., p. 56.

¹⁹ Ibid. The *Cookbook* referred to the Hewitt Associates study, but did not provide a citation or other attribution.

²⁰ P.L. 95-454, 92 Stat. 111. Prior to July 2004, the GAO was know as the General Accounting -- not "Accountability" -- Office.

To further the discussion of pay reform, the U.S. Government Accountability Office (GAO), the U.S. Office of Personnel Management (OPM), the U.S. Merit Systems Protection Board (MSPB), the National Academy of Public Administration (NAPA), and the Partnership for Public Service convened a symposium on March 9, 2005, to discuss organizations' experiences with market-based and more performance-oriented pay systems. Representatives from public, private, and nonprofit organizations made presentations on the successes and challenges they experienced in designing and managing their market-based and more performance oriented pay systems, followed by an open discussion among key human capital stakeholders to learn from their experiences. The organizations described the tools and techniques they used for designing and implementing their pay systems in order to best meet their needs. Based on these organizations' experiences and following discussions, we identified several key themes that highlight the leadership and management strategies these organizations collectively considered in designing and managing market-based and more performance-oriented pay systems.^{21, 22}

The several key themes that highlight the leadership and management strategies the organizations identified as key -- perhaps "best practices for the purposes of this report - - whenever public or private entities engage in designing and managing market-based and more performance-oriented pay systems include:

1. Focus on a set of values and objectives to guide the pay system.
2. Examine the value of employees' total compensation to remain competitive in the market.
3. Build in safeguards to enhance the transparency and ensure the fairness of pay decisions.
4. Devolve decision making on pay to appropriate levels.
5. Provide training on leadership, management, and interpersonal skills to facilitate effective communication.
6. Build consensus to gain ownership and acceptance for pay reforms.
7. Monitor and refine the implementation of the pay system.²³

²¹ *Symposium on Designing and Managing Market-Based and More Performance-Oriented Pay Systems*, GAO-05-832SP; Washington, DC, July 27, 2005.

²² The representatives from public, private, and nonprofit organizations that made presentations at the *Symposium* on the successes and challenges they experienced in designing and managing their market-based and more performance-oriented pay systems included the Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Commonwealth of Virginia, IBM Corporation, and American Red Cross. (See *Ibid.*, *Symposium*, at p. 2.)

²³ *Symposium on Designing and Managing Market-Based and More Performance-Oriented Pay Systems*, GAO-05-832SP; Washington, DC, July 27, 2005, p. 3.

Whether or not the seven key themes represent "best practices" in the context of "bonus pay" may reside in the eye of the beholder. Regardless, they characterize performance-pay-system elements or core practices that public sector leaders and managers should consider.

In order to receive certification of their performance-pay systems for Senior Executive Service personnel (SES)²⁴ from the Office of Personnel Management (OPM) and the Office of Management and Budget (OMB), federal agencies are to design and administer performance appraisal systems that make meaningful distinctions based on relative performance through performance rating and resulting performance payouts (e.g., bonuses and pay adjustments). Specifically, agencies are to use multiple rating levels—four or five levels—and reward the highest-performing executives with the highest ratings and largest pay adjustments and bonuses, among other things.²⁵

The distinctions manifest in the payouts as illustrated by data reported by the GAO as compiled from federal agencies whose SES systems have been certified.

The percentage of eligible executives that received bonuses or pay adjustments varied across the selected agencies for fiscal year 2007, as shown in [Table 1]. The percentage of eligible senior executives that received bonuses ranged from about 92 percent at DOD [Defense] to about 30 percent at USAID [U.S. Agency for International Development], with the average dollar amount ranging from \$11,034 at State to about \$17,917 at NRC [Nuclear Regulatory Commission]. For pay adjustments, all eligible executives at State received pay adjustments, while about 88 percent of eligible executives at DOE [Energy] received adjustments, with the average dollar amount ranging from about \$5,414 at NRC to about \$6,243 at DOE. As a point of comparison, about 67 percent of career SES members received bonuses with an average dollar amount of \$13,292 for fiscal year 2006, according to governmentwide data reported by OPM [Office of Personnel Management].²⁶

²⁴ According to the Senior Executive Service website, the SES is a central coordinating point between the federal government's political leadership, which sets the political agenda, and the line workers who implement it. Members of the SES translate that political agenda into reality. http://www.opm.gov/ses/about_ses/faqs.asp .

²⁵ See *Human Capital: Selected Agencies Have Implemented Key Features of Their Senior Executive Performance-Based Pay Systems, but Refinements Are Needed*; Statement of J. Christopher Mihm, Managing Director Strategic Issues, GAO, July 22, 2008, p. 8.

²⁶ *Human Capital: Selected Agencies Have Implemented Key Features of Their Senior Executive Performance-Based Pay Systems, but Refinements Are Needed*; Statement of J. Christopher Mihm, Managing Director Strategic Issues, GAO, July 22, 2008, p.13. As used in the Statement, a "bonus" is a cash award and a "pay adjustment" is an increase in base pay. (See p. 3 of the Statement.)

The differences are shown in more or different detail in Table 1, below.

Table 1. Percentage of Eligible Senior Executives Who Received Bonuses or Pay Adjustments and the Average Amounts at the Selected Agencies for the Fiscal Year 007 Appraisal Cycle

| Agency | Bonuses | | Pay Adjustments | |
|----------|--------------------------------|-------------------------|---|------------------------------|
| | Percentage that received bonus | Average amount of bonus | Percentage that received pay adjustment | Average amount of adjustment |
| Defense | 92 | \$13,934 | 95 | \$5,739 |
| Energy | 82 | 14,116 | 88 | 6,243 |
| NRC | 87 | 17,917 | 95 | 5,414 |
| State | 55 | 11,034 | 100 | 6,148 |
| Treasury | 77 | 16,074 | 93 | 6,120 |
| USAID | 30 | 11,083 | 90 | 6,227 |

NRC is the Nuclear Regulatory Commission

USAID is the U.S. Agency for International Development

Source: GAO-08-1019T, Table 2, from GAO analysis of agency data.

A broader pay-for-performance system, the National Security Personal System or NSPS, implemented within the Department of Defense (DoD) provides additional perspective on federal pay-for-performance plans. Authorized in 2003,²⁷ the NSPS is designed to cover some 700,000 federal civilian employees within the DoD and is based on the same seven key themes critical to pay-for-performance systems identified previously. The system was rolled out in "spirals" beginning in 2005 and, even before any personnel were transferred from the General Schedule (GS) to NSPS, ran into problems with its design, implementation, administration, and coverage.

Setting aside the growing pains endured as the NSPS was rolled out, a recent report²⁸ illustrates the effects of the System's implementation for the DoD employees paid under the Plan. Interpreting the numbers in Table 2. on the following page, DoD employees covered by the NSPS received in 2009 a general salary increase of 1.74%

²⁷ Pub. L. No. 108-136; National Defense Authorization Act for Fiscal Year 2004.

²⁸ "2009 Payouts Complete for NSPS Employees" on the *NSPS Website*; <http://www.cpms.osd.mil/nsps/2009payouts.html> .

of base salary.²⁹ The general salary increase is a permanent increase in base pay and reflects the general change in wages and salaries the previous year. It is a statutory increase and occurs automatically each year.

| | |
|--|--------------|
| Average Performance Salary Increase | 3.67% |
| General Salary Increase | 1.74% |
| Average Local Market Supplement Increase | 1.00% |
| Total Average Salary Increase | 6.41% |
| Average Bonus | 1.94% |
| Total Average Salary Increase + Bonus | 8.35% |

The average pay increase performance was 3.67% of base salary and ranged from a low of 2.23% for an employee who rated at the lower end of the "Valued Performer" rating, i.e., the middle rating of the NSPS 5-level rating system, to a high of 11.15% for those employees at the higher end of the "Role Model" rating, i.e., the highest rating available in the NSPS. An individual employee's performance pay is divided between a salary adjustment to base pay, which is a permanent increase, and a bonus payment that is based on base salary but is a one-time event. The amounts that are the adjustment to base and the one-time bonus vary for each employee and are based on the supervisor's and the reviewers' discretion.^{30, 31}

Performance Pay Practices in State of Montana Civil Service

Statutory Guidance

The Legislature has provided the Executive Branch broad authority and flexibility to establish, implement, and administer compensation systems within the Executive

²⁹ Ibid., "2009 Payouts Complete for NSPS Employees". Employees that received the lowest rating of 1, Unacceptable, (0.3% of employees) did not receive the general salary increase and those that received a rating of 2, Fair, (1.3% of employees), received only 1/2 of the increase.

³⁰ An employee who is at the maximum pay for his/her pay band would receive the entire performance pay amount as a bonus.

³¹ Congress repealed the NSPS by passing the 2010 National Defense Authorization Act. (H.R. 2647--111th Congress.) President Obama signed the Act on October 28, 2009.

Branch.³² The statutory authority is generally provided in sections 2-18-301 through 2-18-304, MCA. Section 2-18-301, MCA, describes the Legislature's philosophy:

2-18-301. Intent of part -- rules. (1) It is the intent of the legislature that compensation plans for state employees, excluding those employees excepted under 2-18-103 or 2-18-104, be based, in part, on an analysis of the labor market as provided by the department in a biennial salary survey. The salary survey must be submitted to the office of budget and program planning as a part of the information required by 17-7-111.

(2) Pay adjustments, if any, provided for in 2-18-303 supersede any other plan or systems established through collective bargaining after the adjournment of the legislature.

(3) Total funds required to implement the pay increases, if any, provided for in 2-18-303 for any employee group or bargaining unit may not be increased through collective bargaining over the amount appropriated by the legislature.

(4) The department shall administer the pay program established by the legislature on the basis of competency, internal equity, and competitiveness to external labor markets when fiscally able.

(5) The broadband pay plan must consist of nine pay bands. Each pay band must contain a salary range with a minimum salary and a maximum salary.

(6) Based on the biennial salary survey, the department shall:

(a) identify current market rates for all occupations;

(b) establish salary ranges for each pay band; and

(c) recommend competitive pay zones.

(7) The department may promulgate rules not inconsistent with the provisions of this part, collective bargaining statutes, or negotiated contracts to carry out the purposes of this part.

(8) Nothing in this part prohibits the board of regents from engaging in negotiations with the collective bargaining units representing the classified staff of the university system. (*Emphasis added.*)

Administrative Guidance

The Department of Administration (DOA) has executed its statutory charge in section 2-18-301, MCA, by adopting administrative rules governing the broadband pay

³² Respecting the separation of powers, statutes limit the Executive's authority to employees in the Executive Branch. Statutory guidelines regarding compensation of employees of the Judicial and Legislative Branches are provided in the statutes governing each of those branches. See 3-1-702, MCA, regarding the Judicial Branch and 5-11-105, MCA, regarding the Legislative Branch.

plan.³³ As written, the rules require each agency to "design, implement, and administer written pay rules", that:

- must be fiscally responsible, actively managed, and consistent with the agency's mission and objectives;
- identify procedures for implementing all aspects of pay addressed in the DOA's policy; and
- must be filed with the Department.³⁴

Within those three requirements, the DOA states that its broadband pay policy rules "allow agencies to strategically link their compensation practices to the agency's mission". In addition, the DOA rules require that an agency's pay rules must consider four criteria:

1. job-related qualifications;
2. existing pay relationships within the agency and work unit,³⁵
3. ability to pay; and
4. external competitiveness.³⁶

The four criteria listed immediately above -- qualifications, relationships, ability, and competitiveness -- are primary drivers when an agency or work unit initially establishes the base pay for a position and the person accepting the position and again when an agency or work unit considers adjusting the pay for a position or for a specific person in a position.

After the agency or work unit establishes the base pay for a position and for the person taking or holding that position, there are several types of discretionary pay adjustments available to the agency or work unit. The DOA rules governing pay plan administration identify seven types of pay adjustments available to agencies or work units.³⁷ The seven types of adjustments specifically identified in the DOA rules are:

³³ *Montana Operations Manual*, "Broadband Pay Plan Policy", Policy No. 3-05-1, Department of Administration, State Human Resources Division, October 2009.

³⁴ *Ibid.*, p. 1.

³⁵ A "work unit" is a defined, administrative component within a department, such as a division, bureau, or section.

³⁶ *Ibid.*, *Montana Operations Manual*, p. 1.

³⁷ *Ibid.*, pp. 5-6.

- Competency Adjustment
- Market Adjustment
- Performance Adjustment
- Performance Adjustment
- Results Adjustment
- Situational Adjustment
- Supervisory Adjustment
- Strategic Adjustment

In conjunction with the DOA rules, the DOA's State Human Resources Division (SHRD) has also published *A Manager's Guide to Implementing Broadband Pay Plan Rules in Montana State Government* (hereafter *Guide*).³⁸ In the *Guide*, the SHRD offers several basic tenets to state managers whenever they design and modify their agency pay plan rules.³⁹ The tenets are:

- Broadband pay plan rules must support, and not lead, agencies' missions, goals, and objectives.
- Any discretionary funds used for pay above the statutory pay raises should be strategically linked to the agencies' missions, goals, and objectives.
- Pay is an important communication tool. Agencies must communicate their pay goals to the affected managers and employees. To the extent affected employees are unionized, this communication must be delivered in a manner that meets state government's obligation to bargain in good faith.
- No single pay strategy is right for every state agency or work unit. Different work units, agencies, and bargaining units will require different strategies.
- All broadband pay plan rules must contain a means for measuring and recording their success in achieving the desired goals.

Comparing Montana State Government Pay-for-Performance Compensation Practices to Broadly-Recognized, Pay-for-Performance Compensation "Best Practices"

Allowing the key themes cited by the GAO to represent broadly-recognized "best practices" allows the compensation practices laid out by Montana law, DOA rules, and departmental guidelines to be compared side by side, as requested by SAVA. The

³⁸ *A Manager's Guide to Implementing Broadband Pay Plan Rules in Montana State Government*, State Human Resources Division, Montana Department of Administration, December 2009.

³⁹ *Ibid.*, p. 4.

following table illustrates the practices side by side.

| Broadly-Recognized, Pay-for Performance, Compensation "Best Practices" | | Goal Met | Montana State Government Pay-for-Performance, Compensation Practices |
|---|---|-----------------|--|
| 1 | Focus on a set of values and objectives to guide the pay system. | Yes | Strategically link compensation practices to the agency's mission. ⁴⁰ Broadband pay plan rules must support, and not lead, agencies' missions, goals, and objectives. ⁴¹ |
| 2 | Examine the value of employees' total compensation to remain competitive in the market. | Yes | Compensation plans for state employees [should] be based, in part, on an analysis of the labor market. ⁴² Pay covers only a small area of job satisfaction. Several other factors, including the nature of work, relationships, and opportunities, are key to retaining good employees. ⁴³ |
| 3 | Build in safeguards to enhance the transparency and ensure the fairness of pay decisions. | Yes | The DOA shall administer the pay program established by the legislature. ⁴⁴ Pay is an important communication tool. Agencies must communicate their pay goals to the affected managers and employees. ⁴⁵ Each agency's plan(s) must be filed with the DOA. ⁴⁶ |

⁴⁰ *Montana Operations Manual*, Policy 3-05-1, p. 1.

⁴¹ *A Manager's Guide to Implementing Broadband Pay Plan Rules in Montana State Government*, State Human Resources Division, Montana Department of Administration, December 2009, p. 4.

⁴² Section 2-18-301, MCA. Other provisions of Title 2, chapter 18, MCA, address other components of Montana state employee compensation, including health insurance, longevity pay, annual leave, sick leave, etc. Title 19, MCA, provides for several retirement systems in which state employees participate and that comprise a portion of total compensation.

⁴³ *A Manager's Guide*, p. 4.

⁴⁴ Section 2-18-301, MCA.

⁴⁵ *A Manager's Guide*, p. 4.

⁴⁶ *Montana Operations Manual*, Policy 3-05-1.

| Broadly-Recognized, Pay-for-Performance, Compensation "Best Practices" | | Goal Met | Montana State Government Pay-for-Performance, Compensation Practices |
|--|---|----------|---|
| 4 | Devolve decision making on pay to appropriate levels. | Yes | No single pay strategy is right for every state agency or work unit. Different work units, agencies, and bargaining units will require different strategies. ⁴⁷ |
| 5 | Provide training on leadership, management, and interpersonal skills to facilitate effective communication. | Yes | The Professional Development Center offers training in leadership, management, and interpersonal skills. ⁴⁸ |
| 6 | Build consensus to gain ownership and acceptance for pay reforms. | Yes | Communication must be delivered in a manner that meets state government's obligation to bargain in good faith. ⁴⁹ The importance of thoroughly communicating the agency's pay rules cannot be overstated. ⁵⁰ Open pay practices can increase trust, employees' perceptions of fairness, and their understanding of the agency's goals and objectives. ⁵¹ |

⁴⁷ Ibid., *Guide*.

⁴⁸ Ibid. pp. 4-5. See also the training opportunities generally offered through the Professional Development Center, available at <http://pdc.mt.gov/>. The PDC is a bureau of the State Human Resources Division, Montana Department of Administration.

⁴⁹ Ibid., p. 4.

⁵⁰ Ibid., p. 18. The *Guide* includes an entire section, three pages of text, addressing the importance of communication between work unit managers and workers, in both directions. See pp. 18-21 of the *Guide*.

⁵¹ Ibid., p. 19.

| | Broadly-Recognized, Pay-for-Performance, Compensation "Best Practices" | Goal Met | Montana State Government Pay-for-Performance, Compensation Practices |
|---|---|-----------------|---|
| 7 | Monitor and refine the implementation of the pay system. | Yes | All agency broadband pay rules must contain a means for measuring and recording the agency's success in achieving its desired goals. Such metrics allow the agency to monitor the effective of a particular approach. [M]anagers can adjust their approach to better ensure achievement of their organizational goals and objectives. ⁵² |

Individual Agency Practices

The rules adopted by the DOA to guide individual agencies⁵³ in implementing the pay plan pursuant to section 2-18-301, MCA, including pay-for-performance systems, are not particularly specific or controlling. To paraphrase a line from a popular movie, the DOA rules are "...more what you'd call 'guidelines' than actual rules".⁵⁴ As noted in the *Guide*:

The state’s broadband pay plan is not a market, competency, or performance pay plan. It’s an enterprise-wide plan that allows state agencies the flexibility to develop their own pay plan rules using any combination of market, competencies, or performance within broad statutory and policy parameters and authorized funding levels. The system allows state agencies to strategically link their own pay rules to their unique missions and more quickly adapt pay practices to changing demographics and labor markets.⁵⁵

State agencies that reported that they have adopted pay rules for in-house use have

⁵² Ibid., pp. 13-14.

⁵³ The term "agency" as used here includes a department -- Department of Corrections, Department of Transportation, etc. -- or a work unit within a department and any entity that is attached to a department for administrative purposes only -- Montana Historical Society, Montana State Library, Teachers' Retirement System, State Tax Appeal Board, etc..

⁵⁴ *Pirates of the Caribbean: The Curse of the Black Pearl*, dialog spoken by Captain Barbosa, Walt Disney Pictures, 2003.

⁵⁵ Ibid., *Guide*, p. 3.

exercised the flexibility noted in the *Guide*.⁵⁶ While some agencies' pay plans are fairly explicit in the ways in which the respective agency's plan(s) will be administered, many agencies' plans more or less mirror the DOA rules (MOM 3-05-1) and are, therefore, general rather than specific.

The *Guide* identifies eight options in the context of state employee pay, but notes that other options exist as well. Six of the options address an employee's base pay, while the other two address variable pay.⁵⁷

Base Pay Options

Market pay
 Competency pay
 Performance pay
 Career ladder
 Strategic pay
 Situational pay

Variable Pay Options

Lump-sum performance
 pay or award
 Goal sharing

It is perhaps notable that some agencies have opted to implement some of the base pay options identified by the DOA rules as variable pay options in their own agency's pay plan. Other variations exist as well. Purely as examples:

- the Board of Public Education administers competency pay and results pay as types of variable pay. The Board's pay plan also mentions situational pay and strategic pay as options, but is silent on how the Board implements either of those options, i.e., base or variable. The Board's pay plan also identifies and defines "discretionary pay" and "market pay", but otherwise does not discuss either of those options.⁵⁸
- the Department of Military Affairs' (DMA) pay plan identifies and defines base pay, competency-based pay, downgrade, market-based pay, upgrade, results-based pay, pay progression, situational pay, and strategic pay. The DMA rules

⁵⁶ In June 2009, SAVA staff solicited from each department within the Executive Branch and from numerous Executive Branch entities attached to the agencies for administrative purposes only a copy of the department's or entity's pay plan rules by whatever name is given to such rules. Staff also solicited similar information from the Judiciary and the Legislative Branches. In total, SAVA staff sent inquires to over 70 individuals, some of whom are/were employed by the same department or entity. Twenty-six departments or attached entities responded to the staff request. The Judicial Branch and most of the Legislative Branch also responded.

⁵⁷ *Ibid.*, *Guide*, pp. 8-13. The *Guide* also refers to the variable pay options as "Results pay".

⁵⁸ *Pay Plan Policy and Provisions*, Board of Public Education; adopted August 2007, revised December 2007.

also discuss statutory pay increases and longevity pay increases, and "retention difficulties" (outside the confines of strategic or situational pay). DMA does not distinguish between which types of pay or pay increases are basic and which are variable, nor are the rules explicit as to how any of the types of pay or pay increases are determined (by an employee or supervisor) or the dollar or percentage limits of any particular increase (other than the cap provided by the maximum salary for the position).⁵⁹

- the Department of Agriculture's (DofAg) pay plan discusses strategic/situational pay, promotions, and within band pay adjustments, which imply changes to base pay. The pay plan also contains a sheet titled, "Discretionary Funds Distribution Profile" that appears to be a mechanism that is used to make pay decisions based on performance. However, the Profile does not indicate whether the distributions of discretionary funds are changes to base pay or are a form of variable pay.⁶⁰
- the Board of Investment's (BOI) pay plan is bifurcated, with the Board's exempt staff subject to one plan, *Montana Board of Investments Exempt Staff Pay Plan*,⁶¹ and the nonexempt staff subject to a different plan.⁶² For the exempt staff, compensation is composed of base pay plus, possibly, compensation for: (1) individual performance; (2) professional credentials; (3) experience and skill; and (4) fund performance. The plan also allows the Board to make other adjustments⁶³ using other procedures (that aren't identified in the plan). The plan indicates that the pay component for professional credentials is a permanent addition to base pay, but does not indicate a dollar amount or percentage amount for any particular credential earned. The pay components that reflect "performance", "experience and skill", and "fund performance" are all temporary in nature, i.e., they are each assessed annually. The performance factor is the main driver of an employee's base pay and is determined annually by the employee's supervisor or the Board. The experience and skill factor appears to be employed only at the time of initial hire, after which it is essentially replaced by the performance factor. The fund performance factor is clearly denoted as a

⁵⁹ *Broadband Guidelines for Implementing Pay Plan 20*, Montana Department of Military Affairs, DMA Policy #3-0510, March 15, 2007. The *Rules* provide no guidance on how the Discretionary Funds Distribution Profile is used or where discretionary come from.

⁶⁰ *Pay Plan Rules and Provisions*, Department of Agriculture, Rev. Date: 06-27-07.

⁶¹ *Montana Board of Investments Exempt Staff Pay Plan*, Montana Board of Investments, Rev. Nov. 13, 2008.

⁶² The BOI's nonexempt staff is subject to the Department of Administration's pay plan, i.e., the plan that applies to the DOA's staff.

⁶³ The actual language in Board's pay plan for exempt staff states, "Under certain circumstances, the Board may at its discretion set salaries, grant raises, bonuses, or make other adjustments using other procedures." See *Montana Board of Investments Exempt Staff Pay Plan*, Nov. 13, 2008, p. 2.

discretionary "bonus" that may be awarded at the discretion of the Board. A bonus awarded for fund performance is capped at 20 percent of the employee's current salary.⁶⁴

- the Department of Public Health and Human Services' (DPHHS) basic pay plan systematically applies to all applications of the pay system -- except for applications not specifically governed by the policy.⁶⁵ The basic pay plan covers about 20 percent of the DPHHS employees. The other 80% of the Department's employees are covered by one of at least five pay plan addenda:
 - ▶ *Memorandum of Agreement*: MPEA and Montana Department of Public Health and Human Services, Health Resources Division;
 - ▶ *Memorandum of Agreement*: MEA-MFT and Montana Department of Public Health and Human Services, Senior Long Term Care Division;
 - ▶ *Pay Plan Addendum*, November 7, 2007, Federation of Public Health and Human Services Employees Local 4573, MEA-MFT, AFL-CIO, and Montana Department of Public Health and Human Services, MEA-MFT -- Human and Community Services Division;
 - ▶ *Memorandum of Agreement*: MEA-MFT and Montana Department of Public Health and Human Services, Child and Family Services Division; or
 - ▶ *Memorandum of Agreement*: Federation of Public Health and Human Services Employees Local 4573, MEA-MFT, AFL-CIO and Montana Department of Public Health and Human Services, Disability Services Division, plus the four(?) addenda to the *Memorandum* specific to the Division.

The five addenda to the main DPHHS pay plan and the four addenda to the Disability Services Division's addendum are all negotiated agreements with bargaining units that represent DPHHS employees. Some of the addenda include specific metrics on which specific enhancements to base pay are calculated as either permanent or one-time enhancements.

The five examples outlined immediately above show that individual agencies are moving forward in implementing the broadband pay plan pursuant to section 2-18-301, MCA, and the DOA rules and illustrate some of the differences in the ways in which five entities administer compensation for their respective agency's employees. The DPHHS example also illustrates that employees within a single agency are compensated under different pay plans and that employees within a single division can operate under different procedures.

⁶⁴ Ibid.

⁶⁵ *Personnel Policies and Procedures*, Department of Public Health and Human Services, Human Resource Policy #270, Rev. March 2003, p. 130-1.

Recognizing that various departments have disparate divisions whose employees perform considerably different functions and may have groups of employees who are represented by different bargaining units, it is likely that the five examples outlined previously are not unusual. Rather, each entity that has adopted a pay plan for its employees has adopted provisions and procedures distinct to its employees or particular groups of its employees. Consequently, if the provisions and procedures of an entity's pay plan parallel any other entity's pay plan, it may be as likely that the parallels are there by coincidence as by design.

Regardless of a state entity's pay plan design, finding the money to pay any type of award for performance is a challenge due to budget constraints. Executive Branch agencies have typically be subject to a vacancy savings rate of 4% in recent budget cycles, which means that they are funded at only 96% of amount needed to pay employees the same amount the employees are currently paid. Thus, agency managers typically have to "find" 4% of personal services costs in order to not overspend their budget. For the current biennium and reflecting the current budget/economic environment, the vacancy savings rate was generally increased to 7% for most agencies, making it difficult to simply maintain the *status quo*.

Looking back, the only time the Legislature appropriated money specifically for performance-based pay adjustments since converting the Executive Branch to the "broadband" pay plan in 2005 was 0.6% of salaries for fiscal years 2008 and 2009, which was to be allocated "...to each agency to distribute to its employees for reasons including but not limited to market progression, job performance, or employee competencies".⁶⁶ If spread evenly across the approximately 12,000 state employees, the amount appropriated would provide each employee a performance-based increase of about \$347 in each of FY 2008 and 2009.

For comparative purposes to private sector and federal government pay-for-performance plans, if the Legislature were to budget 1% of state employee salaries for performance pay, the cost would be approximately \$6.8 million, of which about \$2.95

⁶⁶ Ch. 81, L. 2007; (HB 13, 2007). The statutory language appropriated funds based on "salaries", not "personal services". (Sections 11(2) and 22(2) of Ch. 81, L. 2007.) Distinguishing "salaries" from "personal services" is important because any increase in a "salary" has a ripple effect in the cost of employee benefits, e.g., retirement contributions, Social Security tax, Medicare tax, worker compensation insurance, unemployment insurance, etc. On average, salary alone comprises about 70% of personal services costs; considerably less than 70% for low-paid employees, but more than 70% for high-paid employees.

million would be state general funds.⁶⁷ If the Legislature appropriated 5% for performance pay, the total cost would approximate \$34 million, of which nearly \$15 million would be general fund.

While a 5% bonus may seem unthinkable in the current economic/budget environment, average bonuses of 5% would be less than one-half the amount reportedly paid as "variable pay" to salaried, exempt employees nationwide in 2005⁶⁸ or slightly more than one-half of the performance-pay increases seen in the federal government's program for the Senior Executive Service and about nine-tenths of the performance-pay increases for the National Security Personnel System's employees.⁶⁹

Implementation Caveat

An explicit or implicit provision in each of the state agency pay plans is a caveat that all pay decisions, whether permanent enhancements to base pay or one-time only enhancements in the form of a "bonus", depend on the availability of funding within the entity considering the decision. Underlying this constant is the statutory language that provides for pay plan administration that involves increasing compensation only when the employing entity is "fiscally able".⁷⁰

On its face, a requirement for "fiscal ability" appears eminently reasonable and nondiscriminatory. On closer examination, however, some entities are likely to have fiscal ability that other entities don't have. An entity that is wholly or largely funded with federal special revenue may have greater or lesser fiscal ability than an entity that is funded with state special revenue or, especially, state general fund revenue. The same may hold true for an entity funded wholly or largely with proprietary funds rather than funds from other sources, particularly state general fund.

The manifestations of differences in fiscal ability may not be readily apparent at this time because many entities' pay plans have not had much time to take effect. By the end of the 2012-13 biennium, however, and perhaps even by the end of the 2010-11

⁶⁷ Derived from data provided by the Montana Legislative Fiscal Division staff. The figures include the costs that would "ripple" through to, e.g., retirement contributions; Social Security tax; Medicare tax; workers compensation insurance; unemployment compensation insurance; etc.

⁶⁸ See *A/E Incentive Compensation Cookbook*, Zweig-White, Natick, MA, 2005, p. 56. The *Cookbook* referred to the Hewitt Associates study, but did not provide a citation or other attribution.

⁶⁹ See Tables 1. and 2, on pages 12 and 13. The percentage amounts referenced here for the federal employee programs do not include federal general increases to base pay (1.74%) or for location pay (1.0%).

⁷⁰ See section 2-18-301(4), MCA..

biennium, some implications may become apparent. Disparities in specific or overall personal services expenditures may start to appear between agencies that have similar positions or personnel but that are funded from different sources of revenue. Disparities may also appear among entities supported by different revenue sources, regardless of the positions or personnel within the entities. Of course it may be that no disparities appear to exist, which information should also be valuable.

SUMMARY AND CONCLUSION

If the 61st Legislature's concern with "bonus pay" as a component of state employee compensation was the illegal, misapplication of bonuses proposed by a statewide elected official defeated at the polls in November 2008, the SAVA members can report to the 62nd Legislature that current law, section 2-18-621, MCA, specifically, already precludes elected officials and others from granting such bonuses. However, if the impetus behind HJR 35 is more extensive than that, the SAVA may wish to gather additional information for further consideration.

The SAVA members themselves were and perhaps are more focused on "best practices" regarding bonus pay and how Montana's practices compare. Unfortunately, there doesn't seem to be a list of best practices for bonus pay that is more or less universally recognized. Rather, the registries of practices and processes that do exist in the context of employee compensation address pay-for-performance compensation systems in general. In that regard, many of Montana's practices and procedures as reflected in agency rules reflect many of the best practices recognized in the private sector and within the federal government.

Notable within the pay-for-performance systems in the private sector is that the average amount of spending among U.S. companies on "variable pay" to salaried, exempt employees in 2005 was 11.4% of compensation.⁷¹ Similarly, within the federal civilian workforce where pay-for-performance has been implemented, performance pay is a significant portion of total pay and is in addition to at least two types of market-driven, statutory, automatic pay increases that federal employees receive annually.⁷²

As directed by the SAVA, this report has attempted to focus on the extent to which

⁷¹ See *A/E Incentive Compensation Cookbook*, Zweig-White, Natick, MA, 2005, p. 56. The *Cookbook* refers to the Hewitt Associates study, but does not provide a citation or other attribution.

⁷² See *Human Capital: Selected Agencies Have Implemented Key Features of Their Senior Executive Performance-Based Pay Systems, but Refinements Are Needed*; Statement of J. Christopher Mihm, Managing Director Strategic Issues, GAO, July 22, 2008, and *Pay-for-Performance: Lessons from the National Security Personnel System*, Wendy R. Ginsberg, December 18, 2009

state pay policies and practices regarding "bonus pay" measure up against the "best practices" in the employee-compensation world. To the minimal extent that "best practices" regarding bonus pay can be identified, the state's policies and practices largely contain or model them. That said, this report was not intended to determine whether or not the state's policies and practices have been and are being implemented as written. Consequently, the state's use of bonus pay and other options that agencies may use as pay-for-performance components of total compensation have been given only passing mention.

If the SAVA wishes to have additional information on whether state agencies are administering their pay plans, including bonus pay, as the plans are written or on any other aspect of Montana state employee compensation, staff remain willing to obtain, analyze, and present the desired information.

