

# **Overview of Immediate Vesting in the State Retirement and Pension System for Heads of Units of State Government**

Chapters 397 and 398 of the Acts of 2021 charged the State Retirement Agency (Agency) with studying two issues: (1) identify those positions as a Secretary of a principal department or a head of a department, office, or other unit of the State government allow for immediate vesting in the State Retirement and Pension System (System) and those which do not; and (2) the reasons for such discrepancies. In addition, the Agency also reviewed positions for staff to the Governor. The Agency concludes this report with options the Legislature may want to consider regarding these classes of employees and their vesting status in the System.

## **Governing Statute**

Section 29-304 of the State Personnel and Pensions Article provides that “[a]n individual who is a Secretary of a principal department or a head of a department, office, or other unit of the State government serving at the Governor’s pleasure has immediate vesting rights on taking office in the State system in which the individual is a member.” Based on the wording of this statute, to determine if an individual is eligible for immediate vesting, it must first be determined if the individual is the head of a “unit of State government.” Article II, Section 24 of the Maryland Constitution provides that a “unit of State government” must be created by the Maryland Constitution, statute or executive order. Article II, Section 24 further provides that while the Governor can establish new State government units such as departments, offices, and agencies, they must be set forth in executive orders and submitted to the General Assembly. An executive order that has been submitted to the General Assembly shall become effective and have the force of law unless specifically disapproved by the Legislature. Because all units of State government must be created by the Maryland Constitution, statute, or executive order, an individual can only be a head of a State unit if the unit was created, accordingly.

In addition to determining whether the individual was the head of a unit of State government, the individual must also serve at the pleasure of the Governor, in order to be eligible for immediate vesting. An analysis by the Agency’s legal counsel revealed that most enabling statutes or executive orders creating units of State government, specifically state whether an official serves at the Governor’s pleasure. However, a few statutes do not specify how or when an appointed official can be removed. The advice provided by the Agency’s legal counsel went on to provide that for those instances where individuals who are appointed for a specific term, they do not serve at the Governor’s pleasure. Article II, Section 15 of the Maryland Constitution provides that the Governor may only remove such officers “for incompetency or misconduct.” Legal counsel concluded that unless otherwise specified by statute, if an individual is appointed by the Governor for a specified term, the appointed official does not serve at the Governor’s pleasure. However, if the term of the appointment is indefinite and provisions on removal are not specified in law, that appointed official does serve at the pleasure of the Governor.

Based on this analysis of § 29-304, a review of 67 positions covering Secretaries of a principal department or department heads for units of State government was conducted in 2017

by the Agency. At that time, it was concluded that 33 of these 67 positions qualified for immediate vesting while 34 did not. Today, those numbers have changed, only slightly, with 34 qualifying for immediate vesting and 33 not qualifying.

## **Legislative Intent Behind Immediate Vesting**

Section 29-304 was enacted under Chapter 156 of the Acts of 1969. While a review of the bill file for Chapter 156 only included a copy of the enacted legislation, it would be reasonable to conclude that the driving force behind the passage of § 29-304 was the general vesting provision in place at that time for members of the System. In 1969, vesting in the System was 20 years. It was reduced to 15 years in 1970.

Prior to the passage of Chapter 156, all Secretaries and department heads were required to accrue 20 years of service credit in order to receive a benefit from the System. In light of the Governor being term limited to two terms, individuals appointed to Secretary or department head positions and serving at the pleasure of the Governor prior to 1969, would likely never vest in the System as it would be expected that a new Governor, upon taking office, would make new appointments to these positions. Accordingly, for Secretaries and department heads serving at the pleasure of the Governor, these individuals would have had to accrue service credit in State positions either prior to being appointed or following their appointments, in order to accrue 20 years of service to be eligible for a normal retirement allowance from the System. It is likely that it was this uncertainty of job security associated with the political nature of Secretaries and department heads serving at the pleasure of the Governor, coupled with the 20-year vesting requirement, that motivated the legislature to enact § 29-304 in 1969.

Because there was little information included in the bill file for Chapter 156, the Agency is unable to report if the legislature contemplated including those individuals functioning as department heads but not serving at the pleasure of the Governor. While it is possible that department heads who were not eligible for immediate vesting, were able to accrue the 20 years (15 years after 1970) necessary to vest for a normal service retirement allowance from the System; the Agency is unable to confirm this. In 1980, vesting was reduced to five years, for State employees who were not serving as judges, legislators, and those who enjoyed immediate vesting. With this change, department heads who were not eligible for immediate vesting were now in a position where vesting in their particular State system was more easily attainable. However, in 2011, legislation was enacted to establish the Reformed Contributory Pension Benefit (RCPB) tier of the Employees' Pension System (EPS). Prior to 2011, the majority of EPS members were in the Alternate Contributory Pension Selection (ACPS) tier of the EPS, enjoying 5-year vesting. The new RCPB tier of the EPS increased vesting to 10 years for State employees who were not serving as judges, legislators, and those with immediate vesting. This increase in vesting for most State employees has once again initiated the conversation of immediate vesting for department heads of units of State government who are not serving at the pleasure of the Governor.

## Current Pool of Secretaries and Department Heads

Chapters 397 and 398 of 2021 amended § 29-304 for the first time since its enactment in 1969. The amendment to this statute provided that “an individual who commences employment as the Executive Director of the State Retirement Agency on or after January 1, 2021, shall have immediate vesting rights in the Employees’ Pension System.” Prior to the enactment of Chapters 397 and 398, the Executive Director of the Agency did not enjoy immediate vesting in the EPS; yet, with the retirement of the long serving Executive Director of the Agency (14 years serving as Executive Director), it became clear that if the next Executive Director was not an existing State employee participating in the ACPS, this individual would be enrolled in the RCPB and subject to 10-year vesting. The search committee appointed to find a new Executive Director for the Agency soon found that 10-year vesting was serving as a deterrent when trying to attract qualified candidates for the position. Consequently, legislation was requested to provide immediate vesting for the next Executive Director of the Agency.

As previously mentioned, of the 67 Secretaries and department heads of units of State government researched by the Agency, 34 individuals qualify for immediate vesting and 33 do not. From this group of 67, **Table 1** provides the total number from each group who are members of ACPS tier of the EPS or the RCPB tier of the EPS. Any State employee who is hired on or after July 1, 2011 that requires the individual to become a member of the EPS, is enrolled in the RCPB. **Table 1** indicates that there are considerably more RCPB members who have immediate vesting compared to those RCPB members that do not have immediate vesting (23 vs. 15, respectively).

<b>Table 1</b> <b>Overview of Membership</b> for Secretaries and Department Heads of Units of State Government (as of November 1, 2021)					
	ACPS/EPS (5-year vesting)	RCPB/EPS (10-year vesting)	Other/ Retired	Average Years of Service in Position	Average Years of Total Service in SRPS
<b>Immediate Vesting</b>	9	23	2	4.9	8.2
<b>No Immediate Vesting</b>	15	15	3	5.1	15.1

One could assume that the 50% increase of RCPB individuals with immediate vesting over those without immediate vesting, supports the premise that the lack of job security serving in positions at the pleasure of the Governor will result in shorter tenure with the State than for those that do not serve at the pleasure of the Governor. However, **Table 1** also indicates that the

average length of service in the position as a Secretary or department head with immediate vesting is virtually the same as the average length of service in the position of a department head without immediate vesting. This indicates that those not serving at the pleasure of the Governor are not experiencing the long tenure that was anticipated by the 1969 legislation when this group was not granted immediate vesting.

A more detailed review of each individual account of these 67 individuals revealed that within the group of 33 that do not have immediate vesting, 12 individuals have 16 or more years of total service compared to four individuals in the group of 34 who do have immediate vesting. However, the Agency discovered that within this group of 12 that had 16 or more years of total State service, only two have vested as a result of their positions as a department head; the remaining 10 have an average tenure in their current position as a department head of three years. Moreover, **Table 2** indicates that comparing just the RCPB members in each group (immediate vesting vs. no immediate vesting) reveals that those with immediate vesting have more service in both their current position and total service with the State. This may signify that the original 1969 premise that department heads not serving at the pleasure of the Governor would likely remain in those positions to the point of vesting, was erroneous.

<b>Table 2</b> <b>Service Credit</b> for Secretaries and Department Heads of Units of State Government Participating in the Reformed Contributory Pension Benefit (as of November 1, 2021)			
	<b>RCPB/EPS (10-year vesting)</b>	<b>Average Service in Position</b>	<b>Average Total Service in EPS</b>
<b>Immediate Vesting</b>	23	4.6	5.4
<b>No Immediate Vesting</b>	15	3.4	4.6

### **Governor’s Staff**

While Chapters 397 and 398 only charged the Agency with studying the vesting issue for Secretaries and department heads of units of State government, in the course of its research for this report, the Agency also researched the tenure status of the Governor’s staff. The Agency included this additional group in this study as it was recognized that individuals serving in these positions also experience job security issues associated with the political nature of their positions since they serve at the pleasure of an individual who is term limited and will only serve, at most, eight years.

When looking at the Governor’s staff, the Agency reviewed 17 additional positions. A list of these positions is included in **Appendix A**. In its research, the Agency discovered that 13 of the individuals currently serving in these positions are members of the RCPB tier of the EPS

and subject to 10-year vesting, two are members of the ACPS tier of the EPS and two are either retired or in a different State system. The average service of the 15 individuals who are either RCPB or ACPS members, serving in their current positions, is 4.6 years, while the average of their total State service is 5.6 years. Of the 13 RCPB members, none will vest before the end of the term of the current Governor. Moreover, the two ACPS members who are vested, are only vested due to the State service they accrued prior to accepting employment in their current positions. This analysis would suggest that this group of employees is similarly situated to the group of individuals employed as Secretaries and department heads who serve at the pleasure of the Governor.

## Options

The options the legislature may want to consider regarding immediate vesting for certain State employees may include choosing to maintain the status quo and continue to only offer immediate vesting to Secretaries and department heads of units of State government who serve at the pleasure of the Governor. However, with the passage of Chapters 397 and 398 of 2021 that expanded this benefit to the Executive Director of the Agency, it is possible other State agencies will begin to seek a similar benefit for their department heads. As noted above, of the 33 individuals serving as department heads without immediate vesting, 12 currently have 16 or more years of State service; in fact, eight have 20 or more years State service. It is likely that many of these 12 will be retiring in the coming years. As the Agency recently discovered when searching for its new Executive Director, when the time comes that these 12 individuals decide to retire from State service, their agencies will likely find 10-year vesting also to be a deterrent to attracting qualified candidates who may otherwise be interested in serving in these positions. Additionally, maintaining the status quo also would likely deprive individuals serving on the Governor's staff from ever vesting in the EPS.

Alternatively, the legislature may want to consider expanding immediate vesting to all department heads of units of State government, regardless of whether the individuals in these positions serve at the pleasure of the Governor, and to those individuals who serve in positions of authority on the Governor's staff. The Agency consulted with its actuary regarding the added cost the System would incur by adding the 33 department head positions and the 17 positions for individuals employed in positions of authority on the Governor's staff that do not have immediate vesting. **Appendix B** includes a list of all current Secretary and department head positions in the State, whether these positions serve at the pleasure of the Governor, the enabling statute creating these positions, and whether each position enjoys immediate vesting.

The Agency consulted the System's actuary regarding the cost to expanding immediate vesting to both department heads who do not serve at the pleasure of the Governor and individuals who are on the Governor's staff and are direct reports to the Governor. The actuary estimated that because this additional group of individuals is so small, the cost to the System would be negligible. They noted that even with immediate vesting, a number of individuals who would enjoy immediate vesting would likely withdraw their contributions upon leaving State service because any benefit they accrued in these positions would be minimal. By doing this, these individuals would forfeit any future right to a benefit based on this service. Conversely,

some serving in these positions will leave their member contributions in the System, and based on current law, these contributions will continue to accrue 5% interest, compounded annually. Once these individuals reach normal retirement age, they will have the option to apply for a normal service retirement, or if their accumulated contributions have grown to an amount greater than the value of their annuity, they may choose to withdraw their contributions with interest at that point.

## Appendix A

### Positions in the Governor's Office Included in this Report

Chief of Staff  
Deputy Chiefs of Staff  
Director, External Affairs and Interagency Initiatives  
Secretary, Appointments Office  
Director, Executive Services  
Director Financial Administration  
Residence Manager, Government House  
Director, Office Intergovernmental Affairs  
Chief Legal Counsel, Office of Legal Counsel  
Chief Legislative Officer, Legislative Office  
Director of Communications, Press Office  
Director, Office of Transformation and Renewal  
Director of Federal Relations, Washington Office  
First Lady's Chief of Staff