

Response to Legislative Auditor General's Office Report on Hiring Practices of the CIO and ITS

**Submitted to Executive Appropriations Committee
21 October 2002**

Introduction

The Executive Appropriations Committee has placed on its October 22, 2002 agenda a discussion of personnel management in the Office of the Chief Information Officer (CIO) and in the Division of Information Technology Services (ITS). CIO Phillip Windley, Department of Administrative Services (DAS) Executive Director Camille Anthony, and Department of Human Resource Management (DHRM) Executive Director Karen Suzuki-Okabe have been invited to appear before the Committee. Additionally, Mr. Windley, Ms. Anthony, and Ms. Suzuki-Okabe have been requested to provide a copy of their written testimony to the Office of Legislative Fiscal Analyst twenty-four hours prior to their appearance before the Committee.

In order to provide brevity and clarity to the pending issues, Mr. Windley, Ms. Anthony, and Ms. Suzuki-Okabe have consolidated their written responses into this single document. They have attempted to address the information contained within the report from the Legislative Auditor General's Office entitled "Hiring Practices of the CIO and ITS" and any other information they believe may be of benefit to the Committee. The response is organized into a summary of the salient points of each testimony, separate sections for each testimony, and addendums containing clarifying information at the end.

Summary

The Department of Human Resource Management's review demonstrates these critical points:

1. The Personnel Management Act was not violated.
2. All salaries paid to the hires mentioned in the report were within the established range.
3. In every case, those hired were qualified IT professionals.
4. The conversion of a merit to an exempt position was in compliance with accepted state practices.

The Department of Administrative Services analysis concludes that several mistakes were made and recommends improvements moving forward.

1. Three specific mistakes were made in the contracting.
 - Payments were made to Rightface, LLC prior to the contract being signed.
 - The actual terms and conditions of the MC1014 contracting process were not reviewed prior to awarding the Tiered Support Model (TSM) contract to STG. Therefore, the appropriate MC1014 process contract process was not followed.
 - The CIO participated on the review panel for the eRep contract when he had a potential conflict of interest regarding one of the applicants, ClearPing, LLC.
2. None of these mistakes were made intentionally or in bad faith.
3. The most regrettable consequence of the mistakes is the feeling among IT employees that they are not valued. Those involved regret and apologize for this.
4. Discontinuing the contracts is not prudent. The department will review the Conflict of Interest Declaration to see if changes are warranted.

The Chief Information Officer responds with these key points:

1. The state's vision for information technology is the right vision and will improve services and save money for residents.
2. The CIO apologizes for the way his actions have created or contributed to employee discontent and perceptions of bias.
3. The CIO will involve an 18-year veteran of state government in meetings with every IT department to improve communication. In addition, Assistant State Chief Information Officers will form an important part of the communication strategy, including the planning and implementation of an architectural framework for IT in the state.
4. The CIO looks forward to participating with the legislature as we implement state's shared IT vision.

Response from the Department of Human Resource Management

Karen Suzuki-Okabe, Executive Director

I. Introduction

The intent of my testimony this afternoon is to provide information that we in DHRM think is important to properly understand the issues addressed in the Auditor General's report. A proper definition of a problem is a critical step in resolving it. I hope my testimony will help establish a proper context for an effectual discussion. First, I want to clarify the differences between merit and exempt employees. I will then address each of the substantive issues in the report related to human resources management.

II. Employment Status – Merit and Exempt

The distinction between merit and exempt employees is critical to understanding what I will address in my testimony. First, the report uses the terms merit state employee and exempt state employee. Their meaning is clear but as we review the code other terms will be used. For clarification, the terms Schedule B, career service and merit are interchangeable and the terms Schedule A, non-career service and exempt are interchangeable.

Secondly, and far more important, we need to distinguish between these sets of terms in order to understand the legal demands of the hiring process. The hiring process for schedule B positions is controlled strictly by statute and rule, the violation of which creates serious problems for the human resource management system. By contrast, the statute gives state officials great flexibility in the hiring of schedule A hire employees. This distinction is made in section 67-19-15 (see addendum A). Section 67-19-16 sets the legal standards for a schedule B hire (see addendum B).

Only two of ten merit positions in the report are schedule B. Figure 1 in report makes the distinction, but then only uses schedule A positions for illustration. There were 13 career service hires in ITS during the 15-month period of the report and none of them give us cause for concern. Two of these were excite@home employees. On the surface, this speaks against the pattern of favoritism for career service hires.

To confirm this, DHRM looked deeper into each hire looking for a pattern of favoritism. Of the remaining eleven hires, there is only one other instance where an excite@home employee was considered for the position and in that case, the person was not hired. In one case, a former excite@home employee and a non-excite@home individual were hired for the same job (two positions) and both were treated exactly the same. We can draw two conclusions: resumes from excite@home employees did not always rise to the hiring list when the data base was searched for viable candidates, and there is not enough data to declare a pattern of favoritism in hiring of merit employees.

III. Salary concerns.

My staff conducted a detailed analysis of each hire listed in the report. This review generated two findings: First, in every case the salaries paid were within the range authorized by DHRM, and second, in every case those hired were well-qualified IT professionals. In our analysis we reviewed the auditor's work plus collected additional information. Let me explain. The auditor's report makes salary comparisons using midpoints and averages. This is very common and we do the same in DHRM. However, we often have to look more closely in order to account for important market conditions. More specific criteria that we ask agencies to use include: comparison to peers, comparison to predecessors in same position, and the experience the candidate brings to the job. This analysis is included in Table 1 of this testimony. If you desire, I will walk us through it.

IV. The conversion of a schedule B position to schedule A.

The procedure used by the Department of Administrative Services was in compliance with criteria set by statute. Section 67-19-15(3) requires DHRM to make schedule assignments consulting with agency heads and the governor (see addendum A). In addition to the criteria in code, we require an executive director to verify to us in writing that the person in the position will be performing duties required by the schedule A assignment as defined in section 67-19-15(2).

The report also mentioned a luncheon meeting with myself, Raylene Ireland, the executive director of DAS, and Phil Windley. This was a routine meeting and one that is occasionally necessary with executive branch directors, especially new appointments. My purpose is to help them understand the HR system and the provisions of the statute and rule they need to be aware of when contemplating certain HR actions.

V. Personnel Management Act not Violated

I can confidently tell you that the Personnel Management Act was not violated by any of the hires addressed by the report. As already stated, all the career service hires were conducted according to law and rule. For schedule A hires, there is only one stipulation in statute. Section 67-19-15(4)(d) allows the appointing authority to establish any wage "...within ranges approved by, and after consultation with the director of the Department of Human Resources." In every case, the wage was within DHRM approved ranges.

Table 1 – Analysis of Salaries and Selection Processes *

	Position Title	Employment Status ^a	Hire Date	Vacant or new position ^b	Selection process ^c	salary	Comparison/Notes
A	Chief Information Officer AC	Exempt State Employee	March 3, 2001	Vacant	Appointed by Governor	Set by 67-22-2	Previous CIO was accepting only a portion of allowed salary.
B	Administrative Assistant AC	Exempt State Employee	March 3, 2001	Vacant	Appointed by Governor	Step 40	Consistent with same position in other agencies
C	Product Management Consultant	Contractor	April 17, 2001	No existing position	Sole Source Contract to Rightface, LLC	**	
D	ITS Section Manager/Deputy CIO AR	Exempt State Employee	July 9, 2001	New, converted from schedule B	Appointed by ITS Director	Step 79 of 81	Lowest paid of 5 positions at same level within ITS after conversion.
E	Director, ITS AD	Exempt State Employee	March 12, 2002	Vacant	2 candidates interviewed by panel of 4 dept. directors. Appointed by DAS Executive Director	Step 89 end of range	Same pay rate as previous ITS Director
F	Senior Systems Administrator Consultant	Contractor	March 25, 2002	No existing position	Contract MC1014 awarded to STG	**	
G	Electronic Product Manager I B	Merit State Employee	May 15, 2002	New	Career Service guidelines followed	Step 68 end of range	Two persons hired, one from Excite@home and one not. This is a new position with no comparisons within state govt. Both paid at same rate.
H	Research Consultant II AL	Exempt State Employee	May 28, 2002	New	Used Career Service guidelines and processes to ID best candidate.	Step 65 of 68	One of a kind in ITS. Similar positions in state are at step 61 on average. This person brings hard to find project mgt. skills to the division. ^d
I	eREP General Manager Consultant	Contractor	June 1, 2002	No existing position	Request for Proposal awarded to ClearPing, LLC	**	
J	Data Processing Security Specialist II B	Merit State Employee	June 17, 2002	Vacant	Career Service guidelines followed	Step 68 of 72	Three peers in ITS are paid at steps 60, 64 and 66. This person brings hard to find web security skills that peers do not have.

Prepared by the Department of Human Resource Management, October 18, 2002.

Footnotes to Table 1

- * The first four columns are extracted directly from page 2 of Legislative Auditor General Report ILR 2002-C, *Hiring Practices of the CIO and ITS* (Figure 1, Former [Excite@home](#) Employees, Their State Employment Status and Their State Hire Dates).
- ** Contract conditions and amounts vary.
- ^a Of the 10 employees identified as former excite@home employees, 5 are exempt or Schedule A and not subject to merit or career service hiring procedures, 3 are contracted and fall under state purchasing regulations and 2 are merit or career service employees. Of the 5 exempt employees, 3 are placed in existing positions that have always been appointed by the Governor or the Executive director of Administrative services. The remaining two, employees D and H are in new positions created within the past six months.
- ^b Three new positions are identified in this column. The first, position D, was converted from an existing career service or merit position to an exempt or non-career service position. The second, position G is a career service position recently created to respond to consumer concerns in improving and developing on line government services. Similar positions exist in the private sector. The third, position H, fills a long term need in ITS for assistance to the deputy director for research and project management. It is an exempt or non-career service position until management can determine where this position best fits in the organization.
- ^c Three of the ten positions, A, B, and D, are appointed by the Governor or the Director of the Department of Administrative Services and three, positions C, F and I, are contractors. The remaining four positions, two career service and two non-career service, were chosen through a competitive process. The AL position (H) was filled using a full career service selection procedure. Under personnel management rules, this position is eligible for conversion to career service status.
- ^d This person qualifies as a research consultant III but was classified as a II by DAS. The person was given the extra steps to account for these additional qualifications.

Response from the Department of Administrative Services

I. Overview (Camille Anthony, Executive Director)

As 24/7 e-government has taken on greater emphasis, the pressure to make it a success, immediately, has been felt by all aspects of state government – elected officials, cabinet members, legislative staff, court staff, the CIO, IT directors and IT staff. As I have reviewed the activities of the executive branch over the past several months, it is clear to me that mistakes have been made. I do not believe they were made intentionally or in bad faith. They were made in the context of quickly moving toward a goal without paying adequate attention to the path being taken to achieve the goal. Nonetheless, errors were made and the Legislative Auditor General's recent report has brought them to light.

I believe we have learned from those mistakes and they will not be repeated. As I stated in my response to the recommendations in the legislative report, "We are committed to providing a fair process for all recruitment, hiring and procurement. We want to attract the most competent people and firms for state employment and contracts and pledge that we will do so in full compliance with state hiring and procurement procedures."

Perhaps the most regrettable consequence of the method by which these issues have been handled is a feeling among IT professionals in state government that they are not valued or appreciated. While nothing could be further from the truth in my estimation, it does not change the fact that talented people feel they have been wronged. It is important that those feelings are acknowledged and understood by decision makers. More importantly, the activities that generated those feelings must not be repeated.

II. Contracting (Doug Richins, Director of Division of Purchasing)

There were three areas where the Legislative Auditor's report was critical of ITS relative to contracting issues. They were: Rightface, LLC sole source contract; ITS' use of a MC1014 contract to utilize the contractual services of STG; and the potential bias in the selection of ClearPing, LLC as the eRep General Manager. At the outset I would like to say that I believe that the report conclusions and recommendations relative to the contract issues are accurate and fair.

Rightface, LLC The report is accurate. ITS made payments to Rightface, LLC prior to the contract being signed. Finet shows that a \$3500 payment was made on 5/14/01. The sole source for Rightface, LLC was logged into our office on 4/30/01 and was approved on 5/11/01. The contract between ITS and Rightface, LLC was logged into our office on 5/11/01 and signed on 5/16/01. While I thought that the sole source justification was not very strong, in balancing my customer service role with my regulatory role, I approved the contract. As to a remedy for this contract, our records show that this contract ended on April 16, 2002, ITS made the final payment to Rightface, LLC on July 19, 2002.

ITS use of MC1014 The report is accurate. ITS acknowledges that actual terms and conditions of the MC1014 contracting process were not reviewed prior to awarding the Tiered Support Model (TSM) contract to STG. It is clear to me that ITS now understands how to appropriately use MC1014. I think that no further education or punitive action on ITS would be productive. The Division of Purchasing plans on reaching out to state agency IT managers to educate them on the appropriate use of MC1014. Relative to ITS's continued use of STG through MC1014 – the Procurement Code spells out several options (see addendum C).

I believe that 1(a) is the appropriate option. ITS tells me that they would like to have this contractor complete the project he was contracted to do – which will be completed by December 1, 2002. My understanding is that they have determined that they want to hire

someone with TSM expertise – and that they would do that via an appropriate personnel selection and hiring process.

eRep Contract with ClearPing, LLC The report is accurate, with some minor wording changes. The CIO asked if I could consider the personnel interview process that had been completed as satisfying the procurement code requirements because there was an immediate need to staff this critical project. My initial encouragement was to complete the “exempt” hiring process they had undertaken – to hire this person as an employee. After researching the issue they came back and indicated that hiring this person as an employee was not possible for two reasons: none of the departments involved had an FTE that they were willing to dedicate to this position, but most importantly – this position was to be funded by the grant from the US Dept. of Labor and the DOL grant would permit the eRep manager to be a contractor, but not an employee. To accommodate the project’s time critical need for this manager, I did agree to shorten the procurement time frame, while still subjecting this procurement to the other normal procurement requirements. I shortened the time that this procurement was out to bid from 10 days to 7 days. Otherwise the solicitation was normally handled: a legal notice of the solicitation was printed in the newspapers and posted on our website; copies of the request for proposal was sent to the prospective bid list for computer consulting services – a total of 99 RFPs were either emailed or sent via US mail. We received proposals from 7 firms. A proposal evaluation committee comprised of Phil Windley, Robert Woolley from ITS and Connie Laws from the Department of Workforce Services individually evaluated the proposals. Each evaluator completed and signed our “Conflict of Interest” statement that we have RFP evaluators sign (see addendum D).

The report criticizes Phil Windley for being an evaluator when he had formerly employed one of the applicants at Excite@home. I have looked at the RFP evaluation committee scores. If I eliminated Phil’s scores because of the appearance of conflict – it does not change the award decision. ClearPing, LLC was evaluated by both of the other evaluators as submitting the most advantageous proposal.

Relative to a remedy – I don’t believe that discontinuing the contract with ClearPing, LLC is necessary or prudent. I don’t believe that this contract was entered into in violation of the procurement code. Even if it was, I would make the determination allowed me as the chief procurement officer under 63-56-63 (1)(a) cited above.

On a broader note, I am contemplating a review of the Conflict of Interest Declaration to include language about avoiding even the perception of conflict.

Response from the CIO

Phillip Windley, Chief Information Officer

I. Introduction: IT Vision

State government can offer enhanced services and greater efficiencies through the increased use of IT. The most visible product of this philosophy is Utah’s award-winning website, Utah.gov; over the last year alone, 71 online services were launched or updated on Utah.gov. In addition, Utah continues to receive numerous awards in the area of IT and eGovernment including:

- An “A” grade in technology from *Governing* magazine.
- 2nd among states in a ranking of friendly e-commerce states (Progressive Policy Institute).
- 7th among states in performance as a digital state (Center for Digital Government).

Continuing this progress and extending it to the realm of cross-agency cooperation requires significant changes to a large, decentralized IT organization.

The state's talented, long-term IT professionals are the core asset enabling this change. They are dedicated, well-qualified employees who truly provide a public service. In addition, structural changes within IT and hiring employees with unique experience from outside the existing organization are also essential.

II. Response to Audit

The review of hiring practices by the Department of Human Resource Management has demonstrated two critical points:

1. In every case those who were hired were qualified, IT professionals.
2. In every case they were paid appropriate salaries.

Even so, some feel that they have been treated unfairly and denied opportunity and I regret that. The Governor has a fantastic vision for IT and how it can change the way government works and the level of service it can provide citizens. The current situation has delayed us from pursuing that vision and kept the real issues of better services for citizens at reduced cost to taxpayers from reaching center stage. To the degree my decisions and actions have unnecessarily contributed to low morale and perception of bias I apologize.

III. Moving Forward

Over the next several months, Kevin Van Ausdal, a 18-year veteran of IT in the State, and I will be meeting with every IT department to talk to each IT employee about the Governor's vision and answer questions. We started last week and will continue throughout the rest of this year. To accomplish the task that has been put before the IT community by the Governor, we will all need to work together and consequently we value the comments and input of all.

The Assistant State Chief Information Officers form an important part of our communication strategy. These ACIOs have been chosen by their agencies and the ACIO team has started meeting regularly. I've been very encouraged by those meetings and the attitudes and capabilities demonstrated. The whole idea behind having ACIOs in the agencies is to encourage more participation by agency IT organizations in IT activities that affect the state as a whole. Over the coming months, the ACIOs will be dealing with issues such as architectural frameworks for IT in the state and the IT planning processes.

The Cabinet has begun to agree on some cross agency eGovernment and IT projects that have high priority and great potential for continuing Utah's leadership role among the states in the area of IT. The Governor has appointed capable project executives from within the agencies to lead these projects and I believe that we are seeing the first fruits of the Governor's plan. We invite the Legislature's participation in this process and look forward to implementing our shared vision of eGovernment.

Addendum A

67-19-15. Career service - Exempt positions - Schedules for civil service positions - Coverage of career service provisions.

(1) Except as otherwise provided by law or by rules and regulations established for federally aided programs, **the following positions are exempt from the career service provisions of this chapter:**

(a) the governor, members of the Legislature, and all other elected state officers, designated as Schedule AA;

(b) the agency heads enumerated in [Section 67-22-2](#), and commissioners designated as Schedule AB;

(c) all employees and officers in the office and at the residence of the governor, designated as **Schedule AC**;

(d) employees who are in a confidential relationship to an agency head or commissioner and who report directly to, and are supervised by, a department head, commissioner, or deputy director of an agency or its equivalent, designated as Schedule AD;

(e) unskilled employees in positions requiring little or no specialized skill or training, designated as Schedule AE;

(f) part-time professional noncareer persons who are paid for any form of medical and other professional service and who are not engaged in the performance of administrative duties, designated as Schedule AF;

(g) attorneys in the attorney general's office who are under their own career service pay plan, designated as Schedule AG;

(h) teaching staff of all state institutions and patients and inmates employed in state institutions, designated as Schedule AH;

(i) persons appointed to a position vacated by an employee who has a right to return under federal or state law or policy, designated as Schedule AI;

(j) noncareer employees compensated for their services on a seasonal or contractual basis who are hired for limited periods of less than nine consecutive months or who are employed on less than 1/2 time basis, designated as Schedule AJ;

(k) those employees in a personal and confidential relationship to elected officials, designated as Schedule AK;

(l) employees appointed to perform work of a limited duration not exceeding two years or to perform work with time-limited funding, designated as **Schedule AL**;

(m) employees of the Department of Community and Economic Development whose positions are designated as executive/professional positions by the executive director of the

Department of Community and Economic Development with the concurrence of the director, designated as Schedule AM;

(n) employees of the Legislature, designated as Schedule AN;

(o) employees of the judiciary, designated as Schedule AO;

(p) all judges in the judiciary, designated as Schedule AP;

(q) members of state and local boards and councils appointed by the governor and governing bodies of agencies, other local officials serving in an ex officio capacity, officers, faculty, and other employees of state universities and other state institutions of higher education, designated as Schedule AQ;

(r) employees who make statewide policy, designated as **Schedule AR**; and

(s) any other employee whose appointment is required by statute to be career service exempt, designated as Schedule AS.

(2) The civil service shall consist of two schedules as follows:

(a) (i) Schedule A is the schedule consisting of positions exempted by Subsection (1).

(ii) Removal from any appointive position under Schedule A, unless otherwise regulated by statute, is at the pleasure of the appointing officers without regard to tenure.

(b) Schedule B is the competitive career service schedule, consisting of all positions filled through competitive selection procedures as defined by the director.

(3) (a) The director, after consultation with the heads of concerned executive branch departments and agencies and with the approval of the governor, shall allocate positions to the appropriate schedules under this section.

(b) Agency heads shall make requests and obtain approval from the director before changing the schedule assignment and tenure rights of any position.

(c) Unless the director's decision is reversed by the governor, when the director denies an agency's request, the director's decision is final.

(4) (a) Compensation for employees of the Legislature shall be established by the directors of the legislative offices in accordance with [Section 36-12-7](#).

(b) Compensation for employees of the judiciary shall be established by the state court administrator in accordance with [Section 78-3-24](#).

(c) Compensation for officers, faculty, and other employees of state universities and institutions of higher education shall be established as provided in Title 53B, [Chapters 1](#) and [2](#).

(d) Unless otherwise provided by law, compensation for all other Schedule A employees shall be established by their appointing authorities, within ranges approved by, and after consultation with the director of the Department of Human Resources.

(5) All employees of the Office of State Auditor, the Office of State Treasurer, the Office of the Attorney General, excluding attorneys who are under their own career service system, and employees who are not exempt under this section are covered by the career service provisions of this chapter.

Addendum B

67-19-16. Appointments to Schedule B positions - Examinations - Hiring lists - Probationary service - Dismissal.

(1) Each appointment to a position under Schedule B shall be made from hiring lists of applicants who have been selected by competitive procedures as defined by the director.

(2) The director shall publicly announce information regarding career service positions:

(a) for periods of time to be determined by the director; and

(b) in a manner designed to attract the highest number of qualified applicants.

(3) The director shall make rules establishing standards for the development, approval, and implementation of examining instruments.

(4) Applicants for employment to Schedule B positions shall be eligible for appointment based upon rules established by the director.

(5) (a) The agency head shall make appointments to fill vacancies from hiring lists for probationary periods as defined by rule.

(b) The director shall make rules establishing probationary periods.

(6) A person serving a probationary period may not use the grievance procedures provided in this chapter and in Title 67, [Chapter 19a](#), Grievance and Appeal Procedures, and may be dismissed at any time by the appointing officer without hearing or appeal.

(7) Career service status shall be granted upon the successful completion of the probationary period.

Addendum C - 63-56-63. Effect of violation after award of contract.

If after an award it is determined administratively or upon administrative or judicial review that a solicitation or award of a contract is in violation of law:

(1) If the person awarded the contract has not acted fraudulently or in bad faith:

(a) The contract may be ratified and affirmed if it is determined that doing so is in the best interests of the state; or

(b) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract prior to termination, plus a reasonable profit;

(2) If the person awarded the contract has acted fraudulently or in bad faith:

(a) The contract may be declared null and void; or

(b) The contract may be ratified and affirmed if such action is in the best interests of the state, without prejudice to the state's rights to any appropriate damages.

Addendum D - CONFLICT OF INTEREST AND NON-DISCLOSURE CERTIFICATION

I hereby certify that neither I nor any member of my immediate family has a material personal or financial interest in or fiduciary relationship to any offeror or to a direct competitor of any offeror under consideration by this proposal evaluation committee. I further certify that no other relationship with or bias towards any offeror exists which will prevent me from evaluating any proposal solely on its merits.

I understand that all information contained in the proposals and information regarding the evaluation process is proprietary and as such can not be released or discussed in any manner with other offerors or individuals not involved in the proposal evaluation process.