STATE OF MINNESOTA

COUNTY OF RAMSEY

7/17/89 State Register

BEFORE SANDRA S. GARDEBRING
COMMISSIONER OF HUMAN SERVICES

BEFORE SISTER MARY MADONNA ASHTON
COMMISSIONER OF HEALTH

BEFORE RUDY PERPICH
GOVERNOR

IN THE MATTER OF THE PROPOSED ADOPTION OF

RULES OF THE MINNESOTA MERIT SYSTEM GOVERNING DEFINITIONS, OBJECTIVES OF THE MERIT SYSTEM, PROHIBITION AGAINST DISCRIMINATION, WORK OUT OF CLASS, EXAMINATION RETESTING, CERTIFICATION METHODS AND PROBATION REQUIRED

STATEMENT OF NEED AND REASONABLENESS

I. The following considerations constitute the regulatory authority upon which the above-cited rule amendments are based:

1. Federal law requires that in order for Minnesota to be eligible to receive grant-in-aid funds for its various human services, public health and public safety programs, it must establish and maintain a merit system for personnel administration.[1] See, e.g. 42 USC Ch. 62.

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1 Also see sections of the United States Code and Code of Federal regulations cited herein where the following programs have statutory or regulatory requirement for the establishment and maintenance of personnel standards on a merit basis:
Aid to Families With Dependent Children - "AFDC" [42 USC sec. 602 (a) (5)]
Food Stamps [7 USC sec. 2020 (e) (B)]
Medical Assistance - "MA" [42 USC sec. 1396 (a) (4) (A)]
Aid to the Blind [42 USC sec. 1202 (a) (5) (A)]
Aid to the Permanently and Totally Disabled [42 USC sec. 1352 (a) (5) (A)]
Aid to the Aged, Blind or Disabled [42 USC sec. 1382 (a) (5) (A)]
State and Community Programs on Aging [42 USC sec. 3027 (a) (4)]
Adoption Assistance and Foster Care [42 USC 671 (a) (5)]
Old-Age Assistance [42 USC 302 (a) (5) (A)]
National Health Planning and Resources Development, Public Health, Service Act [42 USC 300m-1 (b) (4) (B)]
Child Welfare Services [45 CFR 1392.49 (c)]
Emergency Management Assistance [44 CFR 302.5]

2. Pursuant to such congressional action the Office of Personnel Management, acting under authority transferred to the United States Civil Service Commission from the Departments of Health, Education and Welfare, Labor, and Agriculture by the Intergovernmental Personnel Act (IPA) of 1970 and subsequently transferred on January 1, 1979, to the Office of Personnel Management by the Reorganization Plan Number Two of 1978, promulgated the Standards for a Merit System of Personnel Administration codified at 5 CFR Part 900, Subpart F, which imposes on the State of Minnesota general requirements for a merit system of personnel administration in the administration of the federal grant-in-aid programs. (See, Footnote 1 Supra.)

3. Under the aforementioned grant-in-aid programs the State of Minnesota, through its appropriate agencies, is the grantee of federal programs and administrative funds and, accordingly, the State is under an affirmative obligation to insure that such monies are properly and efficiently expended in compliance with the applicable federal standards. Those standards require that in order for the agencies under the Minnesota Merit System to be eligible to receive federal grant-in-aid funds the Minnesota Merit System rules must specifically include, among other things, an active recruitment, selection and appointment program, current classification and compensation plans, training, retention on the basis of performance, and fair nondiscriminatory treatment of applicants and employees with due regard to their privacy and constitutional rights (codified at 5 CFR sec. 900.603).

4. In conformance with 5 CFR Part 900, Subpart F, the Minnesota Legislature enacted Minn Stat., sec. 12.22 subd. 3, sec. 144.071 and sec. 256.012,[2] which respectively authorize the Governor, the Commissioner of Health, and the Commissioner of Human Services to adopt necessary methods of personnel administration for implementing merit systems within their individual agencies. Collectively, the resulting programs are referred to as the "Minnesota Merit System".

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2 See also Minn. Stat., secs. 393.07 (5), 256.01 (4), 393.07 (3) and 256.011.

5. Pursuant to such statutory authority those state agencies have adopted comprehensive administrative rules which regulate administration of the Minnesota Merit System.[3]

6. The Minnesota Supreme Court has upheld the Authority of the Commissioner of Human Services and by implication that of the Commissioner of Health and the Governor to promulgate personnel rules and regulations. The Court quashed a writ of mandamus brought by the Hennepin County Welfare Board against the county auditor in attempting to force payment of salaries in excess of the maximum rates established by the Director of Social Welfare.[4] State ex rel. Hennepin County Welfare Board and another v. Robert F. Fitzsimmons, et. al., 239 Minn. 407, 420, 58 N.W. 2d 882, (1953). The court stated:

> .....It is clear that the Director of Social Welfare was clearly right in adopting and promulgating a merit plan which includes initial, intervening, and maximum rates of pay for each class of position of the county welfare board system included within the plan and that plan so adopted was binding upon all county welfare boards within the state .....In our opinion the federal and state acts, properly construed, provide that the Federal Security Administrator as well as the Director of Social Welfare shall have authority to adopt rules and regulations with respect to the selection, tenure of office and compensation of personnel within initial, intervening and maximum rates of pay but shall have no authority or voice in the selection of any particular person for a position in the state welfare program nor the determination of his tenure of office and individual compensation.

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3 Minnesota Rules, parts 9575.0010 to 9575.1580, parts 7520.0100 to 7520.1200, and parts 4670.0100 to 4670.4300.

4 "Director of Social Welfare" was the former title of the Commissioner of Human Services.

7. The above cited proposed rule amendments are promulgated in accordance with the provisions of applicable Minnesota statutes and expressly guarantee the rights of public employers and Minnesota Merit System employees in conformance with the terms of the state's Public Employment Labor Relations Act (Minn. Stat. secs. 179.61 - 179.77).

II. The justifications establishing the need for and the reasonableness of the specific substantive provisions of the proposed rules, all of which concern the Minnesota Merit System operation, are as follows:

A. Definitions

Minnesota Rules, parts 9575.0010; 4670.0100 and 7520.0100

Amendments are being proposed to these rules providing new or amended definitions for terms that have a meaning specific to the Merit System rules. Six amendments are proposed to 9575.0010, 4670.0100 and 7520.0100 providing definitions for the following terms: "Affirmative action," "Disability," "Discrimination," "Disparity," "Equal employment opportunity" and "Protected groups." All of these terms either already appear elsewhere in current Merit System rule language or are included in other proposed Merit System rule amendments referred to in this statement of need and reasonableness.

The terms "Disparity" and "Protected group" are contained in amendments to 9575.0620 Subp. 7 and 4670.2300 Subp. 7 that were proposed and adopted in 1988. Those subparts provide for the expanded certification of members of protected groups (women, disabled and minorities) in the event an agency has a disparity between its work force and its affirmative action goals for protected group members. Given the significance of this change in Merit System certification methods, it is necessary to define in rule language what constitutes a disparity as well as the makeup of protected groups. The certification of names from eligible

registers is an extremely significant function of the Merit System. The terms "disparity" and "protected group," in some instances, actually change the manner in which certifications are made. The proposed definition for "disparity" is similar to the definition for that term in the Equal Employment Opportunity/Affirmative Action glossary section of the Affirmative Action Manual maintained by the Equal Opportunity Division in the state Department of Employee Relations and has a base in Title VII of the Civil Rights Act. The proposed definition for "protected group" is identical to the definition in Minnesota Statutes, section 43A.02, subdivision 33 except that the reference to Vietnam era veterans who are no longer a protected group has been deleted. Therefore, the proposed language for these terms is reasonable and it is also a reasonable approach to have these terms added to the list of definitions contained in the Merit System rules.

Current language contained in 9575.0090, 7520.0350 and 4670.0600 and proposed new rule provisions identified as 9575.0090 Subp. 2, 7520.0350 Subp. 2 and 4670.0610 use the terms "Affirmative action," "Disability" and "Discrimination." As with the previous two proposed definitions, these are significant terms that justify their being defined. The Minnesota Merit System and the Department of Human Services have both had long standing commitments to affirmative action. For many years, local Merit System agencies have been required to adopt an affirmative action plan and conduct business in compliance with its provisions. While it is obvious that Merit System rules do promote positive affirmative action efforts, it is necessary that the rules define what is meant by affirmative action. The proposed definition is similar in wording to the definition of this term in the EEO/AA glossary section of the Affirmative Action manual glossary in the state Department of Employee Relations and the objective of affirmative action as stated in Minnesota Statutes, Section 43A.01 Subd. 2. It also has a base in Title VII of the Civil Rights Act. The proposed language therefore is reasonable and it is likewise reasonable that a basic policy of the Merit System such as affirmative action be defined in the rules. Since disabled persons are considered a protected group as contained in the

definition of that term, the conditions that must exist for a person to be considered disabled must be defined in the rules. The proposed Merit System definition of "disability" is reasonable since it is identical to the same definition in the Minnesota Human Rights Act (Minnesota Statutes, Section 363.01 Subd. 25). Likewise the rules contain prohibitions against discrimination but the rules have never defined what constitutes discrimination. It is therefore necessary to define the term "discrimination" in rule language. The proposed definition is reasonable because it is almost identical to the one in the state Department of Employee Relation's Affirmative Action manual except that it is somewhat more inclusive since it also lists protected characteristics.

It is proposed to amend 9575.0010, 4670.0100 and 7520.0100 to include a definition for "Equal employment opportunity." One of the objectives of the Merit System currently contained in rule language is to provide "fair and equal opportunity" for persons to compete for positions and promotions solely on the basis of merit and fitness. For years, Merit System stationary and envelopes have proclaimed us to be "an equal opportunity employer." Equal employment opportunity is a basic principle of all public personnel systems. It is closely associated with the proposed definition for affirmative action, which includes the term "equal employment opportunity," in that a positive program of affirmative action leads to the practice of equal employment opportunity in all areas of employment. For these reasons, there is a need to define in rule language what is meant by equal employment opportunity. The proposed definition is reasonable because it is almost identical to the same definition contained in the Affirmative Action manual glossary in the state Department of Employee Relations.

It should be mentioned that the proposed definitions for "Disparity," "Protected group," "Affirmative action," "Disability," "Discrimination" and "Equal employment opportunity" were developed with considerable input, review and approval from the

Affirmative Action Director for the Department of Human Services. The Director proposed specific definitional language, reviewed these proposed definitions with Merit System staff and agreed to their appropriateness.

The next proposed amendment to 9575.0010, 4670.0100 and 7520.0100 amends the current rule definition for "General adjustment." Every year the Merit System recommends a general salary adjustment for all Merit System employees not covered by the terms and conditions of a collective bargaining agreement. In the past, during even-numbered years, the amount of the recommended adjustment was determined exclusively by the change in the Twin City Consumer Price Index over a one year period. This is no longer the case and what is happening with the Twin City Consumer Price Index is only one consideration used in calculating the recommended general salary adjustment for employees. Also in the past, during odd-numbered years, the Merit System conducted a broad-based salary survey, the results of which were used to adjust the salary ranges of Merit System classifications. The survey and its results, however, had nothing whatsoever to do with a recommended salary adjustment for employees. The definition for which amendments are being proposed only relates to salary adjustments for employees and not adjustments to salary ranges. The principal factor upon which the Merit System recommended general adjustment is based is adjustments granted by other public employers, including the State of Minnesota, to employees performing work similar to work performed by Merit System employees. Trends in the Twin City Consumer Price Index which generally reflect the pattern of wage adjustments are also considered but not to the same extent as the adjustments themselves. The amendment being proposed to this definition is necessary to eliminate any reference to irrelevant considerations and to clarify the factors on which the annual recommended salary adjustment is based. Other rule parts such as 9575.0320 Subp. 3a.; 4670.1200 Subp. 3a and 7520.0620 Subp. 3a. clearly establish that general salary adjustments for employees

are based on adjustments to salary levels by employers with similar and competing types of employment and on trends in the Twin City consumer price index. The proposed amendment is a reasonable approach to establishing consistency between rule parts.

B. Objectives

Minnesota Rules, parts 9575.0020 and 7520.0200

An amendment is proposed to these rules that changes the primary basis on which the Merit System establishes salary ranges for its classifications from one of "equal pay for equal work" to one of "equal pay for work of equal value." For years, the Merit System, as well as most other public employers, developed and adjusted salary ranges for classes by comparing them to what other jurisdictions were paying people performing identical or almost identical work. In 1984, the Legislature passed Minnesota Statutes, Section 471.991-471.999 also known as the Local Government Pay Equity Act. That act requires political subdivisions and the Minnesota Merit System to establish equitable compensation relationships between classes of positions based on their comparable work value as determined by the results of a job evaluation study. The underlying principle of comparable worth is that employees occupying positions whose comparable work values are identical or similar should be paid within salary ranges that are identical or similar. For example, if an electrician position and a plumber position have identical comparable work values, the employees in those positions should be paid within the same salary range even though, obviously, the work they do is not remotely similar. After passage of the Local Government Pay Equity Act, the Merit System conducted a job evaluation study of all Merit System classes of positions to determine the comparable work value of each class. Since then, adjustments to Merit System compensation plans have been dictated principally by the comparable work value of classes of positions. Even with comparable worth, there will be occasions when recruiting difficulties for a particular class will dictate that the labor market

for that kind of work be surveyed and an adjustment be made to the salary ranges for the class in order that the Merit System remain competitive in salary when recruiting to fill positions in that class. However, adjustments to salary ranges based on labor market conditions are of secondary importance to adjustments based on comparable work values. Given that the doctrine of comparable worth is mandated by statute, it is not only reasonable but necessary to emphasize in rule language that the Merit System objective in developing pay scales for classes is to provide equal pay based on work of equal value.

C. Prohibition Against Discrimination

Minnesota Rules, parts 9575.0090, 4670.0600-4670.0620 and 7520.0350

Three amendments are proposed to 9575.0090 Subp. 1, 4670.0600 and 7520.0350 Subp. 1. The first adds "political affiliation" to the list of items protected from discrimination. The proposed definition of the term "Discrimination" provides that political affiliation is a protected characteristic. Also, the proposed definition for "Equal employment opportunity" provides that political affiliation be disregarded when conducting personnel activities. It is necessary and reasonable to include political affiliation as a condition to be protected from discrimination in order to be consistent between rule parts.

The second amendment allows a person who believes he or she has been aggrieved by an alleged violation of any prohibited characteristic to file a discrimination complaint under the provisions of a county agency's internal complaint process. This avenue of appeal would be an alternative to a complaint filed with the Minnesota Department of Human Rights under the provisions of Chapter 363. Proposed new language for these rules provides that there shall be an affirmative action plan for each Merit System agency. One of the requirements for each such plan is

that the agency establish an internal discrimination complaint policy and procedure. Assuming that proposed language will be adopted, it naturally follows that it is both reasonable and necessary to inform employees they have the right to use that internal complaint procedure as an avenue of appeal for their complaint instead of the Human Rights Department.

The last amendment proposed to 9575.0090 Subp. 1, 4670.0620 and 7520.0350 Subp. 1 deletes the word "physical" in referring to a disability. The proposed definition for "Disability" includes both physical and mental impairments in its definition and it is improper to refer only to physical disabilities in the rule language. The definition for "Disability" contained in Minn. Stat., Section 363.01, Subd. 25 refers to both physical and mental impairments.

An amendment is proposed to delete Subparts 2 and 3 of 9575.0090, current language in 4670.0610 and Subparts 2 and 3 of 7520.0350. One's political affiliation will be a protected characteristic with two avenues of appeal if the proposed amendments to 9575.0090 Subp. 1, 4670.0600 and 7520.0350 Subp. 1 are adopted. There is then no need to refer to discrimination based on political affiliation elsewhere in the rules. Current language in 9575.0090 Subparts 2 and 3, 4670.0620 and 7520.0350 Subparts 2 and 3 deals with complaints of alleged discrimination in matters outside of protected characteristics. It prescribes involvement by both staff of the Merit System office and the Merit System Council in the complaint process. There are several reasons for the proposed amendment to delete these rule parts and subparts. Since at least 1974 there has not been a single instance of a complaint of alleged discrimination being filed under these rule provisions. It is difficult to envision a complaint alleging violation of a prohibited discrimination that could not be filed under the provisions of Chapter 363 or, alternately, under an agency's internal complaint process. Merit System agencies that are unionized have collective bargaining agreements that must contain grievance procedures. Anyone with a grievance or complaint involving provisions of the contract must use the

grievance procedure. All local units of government have some form of grievance procedure available to all employees. Merit System employees in unionized agencies whose complaint does not involve a labor contract provision and Merit System employees in non-union agencies have access to local government grievance procedures with their complaints. This approach is reasonable since deleting these parts will not reduce the availability of any Merit System employee to have his/her complaint heard and decided. These parts are clearly unnecessary and experience over the past fifteen years would show them to be not viable as well.

An amendment is proposed to these rules that includes entirely new language identified as 9575.0090 Subp. 2a., 4670.0610 and 7520.0350 Subp. 2a. This subpart requires that all local Merit System agencies adopt a minimum of five basic affirmative action requirements to serve as an affirmative action plan for employees in those agencies. It also provides that these requirements may either be included as part of a county-wide affirmative action plan or be provided as an addendum to such a plan.

For the past ten years, Merit System agencies have been required to comply with the existing Merit System affirmative action plan in carrying out their personnel responsibilities. The five basic affirmative action requirements contained in the proposed amendment were a part of that plan. In many cases it was the only affirmative action plan that existed in local governmental jurisdictions. The Federal Standards for a Merit System of Personnel Administration include a requirement for "assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, religious creed, age or handicap and with proper regard for their privacy and constitutional rights as citizens." It goes on to say that this includes compliance with the federal equal employment opportunity and nondiscrimination laws. This requirement was a principal reason why a Merit System affirmative action plan existed. Under Minnesota Statutes, section 363.073, as

amended by Laws of Minnesota 1988, chapter 660, section 8, all contractors with more than 20 full-time employees (including counties) must have an affirmative action plan approved by the Commissioner of Human Rights. All counties were required to submit a county-wide affirmative action plan to the Department of Human Rights. If the plan met Department of Human Rights requirements, the county would be issued a certificate of compliance by that department. However, the requirements of the Department of Human Rights did not include those principles proposed in this amendment as a condition for issuing a certificate of compliance to a county. The Department of Human Services does not want to require counties to maintain a separate affirmative action plan for their Merit System agency in addition to a county-wide affirmative action plan for all other departments. On the other hand, the department feels strongly that there is a need for these requirements to continue to be maintained and complied with by county Merit System agencies. Appropriate county personnel were informed in meetings with Department of Human Services Affirmative Action and Merit System office personnel that they were expected to maintain these requirements for their Merit System agency either as a part of their county-wide affirmative action plan or as an addendum to that plan. As of this time, the department is not aware of any counties that have refused to comply with the department's request to incorporate these requirements as part of their county affirmative action plan. However, on a couple of occasions, the question was raised as to why the county Merit System agency was being asked to comply with requirements that were not necessary to approval of county-wide affirmative action plan by the Department of Human Rights. Staff members from the Department of Human Services Affirmative Action and Merit System offices discussed this matter with legal counsel who stressed the need to incorporate the requirements into rule language, granting them the force and effect of law and avoiding a possible substantive legal problem. Then, if noncompliance should occur, the county Merit System agency becomes liable for sanctions available to the Department of Human Services through the Merit System rules. The

requirements are not onerous and do not require the county Merit System agencies to do something they have not been required to do in the past. Therefore, it is reasonable that they be incorporated in the rules to guarantee that Merit System agencies will continue to administer the personnel function within the spirit and intent of an affirmative action management program.

D. Work Out of Class

Minnesota Rules, parts 9575.0380, 4670.1600 and 7520.0680

An amendment is proposed to these rules providing for the extension of a work out of class assignment for up to an additional six months upon request of a county agency and for specific reasons. For the past ten years, the Merit System rules have provided for work out of class assignments limited in duration to six months. Most public personnel systems, including the State of Minnesota system, provide for work out of class assignments. In the Merit System, the vast majority of such assignments have been utilized to fill in behind an employee who is absent from the agency on an approved leave of absence. In these instances, six months adequately covers such an absence.

The Department of Human Services has embarked on an ambitious project which will affect the positions of Merit System employees engaged in the administration of public assistance programs in the counties. It involves implementing, in all counties, a system known as the MAXIS project. Briefly, MAXIS is a new statewide automated eligibility system now being developed for all Minnesota's major public assistance programs. The system will assist counties in determining client eligibility, dispensing benefits and providing case management reporting support for Food Stamps, Aid to Families with Dependent Children (AFDC) and aspects of General Assistance (GA) and Medical Assistance (MA). During the implementation and conversion phases of the project, it is likely that counties may have to assign higher level functions to workers on a temporary basis. The current rule limits

such work out of class assignments to a maximum of six months. It is anticipated that some counties may need to extend such appointments beyond six months. There will no doubt be an increase in time spent by public assistance workers in intake responsibilities because of the combined application form to be used with MAXIS (one 33 page application for multiple programs). Some of the personnel changes made necessary by the implementation of MAXIS may result in the permanent upgrading of certain positions but counties want adequate time to evaluate their own specific situations. Counties are free to determine for themselves how best to organize to administer the system. A member of the Merit System staff served on a personnel subcommittee of a County Operations and Policy Committee dealing, in part, with personnel issues that need to be addressed during the implementation and conversion phases of MAXIS. Several county staff indicated it would be extremely helpful during this period of time if the Merit System would allow for work out of class assignments of longer than six months.

The Department of Human Services initiative to implement the MAXIS system will significantly affect the way in which public assistance programs are administered in the counties. The Merit System has an obligation to assist both the department and Merit System county agencies in whatever way it can to make the transition to MAXIS as efficient and effective as possible. One such way is to allow for longer work out of class assignments as proposed by this amendment. Given the needs as perceived by county personnel, the amendment is necessary to provide agencies with the time they need to evaluate their organizational structure and determine if it is indeed the best in terms of delivering services via the MAXIS system. The rules already provide for work out of class assignments of six months or less. It is a reasonable approach to amend the existing rule to allow for the extension of such assignments for up to one year, thereby accommodating the needs of some counties during their period of implementation and conversion to the MAXIS system. It is highly unlikely there would be any other situations, not associated with MAXIS, that would justify a work out of class assignment beyond six months.

E. Examination Retesting

Minnesota Rules, parts 9575.0530 and 4670.1980 (Under the provisions of 7520.0200 Subp. 2, the Department of Human Service rules, parts 9575.0400 to 9575.1300 also apply to the Department of Public Safety's county and local agencies.)
Two new rules are being proposed to place in rule language the Merit System's examination retesting policy as it applies to open continuous examinations. Open continuous examinations are those that are open for application on a year around basis. The Merit System keeps 31 such examinations open on a competitive basis (open to the general public) and another 18 such examinations open on a promotional basis (open to current Merit System employees). The proposed new rules are necessary in order to prohibit an applicant from retaking an open continuous examination he/she had failed within sixty days of the previous testing date and to prohibit an applicant from taking the same open continuous examination more than three times during a calendar year. This is a current long standing policy of the Merit System and is printed on both listings of open continuous competitive and promotional examinations.

All public personnel jurisdictions have some kind of retest policy that applies to all job applicants. For instance, the state of Minnesota requires that applicants wait six months before repeating an examination, which means the applicant can only take the same examination twice a year. The Merit System listings of open continuous examinations provide the job applicant with information indicating the minimum qualifications of education and experience to compete in the examination and, in the case of written tests, the content areas to be covered in the examination. Upon request, the Merit System also provides applicants with a breakdown of their test scores indicating which content areas of the examination gave them problems. These matters represent reasonable accommodation to job applicants. However, unlimited retesting goes beyond reasonableness. Persons working in public personnel jurisdictions who are involved in the testing process

are all agreed that allowing unlimited retesting creates a practice effect involving the recall of test items. Obviously, with unrestricted retesting, there will be applicants who qualify for appointment primarily on the basis of their power of recall rather than on the depth and breadth of their knowledge of the examination content areas. This would conflict with merit principles that base the selection and promotion of employees on their relative ability, knowledge and skills. For this reason and to add emphasis to current policy it is a reasonable approach to incorporate the Merit System examination retesting policy in rule language.

F. Certification Method

Minnesota Rules, parts 9575.0620 and 4670.2300 (Under the provisions of 7520.0200 Subp. 2, the Department of Human Services rules, parts 9575.0400 to 9575.1300 also apply to the Department of Public Safety's county and local agencies.)

An amendment is proposed to Subpart 5 of these rules to delete a portion of the current language of the subparts and to change the total number of names on the combined competitive and promotional registers for the same classification which could generate an agency request to certify names of applicants from a different register.

Some background information leading up to the proposed amendment is in order. For several Merit System classifications, both a competitive and promotional register of names exist. Prior to 1988, a complete certification of names from a competitive register consisted of seven names and a complete certification of names from a promotional register consisted of three names. If there were fewer than seven names on the competitive register, fewer than three names on the promotional register or fewer than three names on both registers, the agency could request the Merit System supervisor to certify names from a different register. In 1988, the

rule was amended to change a complete certification to fifteen names from a competitive register and seven names from a promotional register. The number of names on both registers necessary to generate a request for certification from a different register remained at fewer than three. Over the past eleven years, there have been no requests received to certify names from a different register because there were fewer than seven or fifteen names on the competitive register. There were no requests received to certify names from a different register because there were fewer than three or seven names on the promotional register. There were no requests received to certify names from a different register because there were fewer than three names on both the competitive and promotional registers. Most of this inactivity can be attributed to the fact that, for most Merit System classes, there are not any alternative registers containing the names of persons unquestionably capable of performing the work of the vacant position. The one exception to this would be where there is a series of classes in the same occupational field (clerical/accounting) and a person on a register for a higher level class in the series might be interested in being considered for a lower level class in the same series. Another factor contributing to the absence of requests for the certification of names from alternate registers is that county agency personnel are aware that the Merit System supervisor is reluctant to grant permission for an agency, for whatever reason, to bypass persons who have qualified through the appropriate examination process and consider others who have not. The most appropriate response to this kind of situation is to accelerate local recruiting and testing of job applicants for the classification in which the vacancy exists in order to expand the register of names.

On the other hand, it is recognized that there may be occasions when the Merit System supervisor should seriously consider a request to certify names from an alternate, but appropriate, register. The proposed amendment, if adopted, would not allow an agency to request a certification of names from an alternate register

simply if there were fewer than fifteen names on the competitive register for that class or simply if there were fewer than seven names on the promotional register for that class. However, it would continue to allow an agency to request names from an alternate register if there were fewer than seven names on both the competitive and promotional registers combined. We believe it necessary to maintain this flexibility in the rules even though we do not foresee it being used on many occasions. In the past, the basis for using three names as the number of names on both the competitive and promotional registers that could generate such requests was that three names constituted a complete certification of names from a promotional register. In 1988, the number of names constituting a complete certification of names from a promotional register was increased to seven. It is reasonable to maintain the same basis as has been maintained in the past and so we are proposing that fewer than seven names on the combined competitive and promotional registers could generate requests to the Merit System supervisor to certify names from an alternate register.

An amendment is being proposed to Subpart 7 of these two rules. Current language in these subparts references to the definition of protected group contained in Minnesota Statutes, Section 43A.02, subdivision 3. However, a definition for protected groups is proposed for 9575.0010, Subp. 34a. and 4670.0100, Subp. 34a. While it is necessary to provide such a definition in 9575.0620, Subp. 7 and 4670.2300, Subp. 7, it is reasonable that the rule definition be cited rather than requiring the person interested in the definition to refer to the statute definition.

G. Probation Required

Minnesota Rule, part 9575.0720

An amendment is proposed to this rule to eliminate the phrase "and except appointment under 9575.1580" contained in "A." of the rule. That phrase provides

that employees appointed under the provisions of part 9575.1580 do not have to serve a probationary period. Part 9575.1580 relates to incumbents of reclassified positions. Subpart 1 of that rule relates to incumbents of positions that are reclassified and the reclassification is determined to be a reallocation. The last sentence of the subpart states: "An employee promoted in accordance with this provision shall serve a probationary period in the higher class." Obviously, this creates a conflict in language between the two rules. However, the policy and practice with respect to this matter has remained consistent over time. The Merit System has always required incumbents of reallocated positions to serve a probationary period in the higher classification upon appointment to that class. It is necessary to make the proposed change in order to eliminate the inconsistency between language in the two rule parts. It is equally reasonable to maintain the Merit System's policy of requiring incumbents of reallocated positions to serve a probationary period in the higher class. The probationary period is a significant time period used to closely observe the employee's work, obtain the most effective adjustment of the employee to the obligations of the position and to remove an employee whose performance does not meet the required standard of work. A reasonable approach to maintaining this policy is to delete, as proposed, the conflicting language.

It is anticipated that there will be no expert witnesses called to testify on behalf of the agency if this rule is heard in public hearing.

The aforegoing authorities and comments are submitted in justification of final adoption of the above-cited proposed rule amendments.

Ralph W. Corey

Ralph W. Corey

Merit System Supervisor

Dated: June 23, 1989