10/14/91

State of Minnesota
Department of Employee Relations

In the Matter of Proposed Permanent Rules of the Department of Employee Relations Regarding Local Government Pay Equity Compliance, Minnesota Rules, parts 3920.0100 to 3920.1300

STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION

The Department of Employee Relations proposes to adopt rules governing local government pay equity compliance. This document presents the need for and reasonableness of the rules.

To adopt the proposed rules, the department must demonstrate that it has complied with all the requirements of rulemaking established by the Administrative Procedures Act. Those requirements are that there is statutory authority to adopt the rules; the rules are needed; the rules are reasonable; and all additional requirements imposed by law and rule have been satisfied. This document demonstrates that the department has satisfied these requirements.

Section II provides general background about the pay equity law. Section III explains the need for the rules and cites the statutory authority for rulemaking. Section IV addresses compliance with rulemaking procedures. Section V introduces the reasonableness of the rules in general. Section VI documents the need for and reasonableness of each part of the rules. Appendices include a bibliography of relevant publications and other materials.

II. BACKGROUND

In 1984, the Minnesota Legislature enacted Minnesota Statutes 471.991 to 471.999, requiring the state's political subdivisions to establish "equitable compensation relationships," also called comparable worth or pay equity. The law was modeled on a 1982 law requiring pay equity for state employees (Laws 1982, chapter 634).

Both laws are designed to address the problem of sex-based wage disparities. The disparities are present in dual pay structures, with one pay pattern for jobs performed mostly by men and another pattern, with lower pay, for jobs performed mostly by women.

The law applies to an estimated 163,000 employees in the 1,600 political subdivisions in Minnesota, primarily cities, counties, and school

districts. The key provision of the local government pay equity act is that:

> ... every political subdivision of this state shall establish equitable compensation relationships between female-dominated, male-dominated, and balanced classes of employees in order to eliminate sex-based wage disparities in public employment in this state. (Minnesota Statutes, section 471.992, subdivision 1)

The law defines equitable compensation relationships as follows:

> "Equitable compensation relationship" means that the compensation for female-dominated classes is not consistently below the compensation for male-dominated classes of comparable work value ... (Minnesota Statutes, section 471.991, subdivision 5)

The law also defines comparable work value:

> "Comparable work value" means the value of work measured by the skill, effort, responsibility, and working conditions normally required in the performance of the work. (Minnesota Statutes, section 471.991, subdivision 3)

Each jurisdiction was required to use a job evaluation system to determine comparable work value, expressed as a job evaluation rating, for each of its job classes (Minnesota Statutes, section 471.994). After assigning job evaluation ratings to each job, jurisdictions were to compare ratings and pay to identify any sex-based inequities. Finally, jurisdictions were required to develop an implementation plan for correcting the inequities.

The law also required each jurisdiction to report to the Department of Employee Relations by October 1, 1985 on the jurisdiction's inequities and its implementation plan (Minnesota Statutes, section 471.998, subdivision 1).

The law provided jurisdictions with legal protections in the early years of the process. The job evaluations could not be used as evidence in state courts or in actions before the state Human Rights Department until August 1, 1987 (Minnesota Statutes 1984, section 471.997, amended in 1989 to delete this provision). The law also prohibited any cause of action before that date for failure to comply with the law's requirements (Minnesota Statutes, section 471.9975).

The department's report to the legislature in January 1986 (***Pay Equity in Minnesota Local Governments***, listed in Appendix I) noted that 69 percent of jurisdictions had reported. Of those reporting, 49 percent identified sex-based pay inequities. Those with inequities estimated the average cost to correct the inequities, and these amounts averaged 2.6 percent of payroll.

In 1987, the legislature established a financial penalty for schools which did not submit pay equity reports by October 1, 1987 (Laws 1987, chapter 398, article I). Similar penalties were enacted for other non-reporting jurisdictions in 1988 (Laws 1988, chapter 702, section 15, subdivision 2). All jurisdictions reported by the deadline dates and no penalties were imposed.

Also in 1988, the legislature enacted implementation deadlines and financial penalties for failing to implement pay equity (Minnesota Statutes, section 471.9981, subdivision 6, paragraph c). All jurisdictions were required to achieve pay equity by December 31, 1991, seven years after the original law passed. The Department of Employee Relations, which had previously been required to provide technical assistance, was required to determine whether jurisdictions had achieved pay equity. In 1990, further amendments clarified the compliance process.

As part of its technical assistance program, the department has issued a number of publications and has conducted a variety of training activities. In 1984 and 1985, the department published a general guidebook sent to all jurisdictions, five supplements with information specific to various kinds of jurisdictions, and computer software which allowed jurisdictions to analyze their pay patterns. In 1990, the department revised the original guidebook to address legislative changes. All of the publications are listed in Appendix I. The department has provided a staff position for consulting with jurisdictions from 1984 to the present.

III. NEED FOR RULES & STATUTORY AUTHORITY

Local governments and employees affected by the pay equity law need guidance on the methods to be used to implement pay equity and the standards by which compliance will be determined. While the law provides general policies and standards, it does not specify how they will be applied. Rules are needed to make the standards more specific and to ensure consistency in the standards applied to all jurisdictions.

From 1984, when the law was passed, until 1988, when the first penalties were prescribed in amendments to the law, compliance was essentially voluntary. Yet even in that period there was a great demand for the department's assistance in interpreting the law. In its 1986 report to the legislature, the department noted that in 1985 it had presented 27 half-day seminars attended by over 800 local officials. In addition, in the first year and a half after the law was passed, department staff made over 200 presentations and answered an average of 15 calls per day to respond to pay equity inquiries.

The need for formal rulemaking began with the amendments to the law which established financial penalties for non-compliance (Laws 1988, chapter 702, section 15) and clarified the department's enforcement role (Laws 1990, chapter 512, sections 7 to 10). In September 1990, the department published a revised *Guide to Implementing Pay Equity in Local Government* (cited in Appendix I), designed to explain the compliance criteria.

The guidebook also reviewed state and local government experience with pay equity, answered common questions, and provided examples of compensation systems likely to be found in and out of compliance. The examples were based on information submitted by jurisdictions in their original planning reports.

In reviewing drafts of the guidebook, Attorney General staff advised the department that formal rulemaking was needed to ensure that the law could be enforced. They cited several cases supporting the need for rulemaking: Mapleton Community Home, Inc. v. Minnesota Department of Human Services, 391 N.W.2d 798,801 (Minn. 1986) (quoting Minnesota-Dakota Retail Hardware Ass'n. v. State, 279 N.W.2d 360,364 (Minn. 1979) ("an agency interpretation that 'makes specific the law enforced or administered by the agency' is an interpretive rule that is valid only if promulgated in accordance with the Act")); and SA-AG, Inc. v. Minnesota Department of Transportation, 447 N.W.2d 1 (Minn. Ct. App. 1989).

While the department had general rulemaking authority under its enabling statute, Minnesota Statutes chapter 43A, it had no specific authority to make rules related to the pay equity act in chapter 471. Therefore, the department decided to seek rulemaking authority in the next legislative session.

At the same time, the department issued the guidebook to provide as much guidance as possible to local governments in the interval before the formal rulemaking process could begin. The guidebook noted that the department would develop pay equity rules (page 3, page 31).

The department was given rulemaking authority for this purpose in the 1991 legislative session:

> The commissioner may adopt rules under the administrative procedures act to assure compliance with sections 471.991 to 471.999. (Laws 1991, chapter 128, section 2)

IV. COMPLIANCE WITH RULEMAKING PROCEDURES

Minnesota Statutes, sections 14.05 to 14.20, and rules of the Office of Administrative Hearings, parts 1400.0200 to 1400.1200, specify the procedures a state agency must follow when it adopts rules. The department has complied with all of those procedures.

Seeking outside opinions. Minnesota Statutes, section 14.10, requires an agency that seeks information or opinions from persons outside the agency about adoption of rules to publish a notice of this action in the *State Register*. This notice allows interested persons to submit comment or data on the subject of the rules. A Notice of Solicitation of Outside Opinion on these rules appeared in the *State Register* on June 3, 1991 at 15 S.R. 2568.

The department received some letters commenting on pay equity compliance. Those letters, and the department's responses, are submitted as part of the hearing record.

In addition, the department established an advisory committee to assist the department in formulating rules. The advisory committee's work is explained more fully in section V of this document.

Fiscal note. Minnesota Statutes, section 14.11, subdivision 1, requires a fiscal note if a proposed rule will require local public bodies to incur a cost higher than $100,000 in either of the two years immediately following adoption of the rule.

Local governments have implemented pay equity in a variety of ways, including expending funds to increase compensation for female-dominated classes. In March 1990, the department estimated the total cost of implementing the pay equity law at 2.5 percent of the total local government payroll, or about $100 million out of about $4 billion (memo to Department of Finance, 3/27/90).

These rules do not require any additional expenditures. Therefore, no fiscal note is required.

Agricultural land. These rules have no "direct and substantial adverse impact on agricultural land in the state," and therefore the requirements of Minnesota Statutes, section 14.11, subdivision 2 do not apply.

Small business. These rules have no impact on small businesses as defined in Minnesota Statutes, section 14.115, and therefore the requirements of that section do not apply.

Pollution control; health; fees charged. The rules of the Office of Administrative Hearings, part 1400.0500, subpart 1, specify other information which must be included in this document under certain circumstances. These rules are not affected by the provisions of Minnesota Statutes, sections 115.43, subdivision 1, and 116.07, subdivision 6, because those provisions apply only to rules of the Pollution Control Agency. These rules are also not affected by the provisions of Minnesota Statutes, sections 144A.29, subdivision 4, because those provisions apply only to rules of the Department of Health. These rules are also not affected by the provisions of Minnesota Statutes, section 16A.128, subdivision 1, because these rules do not modify a fee charged.

Expert witness. The department will have an expert witness testify on its behalf at the public hearing: Dr. Charlotte Striebel, Ph.D., J.D., Professor of Mathematics at the University of Minnesota. Dr. Striebel assisted the department in developing the statistical analysis described in part 3920.0500, and she will testify on the need for and reasonableness of that part. A summary of her testimony is included in section VI of this statement under part 3920.0500.

Dr. Striebel received her doctor of philosophy degree in mathematical statistics from the University of California at Berkeley in 1960. She received her juris doctor degree, cum laude, from the University of Minnesota in 1981.

Dr. Striebel is a recognized expert in the area of statistical evidence in sex bias litigation. She developed the statistical evidence used by the plaintiffs in their successful class action sex discrimination litigation in

the case of *Rajender v. University of Minnesota*, and she has testified and consulted nationally as a statistical expert in litigation concerning age, race, and sex discrimination. Her vita is included as Appendix II.

She served as chair of the Institute for Technology Scholastic Conduct Committee from 1984 to 1985, and as chair of the Faculty Senate Equal Opportunity for Women Committee for the same period. Dr. Striebel is presently the University Grievance Officer, and she serves on the Faculty Senate Consultative Committee.

The department expresses its appreciation to Dr. Striebel for her invaluable assistance.

Statement of need and reasonableness. A copy of this statement of need and reasonableness was sent to the Legislative Commission to Review Administrative Rules before these rules were published in the *State Register*, as required by Minnesota Statutes, section 14.131.

V. REASONABLENESS OF THE RULES, GENERALLY

This section of the statement reviews some general factors which demonstrate the reasonableness of these rules: the uniqueness of Minnesota's pay equity law, the limitations on the department's resources, the lack of a data base on local government compensation, the seven years of experience in planning for and implementing pay equity, the series of publications documenting the department's interpretation of the law, and the work of a rulemaking advisory committee. Section VI explains the need for and reasonableness of each part of the proposed rules.

Minnesota's pay equity law is unique.

The Local Government Pay Equity Act is the first legislation of its kind in the United States. While other states have undertaken a variety of pay equity activities, no other state has yet required all of its political subdivisions to address pay equity in a comprehensive, proactive manner. Therefore, there is no established precedent to guide the affected parties in applying and enforcing the law. By making the compliance standard as clear as possible, these rules will help establish a legal frame of reference.

The department's resources for administering the law are limited.

Another factor in the rulemaking process has been the size of the pay equity program in contrast with the department's limited resources. The department has one staff position with a total annual budget of $55,000 to administer the program, which directly affects 1,600 local jurisdictions with 163,000 employees.

The program is complex because the jurisdictions vary greatly in size and structure, so that technical assistance and enforcement activities must be

tailored to the various jurisdictional patterns. Because of the volume and complexity of the department's work, it is critical for the department to develop rules which are administratively feasible.

There is no comprehensive data base on local government compensation.

Local government associations collect some information on compensation practices through salary surveys. The department also has some information as a result of the pay equity planning reports submitted by the local governments from 1985 to 1988. However, there is no information currently available to use in predicting all the effects of the proposed rules.

For example, the alternative analysis in part 3920.0600 applies only to jurisdictions with three or fewer classes, to jurisdictions with no salary ranges for any of their classes, and to jurisdictions with four or five male classes which have failed the statistical analysis. The number of jurisdictions in each of these categories is unknown.

There are some jurisdictions with mixed compensation structures, including some classes with salary ranges and some without salary ranges. No information is available to show the number of jurisdictions with these structures, or the degree of mixture.

After the first round of compliance reviews is completed, the department and all interested persons will have better information for future policy-setting. Meanwhile, the department relied on sample studies, as explained in Section VI, and on its expertise and the expertise of the local governments, as explained below.

The department and local governments have had more than seven years of experience with pay equity.

When the pay equity law first passed in 1984, the department asked each of the major jurisdictional associations in the state -- the League of Minnesota Cities, Association of Minnesota Counties, and Minnesota School Boards Association -- to establish advisory committees to review the department's pay equity program.

Those committees reviewed drafts of the guidebook and supplements published in the next year, and provided valuable assistance in explaining how pay equity affected various jurisdictions. The associations also helped communicate to their members about the program. For example, in 1984 the League of Minnesota Cities asked department staff to participate in a series of 13 regional meetings, providing a forum for discussions with many smaller cities.

In the seven years since initial passage of the law, department staff have spent many hundreds of hours meeting with and training local elected and appointed officials on the subject of pay equity. Staff have also provided extensive telephone consultation.

Besides these direct interactions with jurisdictions, the department has gained extensive knowledge about local government compensation by reviewing the 1,600 planning reports submitted by local governments from 1985 to 1988. This information represents an extensive data base on local governments' personnel and compensation systems. It was used in preparing reports to the legislature in 1986 and 1990, in preparing the 1990 guidebook, in developing training materials, and in developing these rules.

As a result of these interactions, the department has developed expertise in the wide variety of situations jurisdictions encounter in the process of implementing pay equity. At the same time, jurisdictions have had a considerable period of time to comment on the process and to apply pay equity principles to their compensation practices. These factors contribute to the reasonableness of the proposed rules.

The department has issued a series of publications documenting its interpretations of the law.

Many of the issues governed by these rules have been addressed throughout the history of this program. For example, the original version of ***A Guide to Implementing Pay Equity in Local Government,*** published in August 1984, referred to the Public Employment Labor Relations Act (Minnesota Statutes, chapter 179A) in determining which jurisdictions are responsible for achieving pay equity (page 5). Similarly, the proposed rules incorporate this standard in part 3920.0100, subpart 9.

That publication also first applied the definition of "employee" which is almost identical to that used in these rules, and, as provided in these rules, noted that fringe benefits must be considered part of compensation. The 1984 guidebook emphasized that a single job evaluation system must be used for all classes in the jurisdiction, as do the rules in part 3920.0300, subpart 4, item C.

Further, the "listing method" of identifying inequities explained in each of the supplements (see, for example, ***Pay Equity Supplement for Hospitals & Nursing Homes,*** June 1985, pages 14-15) is very similar to the "alternative analysis" proposed for smaller jurisdictions in these rules (part 3920.0600).

These rules differ in some ways from these early publications. The changes arose in part from the experience of the department and local jurisdictions in implementing pay equity. Other changes were required because of amendments to the law. However, in most respects the rules incorporate principles which have been widely publicized and generally unchallenged over the past seven years.

A rulemaking advisory committee assisted the department in this process.

In May 1991, Commissioner Barton convened an advisory committee composed of representatives from all of the major groups affected by the pay equity law: employers, unions, and women's groups. Each group was asked to select its own representatives, and the department encouraged groups to seek a balance based on sex, geographic location, and size of jurisdiction. Appendix III is a roster of advisory committee members.

Employer representatives included the Association of Minnesota Counties, the League of Minnesota Cities, and the Minnesota School Boards Association.

Union representatives included the American Federation of State, County, and Municipal Employees (AFSCME); the International Union of Operating Engineers; Law Enforcement Labor Services; Minnesota Nurses Association; Service Employees International Union; and International Brotherhood of Teamsters.

Women's group representatives included the Child Care Workers Alliance, the League of Women Voters, the Minnesota Library Association, the National Organization for Women, Minnesota Pay Equity Coalition, and Minnesota Women's Political Caucus.

The committee met eight times from May through July, 1991. The number of participants at each meeting ranged from 26 to 33, and a total of more than 850 person-hours were spent in advisory committee meetings. Advisory committee minutes are included with this statement as Appendix IV.

In early meetings, the advisory committee generated lists of issues to be addressed, reviewed the approach proposed by the department in its published guidebook, commented on a proposed statistical analysis, suggested definitions of terms, and reviewed sample studies to determine the impact of various suggestions. In later meetings, the committee continued discussion of the statistical analysis and discussed several drafts of the rules.

While the group did not achieve consensus on all parts of these rules, there was extensive discussion of every part. The department considered all of the comments and discussion in developing these rules. The department expresses its appreciation to committee members for their cooperative spirit and their many thoughtful contributions.

SECTION VI. NEED FOR & REASONABLENESS OF RULES, PART BY PART

3920.0100 DEFINITIONS.

Subpart 1. Scope. This subpart is needed to clarify that the definitions apply to the entire sequence of parts 3920.0100 to 3920.1300. This subpart and the definitions that follow in subparts 2 to 11 are needed to help local governments, employees, and others understand the terminology used in these rules.

Subpart 2. Benefits. This subpart is needed to clarify a term used in these rules. Benefits are included in the term "compensation," defined in subpart 3.

Since 1984, the department has consistently advised local governments that benefits are part of compensation. The department's 1984 guidebook stated that

> "Both salary and fringe benefits are included ... You may want to review fringe benefit practices as well as salary practices to ensure that there is no bias because of gender" (page 6).

The department's position has not changed since then. The 1990 guidebook stated that

> "Benefits are part of total compensation and must figure into pay equity... To be in compliance, jurisdictions should make sure that eligibility for benefits is similar for all employees with jobs of comparable value" (page 28).

The proposed definition is reasonable because it is consistent with the department's position over the past seven years, and because insurance is widely considered the most significant component of non-wage compensation. In 1989, for example, medical benefits alone accounted for more than 9 percent of payroll costs for American employers (U.S. Chamber of Commerce annual survey of employee benefits).

The definition of benefits does not include other possible components, such as vacation time, sick leave, and holiday pay. It is reasonable to exclude these components for two reasons. First, the department has not received any substantive suggestions since the law was passed that these components have any significant impact on overall compensation differences between male-dominated and female-dominated classes. Second, there is no widely accepted standard method for determining their monetary value, and therefore including these components would be administratively difficult for the department and for local governments.

There was consensus on the part of the rulemaking advisory committee that pensions should not be included in the definition of benefits. This exclusion is reasonable because the amount of the employer's contribution to pensions is typically specified in state law (see, for example, Minnesota Statutes, section 353.27, subdivision 3). The department decided it was unreasonable to create the possibility of finding a jurisdiction "not in compliance" with the pay equity law based on pension contributions when the jurisdiction has no control over the amounts of those contributions.

Subpart 3. Compensation. This subpart is needed to clarify a term used in the statute and in these rules. Compensation is part of "equitable compensation relationships," the key concept of the statute.

The definition is reasonable because it includes all the significant components of compensation over which the jurisdictions have some control and which could be influenced by past or present sex-biased practices. The need for and reasonableness of including each component are addressed in the discussion of subparts 2, 6, and 10.

Item A, exclusion of overtime pay, is needed to clarify the status of this type of payment. It is reasonable to exclude overtime pay because: (1) it would be difficult for jurisdictions to manipulate these payments as a way to maintain sex-based wage disparities; (2) the department has not received any substantive suggestions since the law was passed that overtime pay has any significant impact on overall compensation differences between male-dominated and female-dominated classes; (3) reporting these payments

would be administratively difficult for jurisdictions to report, and administratively difficult for the department to monitor; and (4) the consensus of the advisory committee was that including these payments was unnecessary and cumbersome.

Item B, exclusion of shift differentials, is needed to clarify the status of this type of payment. It is reasonable to exclude shift differentials for the reasons listed in the discussion of item A.

Item C, exclusion of uniform allowances, is needed to clarify the status of this type of payment. It is reasonable to exclude uniform allowances for the reasons listed in the discussion of item A.

Subpart 4. Department. This subpart is needed to clarify a term used in these rules. The definition identifies the Minnesota Department of Employee Relations as the state agency which monitors compliance with Minnesota Statutes, sections 471.991 to 471.999, and with these rules. It is reasonable to shorten the reference to "department" to shorten these rules.

Subpart 5. Employee. This subpart is needed to clarify a term used in statute and in these rules, and specifically to clarify for what groups of workers jurisdictions must establish equitable compensation relationships. The definition is reasonable because it relies in part on chapter 179A (the Public Employment Labor Relations Act, or PELRA), which is related to the pay equity law in several ways, and because it incorporates exceptions which are consistent with the purpose of the pay equity law.

The pay equity law is "subject to sections 179A.01 to 179A.25 ..." (Minnesota Statutes, section 471.992, subdivision 1), and there are six other references to PELRA in the pay equity law, demonstrating an intentional interaction of the two laws. The department has been using PELRA as the basic definition of an employee for purposes of pay equity for seven years with no major objections, providing for consistency and ease of application. Therefore, it is reasonable to include the PELRA definition as one component of the employee definition for purposes of pay equity.

The PELRA definition excludes employees of charitable hospitals (Minnesota Statutes, section 179A.03, subdivision 14, paragraph h). However, as explained in the discussion of subpart 9, the department was advised by the Attorney General's office in 1985 that hospital employees should be included, and the proposed rules include these employees among those covered by the pay equity law.

The department's inclusion of this group has been consistent since 1985, as evidenced by the department's publication of a ***Pay Equity Supplement for Hospitals and Nursing Homes*** in 1985, and by the department's presenting a series of training seminars sponsored by the Minnesota Hospital Association for its members in the same year. For the reasons explained in the discussion of subpart 9, and because the department has been consistent in its advice to jurisdictions about the inclusion of hospital employees, it is reasonable to include this group in the employee definition.

One group not included by the proposed rules is "employees of charitable hospitals who would be excluded under Minnesota Statutes, section 179A.03, subdivision 14, paragraphs (a) to (f)." The department has never received a question about this group since the pay equity law was passed, and presumably hospitals have always excluded them. It is reasonable to exclude this group because there is no rationale for including part-time and seasonal hospital employees when part-time and seasonal employees of all other jurisdictions are excluded.

Some advisory committee members were concerned that jurisdictions might manipulate hours of work in order to exclude employees from coverage by the pay equity law. That is, employers might reduce employees' days or hours of work to a point below the 67-day cutoff or the 14-hours cutoff established in PELRA so that low-paid female classes or high-paid male comparator classes would not be reported. The concerned advisory committee members suggested using different cutoff points -- that is, requiring reporting of employees with fewer days or hours of work than those established in PELRA -- to avoid the possibility of manipulation.

In deciding to retain the definition, however, the department noted that (1) a 1991 amendment to PELRA clarified that employers may not create a position and fill it with a series of people merely to avoid the 67-day limit (Laws 1991, chapter 308, section 2); and (2) the Human Rights Act may provide recourse for employees who believe days or hours of work are being manipulated in order to maintain practices which discriminate on the basis of sex. Both of these factors contribute to the reasonableness of the proposed definition by reducing the likelihood of manipulation.

In addition, advisory committee members acknowledged that there was no obvious alternative to the cutoffs established in PELRA. It would be administratively difficult to include all employees, even those who worked only a few hours or days in the course of the calendar year, and there is no logical cutoff established in other statutes. Therefore, the proposed use of the PELRA standard is reasonable.

Subpart 6. Exceptional service pay. This subpart is needed to define this component of compensation and to clarify the status of these kinds of payments. It is reasonable to define this component separately from the salary component (defined in subpart 10), because the proposed rules treat the two components differently.

Some advisory committee members advocated excluding exceptional service pay from the definition of compensation. That is, these payments would not be considered in the compliance review process. Other advisory committee members advocated adding exceptional service pay to the definition of salary. That is, these payments would be added to salary range maximums for purposes of comparing male and female compensation. After thorough consideration, the department decided on the proposed definition, which represents a middle ground between these two points of view.

The proposed definition is reasonable because it balances the need to consider payments which could be manipulated to maintain sex-based wage

disparities with the need to recognize distinctions between exceptional service pay and straight salary, as explained in the discussion of items A and B. In addition, the treatment of longevity and performance pay as items not added to base pay is consistent with the treatment proposed in the 1990 guidebook (page 29).

The need for and reasonableness of the department's position on exceptional service pay are presented in more detail in other parts of this statement: in the discussion of implementation reporting, part 3920.0300, subpart 5, item H, and in the discussion of the exceptional service pay test, part 3920.0700, subpart 5.

Item A defines longevity pay as one component of exceptional service pay. The item is needed to explain the status of these payments. It is reasonable because the proposed definition recognizes a distinction between longevity pay and straight salary.

Some advisory committee members advocated defining longevity pay as part of salary. They stated that the distinction between longevity pay and salary is not always clear and that longevity pay could be used to defeat the law's purpose of "eliminating sex-based wage disparities" (Minnesota Statutes 471.992, subdivision 1). Other advisory committee members advocated excluding longevity pay from all analysis, because it is not usually paid to many classes in a jurisdiction and because they believed employers would eliminate these payments to ensure compliance with pay equity.

After considering all the comments, the department decided to include longevity pay in the definition of compensation, but to make a distinction between longevity pay and straight salary. It is reasonable to include longevity pay in the definition of compensation for the reasons listed above. It is reasonable to define longevity differently than straight salary because (1) longevity pay is often paid only to a few members of a class, so that automatically adding longevity pay to salary range maximums could present an inaccurate picture of compensation for a class; (2) most jurisdictions provide longevity pay only for a small number of classes; and (3) there have not been any substantial allegations to date that longevity is being used to maintain sex-based wage disparities.

Item B defines performance pay as one component of exceptional service pay. The item is needed to explain the status of these payments. It is reasonable because the proposed definition recognizes a distinction between performance pay and straight salary.

The advisory committee discussed performance pay in much the same way as longevity pay. Some committee members argued that performance payments should be added to salary range maximums. They stated that performance systems are subjective and used to maintain wage superiority for males. Like longevity payments, performance payments could theoretically be used to maintain disparities between comparable male and female classes with otherwise identical salary range maximums.

Other members argued that performance payments are made to individuals, not to classes, and therefore should not be included in class-based compensation comparisons. They also noted that performance payments above the salary range maximum are relatively rare, and that it would be difficult to manipulate performance payments in order to maintain sex-based wage disparities.

After considering all the comments, the department decided to include performance pay in the definition of compensation, but to make a distinction between performance pay and straight salary. This position is reasonable for the reasons listed in the discussion of item A.

Subpart 7. In compliance, not in compliance. This subpart is needed to clarify terms used in the statutes and in these rules. The terms "in compliance" and "not in compliance" are used in the law (Minnesota Statutes, section 471.9981, subdivision 6b and 6c; and section 471.999) and throughout the rules as a simpler reference to the establishment (or lack of establishment) of equitable compensation relationships. It is reasonable to shorten those references to shorten the rule.

Subpart 8. Job evaluation system. This subpart is needed to clarify a term used in the statute and in these rules. Minnesota Statutes, section 471.994 requires every political subdivision to use a job evaluation system to determine the comparable work value of the work performed by each class of employees. The definition is reasonable because it is consistent with the statute.

Subpart 9. Jurisdiction. This subpart is needed to clarify a term used in these rules, and specifically to clarify which jurisdictions are responsible for establishing equitable compensation relationships for particular groups of employees. This term is used throughout the rules as a simpler reference to the statutory phrases "political subdivision," "public employer," and "governmental subdivision." It is reasonable to use the shorter reference to reduce the length of these rules and to provide a consistent reference.

The 1984 guidebook defined "employers covered by the local government pay equity act" as "political subdivisions which fall under the Public Employment Labor Relations Act (Minnesota Statutes, chapter 179A), and which have final budgetary approval authority over wages for a group of employees" (page 5). In these proposed rules, the department has retained the reference to PELRA, which includes the references to final budgetary approval authority.

It is reasonable to use PELRA as part of the definition of "jurisdiction" for purposes of pay equity because the pay equity law includes six references to PELRA, as explained in the discussion of subpart 5. However, the proposed definition also includes charitable hospitals, which are excluded from PELRA, as explained below.

In 1985, the department responded to inquiries about the status of charitable hospitals by asking for advice on this subject from the Attorney

General's office. The Attorney General's office advised the department that this group should be included under the pay equity law. The department informed jurisdictions that the definition had been clarified by publishing a memo from the Attorney General's office. The memo stated, in part:

> "Apparently, several hospitals and nursing homes plan to take the position that, since they are not covered by the Public Employment Labor Relations Act (PELRA), they are not covered by the Local Government Pay Equity Act either...
>
> In my opinion, the position of these hospitals and nursing homes is untenable... Every section of the pay equity law other than Minn. Stat. § 471.993 (1984) uses the broader term 'political subdivision' rather than the narrower term 'public employer,' the clear implication being that the Legislature intended all government employees (except state and federal, of course) to be covered. Moreover, the law suggests no reason why hospital or nursing home employees should be excluded; the broad remedial objectives of the statute would seem to be as compelling for nurses and medical technicians as they are for courthouse clericals and highway technicians. The right to strike -- the principal difference between the Charitable Hospitals Act and the Public Employment Labor Relations Act -- is not affected by the pay equity law, and there is no indication in any of the legislative history material of which I am aware that hospitals were to be excluded. Consequently, you should advise hospital officials that claiming an exemption from the entire pay equity law is risky." (Memo from then Special Assistant Attorney General Scott Strand to Nina Rothchild, 3-11-85, Appendix V.)

This memo was reprinted in the *Pay Equity Supplement for Hospitals and Nursing Homes* (June 1985, pages 4-8) and in the revised *Guide to Implementing Pay Equity* (September 1990, pp. 54-58). The policy was accepted by the Minnesota Hospital Association at the time it asked department staff to present a series of workshops to its members in 1985.

The proposed definition of "jurisdiction" is reasonable because it incorporates the definition of "public employer" in PELRA, while avoiding the exclusion of certain jurisdictions from PELRA. In addition, the definition is reasonable because it has been used with no significant objections since 1985, when the charitable hospitals were specifically included. There was no controversy about this definition in advisory committee meetings.

Subpart 10. Salary. This subpart is needed to clarify a term used in the statute and in these rules. The pay equity law requires jurisdictions to report salary information (Minnesota Statutes, section 471.998, subdivision 1(2d); section 471.9981, subdivision 5a (6)). The proposed definition is reasonable because it covers the compensation components which are most likely to reflect "sex-based wage disparities," a key concept in the statute.

The definition is also reasonable in excluding exceptional service pay and benefits, which are less likely to reflect those disparities, as explained in the discussion of subparts 2 and 6. While these components of compensation are not included in this definition, the rules provide separate mechanisms for evaluating the impact of sex-based disparities in exceptional service pay and benefits as well (see 3920.0300, subpart 5, item H; 3920.0300, subpart 6; 3920.0400, subpart 2, item B; 3920.0700, subpart 5).

In effect, the rules simplify the reporting process for local governments and the administrative process for the department by assuming that benefits and exceptional service pay are not usually differentially available to male and female classes. At the same time, the rules do provide a mechanism for identifying those jurisdictions in which these components could contribute to sex-based wage disparities.

Item A, wages, is needed to define this kind of payment. It is reasonable to define wages in this way because the proposed definition is similar to the dictionary definition:

> "A payment usually of money for labor or services usually according to contract and on an hourly, daily, or piecework basis ..." (Webster's New Collegiate Dictionary, G. & C. Merriam Company, Springfield, Massachusetts, 1979, page 1305)

The proposed definition limits wages to "*regular* payments for *routinely scheduled* labor..." to distinguish these payments from overtime pay, shift differentials, and other payments excluded from the definition of compensation, as explained in the discussion of subpart 3, and to distinguish these payments from those described in item B.

The definition refers to "hourly, monthly, or annual" payments to ensure that all wages for all employees are included. This reference is needed because "wages" is sometimes otherwise used to refer to hourly pay for lower-level jobs, while "salary" is sometimes used to refer to annual pay for higher-level jobs. It is reasonable to use a single term for all payments for labor and services, since the law does not make these distinctions.

As the definition states, "wages refers to the maximum monthly payment for a job class if there is an established payment range for the class, or to the highest actual monthly wage paid to any member of a class if there is no established payment range for that class." The "maximum monthly payment" is referred to in the pay equity law as information which must be included in the implementation report:

> ...the minimum and maximum salary for each class, if salary ranges have been established ... (Minnesota Statutes, section 471.9981, subdivision 5a, paragraph 6).

The analysis in parts 3920.0500 to 3920.0700 is based on maximum monthly salaries, for jurisdictions with salary ranges, because that figure is the best representation of the earnings potential for a class.

The "highest actual monthly wage" is used as the basis for analysis when there are no salary ranges because the actual pay is the best approximation of what the maximum salary would be if there were salary ranges. It is reasonable to include this alternative definition for jurisdictions without salary ranges because the pay equity law does not exclude those jurisdictions, and therefore some information must be used as the basis for analysis. Parts 3920.0600 and 3920.0700 explain how the department proposes to analyze compensation for jurisdictions without salary ranges.

Item B, additional cash compensation, is needed to clarify a term used in the statute and in these rules. Minnesota Statutes, section 471.9981, subdivision 5a (7) requires jurisdictions to report:

> ...any additional cash compensation, such as bonuses or lump-sum payments, paid to the members of a class ...

The proposed definition is limited to payments made to "all employees in the class." This limitation is reasonable because it distinguishes additional cash compensation from exceptional service pay (see subpart 6) and supports the department's compliance analysis which is based on compensation for classes rather than individuals.

It is reasonable to limit the definition to those payments which "exceed the maximum of an established payment range" because payments below the maximum will be incorporated when jurisdictions report the maximum, as required by item A.

The inclusion of bonuses and lump sum payments in the definition reflects the statutory language cited above. At legislative hearings held in 1989 and 1990, there was testimony that these payments were widely used to maintain sex-based wage disparities, and the statutory language was added in 1990 to address this concern.

The department decided to include additional cash compensation in the definition of salary because (1) there have been allegations of widespread use of these payments to maintain inequities; (2) additional cash compensation is paid to an entire class, and therefore represents an integral part of the compensation structure for that class. (Exceptional service pay increases are often paid only to some employees within a class, and therefore these payments are not included in the definition of salary.)

The inclusion of lump sums and bonuses is also consistent with the 1990 ***Guide to Implementing Pay Equity***:

> "... differentials such as bonuses, premiums, and lump sum payments ...must be reported. That is, these amounts will be added to the maximum of the pay range for purposes of pay comparisons" (page 29).

Subitem 1 excludes certain retroactive adjustments to wages. This subitem is needed to clarify the status of these payments, which are often made for bargaining agreements reached after previous agreements have

expired. It is reasonable to exclude these payments from the definition of additional cash compensation because these payments are included when jurisdictions report wage maximums, as required by item A. If these retroactive payments were added to maximum wages, the effect would be to count such payments twice.

Subitem 2 excludes payments defined elsewhere in the rules. The subitem is needed to clarify the status of these payments. It is reasonable to make this distinction to prevent counting such payments twice.

Subpart 11. Submit, submitted by, or submitted within. This subpart is needed to define terms used in these rules, and specifically the dates by which materials must be submitted. It is reasonable to accept materials postmarked by the due date to ensure equitable treatment of jurisdictions located throughout the state.

3920.0200. JURISDICTION DETERMINATION.

This part is needed to provide consistency in identifying the jurisdictions responsible for achieving pay equity when it is not clear which jurisdiction is responsible for particular classes of employees.

The department has received questions about which jurisdiction is responsible for employees in county hospitals (county board versus hospital board), county or city nursing homes (county board or city council versus nursing home board), county and city libraries (county board or city council versus library board), city-owned utilities (city council versus utility board), regional entities (regional commission versus contributing counties and cities), joint powers organizations (joint powers board versus contributing entities), and others. The jurisdiction determination may have a significant impact on the department's compliance decision.

Subpart 1. Scope. This subpart is needed and reasonable for clarifying the purpose of part 3920.0200.

Subpart 2. Requesting a determination. This subpart is needed to explain who may request a determination and how to do so. The law requires the department to determine whether each jurisdiction has established pay equity (Minnesota Statutes, section 471.9981, subdivision 6, paragraph a), and allows the department to adopt rules to assure compliance with the pay equity law (Laws 1991, chapter 128, section 2). It is reasonable to allow any person or entity to request a determination, to ensure that jurisdictions have reported correctly and that the reports serve as an accurate basis for the compliance decision. The need for completeness and accuracy in jurisdictions' reports is included in the discussion of part 3920.0700, subpart 2.

The subpart requires that requests for jurisdiction determinations be submitted in writing. This limitation is needed and reasonable to discourage frivolous requests and reduce the response burden on department staff.

In addition, the subpart allows the department to decide that a request is without merit. This provision is needed and reasonable because the department may have already resolved a particular jurisdictional issue, or may have knowledge about general jurisdictional structures that makes a review unnecessary. In those cases, making a new determination would be an inappropriate use of resources.

The second paragraph of the subpart allows the department itself to initiate a review. There are a number of situations which could lead to the department's identifying possible jurisdictional problems. For example, the department might receive a report from a county and another report from that county's hospital, both identifying hospital employee classes. The department-initiated review is needed and reasonable to ensure that reports are complete and accurate.

Subpart 3. Documents to support determination. This subpart is needed to explain the process used for resolving uncertainty about the responsible jurisdiction. The subpart is reasonable because it provides an administratively simple method for resolving uncertainties.

The statute provides the department with broad discretion in requiring jurisdictions to submit "any other information requested by the commissioner" (Minnesota Statutes, section 471.9981, subdivision 5a, paragraph 8). It is necessary and reasonable for the department to review the information listed in items A to D because that information corresponds to the definition of "jurisdiction" in part 3920.0100, subpart 9.

Item A refers to documents demonstrating that a jurisdiction has final budgetary approval authority. This item is needed to provide an objective basis for the department's determination that a jurisdiction has or does not have final budgetary authority. This item is reasonable because "final budgetary approval authority" is the key determinant in the definition of "public employer" in Minnesota Statutes, chapter 179A.03, subdivision 15, clause c, and that reference in turn is one part of the definition of a "jurisdiction" in these rules. It is reasonable to rely on documents such as enabling legislation because those documents are direct evidence of the limits of a jurisdiction's authority, and because this information is readily available to all jurisdictions.

Item B refers to documents demonstrating that a different jurisdiction has final budgetary approval authority. This item is needed to provide for an objective comparison of documents when there are alternative choices of responsible jurisdictions. The item is reasonable because it is based on the statutory definition, as explained in item A.

Item C refers to documents demonstrating how budgets are established and adopted. This item is needed to provide other objective bases for the department's determination in cases where the information listed in items A and B is unclear or insufficient for making the determination. The item is reasonable because it assists in identifying final budgetary approval authority, as explained in the discussion of item A.

Item D refers to other documents which identify the responsible jurisdiction. This item is needed because there may be other documents, not identified in items A to C, which support a claim that a particular jurisdiction is responsible.

It is reasonable to allow consideration of documents other than those which identify the final budgetary approval authority, because there are criteria other than final budgetary approval authority which establish the jurisdiction definition for purposes of pay equity. These rules incorporate the PELRA definition of public employer, and in the case of joint powers organizations, the PELRA definition does not refer to final budgetary approval authority:

> ...When two or more units of government subject to sections 179A.01 to 179A.25 undertake a project or form a new agency under law authorizing common or joint action, the employer is the governing person or board of the created agency ... (Minnesota Statutes, section 179A.03, subdivision 15, clause c, second paragraph).

In addition, charitable hospitals are excluded from PELRA, but not from the provisions of the pay equity law, and therefore documents demonstrating that a jurisdiction is a charitable hospital may be needed for making jurisdiction determinations.

Subpart 4. Notice to jurisdictions. This subpart requires the department to notify jurisdictions if a review is being undertaken, and allows jurisdictions a reasonable time to submit the information. It is necessary and reasonable to inform jurisdictions of this action because they are directly affected by the jurisdiction determination, and they will generally be the source for the necessary information.

Subpart 5. Impact on compliance determination. This subpart is needed to explain the consequences of the jurisdiction determination. It is reasonable to use the appeals procedures provided in parts 3920.0900, 3920.1100, and 3920.1200 rather than creating a separate appeals mechanism here because creating separate appeals procedures would be confusing and administratively difficult.

Item A, incomplete reports, is needed to explain the consequences of improperly excluding employee classes. This provision is reasonable as explained in the discussion of incomplete and inaccurate reports, part 3920.0700, subpart 2.

Item B, inaccurate reports, is needed to explain the consequences of improperly including employee classes. This provision is reasonable as explained in the discussion of incomplete and inaccurate reports, part 3920.0700, subpart 2.

3920.0300. IMPLEMENTATION REPORTS.

Subpart 1. Report required. This subpart is needed to inform jurisdictions of their responsibility to provide information which will be used in making the compliance decision. It is reasonable because it is consistent with Minnesota Statutes, section 471.9981, subdivision 5a.

Subpart 2. Report form. This subpart is needed to explain the form jurisdictions must use to provide information to the department. It is reasonable because the use of a prescribed form will assist the department in reviewing the information and will enable the department to carry out its responsibilities with limited staff resources.

The department plans to enter report data in a computer system for analysis, and the use of a standard form will greatly speed and simplify this process. Jurisdictions will be allowed to submit much of the information on a computer diskette, because this can simplify the process for jurisdictions and for the department. However, the standard form must still be used because some of the required information is not easily computerized, and a hard copy of the data may be needed to solve problems in reading the diskette.

Subpart 3. Notice to employees. The department is permitted to adopt rules to "assure compliance" with the pay equity law (Laws 1991, chapter 128, section 2). This subpart is needed to assure compliance by providing an opportunity for verifying the accuracy and completeness of the reports submitted by jurisdictions. The need for and reasonableness of ensuring accuracy and completeness in reporting is included in the discussion of part 3920.0700, subpart 2.

The notice mechanism was suggested by a member of the rulemaking advisory committeee, and there were no objections from committee members. It is reasonable to ensure that employees are informed about their jurisdictions' pay equity reports because employee compensation may be directly affected by the department's decision.

Minnesota Statutes, section 471.9981, subdivision 5b provides that the implementation report is public data. In part because of the sheer number of employees affected statewide, many employees have not been aware of their jurisdictions' activities with respect to pay equity. The department has received some complaints from employees who charge that their jurisdictions have not made pay equity information available.

The department has received hundreds of requests from employees seeking copies of their jurisdictions' reports. The proposed rules seek to reduce the volume of these requests. While the department has charged a nominal fee for retrieving, copying, and mailing this information, the many requests remain an inefficient use of the department's limited resources. Resources should be devoted more directly to assuring compliance with the law rather than providing basic information which must by law be available at the local

level. Therefore, the proposed notice requirement is also reasonable because it reduces the administrative burden on the department.

The department will provide jurisdictions with a sample notice which will meet this requirement.

The 90 day posting requirement is reasonable to ensure that employees have ample opportunity to see the notice and respond appropriately. Few employees read bulletin boards frequently, and in many local governments employees work in buildings far removed from the central office. The 90 day requirement is also reasonable because it should not be difficult for jurisdictions to comply.

While the notice requirement is not specifically included in the law, Minnesota Statutes, section 471.9981, subdivision 5a (8) requires jurisdictions to provide "any other information requested by the commissioner." The subpart is reasonable for the reasons stated above and because it does not impose an undue burden on jurisdictions.

Item A requires jurisdictions to state that they have submitted the implementation report. This item is needed and reasonable to ensure that employees are aware that their jurisdictions have complied with this requirement of the law.

Item B requires jurisdictions to state that the report is public information available to anyone. This item is needed and reasonable to ensure that employees are aware of their right to review this information.

Subpart 4. Verifications. This subpart is needed to ensure that the report is accurate, complete, and officially approved, and to ensure that the jurisdiction's job evaluation system meets statutory criteria. The subpart is reasonable because it provides an administratively simple mechanism for these assurances.

Item A requires the offical to verify that the information is accurate and complete. This item is needed and reasonable to provide part of the mechanism for following up if there are questions about accuracy or completeness. The rest of the mechanism is explained in the rules under part 3920.0700, subpart 2.

Item B requires the official to verify that the governing body has reviewed and approved the report. This item is needed and reasonable to ensure that the report is officially approved by those responsible for the jurisdiction's compensation structures. In some cases in the past, members of governing bodies have informed the department that reports were submitted without their knowledge or approval.

Item C requires the official to verify that the job evaluation system meets certain criteria. This item is needed to ensure that jurisdictions are aware of, and have complied with, their obligation to meet the statutory standards listed below. The item is reasonable because it provides an administratively simple mechanism for ensuring compliance with these requirements of the law.

Subitem 1 requires jurisdictions to verify that job evaluation is based on the skill, effort, responsibility, and working conditions normally required in the performance of the work. The subitem is needed and reasonable because it parallels the language of the law.

> Every political subdivision shall use a job evaluation system in order to determine the comparable work value of the work performed by each class of its employees ... (Minnesota Statutes, section 471.994)
>
> "Comparable work value" means the value of work measured by the skill, effort, responsibility, and working conditions normally required in the performance of the work. (Minnesota Statutes, section 471.991, subdivision 3)

Subitem 2 requires jurisdictions to verify that the same job evaluation system is used for all classes of employees. The subitem is needed and reasonable because it parallels the language of the law, cited in the discussion of subitem 1. In addition, it is reasonable to ensure that jurisdictions are aware that the historical practice of using different job evaluation systems for different groups of employees is not permitted under the pay equity law.

Subpart 5. Job class information. This subpart is needed to provide clarity and statewide consistency in the information jurisdictions are required to report under Minnesota Statutes 471.9981, subdivision 5a. It is reasonable because it includes all the information specified in that section; because it adds only clarifying information necessary for specifying the information to be reported and clarifying information needed to assure that the department's compliance decision is accurate and consistent; and because the required information is readily available to reporting jurisdictions.

The subpart requires jurisdictions to report information for job classes which existed on December 31, 1991, even if there were no employees in the class on that date, if there were employees in the class at any time in calendar year 1991. For classes vacant on December 31, the jurisdiction must report the number of employees and the compensation as of the most recent date the class was occupied.

This provision is reasonable because it provides an accurate picture of the jurisdiction's overall compensation structure, ensuring an accurate compliance decision consistent with the statute's broad purpose of "eliminating sex-based wage disparities in public employment in this state." Excluding classes which happened to be vacant on December 31 would mean compliance decisions would not reflect the overall compensation structure. The legislature's intent was to ensure equity in the overall organizational structure, and some features of the overall structure of a personnel system cannot be accurately captured by analyzing only one moment in time.

The 1990 guidebook required reporting of all classes occupied in the past six months. The department decided to extend this period to a full calendar

year to ensure inclusion of seasonal employees from all seasons. For example, jurisdictions must report on employees such as lifeguards who meet the definition of "employee," and whose classes are a permanent part of the organizational structure, but whose work was not in season in December. This provision is needed and reasonable to ensure that all eligible employees are included.

Item A, class title, is authorized by Minnesota Statutes, section 471.9981, subdivision 5a (1). The clarification on two-tier pay systems is needed and reasonable for several reasons.

At legislative hearings held in 1990, testimony suggested that two-tier pay systems were widely used to maintain sex-based wage disparities. While newly-hired employees in new tiers of male classes were paid comparably to employees in female classes, large numbers of existing employees in the old tiers of male classes continued to be paid more.

The statutory definition of "class" includes "use of the same compensation schedule" as a criterion (Minnesota Statutes, section 471.991, subdivision 4). The provision requiring that each tier be treated as a separate class is therefore reasonable because the tiers have different compensation schedules. The definition is also reasonable in assuring that two-tier systems cannot be used to maintain sex-based wage disparities.

The inclusion of each tier as a separate class is also reasonable because it is consistent with the revised ***Guide to Implementing Pay Equity*** (September 1990, pp. 17, 29). There was no disagreement with this approach in advisory committee meetings.

Item B, number of male employees, is authorized by Minnesota Statutes, section 471.9981, subdivision 5a (2) and (3). The item is needed and reasonable because it reflects a clear statutory requirement. The provisions for reporting on vacant classes are needed and reasonable as explained in the discussion of this subpart.

Item C, number of female employees in each class, is authorized by Minnesota Statutes, section 471.9981, subdivision 5a (3). The item is needed and reasonable because it reflects a clear statutory requirement. The provisions for reporting on vacant classes are needed and reasonable as explained in the discussion of this subpart.

Item D, class type, is authorized by Minnesota Statutes, section 471.9981, subdivision 5a (4). The item is needed and reasonable because it reflects a clear statutory requirement. The provisions for reporting on vacant classes are needed and reasonable as explained in the discussion of this subpart.

Item E, job evaluation rating, is authorized by Minnesota Statutes, section 471.9981, subdivision 5a (5). The item is needed and reasonable because it reflects a clear statutory requirement.

Item F, minimum and maximum monthly salary, is authorized by Minnesota Statutes, section 471.9981, subdivision 5a (6). The item is needed and reasonable because it reflects a clear statutory requirement.

Monthly salaries are required, consistent with information required in the planning report, Minnesota Statutes, section 471.998, subdivision 2(d).

The proposed rules require jurisdictions to identify classes for which no salary range exists, and to list the lowest and highest salaries actually paid for each such class. This clarification is needed because a large number of jurisdictions have not established formal salary ranges. Since the legislature did not intend to exclude these jurisdictions from the requirements of the pay equity law, it is reasonable to use the available information to determine compliance.

The alternative analysis method of determining compliance, explained in part 3920.0600, accounts for the lack of formal structure in jurisdictions with no salary ranges by examining compensation differences which may be caused by differences in years of service or performance.

Subitem (1) is needed to explain how to convert hourly and annual pay rates to monthly salary rates so that the reported information is accurate and consistent. The proposed rule requires calculating monthly salary so that part-time and part-year employee classes are compared on an equivalent basis. These provisions are needed to ensure that compensation differences identified in the department's analysis are not caused by non-gender-related work schedule factors. The provisions are reasonable because they reflect standard personnel practices.

Subitem (2) requires jurisdictions to report salaries below the minimum of the salary range, if any exist in the class. This provision is needed to ensure that the salary information reported reflects the jurisdiction's true compensation practice. The department has received a number of credible complaints that range minimums and maximums were artificial figures, with some employees actually paid less than reported range minimums or more than reported range maximums.

The provisions are reasonable because the actual salary rates are readily available to jurisdictions. The provisions for reporting on vacant classes are needed and reasonable as explained in the discussion of this subpart.

Subitem (3) requires jurisdictions to report salaries above the maximum of the salary range, if any exist in the class. This provision is needed and reasonable for the reasons explained in subitem (2). The provisions for reporting on vacant classes are needed and reasonable as explained in the discussion of this subpart.

Subitem (4) requires jurisdictions to add any additional cash compensation to the salary range maximum. The subitem is authorized by Minnesota Statutes, section 471.9981, subdivision 5a (7). The subitem is needed and reasonable because it reflects a clear statutory requirement.

Adding additional cash compensation to salary is necessary and reasonable as explained in the definitions section of this statement under "salary" (part 3920.0100, subpart 10, item B).

Item G, years to maximum. This item is authorized by Minnesota Statutes, section 471.9981, subdivision 5a(6). The item is needed and reasonable because it reflects a clear statutory requirement.

For classes with no salary ranges, the rule requires jurisdictions to report the actual years of service for the highest-paid employee. This provision is needed because a number of jurisdictions have not established formal salary ranges, and the legislature did not exclude those jurisdictions from the pay equity law.

It is reasonable to consider the actual years of service because this factor is frequently relevant to compensation even when the relationship between job tenure and pay is not formalized. The alternative analysis used for jurisdictions without salary ranges enables the department to consider the effect of years of service on compensation for classes with no ranges.

Item H, exceptional service pay, is authorized by Minnesota Statutes, section 471.9981, subdivision 5a (7). The item is needed and reasonable because it reflects a clear statutory requirement.
The method of reporting this information is necessary and reasonable for the reasons given in the definitions section of this statement under "exceptional service pay," part 3920.0100, subpart 6, and in the "exceptional service pay test" discussed in part 3920.0700, subpart 5.. Jurisdictions are not required to list the amount of exceptional service pay, but only the existence of each form of exceptional service pay.

This method is also reasonable because it allows for consideration of possible sex-based wage disparities in these forms of compensation, while limiting the amount of information jurisdictions need to report and the department needs to analyze. The limitation also reflects the lack of charges to date that additional cash compensation is being manipulated to maintain sex-based wage disparities.

Subpart 6. Benefits. This subpart is authorized by Minnesota Statutes, section 471.9981, subdivision 5a (8). These reporting provisions are needed and reasonable for the reasons given in the definitions section of this statement under "benefits" (part 3920.0100, subpart 2).

The provisions establish a definition of "comparable work value" for purposes of comparing benefits, needed to ensure that the benefits component of compensation is evaluated in accordance with the law's overall standard that "compensation for female-dominated classes is not consistently below the compensation for male-dominated classes of comparable work value."

The 10-percent-above-or-below standard established here is reasonable because (1) it represents a middle ground between the extremes of considering all positions in a jurisdiction comparable, and restricting the

comparison to classes of identical value; (2) there is no obvious standard established in other laws or rules for the meaning of "comparable"; and (3) the proposed standard was not controversial in the advisory committee discussions.

In the department's preliminary evaluations, the standard generally allows for more than one comparator class, so that jurisdictions have flexibility in accommodating to a variety of concerns in pay-setting. In large jurisdictions, the standard generally limits comparator classes to a reasonable number so that there is some grouping of relationships between job value and compensation.

Item A, eligibility for benefits, is needed because there are many possible ways of costing benefits. The proposal to compare eligibility for benefits, rather than the value of the benefits actually received, is reasonable because eligibility is a characteristic of the class while benefits received is a characteristic of individuals. Individual benefits received are often the result of unrelated factors such as marital and parental status.

Item B, contribution limits for benefits, is needed and reasonable for the reasons explained in item A. The alternative of reporting actual contributions rather than contribution limits would have unreasonably reflected characteristics of individuals rather than classes.

It will also be easier for jurisdictions to report eligibility and contribution limits rather than the value of benefits received and actual contributions. The advisory committee accepted these provisions by consensus.

Subpart 7. Performance differences. This subpart is authorized by Minnesota Statutes, section 471.9981, subdivision 5a (8). It is needed to allow fair comparisons of compensation for male and female classes in jurisdictions which have no salary ranges.

The legislature did not exclude jurisdictions without salary ranges. Since the department must compare actual pay rates rather than pay range maximums in these cases, it must also consider non-gender-related factors such as performance which may influence the actual pay rates. The need for and reasonableness of considering performance is explained further in the discussion of part 3920.0600, subpart 2, item C.

It is reasonable to require that jurisdictions simply notify the department that peformance information is available, rather than sending the performance information, for administrative convenience. If the jurisdiction is found in compliance after an initial review or after a review of years of service, there will not be any need for the performance information to be submitted.

Subpart 8. Total payroll. This subpart is authorized by Minnesota Statutes, section 471.9981, subdivision 5a (8). This information is needed

so that the department can provide an estimated cost of compliance to the jurisdiction (required by Minnesota Statutes, section 471.9981, subdivision 6b) and to the legislature (required by Minnesota Statutes, section 471.999).

While these costs could be reported using dollar figures alone, it is reasonable to provide a mechanism for reporting the cost of achieving compliance as a percentage of payroll cost, so that costs can be compared among jurisdictions of different sizes. The legislature would be unable to assess the fiscal impact of pay equity accurately without this information.

In addition, access to the jurisdiction's payroll data will provide the department with a mechanism for checking the accuracy of salary data submitted. The provision is reasonable because jurisdictions have this information readily available. The provision does not specify the precise method of determining payroll costs because jurisdictions may use a variety of methods for calculating those costs, and because only a general estimate is needed.

3920.0400 COMPLIANCE REVIEW

Subpart 1. Compliance requirements. The department's authority to determine compliance is specified in Minnesota Statutes, section 471.9981, subdivision 6(a). This subpart is needed to identify for local governments and others the specific tests to be passed in order to be found in compliance.

The subpart is reasonable because it provides a consistent, objective, understandable, and administratively feasible standard which meets the public policy objectives of the law. Parts 3920.0500 through 3920.0700 of this statement explain the various tests in detail.

Item A, jurisdictions with six or more male classes, is needed to refer readers to the statistical analysis. The reasonableness of the statistical analysis, and the reasonableness of the cutoff at six male classes, are included in the discussion of the statistical analysis (part 3920.0500).

Item B, jurisdictions with four or five male classes, is needed to refer readers to both the statistical and alternative analyses. The reasonableness of this approach and the cutoff point are included in the discussion of the statistical analysis (part 3920.0500).

Item C, jurisdictions with three male classes, is needed to refer readers to the alternative analysis. The reasonableness of this cutoff point is included in the discussion of the statistical analysis as well as the alternative analysis. The reasonableness of the alternative analysis is included in the discussion of part 3920.0600.

Item D, other tests, is needed to refer readers to that part of the rules. The reasonableness of those tests is included in the discussion of part 3920.0700.

Subpart 2. Basis for analysis. This subpart is needed to identify the information to be used in the statistical analysis test and the alternative analysis test. It is reasonable because it establishes an objective and consistent standard based directly on information about the jurisdiction's compensation structure.

The analysis should be based on maximum monthly salaries, for jurisdictions with salary ranges, because that figure is the best representation of the earnings potential for a class. Job evaluation ratings are compared with salaries because those ratings represent "comparable work value," the standard expressed in law.

Item A, actual salaries, is needed because many local governments have no salary ranges. This provision is reasonable for the reasons explained in this statement under part 3920.0300, subpart 5, item F.

Item B, adding benefits to salary, is needed to provide an accurate picture of compensation in those jurisdictions where benefits are different for male-dominated and female-dominated classes and where the differences represent a disadvantage for female-dominated classes.

Benefits could be considered separately from salary, as these rules propose for exceptional service pay. However, the department decided to add benefits to salary rather than considering benefits separately, because both employers and employees commonly consider "tradeoffs" between these two compensation components in formal and informal bargaining processes. Some employees accept lower salaries in exchange for higher benefits, and vice versa.

This item is also reasonable because it provides an administratively simple way to evaluate the overall effect of differential benefits. The reasonableness of the comparability standard for benefits is demonstrated in this statement under part 3920.0300, subpart 6. The reasonableness of the method of calculating benefits costs is demonstrated in this statement under part 3920.0300, subpart 6, items A and B.

3920.0500 STATISTICAL ANALYSIS TEST

This part is authorized by Minnesota Statutes, section 471.9981, subdivision 6(a), requiring the commissioner of employee relations to determine compliance.

This part is needed to provide a basis for the department's compliance decision which is: (1) objective, so that any evaluator following the analysis standards would make the same decision; (2) consistent, so that the same standard is applied to all jurisdictions of the same size and compensation structure; (3) administratively feasible, so that the department can complete the compliance review process for all jurisdictions by the end of 1992, using existing staff resources; (4) understandable by the majority of users with a minimum of training; (5) fully in accordance with the policy goals of the legislation; and (6) legally defensible.

The department made efforts to ensure that the analysis would produce results similar to the approach outlined in the 1990 guidebook, so that local governments which followed that approach are very likely to be in compliance. While the results of the compliance analysis under the guidebook approach and under the statistical approach are very similar, the approaches themselves are different. The department developed the statistical analysis incorporated in the rule in response to local government concerns that the guidebook approach was too subjective.

The proposed analysis was developed in the form of a computer program with assistance from Dr. Charlotte Striebel, who will be an expert witness for the department at the public hearing. Dr. Striebel and the department considered dozens of analytical methods and applied the methods to a sampling of jurisdictions to determine their usefulness in meeting the criteria listed above. Some of the alternative methods of curve-fitting considered were straight-line regression; second, third, fourth, and fifth-order polynomials; a log-linear model; and an exponential linear model. Data analysis methods considered included averaging rather than plotting regression lines; several combinations of weighted and unweighted statistics; and a standard deviation analysis. The method proposed in these rules was selected because it met the criteria listed above better than any of the alternatives considered.

In addition, the advisory committee spent 12 hours (360 person-hours) in discussing and evaluating the statistical analysis. At least four other statistical experts were involved in these discussions. At the committee's meeting on July 1, 1991, the group generated and considered 13 alternative approaches (see minutes, Appendix IV). After considerable discussion, the committee's consensus was that the approach established in these rules was the most reasonable.

Key parts of the law upon which the statistical approach is based are the law's purpose statement, the charge to the department, and the definition of equitable compensation relationships.

The purpose statement requires that:

> ...every political subdivision of this state shall establish equitable compensation relationships between female-dominated, male-dominated, and balanced classes of employees in order to eliminate sex-based wage disparities in public employment in this state ... (Minnesota Statutes, section 471.992, subdivision 1).

The charge to the department is that:

> The commissioner of employee relations shall review the implementation report submitted by a governmental subdivision, to determine whether the subdivision has established equitable compensation relationships ... (Minnesota Statutes, section 471.9981, subdivision 6a).

Finally, the definition of equitable compensation relationships is as follows.

> "Equitable compensation relationship" means that the compensation for female-dominated classes is not consistently below the compensation for male-dominated classes of comparable work value as determined under section 471.994, within the political subdivision (Minnesota Statutes, section 471.991, subdivision 5).

The analysis quantifies the law's standard by defining three terms: "not consistently below," "compensation for male-dominated classes," and "comparable work value." The table below summarizes the statistical definition for each of these terms and the method used for measurement.

Question	Definition	Method
Which classes are of comparable work value?	Within 20% of each other (10% above or below the class). Modified in some cases by expanding window.	Window (subpart 4, A and B).
What is compensation for male classes?	Predicted pay; the predicted salary range maximum or highest actual pay for male classes at any point level in the jurisdiction.	Mini-regression lines (subpart 4, C and D).
Are female classes consistently below male classes?	More than one-fifth of the time (four-fifths rule). For jurisdictions which do not meet this standard, an average pay difference which does not disadvantage female classes, or lack of statistical significance.	Underpayment ratio (subparts 5 and 6); average pay difference (subparts 7 and 8); t-test (subpart 9).

Subpart 1. Scope. This subpart is needed to identify the jurisdictions subject to the statistical analysis. It is necessary to limit the statistical analysis to jurisdictions with more than three male-dominated classes for both substantive and administrative reasons.

Jurisdictions vary by type (county, city, school, other), by number of employees (from 1 to more than 9,000), by number of job classes (from 1 to more than 600), and by many other factors. Compensation structures also vary widely, from flat rates set for each individual employee to fully articulated range-based pay systems which reflect years of service, performance, and other factors.

The department has applied the same general standards to this diversity of jurisdictional types. Both the statistical and alternative analyses determine which jobs are comparable. Both determine the predicted level of pay by analyzing pay for male classes. Both analyses use the four-fifths rule to set an acceptable level of difference from predicted pay. Both consider to some degree the size of pay differences as well as the frequency of pay differences. However, the analyses are somewhat different because it is neither reasonable nor feasible to use the same measurement tools for the smallest and largest jurisdictions.

The department decided to use two analytical models, the statistical analysis described in this part and the alternative analysis described in 3920.0600. Jurisdictions with three or fewer male classes are analyzed only by the alternative model, while all other jurisdictions are initially analyzed by the statistical model.

(As explained later in this discussion, those subject to the statistical analysis are subdivided into two groups. Jurisdictions with six or more male classes and one or more salary ranges are analyzed only by the statistical model. Jurisdictions with four or five male classes, and jurisdictions with no salary ranges, are analyzed by the alternative model if they fail the first test of the statistical model.)

The department prefers to rely on the statistical analysis when it is likely to produce significant results for two reasons: (1) this analysis addresses jurisdiction-wide patterns more comprehensively than the alternative analysis, and (2) this analysis is faster, less labor-intensive, and more conserving of department resources because it is automated.

The statistical analysis is a way of averaging and predicting pay for male classes. The averaging mechanism allows an accurate reflection of overall pay practices in a large jurisdiction, ensuring that comparisons are based on general patterns rather than unusual cases. But for jurisdictions with three or fewer male classes, such an average would be sensitive to each small change in compensation for any one of the male classes. Such averaging would virtually never be statistically significant for small jurisdictions.

The department studied 43 jurisdictions with fewer than 10 male job classes to determine the point at which the statistical analysis would be appropriate. The table below shows the percentage of results which were statistically significant for each group of jurisdictions.

Number of Male Classes	Number of Jurisdictions Studied	Percentage of Results Which Were Statistically Significant
3	9	11 %
4	9	33 %
5	9	33 %
6	9	56 %
7	7	57 %

The study showed that the likelihood of the results being statistically significant increases in direct proportion to the number of male classes. The study did not test results for jurisdictions with fewer than three male classes because those jurisdictions were by definition unable to meet the window criterion (described later in this section) of a minimum of three male classes. However, even if the statistical analysis were designed to apply to jurisdictions with fewer than three male classes, the study demonstrates that the results would rarely be statistically significant.

The legislature could have exempted small jurisdictions from the requirements of the pay equity law, but no such exemption was provided. Therefore, it is reasonable to assume that a separate mechanism, sensitive to the special features of small jurisdictions, had to be devised.

For jurisdictions with three male classes, the statistical analysis produces significant results only 11 percent of the time. For this reason, the department decided to rely exclusively on the alternative analysis for jurisdictions of that size.

The study also showed that a majority of results are statistically significant for jurisdictions with six or more male classes. For this reason, the statistical analysis is the only analysis used for jurisdictions of that size.

The study showed that results are statistically significant one-third of the time for jurisdictions with four or five male classes. The department decided that the advantages of the statistical analysis could be obtained without compromising the quality of the results if a sequenced analysis was used for jurisdictions of this size. That is, the statistical analysis is applied to these jurisdictions, and if the underpayment ratio meets the standard set in subpart 6, the jurisdiction is found in compliance. However, if the underpayment ratio does not meet that standard, the alternative analysis is applied to jurisdictions of this size.

A second problem with applying the statistical analysis to small jurisdictions is that this analysis is most appropriate for comparing salary range maximums, and few of the small jurisdictions have established pay ranges. For larger jurisdictions, in which pay for most jobs is determined through a range system, the range maximum is the fairest measure of pay for a class. Movement through pay ranges is typically governed by years of service and performance, and therefore the range maximum controls for those important variables in comparing classes.

Use of actual pay as a measurement device in jurisdictions with pay ranges would inappropriately reflect an unpredictable mix of years of service and other factors. In addition, calculating actual pay rates for thousands of employees would be administratively impossible with current department resources. Use of the two analytical models allows use of the most appropriate measurements for the jurisdiction's size.

Based on a sample study, the department estimates that about 18 percent of jurisdictions have three or fewer male job classes, and will therefore be

excluded from the statistical analysis. An estimated additional 18 percent of jurisdictions have four or five male classes, and therefore the alternative analysis could possibly be applied to about 36 percent of jurisdictions.

Subpart 2. Criteria for statistical analysis test. This subpart is needed to summarize the requirements for jurisdictions to pass this test. It is reasonable to provide such a summary to assist readers in understanding the analysis.

Item A, an underpayment ratio of 80.0 percent or more, is needed to set the basic definition of "not consistently below." This definition is reasonable because it sets a level of acceptable difference which has precedents in employment discrimination law, and because it allows flexibility for jurisdictions to recognize non-gender-related influences on pay. The need for and reasonableness of the underpayment ratio are explained in more detail in the explanation of subparts 5 and 6.

Item B, tests for jurisdictions which have an underpayment ratio less than 80.0 percent, is needed to provide confirming evidence before finding jurisdictions out of compliance. The additional tests are reasonable because they address the significance of failing to meet the 80.0 percent standard.

Subitem 1 allows an in compliance decision for jurisdictions with an average pay difference which does not represent a disadvantage for female classes, even though those jurisdictions have failed the underpayment ratio criterion. (Note that jurisdictions must also pass the other tests outlined in part 3920.0700 to be in compliance.) This item is needed as one method of testing the significance of the underpayment ratio. The need for and reasonableness of this item are explained further in the discussion of subparts 7 and 8.

Subitem 2 allows an in compliance decision for jurisdictions with an underpayment ratio less than 80.0 percent and an average pay difference which represents a disadvantage for female classes, if the average pay difference is not statistically significant. This test of statistical significance is needed to determine the meaning of the underpayment ratio and average pay difference. The need for and reasonableness of this item are explained further in the discussion of subpart 9.

Subitem 3 refers smaller jurisdictions and those with no salary ranges, if they have underpayment ratios under 80.0 percent, to the alternative analysis part of the rule. This mechanism is needed to provide a more accurate analysis for jurisdictions with informal compensation structures.

If these jurisdictions meet the initial standard set by the statistical analysis, the 80.0 percent underpayment ratio, they can be found in compliance. However, there are several acceptable reasons for failing to meet that standard in these kinds of jurisdictions, and therefore it is

reasonable to provide an alternative analysis mechanism when these jurisdictions fail to meet that standard.

The alternative analysis provides more appropriate ways to test compliance in smaller jurisdictions and in jurisdictions with informal compensation systems. The reasons are the same as those explained in the discussion of subpart 1, the lack of statistical significance of the statistical analysis and the limitations of analysis based on actual pay rather than salary range maximums. As shown in the table above, statistical analysis findings for jurisdictions with four or five male classes are more likely to be significant than for jurisdictions with three or fewer classes. However, the findings are still likely to be insignificant most of the time, and therefore the alternative analysis is an appropriate tool for jurisdictions of this size.

Why is the statistical analysis applied to these jurisdictions at all? Should the alternative analysis be the only one used for jurisdictions with four or five male classes and for those with no salary ranges? The department decided that the proposed method was reasonable for several reasons.

First, the underpayment ratio test provides an opportunity to be found in compliance for those small jurisdictions which can pass the test applied to larger jurisdictions. Second, this method is more efficient for the department to administer. If some jurisdictions can be found in compliance with this automated approach, the manual and time-consuming alternative analysis will not be needed. Third, even when these small jurisdictions have salary ranges, they are more likely to have informal systems for moving through the ranges. These jurisdictions tend to have non-systematic ways of judging performance and years of service, and these factors are most accurately considered by the alternative analysis.

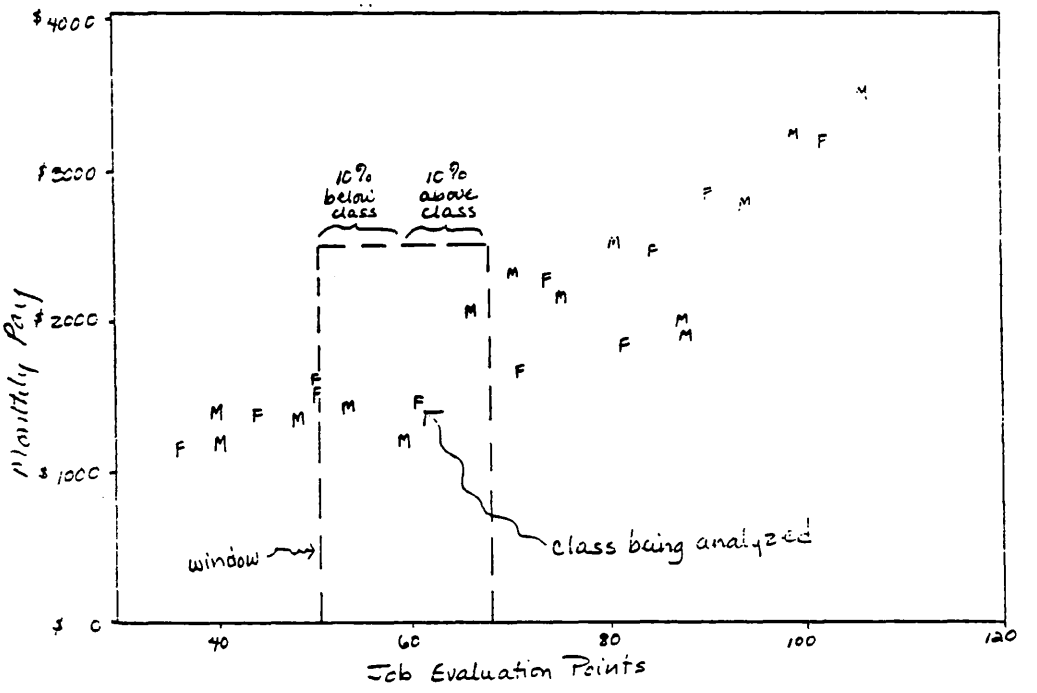
The same reasoning applies to jurisdictions with no salary ranges, in part because most such jurisdictions usually have a small number of male-dominated classes. While there are some larger jurisdictions with no salary ranges, these jurisdictions have no formal compensation structure. Therefore, apparent gender-based salary differences may be caused by differences in performance or years of service, factors which can only be measured by the alternative analysis.

Subpart 3. Steps in the statistical analysis. This subpart is needed to summarize the statistical analysis process. It is reasonable to assist readers in following the discussion in the rest of this part.

Subpart 4. Determining predicted pay. This subpart is needed to explain curve-fitting, the first major part of the statistical analysis. This process shows which classes are of comparable work value, and what compensation is for male-dominated classes. The subpart is reasonable because it is consistent with the statute in requiring application of those concepts.

Item A. Creating a window. This item is needed to define the term "comparable work value," a key concept in the statute. Figure 1 illustrates how a window is constructed. Note that a new window must be constructed for each class in the jurisdiction.

FIGURE 1



Subitem 1 provides the primary definition of comparable work value by defining as "comparable" all classes which are within a range 10 percent above and 10 percent below the class being analyzed. This definition is reasonable because (1) the standard represents a middle ground between the extremes of considering all positions in a jurisdiction comparable, and restricting the comparison to classes of identical value; (2) the standard generally allows for more than one comparator class, so that jurisdictions have flexibility in accommodating a variety of concerns in pay-setting; (3) in large jurisdictions, the standard generally limits comparator classes to a reasonable number so that there is some grouping of relationships between job value and compensation; (4) there is no obvious standard established in other laws or rules for the meaning of "comparable"; and (5) the proposed standard was not controversial in advisory committee meetings.

The method explained in subitem 1 is also the method used for determining comparable work value when comparing benefits (see discussion of part 3920.0300, subpart 6). It is satisfactory for that purpose because benefits differences are nonexistent or insignificant for many jurisdictions. This method, however, has some limitations when applied to predicted pay. Those

limitations are corrected by subitems 2 through 4 and by item B, as explained below.

Subitem 2, inclusion of three or more male classes, is needed to refine the concept of comparable work value as it applies to predicting pay for smaller jurisdictions. In smaller jurisdictions, the 20 percent window may not have three male classes. If only two male classes were used to determine predicted pay in a window, the results would vary greatly with each pay difference in either of the comparator classes.

The requirement that at least a third male class be included (and subitem 4 generally leads to the inclusion of more than three male classes) allows for some averaging of the pay for male classes, confirming whatever trends may exist in the pay rates for the first two male classes. That is, a dramatic change in the pay rates of one of the male classes would be offset to some extent by the presence of a third male comparator class. This subitem is reasonable because it reflects the law's purpose of focusing on the overall compensation system, not on one-to-one comparisons of male and female classes.

Subitem 3, inclusion of at least two male classes of differing values, is needed for drawing the regression line used in predicting pay for the window. While subitem 2 required inclusion of at least three male classes, there are some jurisdictions in which all three male classes would have the same job evaluation rating. In those cases, the two points needed to draw a line would not exist. This subitem is reasonable because it ensures that the analysis can occur.

Subitem 4, inclusion of at least one-fifth of all the male-dominated classes in the jurisdiction, is needed to provide more equity in comparisons of larger and smaller jurisdictions. If this provision were not included, the number of windows would be limited only by the requirement that each window have three male classes. The largest jurisdictions could have as many as 150 windows, while some small jurisdictions would have only one window. While the department perceived a need to use different analytical methods for jurisdictions of different sizes, this large difference in the potential number of windows seemed unreasonable. The department decided it was reasonable to narrow the differences, so that the largest number of windows any jurisdiction would have would be five.

This provision is also helpful in ensuring that a larger number of male classes are available for comparison in most middle-sized and larger jurisdictions. While a jurisdiction may have only three male classes in a window, this provision means that most jurisdictions have a larger number of male classes in each window, allowing for more averaging and less emphasis on the compensation for any one male class.

Item B. Expanding the window. This item is needed so that the statistical analysis can be applied to jurisdictions which would otherwise be too small. The provision is reasonable because it recognizes the fact that employees in smaller jurisdictions compare themselves to a wider range

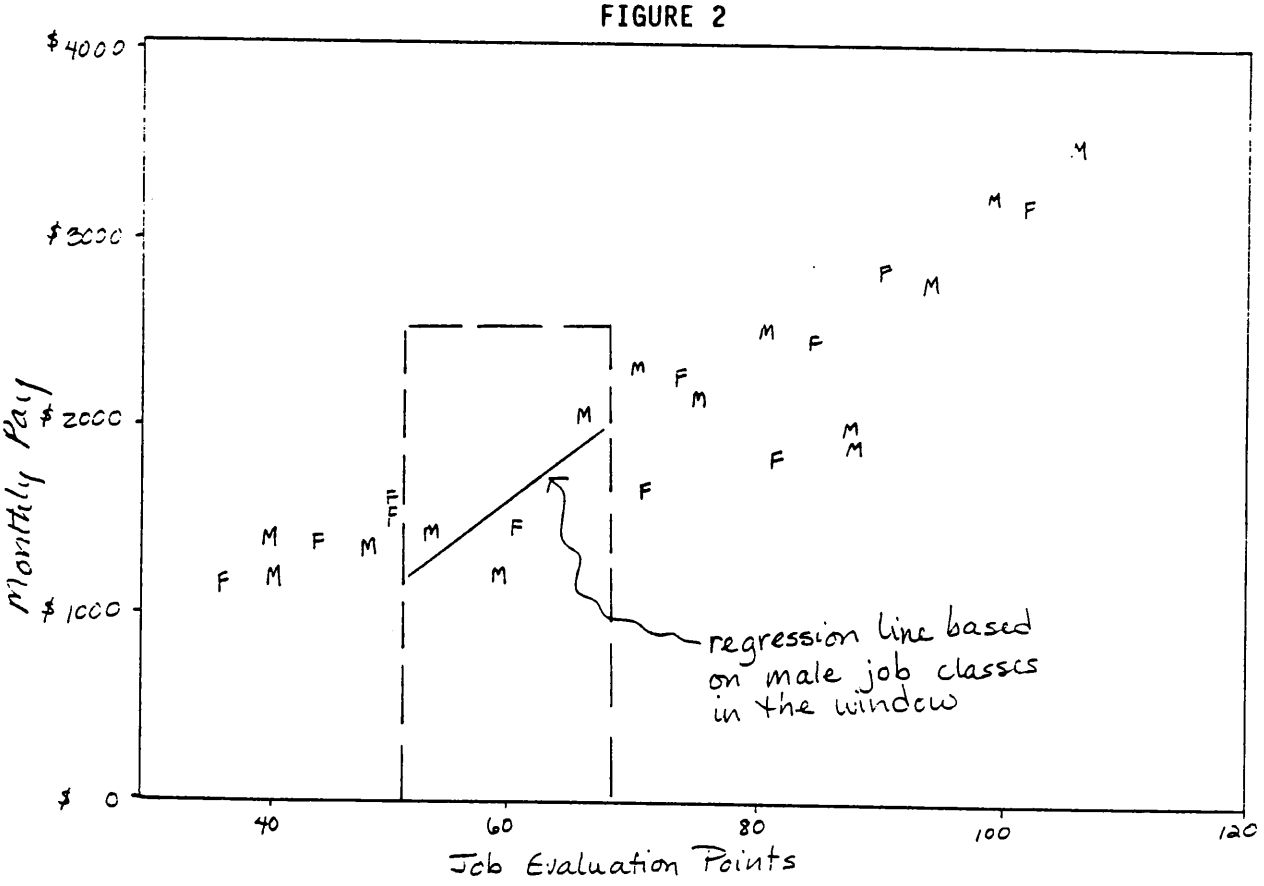
of jobs than employees in larger jurisdictions, and because it is administratively efficient for the department, allowing use of the automated system for more jurisdictions.

It is also reasonable to enlarge the window beyond the original 20 percent definition of "comparability" because, ultimately, all classes in a jurisdiction are compared. In the statistical analysis, the application of the "four-fifths rule" (explained in the discussion of subpart 6) means that the frequency of underpayment for female classes is tabulated across the entire jurisdiction. This four-fifths rule is also used in the alternative analysis (explained in the discussion of part 3920.0600).

The department had originally planned to enlarge the window by doubling it until the criteria were met. The change to enlarging the window by 5 percent increments was made in response to suggestions by advisory committee members. The difference is that the operations possibly required to create a window was increased from a maximum of 3 to a maximum of 16. The incremental method has the advantage of possibly adding a smaller number of male classes and therefore maintaining a greater degree of comparability among the classes in the window.

Item C. Fitting a regression line. This item is needed to explain how predicted pay is determined. Predicted pay is the statistical equivalent of the statutory phrase "compensation for male-dominated classes." The provision is reasonable because it relies on standard mathematical practices and on standard personnel practices which were used to analyze compensation long before pay equity legislation was enacted. Figure 2 shows how the regression line is drawn within the window.

FIGURE 2



Weighted versus unweighted regression lines

There was some controversy in advisory committee meetings about the use of a weighted line which reflects the number of employees in a class. Some, but not all, of the employer representatives advocated the use of an unweighted line, in which all classes would be equally important to the analysis, regardless of the number of employees in each class.

There were two arguments against weighting. First, those opposed to weighting cited the statutory definition of equitable compensation relationships, meaning "that compensation for female-dominated classes is not consistently below compensation for male-dominated classes of comparable work value ... (Minnesota Statutes 471.991, subdivision 5; emphasis added). Second, they noted that the department has changed its position on this issue. Prior to publishing the guidebook in September 1990, the department had always said classes would not be weighted.

After careful consideration, the department decided to weight the regression line, for many reasons. First, the statute must be read and understood as a whole, and particular attention must be given to the purpose statement:

> ...Every political subdivision of this state shall establish equitable compensation relationships between female-dominated, male-dominated, and balanced classes of employees in order to eliminate sex-based wage disparities in public employment in this state ... (Minnesota Statutes, section 471.992, subdivision 1; emphasis added)

As the statute makes plain, the concept of class has little meaning without reference to the existence of employees in classes.

Second, if the department used an unweighted line, class size could easily be manipulated to a degree that would defeat the purpose of the law. There is no check-and-balance system in the pay equity law or elsewhere in local government personnel operations to prevent merging or separating classes to make pay equity "come out right." Jurisdictions could, for example, split relatively low-paid male classes into many new one-person classes while merging many relatively high-paid male classes into one new class with hundreds of employees. The result would be to distort the actual pay practice. Weighting addresses this problem by controlling for the size of classes.

Third, the legislature did not intend the department to ignore employees in classes, because it required jurisdictions to report the numbers of employees in classes as part of the original planning report (Minnesota Statutes, section 471.998, subdivision 1, (2) a and b) and the implementation report (Minnesota Statutes, section 471.9981, subdivision 5a (2) and (3)).

Fourth, although the mini-regression lines and the average pay difference explained later in this section are "weighted," most steps in the compliance

review do not use weighting. The statistical analysis counts the numbers of male and female classes, not employees, below predicted pay. The alternative analysis compares payment for female and male classes, not employees. Class titles, ratings, range maximums, and benefits are all reported for classes and analyzed for classes.

In the few situations where the number of employees in a class is considered, the unit of comparison is still classes: employees in male-dominated classes versus employees in female-dominated classes, not male employees and female employees. The regression lines are weighted for male classes, but since only male classes are used for predicting pay there is no weighting of female classes. The weighting of the average pay difference is less significant because this measure is applied only to those jurisdictions which fail to meet the underpayment ratio standard, a measure which counts classes rather than employees.

Fifth, the distinction between classes and incumbents is often nonexistent in practice. Most small and mid-size cities have mostly one-person classes, and many of these have no salary ranges. No true class structure exists in these jurisdictions, and there is no reason to think the legislature intended to exempt these jurisdictions.

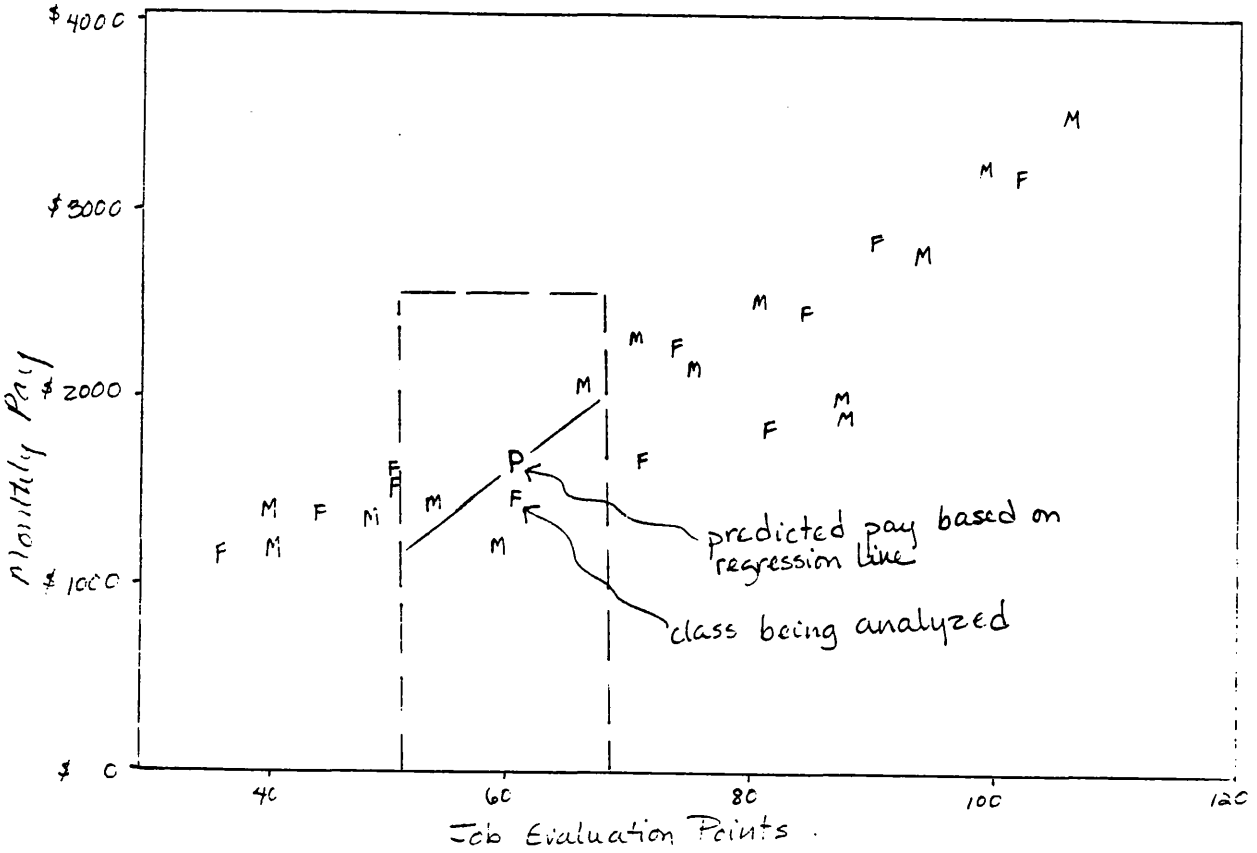
Sixth, jurisdictions have had ample notice that some form of weighting would be used. The 1990 guidebook noted that "...the number of employees in male classes used for comparison with female classes may also be relevant in some cases" (page 33) and that:

> "...The higher paid M's may represent the jurisdiction's larger male classes while the lower paid M's represent only a few incumbents. When this occurs, females are compensated consistently below males in jobs of comparable value ..." (page 40).

Finally, the department changed its stance on this issue partly in response to persistent concerns from local governments about single-incumbent classes and the potential for changing dominance over time. They said, in effect, "How can you find us out of compliance based on one class which is occupied by a woman today and occupied by a man tomorrow, or vice versa?" Weighting addresses the single-incumbent class argument by placing less importance on smaller classes.

Item D. Identifying the predicted pay point. This item is needed as the final step in defining "compensation for male-dominated classes of comparable work value." The item allows a comparison between the actual salary range maximum for a class (male or female) and the predicted salary range maximum for that class based on the payment trend for all male classes in the window. The item is reasonable because it corresponds to standard mathematical and compensation practices: identifying the regression line point which corresponds to the job evaluation rating for a particular class. Figure 3 shows the predicted pay point for a sample window.

FIGURE 3



Subpart 5. Determining the underpayment ratio. The law's standard is that "...the compensation for female-dominated classes [must not be] consistently below the compensation for male-dominated classes of comparable work value ..." (Minnesota Statutes, section 471.991, subdivision 5). Creating the window defines which classes are "of comparable work value," and determining predicted pay defines "compensation for male-dominated classes." This subpart is needed as the first mechanism for defining the statutory phrase "consistently below."

The underpayment ratio compares the percentage of male classes which are underpaid with the percentage of female classes which are underpaid. Both male and female classes are "underpaid" if they are paid below the predicted pay level determined in subpart 4.

This method is reasonable because it allows for a direct comparison of pay patterns for male and female classes and because it allows flexibility for a variety of pay patterns for male and female classes, within the limits set by the "four-fifths rule" explained in the discussion of subpart 6.

The department decided to use a ratio as opposed to a straight percentage cutoff because the ratio more accurately reflects the relationship between male and female pay patterns.

If the department were using a straight percentage cutoff, it could have said that no more than 50 percent of female classes could be paid below predicted pay. However, it is not uncommon for jurisdictions to have 60 percent of male classes paid below predicted pay. If the straight 50 percent percentage were the rule, and 51 percent of female classes were paid below predicted pay, such a jurisdiction would be found out of compliance even though male classes are more likely than female classes to be underpaid.

Another alternative to the ratio or percentage of underpayment would be to calculate the amount of pay available for each job evaluation point, and then determine whether the pay-per-point figure is lower for female classes than for male classes. The department chose not to use this approach for several reasons. First, the pay equity law does not require that every female class be paid the same as every male class at the same or comparable levels, only that female classes not be paid consistently below male classes of comparable value. Thus, a "pay for points" analysis would exceed the statutory requirements.

Second, job evaluation is a subjective process, and requiring all classes to be paid in some rigid relationship to their job evaluation ratings (sometimes called "pay-for-points") would give too much weight to that process.

Finally, the law recognizes that several other factors may have a significant and legitimate influence on pay. For example, collective bargaining is important, as evidenced in the statement that jurisdictions must establish pay equity subject to the Public Employment Labor Relations Act (Minnesota Statutes, section 471.992, subdivision 1).

The use of a standard other than "pay for points" allows jurisdictions and employees the flexibility needed to incorporate a variety of non-gender-related influences into their pay structures.

Item A, determining the percentage of male classes which are underpaid, is needed and reasonable to set the standard against which female classes will be compared.

Item B, determining the percentage of female classes which are underpaid, is needed and reasonable to provide a basis for comparison with male classes.

Item C, calculating the underpayment ratio, is needed and reasonable for the reasons explained above.

Subp. 6. Analyzing the underpayment ratio. Some limit of acceptable difference in the frequency of underpayment for male and female classes must be set (1) in order to allow for variation which can be attributed to chance rather than to sex bias, and (2) in order to avoid a rigid formula-based approach to pay-setting which would exceed the statutory mandate.

Therefore, the department has set 80.0 percent or higher as the underpayment ratio which allows jurisdictions to pass the statistical analysis test.

That is, if the rate of male underpayment is at least four-fifths of the rate of female underpayment, then the jurisdiction passes this test.

The following examples illustrate how the underpayment ratio is calculated and analyzed.

Examples: Underpayment Ratios.

In Jurisdiction A, 40 percent of female classes are underpaid and 32 percent of male classes are underpaid. The jurisdiction will pass the statistical analysis because the underpayment ratio is 80 percent (32 divided by 40 = 80 percent).

In Jurisdiction B, 30 percent of female classes are underpaid and 15 percent of male classes are underpaid. The underpayment ratio is 50 percent, less than 80.0 percent (30 divided by 15 = 50 percent), and the department must continue the analysis.

In Jurisdiction C, 65 percent of female classes are underpaid and 55 percent of male classes are underpaid. The jurisdiction will pass the statistical analysis because the underpayment ratio is 85 percent (55 divided by 65 = 85 percent).

If the underpayment ratio is less than 80 percent, compensation for female classes may be consistently below compensation for male classes. The analysis is continued, as explained in items A through C, to confirm or contradict the pattern shown by the underpayment ratio.

The 80 percent standard for the underpayment ratio is the same as the "four-fifths rule" used as a federal standard in employment discrimination cases. The standard is reasonable because it sets a level of acceptable difference which is used in related law and because it allows jurisdictions flexibility for incorporating non-gender-related influences into pay practices.

This "four-fifths standard" is well-established in related law. In interpreting Title VII of the federal Civil Rights Act, the federal government defines an adverse selection process as one in which a "selection rate for any race, sex, or ethnic group ... is less than four-fifths (4/5) of the rate for the group with the highest rate ..." (29 CFR 1607.3D).

Example. Four-Fifths Rule in Related Law.

An employer's hiring experience is used to determine impact on minorities. "If 100 minority persons apply [for a job] and 30 are hired, the minority selection rate is 30 percent. If 200 non-minority persons apply and 120 are hired, the non-minority selection rate is 60 percent." The rate of minority selection is half that of non-minority selection. The selection ratio in this case, 30 divided by 60, would be 50 percent. This percentage would show an adverse selection process. If the selection ratio were 80

> percent or higher, the finding would be that there was no adverse selection. (Quoted material is from *Federal Law of Employment Discrimination In a Nutshell,* Second Edition 1981, Mack A. Player, West Publishing Co.)

In the proposed rules, this standard is adapted to analyze compensation rather than hiring, and the term "underpayment ratio" is used rather than "selection ratio." However, the amount of acceptable difference between the two groups evaluated is the same.

The department is not aware of any precedent other than the four-fifths rule which could be used to set an acceptable level of difference between compensation for male and female classes.

Item A, alternative analysis for small jurisdictions, is needed and reasonable for the reasons explained in the discussion of subpart 2, item B, subitem 3.

Item B, alternative analysis for jurisdictions with no salary ranges, is needed and reasonable for the reasons explained in the discussion of subpart 2, item B, subitem 3.

Item C, continued analysis for other jurisdictions with underpayment ratios of less than 80 percent, is needed and reasonable to provide confirming evidence before finding jurisdictions out of compliance. The additional analysis itself is reasonable because both the average pay difference (subparts 7 and 8) and the t-test (subpart 9) confirm or contradict the pattern shown by the underpayment ratio.

Subpart 7. Determining the average pay difference. If female classes are more likely than male classes to be underpaid, but the amount of underpayment, on average, is equal to or lower than the amount of underpayment for male classes, the female classes cannot be said to be compensated "consistently below" male classes. While this pattern is not likely to occur often, it is possible, and therefore a determination of the amount of underpayment for male and female classes is needed.

Item A, determining the average pay difference for each female class, is needed to compare predicted pay with actual pay levels. The method proposed is reasonable because it is weighted to reflect the relative size of classes, and because it incorporates female classes paid above predicted pay as well as female classes paid below predicted pay.

It is appropriate to average in classes paid above the predicted level because this method allows for offsetting any disadvantage to some female classes with any advantage provided to other female classes. If there are only two female classes in a jurisdiction, one paid $200 per month above the predicted level and one paid $200 per month below the predicted level, the average pay difference for female classes in that jurisdiction is zero.

If, on the other hand, the class paid $200 above the predicted level has only one employee and the class paid $200 below the predicted level has ten

employees, it is appropriate that the average pay difference reflect the relative size of the two classes. The reasonableness of weighting is included in the discussion of subpart 4, item C.

Item B, averaging the amount of the pay difference for female classes, is needed and reasonable for the reasons listed in item A.

Item C, determining the average pay difference for male classes, is needed and reasonable to provide a basis for comparison with female classes.

Subpart 8. Analyzing the average pay difference. This analysis is needed to determine whether evidence other than the underpayment ratio confirms that compensation for female classes is consistently below compensation for male classes, the standard established by the law.

Item A, no disadvantage for female classes, is needed to show that the underpayment ratio is not meaningful in some situations. It would not be reasonable for the department to find a jurisdiction out of compliance because female classes have a higher frequency of underpayment when there is no average pay difference between male and female classes, or if the male classes are underpaid by a higher amount than the female classes. The phrase "consistently below" implies not only frequency of underpayment but some amount of relative underpayment as well.

Item B, continue the analysis if female classes are disadvantaged, is needed to provide a measure of statistical significance for the average pay difference disadvantage. There are a number of safeguards built into the analysis to prevent non-compliance findings based on irrelevant factors. The safeguards include exclusion of very small jurisdictions, use of an 80 percent rule rather than a 100 percent rule, referral of smaller jurisdictions and those without salary ranges to the alternative analysis, and checking underpayment ratio by analyzing average pay difference. However, some remaining jurisdictions may still fail the other parts of the statistical analysis simply because they are small, or because the deviation from the accepted standards is insignificant.

The department has found through preliminary testing that the two measures (average pay difference and underpayment ratio) are closely related. Therefore, the t-test is a good indicator of the significance of the underpayment ratio as well as the average pay difference.

Subpart 9. Significance of the average pay difference (t-test). This subpart is needed to determine whether the average pay difference could reasonably be attributed to chance rather than to present or historical sex bias in compensation. The proposed method is reasonable because it is the conventional statistical test for this situation.

Item A, application of the t-test, is needed as an objective measure of statistical significance.

One of the advantages of the t-test over other measures of significance is that the t-test does not have to be modified for small samples. If you are

rolling dice you might want to know how closely your results approximate a predicted norm, so that you can determine whether the dice are loaded. If you rolled the dice 100 times, you could be fairly sure that your results should be similar to the predicted norm.

However, if you only rolled the dice 10 times, you could not be as confident that your results should approximate the normal distribution. You would need a higher degree of dissimilarity from the predicted distribution to make you suspicious.

The t-test takes sample size into account in applying the degrees of freedom, which is the number of employees in male and female classes minus two.

Item B, findings based on t-test, is needed to explain the consequences of passing or failing the t-test.

It is reasonable to find a jurisdiction not in compliance if the t-test is significant because this test confirms other findings of the analysis: the unacceptably low level of the underpayment ratio and the disadvantage to female classes of the average pay difference. Compensation for female-dominated classes is consistently below compensation for male-dominated classes of comparable work value. The t-test finding means that the department can be confident at the 95 percent level that the disadvantage to female classes is the result of a factor other than chance.

Jurisdictions which can demonstrate that these data resulted from non-gender-based factors may present that information in the reconsideration process (see part 3920.0900). If a penalty is assessed at a later time for continued non-compliance, jurisdictions may present evidence of non-gender-based factors in a request for suspension of penalty (see part 3920.1100), or in a contested case appeal (see part 3920.1200).

It is reasonable to find a jurisdiction in compliance if the t-test is not significant because this test does not confirm the unacceptable level of the underpayment ratio or the disadvantage to female classes of the average pay difference. While there is some evidence that female classes are compensated below male classes, the department cannot demonstrate that this pattern is significant.

3920.0600. ALTERNATIVE ANALYSIS TEST.

This part is authorized by Minnesota Statutes, section 471.9981, subdivision 6(a), requiring the commissioner of employee relations to determine compliance.

This part is needed to provide a method for determining compliance which is objective; consistent; administratively feasible; understandable by a majority of users with a minimum of training; fully in accordance with the policy goals of the legislation; and legally defensible. As with the

statistical analysis, the department developed the alternative analysis to ensure that it will produce results similar to the approach outlined in the 1990 guidebook.

The alternative analysis was developed with the assistance of the rulemaking advisory committee. In reviewing the effects of this method on sample jurisdictions, the advisory committee noted that the results of the statistical analysis and the alternative analysis were generally similar. However, when the statistical analysis was applied to small jurisdictions, the results were often not statistically significant. Therefore, it is necessary and reasonable to use an alternative analysis for small jurisdictions.

The alternative analysis defines the same terms defined by the statistical analysis: "not consistently below," "compensation for male-dominated classes," and "comparable work value." The table below summarizes the alternative analysis definition for each of these terms and the method used for measurement. A comparison with the table included in the discussion of the statistical analysis shows the similarities in definition of the two analytical approaches.

Question	Definition	Method
Which classes are of comparable work value?	Next higher-rated and next lower-rated classes. Modified in some cases by comparing with other classes (items C and D).	Initial review (subpart 4).
What is compensation for male classes?	Predicted pay. Predicted salary range maximum or highest actual pay for male classes, if they existed at the level of female classes in the jurisdiction.	Predicted level based on pay for adjacent classes (subpart 4).
Are female classes consistently below male classes?	More than one-fifth of the time (four-fifths rule). For jurisdictions which do not meet this standard after initial review, analyze years of service & performance.	Initial review (subpart 4), years of service review (subp. 6), performance review (subp. 7).

Subpart 1. Scope. This subpart is needed to identify the jurisdictions subject to the alternative analysis. It is reasonable to apply this method under the circumstances established by the rule for the reasons explained in the discussion of the statistical analysis (part 3920.0500, subparts 1 and 2).

Item A, application to all jurisdictions with three or fewer male classes, is needed because the statistical analysis is not appropriate for jurisdictions this small. As stated earlier, a department study showed that the statistical analysis would be statistically significant only 11 percent of the time for jurisdictions with three male classes. An alternative analysis is needed to determine the consistency of underpayment.

In addition, these small jurisdictions almost never have salary ranges for all of their classes. Therefore, an alternative analysis is needed to take into account the effects of years of service and performance, factors which are incorporated in range systems but not in systems used by these small jurisdictions.

Item B, application to jurisdictions with four or five male classes when those jurisdictions have unacceptable underpayment ratios, is needed for similar reasons. For this group, the statistical analysis would be statistically significant only 33 percent of the time. An alternative analysis is needed to identify the consistency of underpayment.

Jurisdictions in this group are also likely to have relatively few salary ranges. While some of these jurisdictions may be able to meet the underpayment ratio standard, those which fail that standard should be analyzed to determine the effect of years of service and performance on compensation differences.

Item C, application to jurisdictions with no salary ranges, is needed for similar reasons. No data exists on the number of jurisdictions with and without salary ranges. Informal compensation structures are most common in jurisdictions with fewer than six male classes, those covered by items A and B. However, some jurisdictions with six or more male classes are similar to smaller jurisdictions in having no salary ranges. As explained above, the absence of formal systems for moving through pay ranges requires an analysis of the impact of years of service and performance on pay rates.

In addition, an alternative analysis is needed for these jurisdictions to determine the consistency of underpayment.

Subpart 2. Criteria for alternative analysis test. This subpart is needed to summarize the requirements for jurisdictions to pass this test. It is reasonable to provide such a summary to assist readers in understanding the analysis.

Item A, initial review, is needed as a mechanism for determining the predicted level of compensation for male classes at the level of each female class, and for determining whether female classes appear to be compensated

consistently below male classes. It is reasonable to determine "compensation for male-dominated classes of comparable work value" and "consistently below" because these are the standards set by Minnesota Statutes, section 471.991, subdivision 5.

This review is also needed to identify which female classes are underpaid, so that additional review can determine whether the underpayment for those classes is explained by differences in years of service or performance.

Item B, differences in years of service, is needed to provide a mechanism for recognizing the effect of this variable on compensation for classes without salary ranges.

In systems with salary ranges, years of service is almost always the most important requirement for employee movement through the range. The department analyzes salary range maximums where this information exists, in order to eliminate the effects of differences in years of service among individual employees.

Even in systems without formal salary ranges, there is often a direct relationship between years of service and level of compensation. That is, the lack of salary ranges does not mean that job tenure is not considered, only that tenure is recognized and rewarded in a non-systematic way. Thus, when the analysis is not based on salary range maximums, differences in individuals' years of service must be considered as a possible explanation for compensation differences.

It is reasonable to use this kind of analysis because discrimination laws typically allow consideration of seniority and performance as legitimate non-gender-based factors in wage-setting. For example, the state's equal pay law states:

> No employer shall discriminate between employees on the basis of sex by paying wages to employees at a rate less than the rate the employer pays to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to *a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any other factor other than sex* ... (Minnesota Statutes, section 181.67, subdivision 1; emphasis added).

Item C, differences in performance, is needed to provide a mechanism for recognizing the effect of this variable on compensation for classes without salary ranges.

In salary range systems, satisfactory performance is often an explicit requirement for moving through the ranges. In addition, some employers use performance systems which provide compensation to a certain level for satisfactory performance, and at a higher level for above-average or

outstanding performance. By analyzing salary range maximums where this information exists, the department eliminates the effects of differences in performance among individual employees.

Performance factors can be considered in pay-setting even when there is no formal salary range system. As noted in the discussion of years of service, discrimination law recognizes performance differences as a legitimate "factor other than sex" which may influence earnings. Therefore, when there are no salary range maximums, it is reasonable to consider individual performance differences as a possible explanation for compensation differences.

Measuring performance is inherently more subjective than measuring years of service (with the exception of piecework or other direct measures of productivity, but such measures are rare in local government employment). Therefore, it is necessary and reasonable that the department's consideration of performance differences is limited to documented differences.

Item D, compliance finding when 20 percent of female classes are underpaid, is needed to define the statutory phrase "consistently below." This standard is reasonable because it sets a level of acceptable difference which has precedents in related law, because it allows jurisdictions flexibility for incorporating non-gender-related influences into pay practices, and because it is consistent with the standard applied to larger jurisdictions in the statistical analysis. The need for and reasonableness of this "four-fifths rule" are explained more fully in the discussion of part 3920.0500, subpart 6.

Subpart 3. Basis for the alternative analysis. This subpart is needed to clarify the data upon which the analysis is based. Use of this data is necessary and reasonable as explained in the discussion for part 3920.0400, subpart 2. It is reasonable to restate the basis for analysis here to assist the reader in understanding the analytical steps which follow this subpart.

Subpart 4. Initial review. This subpart is needed to identify classes of comparable work value, to predict compensation for male-dominated classes of comparable work value, and to make an initial determination on the consistency of underpayment. The approach is reasonable because it defines the terms of Minnesota Statutes, section 471.991, subdivision 5.

Each of the items in this subpart compares compensation for female classes to compensation for the adjacent male classes. This procedure is very similar to the one explained in the 1990 guidebook:

> "Conduct an initial review based on the scattergram... If there are F's below M's, the next step is to decide if they are consistently below. There are several ways to measure this.
>
> * When viewing the scattergram as a whole, female classes fall below the mainstream of compensation for male classes; or,

* female classes are paid below male classes with the same points; or,

* female classes are paid below lower-rated male classes; or,

* where there are no male comparison classes at the same or lower point levels, there is an unreasonable relationship between pay for female classes and pay for male classes with higher points." (page 34)

The adjacent male classes, therefore, form part of the definition of "comparable work value." The definition is similar to the one used in the statistical analysis. As in the statistical analysis, the comparator group is expanded when needed to take into account broader patterns (items C and D). And as in the statistical analysis, the concepts of "comparable work value" and "consistency of underpayment" together refer to the frequency and amount of underpayment across the whole jurisdiction, when the four-fifths rule is applied.

The second paragraph of this subpart incorporates the "four-fifths rule" into the alternative analysis. The four-fifths rule is needed and reasonable as explained in the discussion of part 3920.0500, subpart 6.

The initial review is also needed to identify specific underpaid female classes for further analysis in cases where a jurisdiction has no salary ranges. As explained in the discussion of subpart 2, items B and C, it is reasonable for the department to consider permissible non-gender-related influences on compensation before finding a jurisdiction not in compliance.

Item A, female classes rated above male classes, is needed to predict what compensation would be if these female classes were male classes. The item predicts that such male classes would be paid at least as much as lower-rated male classes, and sets that level of compensation as a standard for these female classes. This standard is reasonable because it incorporates recognition of a general relationship between job evaluation and compensation. The standard is also reasonable because it does not over-state the general relationship by requiring "pay for points."

The effect of this item is offset by the four-fifths rule. That is, a jurisdiction may have one or more female classes paid below this level, and still be found in compliance because 80 percent of female classes do meet the standards established in items A to D. Therefore, this item is also reasonable because it provides flexibility in pay-setting and because it is consistent with the standard established in the statistical analysis.

Item B, female classes rated between two male classes, is needed to predict what compensation would be if these female classes were male classes and to set that level of compensation as a standard for these female classes.

The standard requires compensation to fall between the level for the two classes. That is, the female class must be paid at least slightly more than

the lower-rated male class. The only difference between this item and item A is that in this case, a second male class exists to further demonstrate the compensation practice for classes in this range. Therefore, the standard is somewhat higher in requiring that compensation for the female class be not just equal to, but higher than, the compensation for the lower-rated male class.

This standard is reasonable as explained in item A: it recognizes a relationship between job evaluation and compensation without overstating the relationship, and it provides for flexibility through incorporating the four-fifths rule.

Item C, female classes rated the same as male classes, is needed to predict what compensation would be if these female classes were male classes and to set that level of compensation as a standard for these female classes.

The standard requires compensation to be at least equal to that of the male classes. However, the standard is waived if there are higher-rated male classes paid less than the lower-rated male classes.

This item again recognizes a relationship between job evaluation and compensation, and in this case specifically allows for the common situation in which that relationship is not a direct one. That is, jobs with higher points sometimes receive lower pay even in the absence of sex bias. A jurisdiction with a demonstrably less direct relationship between job evaluation and compensation is therefore not required to change that relationship, so long as there is no evidence of consistent underpayment of female classes.

This standard is reasonable as explained in item A: it recognizes a relationship between job evaluation and compensation without overstating the relationship, and it provides for flexibility through incorporating the four-fifths rule.

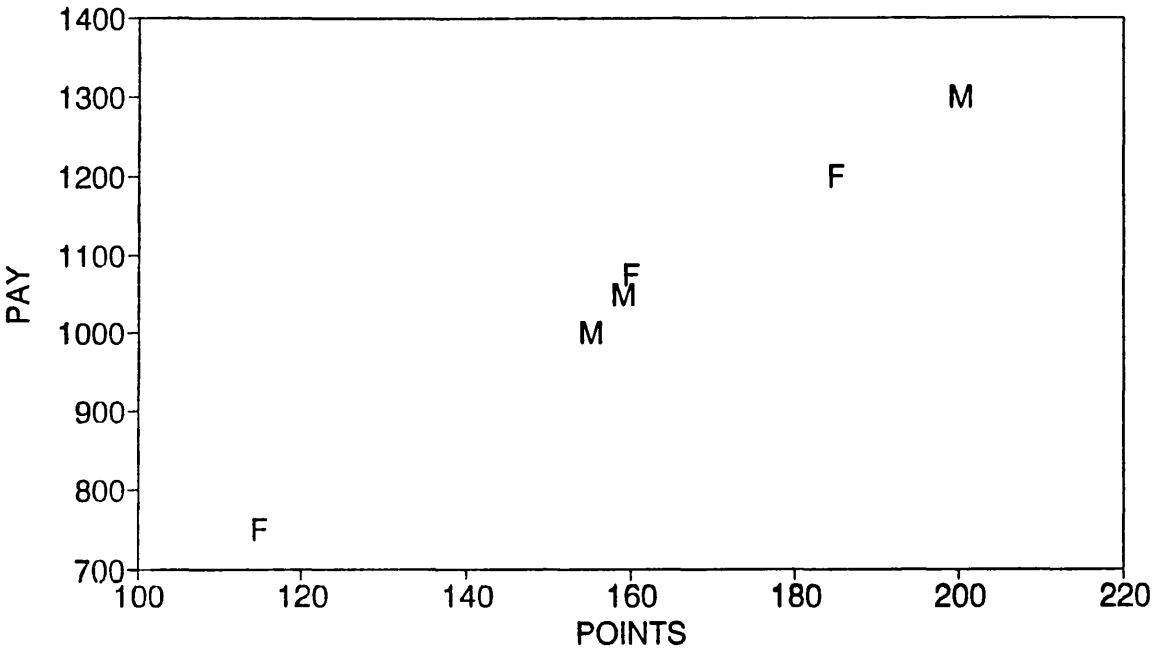
Item D, female classes rated below male classes, is needed to predict what compensation would be if these female classes were male classes and to set that level of compensation as a standard for these female classes.

The item requires that the same degree of relatedness between job evaluation and compensation be applied to female classes as to male classes. This does not mean that the department will calculate a "pay per point" figure and apply that figure to compensation for the female class. Rather, it requires an analysis to determine whether there is a strong or weak relationship between pay and points for the other classes in the jurisdiction, followed by application of the same general pattern to the low-rated female class.

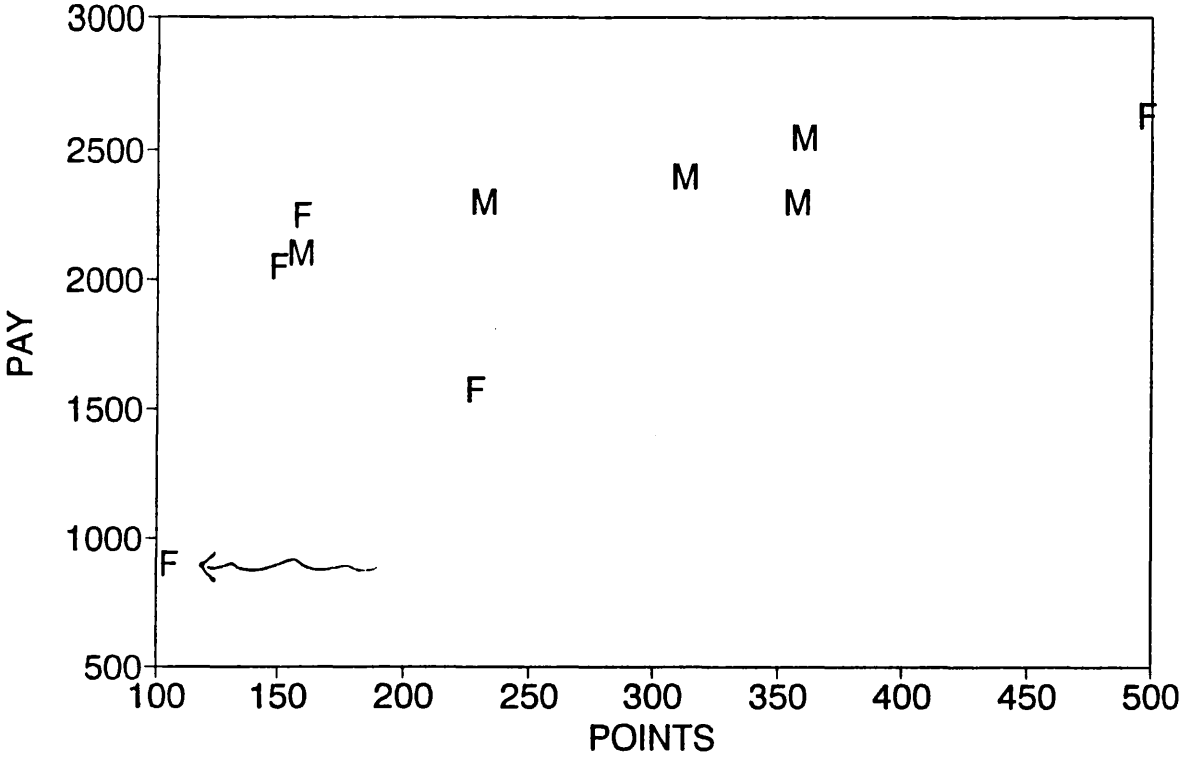
Examples. Female Classes Rated Below Male Classes.

Example A. In this example, the lowest-rated female class has a job evaluation rating far below all the other classes. While the pay for this class is lower than that of the other classes, the class is

EXAMPLE A.



EXAMPLE B.



compensated as reasonably in relation to its rating as the other classes in this jurisdiction. Compensation for this class meets the standard defined in item D.

Example B. In this example, the lowest-rated female class is also rated lower than all other classes. The compensation for male classes in this jurisdiction is relatively "flat" -- that is, there is not much increase in pay as job value points increase. In addition, there is not a direct relationship between pay and points for male classes -- the male class at 343 points is paid less than the lower-rated male class at 314 points.

Therefore, this jurisdiction does not have (and the rules do not require the jurisdiction to have) a pay-for-points system. However, it is clear that the lowest-rated female class is not paid as reasonably in proportion to its rating as are the other classes, and therefore compensation for this class does not meet the standard defined in item D.

The standard in item D is by necessity more subjective than the standard for items A to C. Since there is no lower-rated male class to serve as an "anchor," there is no objective way to set a specific predicted pay rate in these cases short of a pay-for-points formula, which the department believes sets an inappropriately rigid standard. Nevertheless, many female classes would be excluded from the analysis for lack of a comparator if item D did not exist.

In a sample of 29 jurisdictions, 79 percent of the lowest-rated classes were female classes while the remaining 21 percent were male classes. Excluding all of the female classes with no lower-rated male class to serve as an anchor would lead to exclusion of 38 percent of all female classes in these jurisdictions. Since lower-rated classes tend to have more employees than higher-rated classes, as many as 50 percent of female employees in these jurisdictions could be excluded from the analysis. It is not reasonable to exclude such a large group of employees from the analysis.

The standard in item D was proposed by an advisory committee member, and no opposition was expressed in advisory committee meetings.

This standard is reasonable as explained in item A: it recognizes a relationship between job evaluation and compensation without overstating the relationship, and it provides for flexibility through incorporating the four-fifths rule.

Subpart 5. Failure to meet initial review standard. This subpart is needed to explain the next steps in the process for jurisdictions which fail to meet the initial review standard. It is reasonable to sort these jurisdictions according to the presence or absence of salary ranges, as explained below.

Item A, no salary ranges, is needed to explain that these jurisdictions will be analyzed to determine whether years of service

accounts for the underpayment. This analysis is reasonable because years of service is a legitimate non-gender-based factor in wage-setting, as explained in subpart 2, item B.

Item B, salary ranges, is needed to explain that these jurisdictions have failed the alternative analysis. The department has analyzed salary range maximums for these jurisdictions, and salary range maximums control for years of service and performance differences. Therefore, there is no reason to continue the analysis to determine whether these factors account for the underpayment.

It is reasonable to find a jurisdiction not in compliance at this point because the department has considered all known and relevant information in determining whether compensation for female classes is consistently below compensation for male classes of comparable work value.

The item is reasonable because it incorporates the four-fifths rule explained in the discussion of part 3920.0500, subpart 6. Jurisdictions which can demonstrate that the compensation differences are explained by non-gender-based factors may present that information in the reconsideration process (see part 3920.0900). If a penalty is assessed at a later time for continued non-compliance, jurisdictions may present evidence of non-gender-based factors in a request for suspension of penalty (see part 3920.1100), or in a contested case appeal (see part 3920.1200).

Subpart 6. Years of service. This subpart is needed and reasonable as explained in the discussion for subpart 2, item B. As noted previously, this analysis is limited to classes without salary ranges because the department controls for years of service in other classes by comparing salary range maximums.

The department decided not to develop a mathematical model for this part of the analysis. To do so would require the creation of a complex mechanism incorporating consideration of multiple variables: the size of the compensation differentials among all the classes being analyzed; the size of the job evaluation differentials among the classes; the size of the years of service differentials among the classes; and the relationships among all those variables.

Ironically, this sophisticated mechanism would then be applied to the smallest jurisdictions and those with the least formal compensation systems, and then under only limited circumstances. The department decided that it would not be reasonable to devote the requisite time and resources to developing, applying, and explaining such a mechanism under the circumstances

It is not difficult to make judgments in specific situations when the data are displayed on a scattergram. This analysis is reasonable because it is applied only under limited circumstances, and the four-fifths rule is used so that not every failure to meet this standard leads to a non-compliance decision.

The department conducted 13 compliance training workshops around the state in September to November 1990 (eight presented by the Employer Education Service at the University of Minnesota and five presented by the Minnesota School Boards Association). These workshops reached an estimated 800 local government officials. In these and a variety of other presentations, department staff have explained the proposed years of service analysis, and there have been no major objections to this approach.

Item A, passing the alternative analysis test, is needed to demonstrate the impact of the years of service analysis, combined with the initial review, on the compliance finding. The item is reasonable because it incorporates the four-fifths rule explained elsewhere in this document.

Item B, continued analysis if four-fifths standard is not met, is needed to explain the next step under these circumstances. The item is reasonable because it incorporates the four-fifths rule discussed elsewhere. In addition, this item requires consideration of performance differences which may explain the remaining disparities, if information about these differences is available, before the department makes a non-compliance finding. It is reasonable to consider this information since performance differences have been identified as permissible non-gender-based reasons for pay differences, as explained in the discussion of subpart 2, item C.

Item C, failure to pass the alternative analysis test, is needed to explain that these jurisdictions have failed the alternative analysis. The department has analyzed salary range maximums for these jurisdictions, and salary range maximums control for performance differences. Therefore, there is no reason to continue the analysis to determine whether performance differences account for the underpayment.

It is reasonable to find a jurisdiction not in compliance at this point because the department has considered all known and relevant information in determining whether compensation for female classes is consistently below compensation for male classes of comparable work value.

The item is reasonable because it incorporates the four-fifths rule explained in the discussion of part 3920.0500, subpart 6. Jurisdictions which can demonstrate that the compensation differences are explained by non-gender-based factors may present that information in the reconsideration process (see part 3920.0900). If a penalty is assessed at a later time for continued non-compliance, jurisdictions may present evidence of non-gender-based factors in a request for suspension of penalty (see part 3920.1100), or in a contested case appeal (see part 3920.1200).

Subpart 7. Performance. This subpart is needed and reasonable as explained in the discussion for subpart 2, item C. As noted previously, this analysis is limited to classes without salary ranges because the department controls for performance in other classes by comparing salary range maximums.

This analysis of performance is somewhat subjective. However, the proposed analysis is needed and reasonable for the reasons explained in the discussion of years of service, subpart 6. As in the years of service analysis, the subjectivity of the performance analysis is somewhat mitigated by the fact that it is applied only under specified and limited circumstances, and by the fact that the four-fifths rule is used so that not every failure to meet this standard leads to a non-compliance decision.

Item A, passing the alternative analysis test, is needed to demonstrate the impact of the performance analysis, combined with the years of service analysis and the initial review, on the compliance finding. The item is reasonable because it incorporates the four-fifths rule explained elsewhere in this document.

It is reasonable to find a jurisdiction in compliance at this point (assuming the jurisdiction passes the other tests outlined in part 3920.0700) because this analysis does not show that compensation for female classes is consistently below compensation for male classes of comparable work value. While there may be evidence that some female classes are compensated below male classes, compensation for female-dominated classes is not consistently below compensation for male-dominated classes of comparable work value. Therefore, in the language of the statute, equitable compensation relationships have been achieved (M.S. 471.991, subdivision 5).

Item B, non-compliance finding, is needed to demonstrate the consequences of failing to meet the standards of the alternative analysis. It is reasonable to find a jurisdiction not in compliance at this point because the department has considered all known and relevant information in determining whether compensation for female classes is consistently below compensation for male classes of comparable work value.

The item is reasonable because it incorporates the four-fifths rule discussed elsewhere. Jurisdictions which can demonstrate that the compensation differences are explained by non-gender-based factors may present that information in the reconsideration process (see part 3920.0900). If a penalty is assessed at a later time for continued non-compliance, jurisdictions may present evidence of non-gender-based factors in a request for suspension of penalty (see part 3920.1100), or in a contested case appeal (see part 3920.1200).

3920.0700 OTHER TESTS.

This part is authorized by Minnesota Statutes, section 471.9981, subdivision 6(a), requiring the commissioner of employee relations to determine compliance.

The part is needed to address several issues not addressed in the statistical analysis or the alternative analysis. These issues are of several kinds. If the information submitted by jurisdictions is not complete and accurate (subparts 2 and 3), all other analyses may be

meaningless. If the department is unable to consider salary range structures (subpart 4) or exceptional service pay (subpart 5), several critical components of compensation are overlooked. It is reasonable to address these issues so that the department determinations are accurate and comprehensive.

Subpart 1. Scope. This subpart is needed to describe the purpose and impact of the part. It is reasonable to provide this information for clarity.

Subpart 2. Complete and accurate information test. This subpart is needed to ensure that the department's determination is based on correct information. There are negative consequences of any incorrect determination: uncorrected pay inequities suffered by individual employees if the department incorrectly finds a jurisdiction in compliance, or unnecessary expense and inconvenience suffered by jurisdictions if the department incorrectly finds a jurisdiction not in compliance. Therefore, it is reasonable to ensure that the basis for the determination is correct.

The non-compliance finding for non-reporting jurisdictions is required by Minnesota Statutes, section 471.9981, subdivision 5a, final paragraph. The statutory provision is restated here to clarify that failure to report has consequences similar to submitting an inaccurate or incomplete report.

The rule provides that the department will review a jurisdiction's report for completeness and accuracy in two circumstances: (1) when the department receives a complaint which the department determines has merit; or (2) on its own initiative for the purpose of ensuring that the compliance review is based upon correct and complete information. Because of the department's limited resources and because the department assumes that most jurisdictions will provide correct information, it is reasonable not to require the department to check each of the 1,600 implementation reports for completeness and accuracy.

To verify each piece of information provided would take thousands of hours. This would not be a reasonable use of the department's limited resources. However, because the consequences of an incomplete or inaccurate report may be significant, it is reasonable to provide a mechanism to verify reported information when the department has reason to believe that the information provided is not correct or complete. This relieves the department of the burden of verifying all 1,600 reports and at the same time ensures that the department's review of reports for completeness and accuracy will not be arbitrary.

The second paragraph of this subpart provides for a complaint-based process of identifying inaccurate or incomplete reports. This mechanism was suggested by a member of the rulemaking advisory committee, and there were no major objections from the committee. The implementation reports include a very large volume of information (data about 163,000 employees in 1,600 jurisdictions), and the department has only one staff position assigned to pay equity. Therefore, there is no feasible alternative way to systematically corroborate the reported information.

It is reasonable to allow for consideration of such complaints because (1) the reported information is public information and therefore must be available to anyone on request, (2) there is a need to ensure that the information is correct, and there is no alternative mechanism for checking the information, and (3) this mechanism for correcting information may provide redress for employees in some situations, eliminating the need for discrimination lawsuits and other mechanisms which could ensure that equity is achieved despite incorrect reporting.

The department has received many complaints about the information provided by jurisdictions in the earlier planning reports required by Minnesota Statutes, section 471.998, subdivision 1. On the whole, the complaints received have led to better information and communication with all parties.

When the complaints were without merit because employees failed to understand the law (for example, thinking the department could force a jurisdiction to assign different job evaluation ratings), the department was able to explain the provisions of the law so that employees could advocate more appropriately on their own behalf. When the complaints were appropriate (for example, identifying classes which were improperly excluded from the report), the department was able to inform jurisdictions of this oversight so that the problem could be corrected.

The subpart places a limitation on the complaint process by requiring that complaints be submitted in writing. This limitation is needed and reasonable because it may discourage frivolous complaints and reduce the response burden on department staff.

In addition, the subpart allows the department to decide that a complaint is without merit. This provision is needed and reasonable because many complaints in the past have been about issues such as the quality of job evaluations, an area in which the department's authority is limited. In addition, complaints may be refuted by information contained in the report itself. In those cases, reviewing complaints further is an inappropriate use of resources.

The third paragraph of the subpart allows the department itself to initiate a review of the completeness and accuracy of a report. There are a number of situations which could lead to the department's identifying possible inaccuracies or missing information in a report. For example, part of the report form may simply be blank, or figures which amount to less than minimum wage may be reported for a particular class. The statute provides the department with broad discretion in requiring jurisdictions to submit "any other information requested by the commissioner" (Minnesota Statutes, section 471.9981, subdivision 5a, paragraph 8). It is necessary and reasonable for the department to check on this information in those situations and in others where it is necessary to ensure that compliance decisions are based on complete and accurate information.

The fourth paragraph of the subpart requires the department to notify jurisdictions if a review is being undertaken, and allows jurisdictions a

reasonable time to verify or submit the information. It is necessary to inform jurisdictions of this action because they are the custodians of the information involved, and because they may be affected by the review.

It is reasonable to provide jurisdictions some time to verify or submit the information before finding them not in compliance, because the consequences of a non-compliance finding can be relatively severe (such as a financial penalty) while the importance of the missing information may be relatively minor (the information, when corrected, may not have any impact on the department's compliance finding).

The fifth paragraph of the subpart requires the department to find a jurisdiction not in compliance if the jurisdiction does not respond, or if the information remains inaccurate or incomplete. This consequence is necessary to ensure that jurisdictions respond to requests for this information, and to ensure that their responses are accurate and complete. The consequence is reasonable because the jurisdiction has been notified of the possible problem and provided with time to respond. Jurisdictions found not in compliance for this reason, or subjected to penalties for this reason, have recourse under parts 3920.0900, 3920.1100, and 3920.1200.

Subpart 3. Re-opening department determinations. This subpart is needed to ensure that the department can correct its decision if it becomes apparent that a decision was based on incorrect or inaccurate information. Re-opening the determinations is reasonable for the reasons given in the discussion of subpart 2: the negative consequences of an incorrect determination.

In addition, in part 3920.1300 the department is proposing a three-year schedule for future reports, and this means that some jurisdictions will not be reviewed again until 1996. What would happen in the case of a jurisdiction found in compliance in May 1992, if it becomes apparent in June 1992 that the decision was incorrect? Without the re-opener provision, the first date on which there could be any consequence for that jurisdiction might be as late as 1996. There would not be any consequence even then if the jurisdiction had meanwhile come into compliance. Whether the information was incorrect because of an oversight or deliberate misrepresentation, the effect could be to provide an improper and lengthy extension of time to achieve compliance.

This subpart refers to all the department's determinations, not just the initial compliance finding. This provisison is necessary and reasonable because different information is submitted for each process, because the information forms the basis of the decision in each case, and because the consequences of an incorrect decision can be significant in all of these processes.

Item A is needed to specify one of the conditions under which the department must re-open a determination. It is reasonable for the reasons given in the discussion of subpart 3.

Item B is needed to specify the other condition under which the department must re-open a determination. It is reasonable to set this standard before re-opening a determination because of the administrative difficulty of reviewing decisions each time a question is raised about accuracy or completeness.

The last two paragraphs of the subpart are needed and reasonable as explained in the discussion of subpart 2. Jurisdictions found not in compliance after a determination is re-opened, or subjected to penalties after a determination is re-opened, have recourse under parts 3920.0900, 3920.1100, and 3920.1200.

Subpart 4. Salary range test. This subpart is needed to analyze another dimension of the statutory test that female classes may not be compensated consistently below male classes (Minnesota Statutes, section 471.991, subdivision 5), and to support the law's purpose of "eliminating sex-based wage disparities" (Minnesota Statutes 471.992, subdivision 1).

The statistical analysis and alternative analysis tests determine the frequency of underpayment and the average amount of underpayment for female classes. Those tests, however, are based on the maximum of the salary range, if a salary range exists for a class. It is possible for a jurisdiction's compensation structure to pass those tests and still assign systematically and consistently lower compensation to female classes by manipulating movement through pay ranges.

Here is an example, based on a complaint sent to the department from one employee union in June 1991. Maximum salaries were equitable for male classes and female classes of comparable work value. However, the union charged that the jurisdiction's compensation structure required as little as 3 years for employees in male classes to reach the maximum, compared with as much as 47 years for employees in female classes to reach the maximum.

The department has received some reports from local governments reflecting similar patterns. If these patterns were allowed to continue, the concept of equitable compensation relationships would have no meaning. Jurisdictions could adopt a structure which made mere cosmetic changes in salary range maximums, while continuing to pay female classes far below male classes. It is both necessary and reasonable to address this issue to ensure that the law's standard is met.

Jurisdictions found not in compliance for this reason, or subjected to penalties for this reason, have recourse under parts 3920.0900, 3920.1100, and 3920.1200.

Item A, average years for female classes, is needed to determine the compensation structure for female classes. This averaging method is reasonable because it limits the analysis to overall patterns, allowing flexibility for variation in the years to maximum provided for various female classes. It is also reasonable because the method is administratively easy for the department and jurisdictions themselves to apply.

Item B, average years for male classes, is needed and reasonable for providing a basis for comparison.

Item C, apply the four-fifths rule, is needed to set an acceptable level of difference in the male and female averages. This standard is reasonable for the reasons provided in the discussion of part 3920.0500, subpart 6. Using this standard also provides consistency with the statistical and alternative analysis tests.

Subpart 5. Exceptional service pay test. This subpart is needed to analyze one more dimension of the statutory test that female classes may not be compensated consistently below male classes (Minnesota Statutes, section 471.991, subdivision 5), and to support the law's purpose of "eliminating sex-based wage disparities" (Minnesota Statutes 471.992, subdivision 1).

"Compensation" is defined by part 3920.0100, subpart 3 to include exceptional service pay as well as salary and benefits. The other mechanisms included in the rules to this point measure only the salary and benefits components of compensation.

It is necessary to review exceptional service pay for reasons similar to those discussed in the salary range test (subpart 4). If jurisdictions provide consistent compensation for male and female classes in every other way, but provide significant additional compensation to male classes in the form of longevity or performance pay, the law's purpose can be significantly undermined.

The advisory committee discussed these payments at some length. Representatives of female classes argued that exceptional service pay should be added to salary range maximums, as benefits are added in some cases. They asserted that there is no universally agreed upon number of years at which longevity pay is provided. Since these payments can be added at any time, they are theoretically indistinguishable from the payments provided at the salary range maximum to employees with a specified number of years of service.

These representatives stated that longevity payments are made almost exclusively to male classes, and that they provide a mechanism for jurisdictions to perpetuate sex-based wage disparities. A 20-year employee in a female class may receive a salary range maximum equal to a 20-year employee in a male class, but additional payments made to the male class employee in the form of longevity payments may maintain wage disparities between the two classes.

Representatives of female classes argued that performance payments should also be added to salary range maximums. They asserted that numerous studies show that performance systems are subjective and used to maintain wage superiority for white males. Like longevity payments, performance payments could theoretically be used to maintain disparities between comparable male and female classes with otherwise identical salary range maximums.

Representatives of employers and male classes argued that longevity and performance payments should not be considered in the compliance review. They stated that very few classes receive longevity payments, and that performance payments above the salary range maximum are relatively rare. These representatives also said there has been no move to manipulate these payments in order to maintain wage disparities, and that it would be difficult to do so.

After considering the advisory committee's suggestions, the department chose the middle ground represented in these proposed rules. While it is true that these payments could in theory be manipulated, the department has received few complaints that this manipulation is actually occurring.

Both kinds of payments are subject to historical trends, and there is no data base showing how common the payments are under various circumstances, but it appears that both payment types are relatively rare.

The department was also aware that lump sums and bonus payments, which these rules require to be added to salary range maximums, are by definition paid to every member of a class. Longevity and performance payments, however, are likely to be paid only to qualifying members of the class. Therefore, adding these amounts to salary range maximums could give a misleading picture of the pay for the class itself. In addition, it would be difficult administratively for the department and for jurisdictions to add these payments to salary range maximums.

The department proposes to guard against manipulation by defining these payments carefully (part 3920.0100, subpart 6) and by requiring jurisdictions to report if such payments are made. The department will then evaluate the reported information as explained below.

The proposed rules recognize the other arguments by not requiring jurisdictions to report the dollar amounts of these payments, and by not adding the payments to salary range maximums. If the department finds in reviewing implementation reports that these payments are more common than was previously believed, or if there are frequent substantiated complaints that these payments are being manipulated, it may be necessary to amend these rules in the future.

The department's position in these proposed rules is very similar to that expressed in ***A Guide to Implementing Pay Equity:***

> "Jurisdictions will be asked to report any compensation received by members of a class which might result in actual pay above the maximum of the pay range for that class. However, there are two categories of additional compensation, and the two categories will be treated differently.
>
> "Category One includes longevity pay, shift differentials, and performance pay. These pay differentials will not be considered part of base pay unless there is evidence that the differentials are maintaining gender-based compensation inequities ...

> "Jurisdictions will be asked to report which classes are eligible for these kinds of pay differentials and how many incumbents receive the differentials. However, they will not be required to report the amounts of these pay differentials unless there is a question about inequities in this area..." (pages 28-29). (Note that the proposed rules exclude shift differentials from the definition of compensation, as explained in part 3920.0100, subpart 3, item B.)

The department's position is reasonable because it recognizes valid arguments made by all sides in the advisory committee discussion, because it is consistent with guidelines provided by the department a year ago, and because it provides for safeguarding the law's purpose while avoiding cumbersome and possibly unnecessary reporting.

Jurisdictions found not in compliance for this reason, or subjected to penalties for this reason, have recourse under parts 3920.0900, 3920.1100, and 3920.1200.

Item A, average number of male classes receiving payments, is needed to establish a basis for comparison with female classes. This averaging method is reasonable because it limits the analysis to overall patterns, rather than reacting to the availability of the payments to one or two specific classes. It is also reasonable because the method is administratively simple for the department and jurisdictions themselves to apply.

Item B, less than 20 percent of male classes receive payments, is needed to simplify the process. This standard is reasonable because it corresponds to the four-fifths rule used for the statistical analysis test and the alternative analysis test, as explained elsewhere in this document. If less than 20 percent of male classes receive these payments, then the jurisdiction will by definition pass the four-fifths test for this subpart.

Item C, average number of female classes receiving payments, is needed to determine the frequency of this form of compensation for female classes. This method is reasonable for the reasons provided in the discussion of item A above.

Item D, apply the four-fifths rule, is needed to set an acceptable level of difference in the male and female averages. This standard is reasonable for the reasons provided in the discussion of part 3920.0500, subpart 6. Using this standard also provides consistency with the statistical and alternative analysis tests and with the salary range test.

3920.0800 COMPLIANCE NOTIFICATION.

This part is needed to explain the consequences of the department's compliance decisions and to identify the next steps in the process. The part is written to parallel the procedural steps set forth in Minnesota Statutes, section 471.9981, subdivision 6. It is reasonable to undertake

these procedural steps so that information about compliance status will be available to jurisdictions and to the public, and so that the consequences of not correcting problems are known.

Subpart 1. Written notice. This subpart is needed and reasonable because it is directly required by statute.

> ... The commissioner shall notify a subdivision found to have achieved compliance with section 471.992, subdivision 1. (Minnesota Statutes, section 471.9981, subdivision 6, paragraph a)

The need for and reasonableness of the notice requirement for jurisdictions found not in compliance is explained in the discussion of subpart 3.

Subpart 2. Jurisdictions in compliance. This subpart is needed to notify jurisdictions found in compliance that there are no further statutory reporting requirements until the next report is due. The future reporting requirement is authorized by law:

> *The commissioner of employee relations shall report to the legislature by January 1 of each year* on the status of compliance with section 471.992, subdivision 1, by governmental subdivisions.
>
> The report must include a list of the political subdivisions in compliance with section 471.992, subdivision 1, and the estimated cost of compliance. The report must also include a list of political subdivisions found by the commissioner to be not in compliance, the basis for that finding, recommended changes to achieve compliance, estimated cost of compliance, and recommended penalties, if any. The commissioner's report must include a list of subdivisions that did not comply with the reporting requirements of this section. *The commissioner may request, and a subdivision shall provide, any additional information needed for the preparation of a report under this subdivision.*(Minnesota Statutes, section 471.999, emphasis added)

Future reports are needed and reasonable to ensure that jurisdictions maintain "equitable compensation relationships ... in order to eliminate sex-based wage disparities in public employment in this state" (Minnesota Statutes, section 471.992, subdivision 1). The law would be meaningless if interpreted to require only that pay equity should be achieved on the original reporting date of December 31, 1991. Without future monitoring, it is likely that longstanding practices would be gradually reinstated and that female classes would again be consistently underpaid in a short period of time.

The legislative requirement to maintain pay equity in the future is also supported by statutory requirements that job evaluations be kept current:

> Every political subdivision shall use a job evaluation system in order to determine the comparable work value of the work performed by each class of its employees. *The system must be maintained and*

> *updated to account for new employee classes and any changes in factors affecting the comparable work value of existing classes. A political subdivision that substantially modifies its job evaluation system or adopts a new system shall notify the commissioner....* (Minnesota Statutes, section 471.994; emphasis added. Emphasized portion added in 1990 amendments)

The future reporting requirement is reasonable because it supports the law's purpose of maintaining systems free of sex-based wage disparities. It is also reasonable because the requirement is not onerous. Future reporting is limited to every three years, with reporting information essentially identical to the information reported in 1992 (see part 3920.1300, subpart 2).

Subpart 3. Jurisdictions not in compliance. This subpart is needed and reasonable because it is directly required by the law.

> If the commissioner finds that the subdivision is not in compliance ...the commissioner shall notify the subdivision of the basis for the finding. The notice must include a detailed description of the basis for the finding, specific recommended actions to achieve compliance, and an estimated cost of compliance...." (Minnesota Statutes, section 471.9981, subdivision 6, paragraph b)

The requirement that the department set dates for submitting revised reports is stated later:

> If the subdivision does not make the changes to achieve compliance *within a reasonable time set by the commissioner*, the commissioner shall notify the subdivision ... that the subdivision is subject to a five percent reduction in the aid that would otherwise be payable ... (Minnesota Statutes, section 471.9981, subdivision 6, paragraph c)

It is reasonable that the revised report contain the same information as the original report, since both reports correspond to information set by statute (Minnesota Statutes, section 471.9981, subdivision 5a) as the basis for the compliance decision.

The third paragraph of this subpart requires the department to consider the basis for the non-compliance finding and the actions recommended to achieve compliance in setting the date by which compliance must be achieved. This provision is reasonable because the amount of time which is "reasonable" will vary depending on these factors.

For example, if a jurisdiction has failed only the salary range test, it may be able to correct the problem quickly by, for example, adjusting the number of years to achieve maximum salary. On the other hand, if a jurisdiction has failed the statistical analysis, it may be that the only possible correction is to re-open negotiations with a union representing female classes. That step could take longer. Of course, this does not mean that jurisdictions which are the furthest from compliance will be given the longest time to correct inequities.

Subpart 4. Report to legislature. This subpart is needed and reasonable because it is directly required by the law, cited in the discussion of subpart 2.

Subpart 5. Next steps. This subpart is needed and reasonable because it is required by the law (Minnesota Statutes, section 471.9981, subdivision 6, paragraphs b and c).

Item A, compliance finding after revised report, is needed and reasonable to inform jurisdictions which are in compliance at this point that no penalty will be imposed. The requirements for future reporting are needed and reasonable as explained in the discussion of subpart 2.

Item B, non-compliance after revised report, is needed and reasonable because this procedure is directly required by law (Minnesota Statutes, section 471.9981, subdivision 6, paragraph c).

3920.0900 RECONSIDERATION.

This part is needed and reasonable to explain the jurisdiction's first opportunity to appeal the department's non-compliance decision. The part is written to parallel as closely as possible the statutory provisions of Minnesota Statutes, section 471.9981, subdivision 6, paragraph b.

Subpart 1. Scope. This subpart is needed to explain the jurisdiction's option to request reconsideration and the possible results of the department's reconsideration. The subpart is reasonable as a summary of the process outlined in this part.

Item A, department's decision was correct, is needed and reasonable to establish this as one possible consequence of the reconsideration. The evidence presented may not be relevant or persuasive.

Item B, jurisdiction is in compliance, is needed and reasonable to establish this as another possible consequence. For example, the department's decision may have resulted from a data entry error.

Item C, jurisdiction is not in compliance but time to achieve compliance is extended, is needed and reasonable to establish this as another possible consequence. The department cannot be aware of all the constraints on a jurisdiction's ability to correct compensation inequities, and the department may be persuaded by evidence presented that it is appropriate to provide a time extension.

Subpart 2. Initiating a reconsideration request. This subpart is needed and reasonable because it corresponds closely to the statute:

> ...If the subdivision disagrees with the finding, it shall notify the comissioner, who shall provide a specified time period in which to submit additional evidence in support of its claim that it is in compliance.... (Minnesota Statutes, section 471.9981, subdivision 6, paragraph b)

The department decided to set a uniform time period for notifying the department of a reconsideration request (and for submitting evidence in support of the request, as explained in subpart 3) in order to simplify the process. The 30 day period is reasonable because it provides ample time for jurisdictions to decide if they will seek reconsideration. Many jurisdictions will know in advance of the non-compliance notice that they will be found not in compliance, and thus will not need much time to decide on their next steps.

Subpart 3. Submitting information. This subpart is needed and reasonable to summarize the information needed to support a reconsideration request. The 60-day date is a uniform time period set to simplify the process, as explained in the discussion of subpart 2. The 60 days is reasonable because it provides ample time for jurisdictions to submit evidence. The evidence to be submitted, listed in subparts 5, 8, and 9, should be readily available to the jurisdiction.

Item A, notice to employees, is needed so that employees can assist in identifying any inaccurate or incomplete information in the reconsideration request. This mechanism was suggested by a member of the rulemaking advisory committee.

It is reasonable to allow for employees to comment on the reconsideration request because (1) many employees' compensation may be directly affected by the department's decision, (2) the reported information is public information and therefore must be available to anyone on request, (3) there is a need to ensure that the information is correct, and there is no alternative mechanism for checking the information, and (4) this mechanism for correcting information may provide redress for employees in some situations, eliminating the need for discrimination claims against jurisdictions. The need for and reasonableness of this item are explained more fully in the discussion of part 3920.0300, subpart 3.

Item B requires jurisdictions to submit a compliance plan if they are seeking a time extension but not an in compliance decision. This item is needed and reasonable because it is directly required by the statute:

> ...The subdivision shall also present a plan for achieving compliance and a date for additional review by the commissioner. (Minnesota Statutes, section 471.9981, subdivision 6, paragraph b, final sentence)

It would not be reasonable to require this information from jurisdictions which seek to persuade the department that they are already in compliance. However, for jurisdictions who are seeking more time, this procedural step is needed and reasonable as a response to the actions recommended by the department and the compliance date set by the department. The jurisdiction may persuade the department that a different set of actions is appropriate, and that there is good reason to take more time to achieve compliance.

Item C, jurisdictions may submit other evidence, is needed and reasonable because it parallels the statutory requirement that the

department consider certain information (Minnesota Statutes, section 471.9981, subdivision 6, paragraph b). The law requires the department to consider this information if offered, but it does not require the jurisdiction to submit any of the specified information.

Subpart 4. Burden of proof. This subpart is needed to explain the framework of the reconsideration process. It is reasonable to place the burden on jurisdictions at this point because the department has provided specific evidence that a jurisdiction is not in compliance, based on the tests in these rules. This approach is also supported by the law's statement that the commissioner must provide time for a jurisdiction to "submit additional evidence to support its claim" (Minnesota Statutes, section 471.9981, subdivision 6, paragraph b). The jurisdiction must show why the department's decision was incorrect.

Subpart 5. Notice to employees. This subpart is needed and reasonable for the reasons given in the discussion of subpart 3, item A, and the discussion of part 3920.0300, subpart 3.

Item A, statement that employees have been notified, is needed and reasonable as a simple mechanism for informing the department that employees have been notified.

Item B, copy of the notice, is needed and reasonable as a simple mechanism for ensuring that all the required information has been provided to employees.

Subpart 6. Notice requirements. This subpart is needed and reasonable for the reasons given in the discussion of subpart 3, item A, and the discussion of part 3920.0300, subpart 3. The substance of the required notice is needed and reasonable because each item is needed for employees to take appropriate action.

Item A requires jurisdictions to state that they have been found not in compliance and are requesting reconsideration. This item is needed and reasonable to ensure that employees are aware of their jurisdictions' status.

Item B requires jurisdictions to describe the grounds for the reconsideration request. This item is needed and reasonable to provide part of the mechanism for following up if employees question the accuracy or completeness of the grounds.

Item C requires jurisdictions to state that the materials are public information. This item is needed and reasonable to ensure that employees are aware of their right to review this information.

Item D requires the jurisdictions to state that comments may submitted to the department. This item is needed and reasonable to provide a mechanism for following up if employees question the accuracy or completeness of any part of the reconsideration request.

Item E requires the jurisdictions to list the department's address and telephone number. This item is needed and reasonable to ensure that employees are able to contact the department if they have concerns about accuracy or completeness.

Subpart 7. Comments. This subpart is needed and reasonable for the reasons given in the discussion of part 3920.0700, subpart 2.

Subpart 8. Compliance plan. This subpart is needed and reasonable as explained in the discussion of subpart 3, item B.

Item A, compliance plan, is needed as a procedural step in responding to the department's recommended actions. A jurisdiction may note, for example, that it plans to achieve compliance by adjusting salaries of classes other than those mentioned by the department. This item is reasonable because jurisdictions may choose from a variety of options in achieving compliance, while the department must decide if the proposed plan will actually lead to compliance.

Item B, proposed date for achieving compliance, is needed as a procedural step in responding to the date set by the department. The jurisdiction may be aware of a variety of factors which affect the reasonableness of achieving compliance by any given date, and it is reasonable for the department and the jurisdiction to discuss that information before a final date is set.

Item C, approval by the governing body, is needed and reasonable as a procedural step to ensure that the jurisdiction is prepared to carry out the proposed plan, if approved by the department.

Subpart 9. Evidence for reconsideration. This subpart is needed to list the evidence jurisdictions may submit in support of a reconsideration request. The subpart is reasonable because it is consistent with the language of Minnesota Statutes, section 471.9981, subdivision 6, paragraph b. Items B to G are specifically cited in the statute. Although not specifically listed in the statute, items A and H are reasonable because the law requires that the commissioner consider "at least" the information listed in items B to G. Thus, the department's review need not be limited to those items.

Item A, non-gender-based inequities, is needed and reasonable because the law recognizes that there may be factors other than gender which account for differences in compensation between male-dominated and female-dominated classes. To allow the department to consider such evidence is consistent with the stated purpose of the law to establish equitable compensation relationships "in order to eliminate sex-based wage disparities in public employment in this state" (Minnesota Statutes, section 471.992, subdivision 1).

Item B, recruitment difficulties, is needed and reasonable because it parallels the law's language (Minnesota Statutes, section 471.9981,

subdivision 6, paragraph b, clause 1). The language of the subitems is almost identical to language published in the 1990 ***Guide to Implementing Pay Equity*** (page 48).

Subitem 1 allows jurisdictions to show that recruitment problems in female classes would be treated the same as recruitment problems in male classes. This subitem is needed and reasonable for supporting the law's purpose of eliminating sex-based wage disparities. For example, if a jurisdiction addressed recruitment problems in male classes by paying more, but failed to identify recruitment problems in female classes, sex-based wage disparities would continue.

Subitem 2 allows jurisdictions to show that the higher wages for male classes were necessary to solve the recruitment problem. This subitem is needed and reasonable to ensure that a circumstance which by definition has a negative effect on female classes is justified at least in part by its efficacy. If recruitment problems could be solved by a mechanism other than higher wages for male classes, the recruitment problem could be addressed without creating pay inequities.

The guidebook listed evidence which could be submitted in support of this item:

> "...number of openings in the class since 1984, extent of advertising and number of qualified applicants when attempting to fill the position at a lower pay rate and at the current pay rate, number of qualified applicants refusing to take the position at a lower pay rate and at a current pay rate, required qualifications, size of the pool of qualified applicants, and efforts to recruit or train female candidates for the male-dominated class." (page 48)

The guidebook stated that "the department may ask for" this information. At the suggestion of the rulemaking advisory committee, the rule provides that "jurisdictions may submit" this information. While the department does not require that this information be submitted, it may be helpful to jurisdictions to know the kind of information the department would find useful in considering recruitment problems.

Item C, retention difficulties, is needed and reasonable because it parallels the law's language (Minnesota Statutes, section 471.9981, subdivision 6, paragraph b, clause 2). The language of the subitems is almost identical to language published in ***A Guide to Implementing Pay Equity*** (pages 48-49).

Subitem 1 allows jurisdictions to show that retention problems in female classes would be treated the same as recruitment problems in male classes. This subitem is needed and reasonable for the reasons given in item B, subitem 1.

Subitem 2 allows jurisdictions to show that the higher wages for male classes were necessary to solve the retention problem. This subitem is needed and reasonable for the reasons given in item B, subitem 2.

The guidebook listed evidence which could be submitted in support of this item:

> "...data on turnover in the relevant classes since 1984, resignation letters or other documents citing pay as a reason for the turnover, importance of retention in the class, size of the pool of qualified applicants, and efforts to recruit or train female candidates for the male-dominated class" (page 49).

The guidebook stated that "the department may ask for" this information. At the suggestion of the rulemaking advisory committee, the rule provides that "jurisdictions may submit" this information. While the department does not require that this information be submitted, it may be helpful to jurisdictions to know the kind of information the department would find useful in considering retention problems.

Item D, recent arbitration awards, is needed and reasonable because it parallels the law's language (Minnesota Statutes, section 471.9981, subdivision 6, paragraph b, clause 3).

Item E, good faith effort, is needed and reasonable because it parallels the law's language (Minnesota Statutes, section 471.9981, subdivision 6, paragraph b, clause 4).

The guidebook stated that "the department will judge continued progress by" this information. At the suggestion of the rulemaking advisory committee, the rule provides that "jurisdictions may submit" this information. While the department does not require that this information be submitted, it may be helpful to jurisdictions to know the kind of information the department would find useful in considering good faith efforts.

Subitem 1 allows jurisdictions to demonstrate that inequities have been reduced since 1984. For example, the jurisdiction might submit the list of inequities included in the 1984 planning report for comparison with the number and dollar amount of remaining inequities.

This subitem is needed and reasonable as direct proof that progress has been made in the eight years since the law was passed. It is also reasonable because the information should be readily ascertainable: the 1984 inequities are documented in the jurisdiction's original planning report to the department. A similar standard was set in the guidebook ("How much have the inequities in women's salaries been reduced since 1984?", page 49).

Subitem 2 allows jurisdictions to demonstrate that a substantial portion of funds available has been spent on reducing inequities. For example, the jurisdiction might submit a table showing the amount of money available for all compensation increases each year, and the percentage of that amount which was earmarked and spent each year on increases for female classes identified in the planning report as having an inequity.

This subitem is needed and reasonable as direct proof that resources have been expended on pay equity. A similar standard was set in the guidebook

("Of the amounts available for salary increases since 1984, how much has been spent on underpaid female classes compared with other classes?", page 49).

Subitem 3 allows jurisdictions to submit any other evidence of their good faith efforts. This subitem is needed and reasonable to demonstrate that there may be other evidence of good faith, and that the department will consider any such evidence.

Item F, continued progress, is needed and reasonable because it parallels the law's language (Minnesota Statutes, section 471.9981, subdivision 6, paragraph b, clause 4).

Item G, constraints, is needed and reasonable because it parallels the law's language (Minnesota Statutes, section 471.9981, subdivision 6, paragraph b, clause 4).

Subitem 1 allows the jurisdiction to submit information showing that severe fiscal constraints have made implementation difficult or impossible. For example, the jurisdiction may submit data showing that the total money available for pay increases has been reduced significantly and consistently over the years.

The guidebook stated that

> "The department will generally interpret 'constraints' to mean fiscal constraints that have occurred since 1984. The jurisdiction would need to demonstrate that the constraints were severe, and that the constraints had similar effects on male and female classes. The department will review the amount of money set aside for salary increases in general, and where those dollars were directed. For example, if the fiscal emergency resulted in a salary freeze that applied to all employees for a significant number of years, the department may grant an extension of time for pay equity compliance." (page 50)

While jurisdictions are not required to submit this information, it may be helpful for jurisdictions to know the kind of information the department would find useful in considering constraints.

Subitem 2 allows jurisdictions to submit information about any other constraints which have made implementation difficult or impossible. This item is needed and reasonable to demonstrate that there may be other constraints of which the department is unaware, and that jurisdictions may submit that information.

Item H allows jurisdictions to submit any other information to support a reconsideration request. This could include, for example, a data entry error on the department's part. This item is needed and reasonable to demonstrate that there may be other factors affecting compliance of which the department is unaware, and that the department will consider any such information on its merits.

Subpart 10. Reconsideration decision and notice. This subpart is needed to show how jurisdictions will be notified of action on their reconsideration requests. The provisions are reasonable because they provide similar notice to that specified in statute for the original compliance decision.

Item A, jurisdiction is in compliance, is needed and reasonable to notify jurisdictions of this decision. Future reporting requirements are needed and reasonable as explained in the discussion of part 3920.0800, subpart 2.

Item B, department's decision is unchanged, is needed and reasonable to notify jurisdictions of this decision. It is reasonable for the department to specify if the basis for the non-compliance decision has changed, so that jurisdictions are aware of any changes in the steps needed to correct the inequities.

Item C, time extension, is needed and reasonable to notify jurisdictions of this decision. The revised reporting date is needed and reasonable to ensure that jurisdictions know how much time they have to achieve compliance. It is also reasonable for the department to specify if the basis for the non-compliance decision has changed, so that jurisdictions are aware of any changes in the steps needed to correct the inequities.

Subpart 11. Next steps. This subpart is needed and reasonable to show the impact of the department's review of a a report submitted after a time extension. The provisions are reasonable because they parallel the steps required by statute for the original time extension provided to all jurisdictions not in compliance.

Item A requires the department to notify jurisdictions if they are in compliance after the revised report is submitted. Future reporting requirements are needed and reasonable as explained in the discussion of part 3920.0800, subpart 2.

Item B requires the department to notify jurisdictions if they remain not in compliance after the revised report is submitted. The imposition of a penalty is needed and reasonable as explained in the discussion of part 3920.0800, subpart 5, item B.

3920.1000 PENALTIES.

This part is needed to explain when and how penalties are imposed, as required by Minnesota Statutes, section 471.9981, subdivision 6, paragraph (c). The part is reasonable because it is consistent with the statutory language.

Subpart 1. Department of Revenue notification. This subpart is needed to explain that the Department of Revenue is the agency which applies the penalty. It is reasonable because it closely follows the language of the law:

> If the subdivision does not make the changes to achieve compliance within a reasonable time set by the commissioner, the commissioner shall notify the subdivision and the commissioner of revenue that the subdivision is subject to a five percent reduction in the aid that would otherwise be payable to that governmental subdivision under section 124A.23, 273.1398, or sections 477A.011 to 477A.014, or to a fine of $100 a day, whichever is greatest ... (Minnesota Statutes, section 471.9981, subdivision 6, paragraph c).

Subpart 2. Enforcement conditions. This subpart is needed to further explain the process of imposing penalties. It is reasonable because it closely follows the language of the law:

> ...The commissioner of revenue shall enforce the penalty beginning in calendar year 1992 ... However, the commissioner of revenue may not enforce a penalty until after the end of the first regular legislative session after a report listing the subdivision as not in compliance has been submitted to the legislature under section 471.999. The penalty remains in effect until the subdivision achieves compliance. The commissioner of employee relations may suspend the penalty upon making a finding that the failure to implement was attributable to circumstances beyond the control of the governmental subdivision or to severe hardship, or that non-compliance results from factors unrelated to the sex of the members dominating the affected classes and that the subdivision is taking substantial steps to achieve compliance to the extent possible. (Minnesota Statutes, section 471.9981, subdivision 6, paragraph c)

The subpart refers the reader to the rule parts related to suspension of penalty (3920.1100, subpart 8, item A), and to contested case appeals (3920.1200, subpart 3). The provision that penalties not be imposed while a contested case appeal is pending is needed and reasonable because it directly parallels the law:

> .... No penalty may be imposed while an [contested case] appeal is pending. (Minnesota Statutes, section 471.9981, subdivision 7)

Subpart 3. Enforcement procedure. This subpart is needed to specify how penalties will be enforced. It is reasonable because it closely parallels the law, cited in the discussion of subparts 1 and 2. The law specifies which aid is affected, how to determine the size of the penalty, when the penalty is to begin, and that the penalty continues until compliance is achieved.

Item A is needed and reasonable because it closely follows the law's language as it affects aid otherwise payable to the jurisdiction.

Item B is needed and reasonable because it closely follows the law's language about the alternative penalty of $100 a day.

3920.1100 REQUEST FOR SUSPENSION OF PENALTY.

This part is needed to specify the process for suspending a penalty. The part is reasonable because it closely follows the language of the statute:

> ... The commissioner of employee relations may suspend the penalty upon making a finding that the failure to implement was attributable to circumstances beyond the control of the governmental subdivision or to severe hardship, or that non-compliance results from factors unrelated to the sex of the members dominating the affected classes and that the subdivision is taking substantial steps to achieve compliance to the extent possible. (Minnesota Statutes, section 471.9981, subdivision 6, paragraph c)

Subpart 1. Scope. This part is needed to explain the circumstances under which a jurisdiction may request that the penalty be suspended. It is reasonable to limit these requests to jurisdictions which have been informed that they are subject to penalty, because jurisdictions which simply receive a non-compliance notice have other opportunities to avoid penalties before they are imposed. All jurisdictions not in compliance are given a period of time to achieve compliance before a penalty is imposed, as explained in 3920.0800, subpart 3.

The proposed subpart does not require jurisdictions to submit a reconsideration request before submitting a request for suspension of penalty. This provision is reasonable because the statute does not establish such a requirement.

Since the statutory bases for a reconsideration request and a request for suspension of penalty are similar, the department does not expect a large number of jurisdictions to undertake both of these appeal mechanisms.

Subpart 2. Evidence for request. This subpart is needed to further specify the process for suspending a penalty. It is reasonable because it closely follows the statutory language cited in the discussion introducing this part. The statute provides the department with broad discretion in this area.

Item A, evidence of hardship, is needed and reasonable because it parallels statutory language.

Item B, evidence that noncompliance is unrelated to sex bias, is needed and reasonable because it parallels statutory language.

Subpart 3. Initiating a request. This subpart is needed to provide a mechanism for requesting a suspension of the penalty. It is reasonable because it provides the same time period, 30 days, that the statute provides for notifying the commissioner of a contested case appeal (Minnesota Statutes, section 471.9981, subdivision 7). In addition, most jurisdictions subject to a penalty will be aware of their status before receiving a

penalty notice from the department. Therefore, most jurisdictions will have ample opportunity to decide whether to seek a suspension.

Subpart 4. Burden of proof. This subpart is needed to explain the framework of the penalty suspension process. It is reasonable to place the burden on jurisdictions at this point because the department has provided specific evidence that a jurisdiction is out of compliance after an initial review process, and again out of compliance after re-examining the jurisdiction's second report, based on the tests in these rules. In addition, the jurisdiction is the source for all the information specified in the statute as the basis for the decision to suspend or not to suspend the penalty.

Subpart 5. Notice to employees. This subpart is needed so that employees can assist in identifying any inaccurate or incomplete information in the request for suspension of penalty. This mechanism was suggested by a member of the rulemaking advisory committee.

The subpart is reasonable for the reasons given in the discussion of part 3920.0300, subpart 3; part 3920.0700, subpart 2; and part 3920.0900, subpart 3, item A.

Item A, a statement that employees have been notified, is needed and reasonable as a simpla mechanism for informing the department that employees have been notified.

Item B, copy of the notice, is needed and reasonable as a simple mechanism for ensuring that all the required information has been provided to employees.

Subpart 6. Notice requirements. This subpart is needed and reasonable for the reasons given in the discussion of part 3920.0300, subpart 3; part 3920.0700, subpart 2; and part 3920.0900, subpart 3, item A.

The substance of the required notice is needed and reasonable because each item is needed for employees to take appropriate action, and because the information is readily available to the jurisdiction. The department intends to provide a sample notice form to jurisdictions which will satisfy all the requirements of this part and which will simplify meeting those requirements.

Item A requires that the notice explain that the jurisdiction is submitting a request for suspension of penalty. This information is needed and reasonable to inform employees of the jurisdiction's status.

Item B requires the jurisdiction to explain the grounds for its request. This information is needed and reasonable as a basis for employees to decide whether they should comment on the accuracy of the jurisdiction's proferred grounds for suspension.

Item C requires the jurisdiction to state that the materials submitted are public information. This statement is necessary to ensure that employees are aware that they have a right to this information. It is reasonable because without access to this information, employees cannot comment upon its accuracy or completeness, and the department would lose this avenue of ensuring the information is correct.

Item D requires the jurisdiction to state that employees may comment to the department. This statement is necessary and reasonable to ensure that employees are aware of their right to provide information.

Item E requires the jurisdiction to provide the department's address and telephone number. This information is necessary to assist employees in submitting comments. It is reasonable because employees might otherwise have difficulty in locating the department.

Subpart 7. Comments. This subpart is needed and reasonable for the reasons given in the discussion of part 3920.0700, subpart 2.

Subpart 8. Decision on request. This subpart is needed to further explain the penalty suspension process. It is reasonable because it closely follows the law's language, cited in the introductory discussion of this part.

It is reasonable to provide written notice to the jurisdiction of this decision because the jurisdiction is directly affected, and because the provision parallels statutory notice requirements for the original compliance decision (Minnesota Statutes, section 471.9981, subdivision 6a and 6b) and for the original penalty decision (Minnesota Statutes, section 471.9981, subdivision 6c).

Item A, penalty is suspended, is needed to explain the consequences of this decision. It is reasonable to set a date by which compliance must be achieved, because the statute makes clear that suspending a penalty is not the same as deciding the jurisdiction is in compliance:

> ...The commissioner of employee relations may suspend the penalty upon making a finding that the ***failure to implement*** was attributable to circumstances beyond the control of the governmental subdivision or to severe hardship, or that ***non-compliance*** results from factors unrelated to the sex of the members dominating the affected classes and that the subdivision is taking substantial steps ***to achieve compliance*** to the extent possible. (Minnesota Statutes, section 471.9981, subdivision 6, paragraph c; emphasis added).

There is no statutory basis for exempting a jurisdiction from the requirement to achieve compliance, even if the department finds that the penalty should be suspended for a period of time.

Item B, penalty is not suspended, is needed to explain the consequences of this decision. It is reasonable to enforce the penalty as

it would be enforced if the request for suspension had not been made, since the department has not determined that there are grounds for a suspension.

3920.1200 CONTESTED CASE APPEAL.

This part is needed to specify the process for contested case appeals. The part is reasonable because it closely follows the language of the statute:

> A governmental subdivision may appeal the imposition of the penalty under subdivision 6 by filing an appeal with the commissioner of employee relations within 30 days of the commissioner's notification to the subdivision of the penalty. An appeal must be heard as a contested case under section 14.57 to 14.62. No penalty may be imposed while an appeal is pending. (Minnesota Statutes, section 471.9981, subdivision 7)

Subpart 1. Scope. This subpart is needed to explain the circumstances under which a jurisdiction may appeal the penalty. The proposed subpart does not require jurisdictions to submit a reconsideration request or a request for suspension of penalty before filing a contested case appeal. This provision is reasonable because the law does not establish such a requirement, and because this is the jurisdiction's first opportunity to present its case to an entity other than the department.

Subpart 2. Initiating a contested case appeal. This subpart is needed and reasonable because it parallels the language of the law.

Subpart 3. No penalty pending appeal. This subpart is needed to ensure that no penalty is imposed. The subpart is reasonable because it parallels the language of the law.

Subpart 4. Contested case procedure. This subpart is needed as a cross-reference to the law governing contested case appeals. The subpart is reasonable because it parallels the language of the law.

3920.1300 MAINTAINING PAY EQUITY.

This part is needed to ensure that jurisdictions maintain "equitable compensation relationships ... in order to eliminate sex-based wage disparities in public employment in this state (Minnesota Statutes, section 471.992, subdivision 1).

It is reasonable to provide for future compliance review mechanisms, because the law would be meaningless if interpreted to require only that pay equity should be achieved on the original reporting date of December 31, 1991. Without future monitoring, it is likely that longstanding practices would be gradually reinstated and that female classes would again be consistently underpaid in a short period of time.

The legislature's requirement that pay equity be maintained in the future is also supported by statutory requirements that job evaluations be kept current, cited in the discussion of subpart 2, item B, subitem 2.

Subpart 1. Scope. This subpart is needed and reasonable to summarize the other provisions of the part and to clarify that jurisdictions must maintain pay equity once it has been established.

Subpart 2. Future reports. Future reports are needed to provide a basis for the department's annual reports to the legislature, which in turn are needed to provide ongoing oversight for pay equity. The future reporting requirement is authorized by law:

> *The commissioner of employee relations shall report to the legislature by January 1 of each year* on the status of compliance with section 471.992, subdivision 1, by governmental subdivisions.
>
> The report must include a list of the political subdivisions in compliance with section 471.992, subdivision 1, and the estimated cost of compliance. The report must also include a list of political subdivisions found by the commissioner to be not in compliance, the basis for that finding, recommended changes to achieve compliance, estimated cost of compliance, and recommended penalties, if any. The commissioner's report must include a list of subdivisions that did not comply with the reporting requirements of this section. *The commissioner may request, and a subdivision shall provide, any additional information needed for the preparation of a report under this subdivision.* (Minnesota Statutes, section 471.999, emphasis added)

The future reporting requirement is reasonable because it is not onerous. Future reporting is limited to every three years, with reporting information essentially identical to the information reported in 1992.

The first group of jurisdictions will be required to submit their first future reports in 1994. The department is required to submit a report to the legislature in 1993, and could have established a second round of reporting in that year. However, the department decided it is reasonable to wait an additional year before beginning a new reporting cycle for two reasons: (1) to allow the department ample time to make the initial compliance decisions for the 1,600 jurisdictions involved in the first year of the program; and (2) to allow time for all parties to complete the first cycle of reconsiderations, requests for suspension of penalty, and contested case hearings, since these procedures are likely to be most numerous in the first cycle and since the outcomes could conceivably affect future procedures.

Item A, one year's notice, is needed to ensure that the department's future reporting schedule is not arbitrary. The provision is reasonable because it allows the department time to plan ahead for the number of jurisdictions to be reviewed in a given year, and because it allows

jurisdictions to prepare for gathering and reporting the required information.

Item B, information required, is needed to clarify what information must be reported. It is reasonable to base future compliance decisions on this information because the law specifies this information (Minnesota Statutes, section 471.9981, subdivision 5a) and because the similarity of information allows the review process to be as similar as possible in each reporting cycle. This will allow reasonable comparisons from one year to the next in the department's annual reports to the legislature.

Subitem 1 changes the time period in which lump sums and bonus payments must be reported. In the first reporting cycle, jurisdictions are required to report only lump sums which were paid in the previous 6 months. That provision was necessary to allow jurisdictions flexibility in phasing in pay equity while reducing a perception in some jurisdictions of negative consequences for male classes.

That is, jurisdictions could provide male classes with lump sum pay increases in the first half of calendar 1991 without having these payments "count" in the compliance review. Therefore, jurisdictions could continue to pay more for male-dominated classes up to six months prior to the implementation deadline, on the assumption that these relatively higher payments would not be part of the jurisdiction's ongoing salary base.

However, for purposes of future reporting, it would not be reasonable to overlook continued pay increases to male classes, when those pay increases could be used to maintain sex-based wage disparities. This subitem requires jurisdictions to report all additional cash compensation paid in the previous year, which generally corresponds to one budget cycle.

Jurisdictions may provide additional cash compensation to any employee group at any time. However, it is necessary and reasonable to add these forms of compensation to other payments in the compliance review process in order to reflect the true compensation for each class.

Subitem 2 requires that jurisdictions verify that they have notified the department of substantial changes in their job evaluation systems. This provision is needed and reasonable to carry out the law's provision that job evaluations must be maintained.

> Every political subdivision shall use a job evaluation system in order to determine the comparable work value of the work performed by each class of its employees. ***The system must be maintained and updated to account for new employee classes and any changes in factors affecting the comparable work value of existing classes. A political subdivision that substantially modifies its job evaluation system or adopts a new system shall notify the commissioner....*** (Minnesota Statutes, section 471.994; emphasis added)

Subpart 3. Future compliance reviews and notifications. This subpart is needed to explain that these future tests and procedures will be the same as those for the first reporting cycle. It is reasonable to use these tests and procedures for the reasons given in the discussion of original compliance reviews (3920.0400 to 3920.0700) and notifications (3920.0800). In addition, it is reasonable to use the same tests and procedures in the future for continuity, ensuring that jurisdictions are aware of the standards to be applied, and ensuring that the legislature is aware of any trends in compliance and non-compliance.

Subpart 4. Future reconsideration and appeal. This subpart is needed to explain that these future procedures will be the same as for the first reporting cycle. It is reasonable to use these procedures for the reasons given in the discussion of original reconsiderations (3920.0900), requests for suspension of penalty (3920.1100), and contested case appeals (3920.1200). In addition, it is reasonable to provide the same appeals mechanisms in the future for continuity, ensuring that jurisdictions are aware of the standards to be applied, and ensuring that the legislature is aware of any trends in compliance and non-compliance.

Subpart 5. Future penalties. This subpart is needed to explain that future penalties will be the same as for the first reporting cycle. It is reasonable to apply these penalties for the reasons given in the discussion of the original penalties (3920.1000) and for continuity. In addition, it is necessary and reasonable to apply the same penalties in the future in order to ensure that pay equity is maintained.

Subpart 6. Enforcement conditions for future penalties. This subpart is needed to explain that the enforcement conditions will be the same as for the first reporting cycle. It is reasonable to establish these conditions for the reasons given in the discussion of the original enforcement conditions (part 3920.1000, subpart 2) and for continuity.

The subpart proposes that the penalty be calculated from the beginning of the calendar year in which the department finds the jurisdiction not in compliance. This provision is reasonable because it parallels the calculation of the penalty for the first reporting cycle, and because local aid payments are established on a calendar year basis.

Alternatives would have been (1) to assume that the jurisdiction has been not in compliance for the entire period, possibly as long as four years, since the original finding that the jurisdiction was in compliance; or (2) to assume that the jurisdiction is not in compliance only on the date when the data was reported. Calculating the penalty from the beginning of the calendar year is reasonable because it represents a middle ground between these two extreme alternatives.

Subpart 7. Enforcement procedures for future penalties. This subpart is needed to explain that the enforcement procedures will be the same as for the first reporting cycle. It is reasonable to establish these procedures for the reasons given in the discussion of the original enforcement procedures (3920.1000, subpart 3) and for continuity.

Item A is needed to show how the reduction in aid is calculated. This provision is reasonable for the reasons given in the discussion of part 3920.1000, subpart 3, item A.

Item B is needed to show how the fine is assessed. This provision is reasonable for the reasons given in the discussion of part 3920.1000, subpart 3, item B.

DATE: 9/26/91

Linda M. Barton

LINDA BARTON
Commissioner

DEPARTMENT OF EMPLOYEE RELATIONS
STATE OF MINNESOTA

In the Matter of the Proposed Adoption of Rules of the Department of Employee Relations Regarding Local Government Pay Equity Compliance, Minnesota Rules, parts 3920.0100 to 3920.1300

SUPPLEMENTAL STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION

The Department of Employee Relations (hereinafter the "Department") proposes to adopt rules governing local government pay equity compliance. The Department submits this Supplemental Statement of Need and Reasonableness in support of the proposed rules.

The Department first published proposed rules on this subject in the State Register on Monday October 14, 1991 (16 S.R. 893-909). A hearing was held on November 14, 1991, before the Honorable Allen E. Giles, Administrative Law Judge. On December 31, 1991, Judge Giles issued a report on the proposed rules. Judge Giles found that the rules as proposed, as well as the amendments to the rules proposed by the Department following publication, were needed and reasonable in all respects. He also found that the amendments proposed by the Department following initial publication did not amount to substantial changes. The administrative law judge found further that with one exception, the Department had complied with all procedural and jurisdictional requirements of the rulemaking process. However, in Finding Number 23, Judge Giles concluded that the Department's failure to include a Fiscal Note in the Notice of Hearing constituted a defect in the rule which required republication or renotice of the proposed rules with an adequate Fiscal Note in the Notice of Hearing.

On January 2, 1992, the Chief Administrative Law Judge issued his report. The Chief Administrative Law Judge approved the Report of the Administrative Law Judge in all

respects and concluded that the Department did not meet the notice requirements of Minn. Stat. § 14.14, subd. 1(a), in that the Notice did not contain the information required by law under Minn. Stat. § 14.11, subd. 1. The Chief Administrative Law Judge further found that in order to adopt this rule, the Department must re-commence the rulemaking process by giving the proper statutory notice, proceeding either under Minn. Stat. § 14.14 or Minn. Stat. § 14.22, and complying with all related substantive and procedural requirements.

The Department has decided to recommence the rulemaking process under Minn. Stat. § 14.14 by proceeding with another public hearing. The rules proposed are those published in the State Register at 16 S.R. 893 to S.R. 909 as modified by the amendments the Department proposed at the November 14, 1991 hearing and in its post-hearing comments dated November 25, 1991. The Department expects that these amendments will be published in the State Register along with a new Notice of Hearing on June 1, 1992. The Department proposes no further amendments.

Pursuant to the report of the Chief Administrative Law Judge, the entire record of the November 14, 1991 hearing will be incorporated in this proceeding. This includes the Department's earlier Statement of Need and Reasonableness, all exhibits offered by the Department and others at the earlier proceeding, all post and pre-hearing written comments, and all testimony from the earlier hearing. A list of the documents and other material contained in the record from the November 14, 1991 hearing is attached to this SONAR as Exhibit A.

To adopt the proposed rules, the Department must demonstrate that it has complied with all of the requirements of rulemaking established by the Administrative Procedures Act. Those requirements are:

I. That there is statutory authority to adopt the proposed rules;

II. That the rules are needed and reasonable; and,

III. That all additional substantive and procedural requirements imposed by law and by rule have been satisfied.

To demonstrate its compliance with these requirements, the Department relies first on its original Statement of Need and Reasonableness (SONAR) dated September 26, 1991, as well as its Appendices. Next, the Department relies on the record of the hearing held on November 14, 1991 including: the testimony presented at the hearing; the exhibits presented at the hearing; and, the Department's post-hearing comments of November 25, 1991 and December 2, 1991. Finally, the Department will also comment upon a few matters in this Supplemental SONAR and the Department also expects to comment upon these matters at the hearing.

The Department would note that as at the earlier hearing, the Department expects to call Dr. Charlotte Striebel, Ph.D., J.D., as an expert witness. As explained in the Department's earlier SONAR at pages 5-6, Dr. Striebel assisted the Department in developing the statistical analysis described in part 3920.0500 of the rule. She will be available to testify about and respond to questions about that part. Dr. Striebel's background qualifications are summarized in the Department's earlier SONAR at pages 5-6 and in her Vitae, which is an Appendix to that SONAR.

David Korby, of the Department's Management Information Services Division, will also attend the hearing. Mr. Korby worked on the software the Department will use in making compliance decisions.

It should be noted that the Department is making this software available for jurisdictions. Paradox 3.5 Copyright 1990, Borland International, all rights reserved, was used. The software uses Dr. Striebel's methodology for calculating the statistical analysis described in part 3920.0500 of the rule. The software also calculates the salary range test described in part 3920.0700, subd. 4 and the exceptional service pay test described in part 3920.0700, subp. 5. A copy of the software will be made available to all jurisdictions, for a nominal cost. Jurisdictions who have ordered a copy should receive it in mid-May, 1992. Those jurisdictions who have not ordered it as of this date will receive it approximately two weeks after they do so.

The Department's initial SONAR provides background on the pay equity law in the State of Minnesota in Section II. Section III summarizes the need for the rules as well as the Department's statutory authority for adopting rules. Section IV of the initial SONAR

describes the Department's compliance with most of the requirements for rulemaking set forth in statute and in rules. These include:

- **Seeking outside opinions:** The Department's efforts to seek outside opinions are described in its original SONAR. As explained at the page 4 of the first SONAR, the Department originally published a Notice of Solicitation of Outside Opinion on June 3, 1991, at 15 S.R. 2568. The Department again published a Notice of Solicitation of Outside Opinion on May 4, 1992 at 16 S.R. 2411-2412 (1992). The Department will submit all comments received in response as part of the hearing record.

- The Department also met with its advisory committee once (on February 14, 1992) since receiving the report of the Administrative Law Judge and Chief Administrative Law Judge and has responded to inquiries about the rule from committee members and other interested persons.

- **Agricultural land.** See page 5 of initial SONAR.

- **Small business.** See page 5 of initial SONAR.

- **Pollution control; health; fees charged.** See page 5 of initial SONAR.

- **Statement of Need and Reasonableness.** See page 5 of the initial SONAR. In addition, in accordance with Minn. Stat. § 14.131, a copy of this Supplemental Statement of Need and Reasonableness will be sent to the Legislative Commission to Review Administrative Rules before the proposed amendments and hearing notice are published in the State Register.

In Section II below, the Department will describe its compliance with the "fiscal note" requirement of Minn. Stat. § 14.11, subdivision 1. Section V of the initial SONAR

describes the reasonableness of the rule generally while Section VI provides a part by part analysis of the rules.

The testimony from the November 14, 1991, hearing provides further evidence of the need for and reasonableness of these rules. In addition, Exhibit 13 at the hearing as well as the Department's November 25, 1991 post-hearing comments explain the need for and reasonableness of the amendments the Department proposed to the rule following their initial publication on October 14, 1991. In addition, the Department refers to the Report of the Administrative Law Judge for further discussion of the need for and reasonableness of various parts of the rule.

In this document, the Department will discuss its fiscal note in Section II. In Section III, the Department will comment upon the statutory date for local governments to establish compliance with the pay equity law as well as upon the timing of these rules.

II. FISCAL NOTE

The Administrative Law Judge and the Chief Administrative Law Judge concluded that the Department did not comply with the Administrative Procedures Act in promulgating these rules because the initial Notice of Hearing did not contain a fiscal note. That requirement is set forth in Minn. Stat. § 14.11, subd. 1 (1990) which provides in part :

> If the adoption of a rule by an agency will require the expenditure of public money by local bodies, the appropriate notice of the agency's intent to adopt a rule shall be accompanied by a written statement giving the agency's reasonable estimate of the total cost to all local bodies in the state to implement the rule for the two years immediately following the adoption of the rule if the estimated total cost exceeds $100,000 in either of the two years.

Under this section, when a rule will require an expenditure of funds in excess of $100,000 by local public bodies in the two years following its adoption, an agency must publish an estimate of the total cost for the two year period.

The Department believed that this requirement did not apply to these rules because in its view, the rules themselves will not require the expenditure of public money by local bodies. Instead, any additional expenditure of public money made by jurisdictions in order to establish equitable compensation relationships is required by the pay equity law itself and not by the adoption of these rules. The Department so argued in its post-hearing comments. At the same time, the Department noted that it has acknowledged from the outset that there are costs involved in achieving equitable compensation relationships and the Department cited the information it has provided both to the legislature and to the Department of Finance estimating the costs to local government of complying with the pay equity law.[1] See Initial Sonar at p.5 and Department's November 25, 1991 comments concerning the fiscal note, Section 3E.

The Administrative Law Judge and the Chief Administrative Law Judge rejected the Department's arguments and ordered that in order to adopt these rules, the Department must re-commence the rulemaking process and include a fiscal note in its notice of the proposed rules. While the Department maintains that the rules themselves do not require expenditures above and beyond those required by the law, the Department has prepared a fiscal note in accordance with the reports of the judge and the chief judge.

As the Notice of Hearing states, the Department estimates that in the two years following the rule's adoption, the cost to local governments of coming in to compliance with the pay equity law and hence with these rules will be in excess of $100,000. More specifically, the Department estimates that up to 33% of the approximately 1600 jurisdictions required to comply with the pay equity law may be found not-in-compliance after the Department completes its initial compliance review of their January 31, 1992, implementation reports. The Department estimates the total cost to these jurisdictions to implement pay equity and to come into compliance with the rules and law to be $16,414,992. The basis for this estimate is explained below.

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1 In 1986, the department reported to the legislature that: "Overall, the average estimated cost to correct in equities is 2.6% of payroll for those jurisdictions with inequities." See, Hearing Exhibit 10G, page 11. That cost was derived from planning reports submitted by the local governments. Then, in 1990, at the request of the Department of Finance, the department estimated the remaining implementation cost. See memorandum of 3/27/90, attached as Exhibit to Section 3E of the Department's November 25, 1991 comments.

Background Information

The Department based its fiscal note on its analysis of certain preliminary evaluations the Department completed of local governments' compensation practices. These preliminary evaluations are part of the technical assistance the Department has provided to local government jurisdictions since the pay equity law was first adopted. Specifically, in order to assist jurisdictions in their efforts to come in to compliance with the pay equity law by December 31, 1991, the Department gave local governments the opportunity to submit compensation data to the Department for a preliminary evaluation. Between the winter of 1990 and December 15, 1991, the Department received approximately 560 requests for such evaluations and it completed them by early January, 1992.

For purposes of estimating the cost to jurisdictions of coming in to compliance with its proposed rule and completing this fiscal note, the Department analyzed only those preliminary evaluations which were based on the Department's proposed rule in its final form. Specifically, the group of "preliminary evaluations" upon which the Department based its fiscal note include only those evaluations for which jurisdictions' compensation data was analyzed by applying the rule published by the Department in the State Register on October 14, 1991, as amended by the amendments proposed by the Department at the November 14, 1991 hearing and in its November 25, 1991, post-hearing comments. These rules and amendments were found to be needed and reasonable by the Administrative Law Judge. The Department is proposing no additional amendments. Therefore, the fiscal note is based on preliminary evaluations of jurisdictions' compensation practices based on the proposed rule in its current form. These were those completed between November, 1991 and January, 1992.

Fiscal note figures were based on the estimated actual dollars it would take for jurisdictions to come into compliance with the law based on the proposed rule. Although there are a number of ways in which a jurisdiction could come in to compliance, some of which would not require the actual expenditure of additional funds, for purposes of preparing its fiscal note, the Department assumed that the method not-in-compliance jurisdictions would use in order to establish equitable compensation relationships would be to increase compensation for female dominated classes. Therefore, the Department

expects that its estimate of the fiscal impact is higher than what the actual cost will, or needs to, be.

In addition, the Department assumed, as noted above, that up to 33% of jurisdictions may be found not-in-compliance after the Department completes its review of the January 31, 1992, implementation reports. This is based on the fact that 33% of the jurisdictions in the fiscal note sample were not-in-compliance based on the Department's preliminary evaluation. The Department believes, however, that a smaller percentage of jurisdictions will actually be found not-in-compliance after the January 31, 1992 implementation reports are reviewed. This is because jurisdictions who received the results of the preliminary evaluations before December 31, 1991, had an opportunity to correct any problems or, at least, to make changes to increase their progress toward achieving pay equity.

Facts About the Preliminary Evaluations and Fiscal Note Sample

To estimate the costs to local governments of coming into compliance with the pay equity law in the two years following the rule's adoption, the Department first reviewed the results of all of the preliminary evaluations for the period described above. The Department had evaluated each jurisdiction in the "Fiscal Note Sample" under the statistical analysis or alternative analysis as appropriate according to the proposed rules based on the makeup of the jurisdiction's workforce gender and compensation data. For each jurisdiction which was found not-in-compliance based on that review, the Department completed a "Fiscal Note Worksheet" based on the information the jurisdiction submitted on its "Pay Equity Preliminary Evaluation Form". This worksheet estimated the annual cost to increase the compensation for female classes in order to pass the appropriate tests so as achieve pay equity. The Department also completed a "Fiscal Note Worksheet-Salary Range Test" for those jurisdictions which did not pass the "salary range test." Samples of these forms are included within Appendix B to this SONAR entitled "Fiscal Note Documents".

For those jurisdictions who did not pass the alternative analysis, the Department estimated the cost to increase female compensation so as to achieve pay equity by first identifying female classes which needed to be increased, the number of employees in those classes and the amount needed per month to reach the appropriate level of male

compensation for each class. The Department then added the amount needed for each class and multiplied this figure by 12 months to arrive at the annual cost. (See Appendix B, Exhibits A and B.)

For those jurisdictions who did not pass the statistical analysis, the Department first determined the average number of employees in a female class and next identified the number of female classes whose compensation needed to be increased to reach an underpayment ratio of 80%. Then, the Department multiplied the number of classes needing adjustment by the average number of employees in a female class and multiplied that figure by the average monthly dollar amount female employees fell below predicted pay. That total was then multiplied by 12 to arrive at the total annual cost for that jurisdiction to achieve pay equity. See for example, Appendix B, Exhibit E, Fiscal Note Worksheet, Statistical Analysis, Steps 1 through 7. Information to complete Exhibit E was taken from Exhibit D, the results of the Department's computer analysis of the information that jurisdiction provided on its Pay Equity Preliminary Evaluation Form.

The cost for jurisdictions who did not pass the salary range test was calculated by first determining the average number of years to maximum for female classes and the average number of years to maximum for male classes. Then, the average monthly dollar value of each year required to reach maximum salary for female classes was determined. The Department then took that amount and multiplied it by the number of years needed to reduce salary ranges for female classes in order to meet the 80% requirement of the salary range test established by the proposed rule. The monthly cost was then multiplied by 12 to arrive at the annual cost for that jurisdiction to achieve pay equity. See Appendix B, Exhibit F, for an example of these calculations. The information on Exhibit F was derived from Exhibit C.

The Department then totaled the annual costs for each jurisdiction and divided by 105 (the number of jurisdictions preliminarily not-in-compliance) to arrive at the average annual cost of $31,089 per jurisdiction to achieve pay equity.

Mathematical Techniques

Based on its analysis of jurisdictions' preliminary reports, the Department estimates that up to 33% of jurisdictions may be found not-in-compliance after the Department's initial compliance review of jurisdictions' January 31, 1992 implementation reports. Again, based on an analysis of the preliminary reports, the Department estimates that the average cost to come into compliance for a jurisdiction will be $31,089. This figure was multiplied by 528 (33% of the 1600 jurisdictions required to report) to arrive at the overall estimate of $16,414,992.

In calculating the costs to come into compliance, the Department averaged and rounded figures such as monthly pay, number of employees in female classes, years to maximum, costs per month, difference from predicted pay and costs per year.

Checks were done for each jurisdiction preliminarily found not-in-compliance to determine whether the dollars estimated for a jurisdiction would actually bring it into compliance. The Department found no cases where the jurisdiction could not come into compliance for the amount estimated.

Facts About the Sample

The sample used to calculate the cost was representative of the 1600 jurisdictions in size, type, range of costs and number of employees. As noted above, the jurisdictions evaluated were those whose preliminary evaluations were completed between November, 1991 and January, 1992.

1. Size of Sample - 314 jurisdictions evaluated, represents approximately 20% of total number of jurisdictions required to report.

2. Type:
   a. 135 cities (represents 16% of all cities)
   b. 33 counties (represents 38% of all counties)
   c. 93 schools (represents 26% of all schools)

d. 51 others (represents 24% of all others required to report)

3. Jurisdictions preliminarily not-in-compliance - 105

A. Range of number of employees:

1. cities: 2 - 192 (average of 40)
2. counties: 62 - 10,345 (average of 1162)
3. schools: 20 - 1095 (average of 137)
4. others: 3 - 63 (average of 21)
5. overall: 2 - 10,345 (average of 199)

B. Range of costs to come into compliance:

1. Cities $563 - $149,940 (average of $11,862)
2. Counties $1,989 - $689,273 (average of $90,533)
3. Schools $372 - $354.144 (average of $45,022)
4. Other $1,092 - $6,240 (average of $2,858)
5. Overall $372 - $689,273 (average of $31,089)

C. Percentage of jurisdictions not in compliance by type:

1. 50 cities (48% out-of-compliance in samples)
2. 12 counties (11% out-of-compliance in samples)
3. 35 schools (33% out-of-compliance in samples)
4. 8 others (8% out-of-compliance in samples)
5. 105 overall (33% out-of-compliance in samples)

D. Type of Analysis

1. Statistical Analysis- approximately 50%
2. Alternative Analysis- approximately 50%
3. Not-in-compliance- 105 jurisdictions

a. Statistical Analysis- 49 jurisdictions

Rule 3920.0500

b. Alternative Analysis- 49 jurisdictions

Rule 3920.0600

c. Salary Range Test- 6 jurisdictions

3920.0700, subp. 4

d. Salary Range Test and Statistical-1

3920.0500 and 3920.0700, subp. 4

Attached as Exhibits G through K to Appendix B are documents which show the summary of total of estimated costs to come into compliance for all jurisdictions in the sample as well as the type of analysis applied to each jurisdiction as well as the total number of employees in each jurisdiction.

III. COMPLIANCE DATE

The Department will comment briefly here upon the statutory date for compliance with the pay equity law and upon concerns about the "newness" of the criteria for compliance contained in the proposed rule. Finally, the Department will comment upon the compliance process and upon the timing of any penalties which may result from a not-in-compliance determination.

Compliance Date

Although this question is not directly applicable to Judge Giles' previous ruling on the merits of the rules or on any ruling which will result from this proceeding, the Department thinks it important to clarify that it does not have statutory authority to extend the compliance deadline for establishing equitable compensation relationships established by Minn. Stat. § 471.9981, subd. 6(a). Judge Giles seemed to find to the contrary in his December, 1991 report.

In Finding 28, Judge Giles states in part that:

> [T]he Pay Equity Act requires jurisdictions to have a fully implemented compensation structure that provides equitable compensation relationships by December 31, 1991, unless the Commissioner of

> Employee Relations approves a later date. Minn. Stat. § 471.9981, subd. 1 (emphasis added).

Then in Finding 39, he states that: ". . .The Commissioner has discretion to establish an alternative date in Minn. Stat. § 471.9981, subd. 6 (a)." The Department believes that these findings are in error.

Although these findings have no direct bearing on the single procedural defect found in the rulemaking process or on the need for or reasonableness of the rules on their face, the statutory references to the "compliance date" must be understood in context in order to ensure that the law as well as department's position are clear. If these findings were not clarified, persons reviewing the record might believe that the Department acted unreasonably in adhering to a deadline which it could have changed.

The deadline for establishing equitable compensation relationships is set forth in Minn. Stat. § 471.9981, subd. 6 which provides in part:

> (a) The commissioner of employee relations shall review the implementation report submitted by a governmental subdivision, to determine whether the subdivision has established equitable compensation relationships as required by section 471.992, subdivision 1, by December 31, 1991 or the later date approved by the commissioner.

(Emphasis added). Judge Giles seemed to rely on the emphasized language to support his statement that the commissioner may extend the compliance deadline for any or all jurisdictions covered by the pay equity law. A review of the statute as well as its legislative history demonstrates that this is not the case and that the "later date approved by the commissioner" refers only to any jurisdiction who requested, and was granted, a later compliance date (a date after the December 31, 1991 date established by the law) when it filed its pay equity planning report.

The critical statutory reference is found in Minn. Stat. § 471.9981, subd. 1 which provides:

> **1988 report.** A home rule charter or statutory city or county. . . that did not submit a report according to section 471.998, shall submit the report by October 1, 1988, to the commissioner of employee relations. The plan for implementing equitable compensation relationships for the employees must provide for complete implementation not later than December 31, 1991, unless a later date has been approved by the commissioner. If a report was filed before October 1, 1987, and had an implementation date after December 31, 1991, the date in the report shall be approved by the commissioner. The plan need not contain a market study. (emphasis added).

A parallel reference was made in other related law governing school districts:

> A school district subject to sections 471.991 to 471.999 shall implement the plan to establish equitable compensation relationships set forth in its report to the commissioner of employee relations. The plan shall be implemented by December 31, 1991, unless a later date has been approved by the commissioner. If a report was filed before October 1, 1987, and had an implementation date after December 31, 1991, the date in the report shall be approved by the commissioner.

Minn. Stat. § 124A.31, subd. 1. (Emphasis added). Both references to a "later date" and an "implementation date after December 31, 1991" were added to the pay equity law in the 1988 legislative session, in response to the problem of non-reporting by some jurisdictions which had failed to meet the statutory deadline of October 1, 1985 for submitting a planning report to the department. Minn. Sess. Law 1988.

The pay equity law as enacted in 1984 had required such a report, and required that the report establish "a timetable for implementation of pay equity." Minn. Stat. § 471.9981 (1984). The 1988 legislation established enforcement procedures for the first time as well as a penalty for failing to submit a planning report, a deadline for achieving pay equity, and a penalty for failing to implement pay equity. Minn. Sess. Law. 1988.

In passing the 1988 amendments, the legislature wanted to allow jurisdictions which had reported on time (or at least prior to the 1988 session) to implement pay equity later than the newly-established deadline, if they had in good faith planned for a longer timetable. Therefore, the legislature incorporated the language cited above to provide very limited exceptions to the general deadline. The commissioner did not approve any alternative dates. Therefore, the December 31, 1991 deadline applies to all jurisdictions. It should also be noted that the statute does not provide for any exceptions to the reporting deadline, and in fact provides that any jurisdictions which fail to report must be found not in compliance. Minn. Stat. § 471.9981.

In sum, the pay equity law does not allow the commissioner to establish unilaterally a different compliance deadline for all jurisdictions. The legislative history of the law supports the conclusion reached by the plain language of the statute. The legislature passed amendments in 1987 (Laws 1987, chapter 398, article I, related to nonreporting by school districts) and again in 1988 (cited above) to specify deadlines and penalties ensuring compliance with reporting and implementation requirements of the law. If the legislature had intended for the commissioner to exercise broad discretion in establishing deadlines, these amendments would have been unnecessary.

Newness of criteria and tests in the rule.

The Department also thinks that it is important to comment upon issues raised at the earlier hearing and in Judge Giles' report concerning the relative recency, or newness, of specific criteria and tests set forth in the rule and about the alleged difficulty jurisdictions might experience in adapting to these criteria. The concern appears to be with compliance criteria which differ from the Department's Guide to Implementing Pay Equity in Local Government published in September 1990. These concerns were noted in Judge Giles' report in the following findings among others:

> Finding 35. . . .several of the criteria and tests introduced by the proposed rules represent a departure from previous guidelines or directions from the Department. Application of the criteria or tests to a jurisdiction's compensation plan may render the jurisdiction out of compliance even in circumstances where the jurisdiction complied

according to criteria and tests that the Department used before the proposed rules.

Finding 36. The criteria or tests were first presented formally with the publication of the proposed rules in June 1991. Jurisdictions will have had less than one-half year to comply with the newly introduced criteria and tests.

Finding 111. The salary range test was first presented formally by the Department in the publication of the proposed rules in June 1991. Jurisdictions will have had less than one-half year to bring their compensation structures into compliance with the salary range test.

The Department disagrees with these findings to the extent that they suggest that the Department's proposed rule is an "amendment" of an earlier rule. It is important to note that this rule is not an amendment to an earlier rule and in that sense it does not propose amendments to already established criteria. Instead, this is the Department's first rule on this subject. Further, the Department contends that these criteria and tests are not "new" with respect to earlier guidance provided by the law and the Department. Rather, the criteria and tests identify specific mechanisms for measuring factors that local governments knew would be used in the compliance decisions. If the specific mechanisms were listed in the law itself, there would be no need for the rulemaking process, which anticipates identification of the specific mechanisms used to measure the law's general requirements.

The primary concern with "newness" seemed to be with the salary range test and benefits. The Department contends that these aspects of pay equity are not "new".

As for the salary range test, this test was implicit in the 1990 amendments to the law which required reporting of "the amount of time in employment required to qualify for the maximum." The 1990 guidebook also contained some references to this issue. For example, the guidebook provided:

"Is the pay range maximum accurate? In some pay systems, no employee receives the maximum salary or a salary near the maximum.

DOER would first ask whether this is true for both male and female classes. If so, this practice would not represent an inequity. But if men are generally paid at the top of the ranges and women are paid at the bottom, DOER will investigate to see if gender-based discrimination is occurring. Documented seniority and performance systems are two acceptable explanations for this pattern." (page 33)

"If female employees have more seniority than male employees, but the female employees have similar or lower pay, the jurisdiction may be found out of compliance even if the scattergram looks equitable." (page 46)

As for benefits, the Department referred to them in its 1984 guidebook. At that time, there were no deadlines for pay equity and the Department had no enforcement authority. However, in its 1990 Guidebook, the Department confirmed that it would evaluate how jurisdictions paid benefits and that a jurisdiction could be found out of compliance based on inequity in the payment of benefits.

As for other concerns about newness noted in the earlier proceeding, the Department notes that it commented about this in its comments of November 25, 1991, especially in Section 3D, and in its comments of December 2, 1991, especially in the section entitled "Changes in the Rule." As for specific aspects to the rule cited by some commenters as amounting to changes or new criteria, the Department refers to the following discussions in its earlier submissions with respect to the need for and reasonableness of these aspects of the proposed rule as well as the references to these aspects of the proposed rule in the Department's earlier guidance on these subjects:

part-time employees- initial SONAR pages 11 and 12, 11/25/91 comments and 12/2/91 comments;

benefits-initial SONAR pages 9, 10, 26, 17, and , 11/25/91 comments;

mini-regression lines- SONAR pages 38, 29;

years to maximum salary and salary range test- SONAR page 26, 60 and 61 and 11/25/91 comments;

weighting of line- initial SONAR pages 38, 39 and 11/25/91 comments and 12/2/91 comments;

exceptional service pay-initial SONAR pages 61-63 and 11/25/91 comments and 12/2/91 comments;

sore thumb- 11/25/91 comments.

These comments and the other evidence the Department has presented throughout this proceeding demonstrate that in developing this proposed rule, the Department has been as consistent as possible with its earlier guidance.

Timing of Penalties

It is finally important to note that while the implementation deadline established in the pay equity law is December 31, 1991, no penalty is assigned to any jurisdiction until after an automatic extension prescribed by statute for all jurisdictions. The law provides:

> "If the subdivision does not make the changes to achieve compliance within a reasonable time set by the commissioner, the commissioner shall notify the subdivision . . . [that it is subject to a financial penalty]." (Minn. Stat. § 471.9981, subd. 6c).

This provision is reflected in the Department's rule. As the rule describes, after the time extension, jurisdictions submit a new implementation report based on their then-current compensation structure, and the Department's compliance decision is based on that point in time. Therefore, even those found out of compliance because of the "new criteria" may have a year or more after the rule is adopted, and after this automatic extension is provided, to achieve compliance without suffering any penalty. Further, if jurisdictions are

successful in any of the appeal processes provided in the rule, they may receive an additional time extension as an alternative to a not-in- compliance finding.

Dated: 5/18/92

Linda Lee Barton

LINDA BARTON
COMMISSIONER
OF EMPLOYEE RELATIONS