12/20/93

STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE NATALIE HAAS STEFFEN
COMMISSIONER OF HUMAN SERVICES

BEFORE MARY JO O'BRIEN
COMMISSIONER OF HEALTH

BEFORE ARNE H. CARLSON
GOVERNOR

IN THE MATTER OF THE PROPOSED ADOPTION OF

AMENDMENTS TO RULES OF THE

MINNESOTA MERIT SYSTEM GOVERNING

DEFINITIONS, PROHIBITION AGAINST

DISCRIMINATION, THE PROBATIONARY

PERIOD, THE COMPENSATION PLAN AND SALARY

ADJUSTMENTS AND INCREASES

STATEMENT OF NEED

AND REASONABLENESS

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

1. Federal law requires that in order for Minnesota to be eligible to receive grant-in-aid funds for its various human services, health and public safety programs, it must establish and maintain a merit system for personnel administration. See, e.g. 42 USC §§ 4701-28.[1]

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[1]Also see sections of the United States Code and Code of Federal Regulations cited herein where the following programs have statutory or regulatory requirements for the establishment and maintenance of personnel standards on a merit basis:

Aid to Families With Dependent Children - "AFDC" [42 USC § 602(a)(5)]
Food Stamps [7 USC § 2020(e)(6)(B)]
Medicaid- "Medical Assistance" or "MA" [42 USC § 1396(a)(a)(4)(A)]
Aid to the Blind [42 USC § 1202(a)(5)(A)]
Aid to the Permanently and Totally Disabled [42 USC § 1352(a)(5)(A)]
State and Community Programs on Aging [42 USC § 3027(a)(4)]
Adoption Assistance and Foster Care [42 USC § 671(a)(5)]
Old-Age Assistance [42 USC § 302(a)(5)(A)]
Emergency Management Assistance [44 CFR § 302.4]

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

3. Under the aforementioned grant-in-aid programs, the State of Minnesota, through its appropriate agencies, is the grantee of federal programs and administrative funds. Accordingly, the State is under an affirmative obligation to insure that such monies are properly and efficiently expended in compliance with applicable federal standards. Those standards require that in order for the agencies under the Minnesota Merit System to be eligible to receive federal grant-in-aid funds the Minnesota Merit System rules must specifically include, among other things, an active recruitment, selection and appointment program, current classification and compensation plans, training, retention on the basis of performance, and fair nondiscriminatory treatment of applicants and employees with due regard to their privacy and constitutional rights (48 Fed. Reg. 9211 (March 4, 1983) codified at 5 CFR § 900.603).

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

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

6. The Minnesota Supreme Court has upheld the authority of the Commissioner of Human Services (and by implication that of the Commissioner of Health and the Governor) to promulgate personnel rules and regulations. The Court quashed a writ of mandamus brought by the Hennepin County Welfare Board against the county auditor in attempting to force payment of salaries in excess of the maximum rates established by the Director of Social Welfare.[4] State ex rel. Hennepin County Welfare Board v. Fitzsimmons, 58 N.W.2d 882, 890 (1953). The court stated:

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[2] See also Minn. Stat. §§ 393.07 subdivisions 3 and 5, 256.01 subdivisions 4 and 5, and 256.011.

[3] Minn. Rules, parts 9575.0010-1580, 7520.0100-1200, and 4670.0100-4300.

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

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

7. The above cited proposed rule amendments are promulgated in accordance with the provisions of applicable Minnesota statutes and expressly guarantee the rights of public employers and Minnesota Merit System employees in conformance with the terms of the state's Public Employment Labor Relations Act (Minn. Stat. §§ 179A.01-179A.25).

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

A. DEFINITIONS

Minnesota Rules, parts 9575.0010, 4670.0100 and 7520.0100

Amendments are being proposed to these rules providing changes in the definitions for terms that have a meaning specific to the Merit System rules. Changes are proposed to the definitions of "discrimination" and "equal employment opportunity".

To both definitions, the term "sexual orientation" is being added so that Merit System rules are in compliance with the State of Minnesota Human Rights Act. On April 2, 1993, the Governor signed into law changes to Minnesota Statutes, Chapter 363, which prohibited discrimination in employment on the basis of sexual orientation. This change to Minnesota Statutes, Chapter 363 was effective August 1, 1993. Since Merit System rules, part 9575.0090 provides that no person shall be discriminated against for reasons that are outlined in the Minnesota Human Rights Act, and that employees or applicants may file a discrimination complaint with the Department of Human Rights, it is necessary to change Merit System rules so that they are in compliance with state law.

To both definitions, "membership or activity in a local commission" is also being added to the rules for the same reason. Language in the Minnesota Human Rights Act provides that no person shall be discriminated against in employment because of membership or activity in a local commission. It is necessary to amend the Merit System rules so that they are in compliance with the Minnesota Human Rights Act.

B. PROHIBITION AGAINST DISCRIMINATION/AFFIRMATIVE ACTION PLAN

Minnesota Rules, parts 9575.0090, 4670.0600, 4670.0610 and 7520.0350

The amendments to part 9575.0090 subpart 1, part 4670.0600 and part 7520.0350 subpart 1 are designed to update the current language. Again, "sexual orientation and membership or activity in a local commission" has been added to make the rule consistent with the requirements of the Minnesota Human Rights Act.

Proposed deletion of the words "when such disability does not interfere with the completion of assigned duties" is being proposed to avoid any inconsistencies with Title I of the Americans with Disabilities Act (ADA), which was passed by Congress in 1990. The ADA prohibits discrimination in employment based upon disability. Under the ADA, employers must define the "essential" functions performed by positions and may not refuse to hire or retain an individual with a disability if the individual could perform the essential functions of the job with or without reasonable accommodation. Essential functions are the fundamental job duties of the position which the individual with a disability holds or desires. The ADA requires an employer to focus on the essential functions of a job to determine whether a person with a disability is qualified. In other words, it is illegal to deny employment to an individual with a disability because he or she cannot perform the marginal functions of the job. The current language in parts 9575.0090 subpart 1, 4670.0600, and 7520.0350 subpart 1 suggests that an employer may deny employment to an individual with a disability if the disability would prevent him or her from performing any of the assigned duties of the position (which would include both the essential and marginal functions). As a result, the proposed deletion of this language is necessary in order to be in conformance with Title I of the ADA.

The language in parts 9575.0090 subpart 2a, 4670.0610 and 7520.0350 subpart 2a outlines the components that an approved affirmative action plan must include. The major change to these rules is the inclusion of language which requires that the local agency's affirmative action plan have a provision for compliance with Title I of the ADA. It is necessary to include this language in the rules since employers covered by the Minnesota Merit System must comply with the terms of the ADA.

The final amendment to these rules involves the retitling of the Department of Human Services Affirmative Action Office to the "Department of Human Services Office for Equal Opportunity, Affirmative Action and Civil Rights". In 1993, the Department of Human Services Affirmative Action Office was given the additional responsibility for ensuring that the civil rights of county social services agency clients were being met. Thus, a change in the name of the office occurred. As a result, our rules must be updated to reflect this change.

C. PROBATIONARY PERIOD

Minnesota Rules, parts 9575.0730 and 4670.2610
(Under the provisions of Minnesota Rules, part 7520.0200 subpart 2, the Department of Human Services rules, parts 9575.0400 to 9575.1300 also apply to the Department of Public Safety's county and local agencies.)

Amendments to these parts serve to simplify the computation of the probationary period for intermittent employees. The current language in the rules requires that an intermittent employee (an employee who does not have a fixed work schedule) must serve the equivalent of six full months of compensated service in order to complete his or her probationary period. Because the time served in the probationary period is prorated, it may take an intermittent employee working less than 10 hours per week over two years to complete a probationary period.

The probationary period is part of the selection process and is a time during which employees are required to demonstrate ability to perform the duties and fulfill the responsibilities of the position. During this period of time, employees are evaluated by their supervisors and a final decision is made as to whether they will be granted permanent status and continue employment in their positions. Local and county agency supervisory staff have indicated that it is unreasonable to expect an individual to be in probationary status for a period of more than two years. They also have indicated that two years is a sufficient period of time in which to evaluate any employee, even if that employee does not have a regular, fixed work schedule and is working very few hours per week.

Therefore, it is reasonable to propose this amendment to the rules allowing intermittent employees, after two years, to complete their probationary periods.

D. SALARY ADJUSTMENTS AND INCREASES

Minnesota Rules, parts 9575.0350, 4670.1320 and 7520.0650

An amendment is proposed to parts 9575.0350 subpart 3; 4670.1320 and 7520.0650 subpart 3 providing for a recommended general salary adjustment of zero percent for all non-bargaining unit Merit System employees on Merit System professional, support, clerical and maintenance and trades salary schedules to be effective January 1, 1994. The amendment is necessary in order to change the recommended general salary adjustment percentage in these rule parts from that adopted for 1993.

It is reasonable that no salary adjustment be recommended for a variety of reasons. The proposal is based on a review of adjustments to salary levels by employers with similar and competing types of employment. It also is in keeping with the Governor's request that, for 1994, all public sector jurisdictions in Minnesota exercise restraint in granting public employee salary increases.

Merit System rules require that the annual recommended general salary adjustment for employees be based on salary adjustments granted by employers with similar and competing types of employment. For the Merit System, employers with similar and competing types of employment means other public employers. Traditionally, other employers the Merit System has looked to in developing a recommended general salary adjustment are the State of Minnesota and counties with their own personnel systems which are separate and apart from the Merit System.

The State of Minnesota has negotiated a contract with AFSCME Council 6 representing approximately 18,000 state employees providing for a 0% salary adjustment effective July 1, 1993. The state has also negotiated a contract with supervisory employees providing a 0% adjustment effective

July 1, 1993. Only two other jurisdictions have settled for 1994. Both Dakota and Blue Earth Counties have settled for a 2% increase in salary effective January 1, 1994.

Merit System rules also provide that the proposed annual employee salary adjustments be based on the trends in the Twin Cities Consumer Price Index (TCCPI). The United States Department of Labor's Bureau of Labor Statistics calculates changes in the index for all urban consumers (covering approximately 80% of the total population) twice a year. For the first half of 1992 to the first half of 1993, the index increased 3.8%. To date, the 1994 wage adjustments granted employees in other public sector jurisdictions in Minnesota have not matched the level of increase reflected by the TCCPI.

The principal factor upon which the Merit System recommended general salary adjustment is based is adjustments granted by other public employers, particularly the State of Minnesota. Trends in the TCCPI which generally reflect the pattern of wage adjustments historically have not been given as much weight as the adjustments themselves due to the fact that they generally do not adequately reflect salary changes in the public sector. For this reason, coupled with the Governor's request that all public sector employers in Minnesota show restraint in granting salary adjustments in 1994, it is reasonable to recommend that salaries of Merit System employees not covered by the terms and conditions of a collective bargaining agreement be increased by 0% effective January 1, 1994, or on the beginning date of the first payroll period following January 1, 1994, for those agencies on a biweekly or four-week payroll period.

It should be emphasized that the recommended general salary adjustment of 0% is simply that - a recommendation. It lacks the binding effect of a negotiated collective bargaining agreement. Agencies, even those where there is no collective bargaining agreement, are not required to follow the Merit System recommendations on salary adjustments, but have the flexibility, under Merit System rules, to adopt a differing salary adjustment for agency employees. Under whatever salary adjustment is finally adopted by an agency, the only requirement is that the salaries paid the non-union employees be within the minimum and maximum salaries on the Merit System compensation plan.

Another important point is that, under Merit System rules, Merit System compensation plan adjustments do not apply to employees in a formally recognized bargaining unit. There are 44 Merit System agencies where most of the agency employees are covered by a collective bargaining agreement and employee compensation is the product of negotiation between the appointing authority and the employee's exclusive representative. In these agencies, the only employees subject to Merit System compensation plans are those in positions that are excluded from the bargaining unit by virtue of being supervisory or confidential in nature.

E. COMPENSATION PLAN

Minnesota Rules, parts 9575.1500, 4670.4200-4240 and 7520.1000-1100

Amendments proposed to these parts specifically recommend adjustments to the 1994 minimum and maximum salaries for all Merit System classes of

positions covered by the Human Services, Health and Public Safety Merit System rules, to be effective January 1, 1994. Merit System rules require that Merit System compensation plans be adjusted annually to reflect changes in the level of salary rates in business and government for similar and competing types of employment and to achieve equitable compensation relationships between classes of positions based on their comparable work value.

Proposed amendments to parts 9575.1500, 4670.4200-4240 and 7520.1000-1100 adjust the minimum salaries of all but one classification by 0% for 1994. This is the same percentage adjustment that is being recommended as a general salary adjustment for employees in Merit System classifications. That kind of adjustment provides that employees will remain on the same salary step in their new salary range as they were on their previous salary range. This is reasonable in terms of the practice in other public jurisdictions of adjusting salary ranges by the same percentage amount as the general salary adjustment granted to all employees of the jurisdiction.

Proposed amendments to parts 9575.1500, 4670.4200-4240 and 7520.1000-1100 adjust the maximum salaries of all classifications by one step, or approximately 4.5% for 1994. In other words, another salary step is being added to the maximums of the ranges. This is being proposed so that those agencies that provide merit increases or have pay for performance policies, may, at their option, grant employees who are at the top of the ranges for their classifications performance based increases. The intent of this proposal is to facilitate local autonomy in establishing consistent county wide salary policies. To not propose this change would result in many counties not being able to grant merit or performance increases to employees currently at the top of their salary ranges. This proposal would not require that agencies adopt the Merit System 1994 maximum salaries as their maximum salaries, since they are required only to pay non-union employees at least at the minimum step of the Merit System range and no greater than the maximum step of the Merit System range.

The minimum salary of the Financial Worker range is being adjusted by one-half step, or approximately 2.25% in order to comply with the provisions of Minnesota Statutes, sections 471.991-.999, requiring the establishment of equitable compensation relationships between classes of positions based on their comparable work value as determined by a formal job evaluation system. Subsequent to passage of Minnesota Statutes, sections 471.991-.999 in 1984, the Merit System conducted a formal job evaluation study of all classes of positions which determined the comparable work value of all Merit System classes of positions. A basic principle of pay equity is that classes with identical or similar work values should have identical or similar salary ranges. The results of the study revealed a large number of situations where classes of positions with similar comparable work values had quite disparate salary ranges. These situations represented compensation inequities and, over the past seven years, the Merit System has proposed and adopted a significant number of comparability adjustments to either equalize or reduce the differences between salary ranges for classes with identical or similar comparable work values. It is necessary to continue this process to attain the statutorily-mandated requirement to

establish equitable compensation relationships between all classes of positions. When major changes occur to a job, it is necessary for the Merit System to review and evaluate the job to ensure that the job evaluation rating assigned the position is accurate. In the fall of 1992, a study of the Financial Worker positions was conducted by the Merit System. This study was conducted because major changes had occurred to the Financial Worker job. The results of the study revealed that the comparable work value of the Financial Worker position had increased significantly due to the changes. As a result, it is necessary to make the proposed adjustments to the salary range for the Financial Worker classification.

The Merit System also reviewed current compensation plans for competing employers such as the State of Minnesota and the counties of Hennepin, Ramsey, St. Louis, Beltrami, Dakota, Anoka, Blue Earth, Olmsted, Scott, Washington and Itasca to determine their salary levels and consider them in proposing these amendments to parts 9575.1500, 4670.4200-4240 and 7520.1000-1100.

Amendments also are proposed to part 9575.1500 providing for class titles and minimum and maximum salaries for six new classes entitled Business Manager, Day Treatment Supervisor, Day Treatment Therapist, Recreational Therapist, Fraud Prevention Specialist, and Social Services Administrative Aide. The Business Manager classification was established as a result of changes and restructuring that occurred in the accounting division of the St. Louis County Social Services Agency. The classifications of Day Treatment Supervisor, Day Treatment Therapist and Recreational Therapist were developed as a result of a legitimate need for these classes in Carver County, which has established a day treatment program. The Fraud Prevention Specialist classification was developed as a result of a new federal program which provides enhanced federal reimbursement to county social services agencies for hiring staff to perform fraud prevention functions. The Social Services Administrative Aide classification was developed as a result of a request by the Wadena County Social Service Department to review a position description of an employee who had assumed additional duties and was no longer properly classified in her current classification. All of these amendments are necessary and reasonable to ensure that the Human Services Merit System compensation plan reflects appropriate class titles and salary ranges that are current.

The final amendment proposed to Minnesota Rules, part 9575.1500 deletes the class title and minimum and maximum salaries for the Welfare Director VI classification since there is currently no one in that classification at this time. This amendment is both necessary and reasonable to ensure that the Human Services Merit System compensation plan properly reflects current class titles and salaries that are reflective of the functions actually being performed by Merit System employees.

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

If this rule goes to public hearing, it is anticipated that there will be no expert witnesses called to testify on behalf of the agency. The small business considerations in rulemaking, Minnesota Statutes, Section 14.115, do not apply to this rule amendment.

Dated: 10/26/93

NATALIE HAAS STEFFEN
COMMISSIONER
DEPARTMENT OF HUMAN SERVICES

Dated: 11/12/93

MARY JO O'BRIEN
COMMISSIONER
DEPARTMENT OF HEALTH

Dated: 12/2/93

ARNE H. CARLSON
GOVERNOR