

STATE OF MINNESOTA  
DEPARTMENT OF EMPLOYEE RELATIONS

IN THE MATTER OF THE PROPOSED RULES  
GOVERNING TEMPORARY DESIGNATION OF  
POSITIONS IN THE UNCLASSIFIED  
SERVICE, EXAMINATIONS FOR  
APPLICANTS WHO ARE HANDICAPPED,  
AND UNCLASSIFIED APPOINTMENTS.

STATEMENT OF NEED  
AND REASONABLENESS

The subject of which positions in the civil service should be classified and subject to merit system appointment procedures and which should be unclassified thereby allowing them to be filled by direct appointment is an important public issue. The subject is dealt with in statute but also requires some clarification in rules. Specifically rules are needed to specify 1) the criteria the Commissioner will use in temporarily authorizing positions to be placed in the unclassified service in accord with Minnesota Statutes 43A.08, subd. 2A; and 2) the maximum length of time a person may occupy such positions. Additionally, DOER has long felt a need to provide an explanation in rule of the direct appointment aspects of unclassified positions so that the public will not expect such positions to come under the same requirements as those in the classified service.

Minnesota has had a statute providing on-the-job work experience testing for handicapped applicants since 1978. The original language, however, indicated that "the procedures (for implementation) need not be adopted as rules but they must be consistent with other applicable laws, rules and duly adopted plans of the state relating to affirmative action." General policy guidelines were set forth in memorandums from the Commissioner to applicants and referral agencies serving handicapped clients. In 1981, Chapter 210 revised most of the State's personnel law including provisions regarding testing for handicapped applicants. One of the primary changes was to remove the language exempting on-the-job testing procedures from rule-making requirements. Proposed rules 2 MCAR 2.331-2.333 are, therefore, new and designed to implement Minnesota Statutes 43A.10, subd. 7 and 8 to carry out the responsibility of the Department of Employee Relations to offer test accommodations to applicants who are handicapped and to administer qualified handicapped examinations.

The authority of the Department of Employee Relations to promulgate and adopt these rules is Minnesota Statutes 43A.04, subd. 3.

2 MCAR § 2.308 Temporary Designation of Positions in the Unclassified Service. Minn. Stat. § 43A.08, subd. 2A authorizes the Commissioner of Employee Relations to temporarily designate positions in the unclassified service when the positions are expected to be of a limited duration. The statute does not set a maximum limit for these positions, but past practice has been three years, based on a similar rule established in 1974 (previous 2 MCAR 2.010).

This rule is reasonable because it allows management to accomplish short-term projects with limited disruption to present staffing. Yet it establishes a maximum time limit to protect the right of the public to be informed of long-term employment opportunities and to compete for them through the merit selection process. Three years is a reasonable limit which has worked in the past. There are few situations in which agency management can project future needs beyond 3 years and still meet the statutory requirement that unclassified positions under the proposed rule must be "fully anticipated to be of limited duration." When this requirement cannot be met, positions are appropriately placed in the classified service.

2 MCAR 2.331. Test accommodations for applicants who are handicapped. This rule specifies what information applicants who are handicapped shall provide and in what form to request test accommodations. It also outlines what factors the Commissioner shall consider in determining whether to make accommodations and what examination alternatives the Commissioner shall provide if the Commissioner denies accommodations.

The rule is needed to inform handicapped applicants of the procedures to follow to request accommodations and of the consideration and outcomes they can expect to receive as a result of their requests. It is also needed to inform the non-handicapped public of how accommodations, not available to them but which may have an affect on their chances of being appointed to classified positions, will be administered.

The statute provides accommodations only for applicants who are handicapped. It is reasonable to require applicants to identify themselves as handicapped as a condition of receiving special test accommodations.

The requirement of identifying "the handicapping condition which substantially limits one or more major life activities" is reasonable because it is a shortened form of the definition of handicap taken from the Federal Rehabilitation Act of 1973 as amended by the Rehabilitation Act amendments of 1974 (public law 93-516). It is the most common definition currently available. As a state receiving Federal financial assistance under the terms of these acts, Minnesota is required to comply with them.

It is reasonable to ask applicants to specify what accommodations they desire. Applicants know and understand their handicaps better than the Commissioner or agency staff. Applicants are, therefore, in the best position to suggest an accommodation which would assist them in competing in the examination process. The Commissioner, however, knows and understands the test process and the effect various types of accommodations would have on the validity, reliability, and job-relatedness of the examination. It is, therefore, reasonable for the Commissioner to make the decision regarding the effects of the accommodation and to decide whether or not to provide the requested accommodations.

It is reasonable to specify the alternatives to accommodation, i.e., participation in the examination without accommodations, admission to a qualified handicapped examination. It is further reasonable to permit applicants who have been denied accommodation the choice of alternatives if both are offered. They know their own strengths and limitations and, therefore, are able to judge the best alternatives.



2 MCAR 2.332. Qualified handicapped examination. This rule specifies how qualified handicapped examinations will be administered. It provides that qualified handicapped examinations will be made available only to persons who meet the requirements of Minnesota Statutes 43A.10, subd. 8 and sets forth the procedures the parties involved will follow in the examination process.

The rule is needed to assure the public that the extraordinary on-the-job, trial-work-experience test procedures provided in statute will be made available only to applicants legally entitled to them. It is also needed to inform the public of the conditions under which the Commissioner will authorize use of the qualified handicapped examination procedure. Finally, the rule is needed to inform eligible handicapped applicants of the examination process, their responsibilities, and the role of the placement and referral specialist and the Commissioner in the process.

Because test accommodations have already been considered and rejected as inappropriate before a qualified handicapped examination is considered, it is reasonable to provide a unique placement procedure for this type of examination. Qualified handicapped examinations work in reverse of the standard examination procedure. The process begins with identification of an applicant and proceeds through a job development approach to identify a suitable position for placement. The standard examination procedure begins with the position and proceeds through a screening process to identify a suitable candidate.

The placement procedure established is reasonable because it makes use of professionals skilled in job development for handicapped applicants and requires the Commissioner to provide enough information about state jobs so that placement possibilities will be maximized. The procedure provides opportunity for qualified handicapped applicants and their counselors to get information to state appointing authorities about the capabilities of qualified handicapped applicants and of accommodations to facilitate their employment so that suitable placements can even be developed before the standard job-filling process.

Since the statute provides that a qualified handicapped examination shall consist of "up to 700 hours" (emphasis added), it is necessary to define in rule how the discretion will be administered. The appointing authority through his/her supervisors must conduct the on-the-job trial work experience and is the only person in a position to judge the candidate's success or failure on the particular job. It is, therefore, reasonable to enable the appointing authority to "pass" the candidate on the examination at any time that the supervisor has accumulated sufficient evidence of satisfactory performance to attest to the candidate's successful completion of the examination. To overcome stereotypes about the abilities of handicapped persons, it is, however, necessary to establish a minimum time period in which the handicapped candidate is assured of an opportunity to demonstrate his or her skills free of the possibility of termination. Thirty days is a reasonable amount of time to insure fair test opportunity. Thereafter, it is reasonable to accept the assessment of the appointing authority through the assigned supervisor conducting the on-the-job test - including termination of the test for unsatisfactory performance by the candidate.

Since the match of handicapped job applicants to position requirements must be a much more individualized matter than that involved in the standard examination referral and appointment process, it is reasonable to offer the handicapped candidate who fails a qualified handicapped examination an opportunity to retest through another on-the-job placement if certain conditions are met. The high costs of on-the-job testing (and the psychological costs to the applicant as well as the setback costs to program acceptance of repeated failures) make the offer to repeat testing an important decision for the Commissioner to make. It is, therefore, reasonable to outline specific job-related conditions which must be present before the Commissioner may authorize the candidate and counselor to pursue additional placement possibilities.

2 MCAR 2.333. Notice. This rule requires the Commissioner to notify applicants of decisions the Commissioner makes regarding test accommodations and competitive and qualified handicapped examinations which directly affect handicapped applicants and to provide written statements of the reasons for the decisions.

The rule is necessary and reasonable as it requires the Commissioner to notify the handicapped public of decisions affecting them and to provide justification for the decisions made. It puts accountability into the process.

It is reasonable to require notice when an action has an effect on the applicant. It is not, however, reasonable to require notice of action on a requested test accommodation which is unnecessary due to the format of the examination, since the decision will have no effect on the applicant's opportunity for testing or selection. For example, an applicant who is handicapped may request use of a reader for the test thinking the selection process involves a written test, but the exam may be rather a rating of experience and training based on review of information collected from the application. Plainly the requested accommodation would be both inappropriate and unnecessary. The exam can be conducted without further candidate participation and without further delay. Requiring notice of action on accommodation requests in such situations would merely add unnecessary time and cost to the selection process. The handicapped candidate will receive notice of his examination score in accord with 2 MCAR 2.325.

2 MCAR 2.371. Unclassified appointments. This rule describes the latitude appointing authorities have in making appointments to the unclassified service. It also imposes a three-year maximum on the employment of any one person to perform the same function in the same agency in a position placed temporarily in the unclassified service under 2 MCAR 2.308 in accord with Minnesota Statutes 43A.08, subd. 2A.

The rule is needed to inform the public about unclassified appointments and of the rights of appointing authorities in making them. Frequently members of the public contact the Department of Employee Relations to learn of unclassified position vacancies and to be given an opportunity to qualify for them, because they think the requirements of public notice and merit-based selection apply to classified and unclassified positions. This rule is needed as a succinct synthesis of the effects of many statutes which establish positions in the unclassified service specifically to exempt them from the requirements of the classified service.

The rule requires submission by the appointing authority of a resume' outlining the candidate's qualifications and sets a three year appointment maximum on temporary unclassified appointments authorized under 2 MCAR 2.308. The first requirement is reasonable because the Commissioner needs certain biographic and demographic information about the appointee to accurately process the appointment and because the public has an inherent right to information about the qualifications of the persons appointed to any position supported with tax dollars. The second requirement is reasonable because it complements the three-year limit on temporary unclassified positions established in 2 MCAR 2.308 for the same reasons specified in support of that proposed rule.