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STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE SANDRA S. GARDEBRING
COMMISSIONER OF HUMAN SERVICES

BEFORE SISTER MARY MADONNA ASHTON
COMMISSIONER OF HEALTH

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDMENTS TO RULES OF THE MINNESOTA MERIT SYSTEM GOVERNING EMERGENCY APPOINTMENT; EXTENSION OF PROBATIONARY PERIOD; PROMOTION BY NONCOMPETITIVE EXAMINATION; RETIREMENT; AND THE COMPENSATION PLAN.

STATEMENT OF NEED AND REASONABLENESS

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

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

1/ _Also_ _see_ sections of the United States Code and Code of Federal regulations cited herein where the following programs have statutory or regulatory requirement for the establishment and maintenance of personnel standards on a merit basis:

Aid to Families With Dependent Children - "AFDC" [42 USC sec. 602 (a) (5)]
Food Stamps [7 USC sec. 2020 (e) (B)]
Medical Assistance - "MA" [42 USC sec. 1396 (a) (4) (A)]
Aid to the Blind [42 USC sec. 1202 (a) (5) (A)]
Aid to the Permanently and Totally Disabled [42 USC sec. 1352 (a) (5) (A)]
Aid to the Aged, Blind or Disabled [42 USC sec. 1382 (a) (5) (A)]
State and Community Programs on Aging [42 USC sec. 3027 (a) (4)]
Adoption Assistance and Foster Care [42 USC 671 (a) (5)]
Old-Age Assistance [42 USC 302 (a) (5) (A)]
National Health Planning and Resources Development, Public Health, Service Act [42 USC 300m-1 (b) (4) (B)]
Child Welfare Services [45 CFR 1392.49 (c)]
Emergency Management Assistance [44 CFR 302.5]

2. Pursuant to such congressional action the Office of Personnel Management, acting under authority transferred to the United States Civil Service Commission from the Departments of Health, Education and Welfare, Labor, and Agriculture by the Intergovernmental Personnel Act (IPA) of 1970 and subsequently transferred on January 1, 1979, to the Office of Personnel Management by the Reorganization Plan Number Two of 1978, promulgated the Standards for a Merit System of Personnel Administration 48 Fed. Reg. 9209-9212 (March 4, 1983), 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. (<u>See</u>, Footnote 1 <u>Supra.</u>)

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

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

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

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

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

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

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

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

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

A. Emergency Appointment

Minnesota Rules, part 9575.0670 and 4670.2520

An amendment is proposed to these parts changing the maximum duration of an emergency appointment from 70 to 67 working days. Current language provides for initial emergency appointments for up to 45 working days which can be subsequently extended to a maximum of 70 working days in a calendar year. The Public Employment Labor Relations Act (PELRA) includes in its definition of an "employee" any employee whose position is temporary or seasonal in nature and who is employed for more than 67 working days in any calendar year. What this means is that, in an organized Merit System agency with a collective bargaining agreement, an emergency employee who works more than 67 days in a classification that is included in the bargaining unit becomes an employee of the agency and governed by the terms and conditions of the collective bargaining agreement.

In most cases, Merit System agencies hire an emergency employee for a short period of time to fill in during the absence of a regular employee who has been granted a leave of absence. The employment conditions are explained to the employee prior to hire and, when the regular employee returns to the position, the emergency employee terminates from the position. In such cases, it is the intent of the agency that the emergency employee not become an "employee" of the agency as defined by PELRA and, therefore, included in the agency bargaining unit. However, if an emergency employee continued for the 70 days currently allowable, that person would become an "employee" for purposes of PELRA. Such a result would be unintended by the employing agency. Given those circumstances, we believe it is reasonable that

Merit System rule language regarding the duration of emergency appointments be consistent with the exclusion in PELRA from the definition of employee for temporary or seasonal employees who do not work more than 67 working days in a calendar year.

B. Extension of Probationary Period

Minnesota Rules, part 9575.0740 and 4670.2630

An amendment is proposed to these parts to delete the current requirement that a request to extend the probationary period of an employee must be initiated on or before the beginning of the sixth month of the probationary period.

Under Merit System rules, a person employed by an appointing authority by appointment from an eligible register other than a layoff register must serve a six month probationary period before attaining permanent status. Agencies are requested to formally review the performance of a probationary employee twice during the probationary period, once at the end of three months (halfway through the probationary period) and again at the end of the fifth month of employment. Normally, it is after the second performance review that the decision is made to grant permanent status to the employee, terminate the employee or, in some cases, request an extension of the probationary period for the purpose of further evaluation. Given the above recommended scheduling of performance reviews, it is not possible, at times, for appointing authorities to meet the requirement for submission of a request for extension of the probationary period on or before the beginning of the sixth month of the probationary period.

Under current rule language, the only alternative available to the appointing authority in these situations is to either terminate the employee or grant permanent status to the employee at the end of the initial six month probationary period. While it is not commonplace, there are occasions when it is difficult for

an appointing authority to arrive at a thorough and fair determination of an employee's ability to satisfactorily perform all of the functions of his/her position at the end of the fifth month of the probationary period. An extension of the probationary period allows the appointing authority additional time to closely observe the employee's work in relation to appropriate performance standards and also allows the employee more time to address the area or areas of work that need improvement in order for the employee's overall performance to be determined to be fully satisfactory and permanent status granted. To accommodate use of this alternative and give the appointing authority adequate time to complete a five month evaluation, the proposed amendment would push back the deadline by about two weeks. The amendment would give the appointing authority until fifteen days prior to the end of the probationary period.

The rule will still require that the employee be provided with a copy of his/her performance review as well as a copy of the appointing authority's request to extend the probationary period. It will also still contain the requirement that the supervisor's decision on the request be provided to the agency and the employee prior to the end of the initial probationary period. However, that period will be changed from ten days to five days. The five day period is the same as that required when a probationary employee is to be removed. See Minn. Rules pt. 9575.0780, subp. 1. This will guarantee that the employee will still receive advance notice of the appointing authority's intent to extend the employee's probationary period. By deleting the requirement to initiate such a request on or before the sixth month of the probationary period, the appointing authority would be provided with some additional time subsequent to the second employee performance review in which to decide whether to request an extension of the probationary period without being in violation of the current time requirement in these rules. We believe it not only reasonable to allow appointing authorities the increased flexibility in submitting requests for the extension of an employee's

probationary period but also necessary to eliminate problems of compliance with current rule language based on the timeliness of such requests.

C. Promotion by Noncompetitive Examination

Minnesota Rules, part 9575.0820 and 4670.2720

An amendment is proposed to delete these two parts in their entirety from the Merit System rules. These provisions have not been used since at least 1978, the tenure of the current merit system supervisor, and their origin is unclear. They allow, by agreement between the appointing authority and the merit system supervisor, the promotion of an employee to a vacant position in an agency without providing for competition from up to two similarly qualified employees of the same agency. While the employee proposed for promotion must meet the minimum qualifications for the higher position and pass a noncompetitive promotional examination in order to be appointed, other employees in the agency who also meet the minimum qualifications for the higher position are not granted the same opportunity to take a noncompetitive promotional examination.

One of the objectives of the Merit System, as stated in rule language, is "fair and equal opportunity for all qualified persons to compete for positions and promotions under the jurisdiction of the merit system solely on the basis of merit and fitness as ascertained through practical examinations." The key phrase in this language is "all qualified persons." It is apparent that, in certain instances, parts 9575.0820 and 4670.2720 provide less than equal opportunity for all qualified persons to compete for promotion.

Additionally, there are other rule parts which address the matter of promotion within an agency and which also provide for open competition to all qualified employees in the final examination process. These parts are 9575.0660 and 4670.2510 relating to provisional appointments. They provide a mechanism for provisionally promoting an employee in situations where there is an urgent need to

fill a vacant position and there is no promotional register of qualified persons from which to refer names to the agency. In these situations, a person meeting the minimum qualifications of education and experience for the vacant position may be provisionally promoted to the position pending the establishment of a promotional register of qualified employees. Provisional appointments are limited in duration to six months, which allows time for the appropriate examination to be announced, qualified applicants to be recruited, the examination administered and scored, an eligible register established and names referred to the agency to fill the position. All employees meeting the minimum qualifications of education and experience for the vacant position, including the provisional appointee, have an opportunity to compete in the examination given to fill the vacancy. While both sets of rules referred to address the matter of promotional appointments, the provisional appointment rules allow for equal opportunity for all qualified persons to compete for promotion in such situations whereas the parts proposed for deletion do not provide for the same level of equal opportunity in all situations.

Given the fact that the existing provisional appointment rule language is far more consistent with the overall Merit System objective of providing equal opportunity for qualified persons to compete for promotions than that provided by 9575.0820 and 4670.2720, and also that the rules affected have been dormant for at least 10 years, we believe it not only reasonable but highly desirable to delete the latter parts from the Merit System rules.

D. Retirement

Minnesota Rules, part 9575.0970 and 4670.2970

An amendment is proposed to delete these two rule parts in light of recently passed federal legislation relating to mandatory retirement. Current rule language provides that an appointing authority may retire an employee in the merit system

who attains the age of 70. In October, 1986, Congress passed HR 4154, known as the Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592. The amendments were signed by President Reagan on October 31, 1986, and became effective on January 1, 1987. This legislation prohibits mandatory retirement at an age certain, except for public safety officers and tenured faculty members. There are no public safety officers or faculty positions covered by the Minnesota Merit System rules. Since an employee can no longer be mandatorily retired due to age alone, it is not only reasonable but also necessary to delete these rule parts to avoid conflict with federal law.

E. Compensation Plan

Minnesota Rules, part 9575.1500

Amendments are proposed to part 9575.1500 providing class titles and minimum and maximum salaries for three newly established classes entitled Food Stamp Corrective Action Specialist II, Support Enforcement Aide and Methods and Procedures Technician. These amendments are necessary in order to maintain a current compensation plan with class titles and minimum and maximum salaries that are reflective of the various functions actually being performed by Merit System employees. In accordance with Merit System rules, the proposed new positions were evaluated using a formal job evaluation system to determine their comparable work value. The proposed minimum and maximum salaries for these classes are based principally on their comparable work value as determined by these evaluations. Also, in accordance with Merit System rules, the proposed new classes and salary ranges were presented to the Merit System Council for consideration. The Council recommended adoption of the new classes and salary ranges as proposed.

Two amendments are proposed to part 9575.1500. The first proposal is to change the title of the class Food Stamp Corrective Action Specialist to more clearly distinguish it from the higher level proposed new class of Food Stamp Corrective

Action Specialist II. Having two positions designated as "I" and "II" will accomplish that goal. We also propose to change the title of the class Staff Training Supervisor to more appropriately identify the primary thrust of the position, which is not supervisory. The new title will be Senior Staff Development Specialist. While persons in this position may have some supervisory responsibilities, their chief function would be directly with staff development. These proposed title changes have also been reviewed by the Merit System Council which recommended their adoption as proposed.

An amendment is proposed to part 9575.1500 adjusting the minimum and maximum salaries for the class Administrative Secretary as the result of a recent job evaluation rating of this class establishing its comparable work value. Minn. Stat. Sections 471.991-471.999 requires the Merit System to establish equitable compensation relationships between classes of positions based on their comparable work value as determined by a job evaluation system. Classes of positions with similar comparable work values are to be compensated in a similar manner. The comparable work value for the class Administrative Secretary compared to similar comparable work values for other classes clearly justifies the proposed adjustment to the minimum and maximum salaries for this class. The amendment is necessary both to comply with the statutory mandate to establish equitable compensation relationships between classes of positions and to recognize the comparable work value of the class by providing appropriate minimum and maximum salary rates for the class. The Merit System Council has recommended adoption of the adjustment as proposed.

Amendments are proposed to part 9575.1500 deleting the class titles and minimum and maximum salaries for Education Supervisor, Office Manager and Personnel Aide.

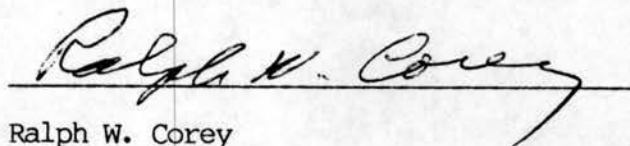
There are no incumbents in these classes and no plans by any agency to establish any such positions in the foreseeable future. The amendments are necessary and reasonable to ensure that Merit System compensation plans provide for class titles that are reflective of functions actually being performed by current Merit System employees. Again, as with other proposed amendments to the compensation plan rule, the Merit System Council has recommended abolishment of these classes as proposed.

Some background information is desirable regarding amendments proposing a single salary range for the Food Stamp Corrective Action Specialist I class and the proposed new class of Food Stamp Corrective Action Specialist II. The state Department of Human Services administers a statewide Food Stamp Quality Control program, a function mandated by federal regulation. The federal government places a low tolerance level on errors occurring in the state's food stamp program and applies fiscal sanctions to states whose error rates exceed that level. Consequence of error is significant considering that Minnesota's average statewide monthly food stamp issuance exceeds nine million dollars. The Department of Human Services has entered into contracts with two "host counties," Redwood and Crow Wing, which employ persons in these two classifications to carry out the functions of food stamp program review and corrective action in all 87 counties of the state. While these persons are employees of the two host counties for payroll purposes, they serve as field representatives for the Department of Human Services and receive program direction from the department. Each host county is responsible for carrying out the Food Stamp Quality Control program in approximately half of the state's counties with a combined staff in the two counties of 22 Corrective Action Specialists engaged in the program. These 22 employees actually live and work throughout the state, which is a unique situation from other Merit System employees who live and work within the county of employment or adjacent county.

They work with considerable independence out of their own homes in both metropolitan and non-metropolitan locations and with both large and small county social service agencies in urban as well as rural areas of the state. The Merit System has an obligation to provide compensation schedules for classes that allow agencies to attract well-qualified job applicants to fill their vacant positions. In the case of these two classes, it means providing compensation schedules for them that will enable the two host counties to recruit qualified applicants in both urban metropolitan areas and in rural Minnesota. Given the statewide nature of the department's Food Stamp Quality Control program which requires statewide individual work stations for these employees charged with the responsibility for carrying out the function, it is both necessary and reasonable to provide the two host county agencies with a single statewide salary range for these two classes. The proposed single range will better enable these agencies to attract quality applicants on a statewide basis for these positions and retain current employees already performing this important function, and avoid having employees vying for certain locations only because of higher pay.

Finally, it is anticipated that there will be no expert witnesses to be called to testify on behalf of the agency.

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



Ralph W. Corey

Merit System Supervisor

Dated: 5-1-87