STATE OF MINNESOTA
DEPARTMENT OF JOBS AND TRAINING

In the Matter of Proposed Rules Relating to Extended Employment Programs, Minnesota Rules, Parts 3300.1950 to 3300.3150

Statement of Need and Reasonableness

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Statement of Need and Reasonableness

INTRODUCTION

These proposed rules are amendments to Minnesota Rules, parts 3300.1950 to 3300.3150. They are presented by the Department of Jobs and Training in accordance with the Administrative Procedures Act, Minnesota Statutes, sections 14.01 to 14.69. The proposed rules have been developed as authorized by Minnesota Statutes, section 268A.03(m), which requires the commissioner of the Department of Jobs and Training to "adopt, amend, suspend, or repeal rules necessary to implement or make specific programs that the commissioner by sections 268A.01 to 268A.10 is empowered to administer," and by Minnesota Statutes 268A.09, subdivision 5, which requires the commissioner to promulgate rules for the operation of extended employment programs. The proposed amendments are intended as technical amendments to improve the administration of the Extended Employment Program.

The Department of Jobs and Training acknowledges that these proposed amendments to the rules do not address a number of significant programmatic issues of importance to persons with disabilities, advocates, rehabilitation facilities, and other organizations and individuals. The Department intends to address these concerns through an Extended Employment Program revision project, which will include the development of additional proposed amendments to the Extended Employment Program rules. Extended Employment Program stakeholders will be involved in this revision initiative and in the process of recommending further amendments to the rules.

The Extended Employment (EE) Program is administered by the Department of Jobs and Training, Division of Rehabilitation Services, as provided by Minnesota Statutes 268A.03(a), which grants to the commissioner the power to certify rehabilitation facilities to offer extended employment programs, grant funds to the extended employment programs, and evaluate those programs. The EE Program is funded by the State of Minnesota. In state fiscal year 1994, $10,329,000 was appropriated for the program. Extended employment programs operated by 31 rehabilitation facilities receive EE Program funding. In accordance with Minnesota Statutes 268A.01, subdivision 6, these rehabilitation facilities provide "remunerative employment to

those persons with a disability who, as a result of physical or mental disability, are unable to participate in competitive employment." Employment is provided by rehabilitation facilities "(1) as a step in the rehabilitation process for those who cannot be readily absorbed in the competitive labor market, or (2) during such time as employment opportunities for them in the competitive labor market do not exist."

Changes to Conform to Statutory Terminology. The term "community-based employment" has been changed to "supported employment" throughout the proposed rules; this change in terminology conforms to the terminology in Minnesota Statutes 268A. The statutory change from "community based employment" to "supported employment" was mandated by 1990 Minnesota Laws, chapter 363. Likewise, the term "participant" has been changed to "worker" throughout the proposed rules to conform to Minnesota Statutes 268A.; this change in terminology was mandated by 1989 Minnesota Laws, chapter 35.

Changes to Permit Flexibility in Administration. References to "state fiscal year" or the "period of July 1 to June 30" have been removed. Presently the agency is bound by rule to operate the system within the state fiscal year. This requires DRS to issue a contact in June and then amend that original contact in October to reflect the performance factors, full-time equivalents (FTEs) requested in rehabilitation facilities' applications, and reported previous year's production. This is unnecessarily costly and burdensome. The intent of the proposed changes is to enable the agency to study the feasibility of issuing contracts reflecting reported production, FTE requests and performance factors and not have to amend them later. The proposed deletion of the "state fiscal year" language is necessary and reasonable to permit a streamlined system of contract development, if one is determined to be appropriate. DRS is investigating how that process could work and under what time frames such a change would be reasonable, and will be discussing this possibility further with rehabilitation facilities, advocates and other interested parties.

Changes Based on Committee Recommendations. Several proposed changes are the result of year-long efforts by two committees which met between June, 1989 and June, 1990 at the request of the Division of Rehabilitation Services (DRS). The Management Information System Committee made suggestions on how the operation of the evaluation factors could be improved. This committee recommended eliminating certain categorical exclusions from these factors: "rate of placement in competitive employment," "rate of retention in competitive employment," and work and service in supported employment." The Disability Index Improvement Committee made suggestions concerning Functional Assessment Inventory (FAI) calculations and auditing procedures. This committee recommended that: (1) all the 30 ratings on the FAI instrument be given the same weight; (2) random sampling of FAI data be limited to new workers unless a significant deviation is discovered; and (3) reconciliation of reported and actual FAI data be in a three year cycle of data production, audit and allocation adjustment.

Other proposed modifications of the rules are the result of meetings of the Extended Employment Program Advisory Committee convened by DRS. This committee met in 1990 and 1991 after a Notice of Solicitation of Outside Information or Opinions was published in the May 28, 1990 State Register. Input on changes to the rules was also obtained at six public meetings held at locations throughout Minnesota in 1990.

Some proposed amendments are presented by the department to enhance or simplify program operations or to conform all parts of the rules to committee recommendations. In addition, other amendments are proposed so that the rules will conform to federal law or regulations or to state law.

A Notice of Solicitation of Outside Information or Opinions was published in the January 3, 1994 State Register to notify the public of the Department's intent to prepare non-controversial technical and administrative amendments to the Extended Employment Program rules, and to request information concerning the subject matter of the proposed rules. The notice indicated that the Department expected to propose to adopt the rules without a public hearing. The notice also indicated that the Department expected to complete the rulemaking process so that the proposed rules could become effective July 1, 1994.

DISCUSSION

3300.2050 DEFINITIONS

Subp. 3. Community-based employment program. It is necessary and reasonable to change the term "community-based employment program" to "supported employment program" to conform to usage in Minnesota Statutes 268A, as described in the "Changes to Conform to Statutory Terminology" section of the Introduction of this Statement of Need and Reasonableness. For information about the proposed definition of "supported employment," see the discussion of 3300.2050, subpart 31a.

Subp. 4. Competitive employment. In item D, it is necessary and reasonable to change "available on a permanent basis" to "available on an ongoing basis." The term "ongoing" better reflects the reality of competitive employment, where there may be the expectation that jobs will be "ongoing," that is, not temporary, but where it is unrealistic to assume that any job is "permanent."

Subp. 7. Disability index. Amendments to this definition are necessary so that the recommendations of the Disability Index Improvement Committee may be accommodated. The amendments are reasonable because the committee found that the weighting of Functional Assessment Inventory (FAI) ratings under the current rules does not significantly increase the predictive power of the FAI instrument in comparison to the total score from all the ratings. Therefore, the committee

recommended that this definition be simplified. DRS agrees with the recommendation and proposes the change to the definition. In addition, the reference to the published Functional Assessment Inventory has been updated to refer to the 1990 modified version published by DRS. It is reasonable to refer to the 1990 version, which is the one used by rehabilitation facility staff in assessing the impact of disability on extended employment program workers.

Subp. 11. Extended employment program. The proposed rules delete items B and C, referring to "work component program" and "work activity program." The discussions of the definitions of "work component program" and "work activity program" in this Statement of Need and Reasonableness explain the reason for this change. Language indicating that extended employment programs are "reasonably expected to allow workers to develop their vocational potential" is added; this language is consistent with the mission of rehabilitation facilities and their employment programs. It also reflect the mission of the Division of Rehabilitation Services.

The proposed amendments also specify the rate of pay provided by extended employment programs. It is necessary to specify pay rates in order to inform rehabilitation facilities and the public of the requirement to pay state or federal minimum wage, whichever is applicable, or to pay a lesser rate in accordance with a subminimum wage certificate issued by the federal Department of Labor. These requirements are reasonable; they are consistent with state and federal law and with current practice, and do not impose new requirements on rehabilitation facilities.

Subp. 13. Full-time equivalent (FTE). It is necessary and reasonable to remove the references to a work activity program or work component program, as explained in the discussion of the definitions of those terms in this Statement of Need and Reasonableness. Given the elimination of references to work activity and work component, in item A it is not necessary to specify that the 1,560 hours per year applies to the long-term employment or supported employment programs, because they are the only programs that will be operated by rehabilitation facilities under these rules after July 1, 1994.

Subp. 14. Fundamental personnel benefits. The amendments to this definition are necessary and reasonable to correct a logical inconsistency in the present rules, as recommended by the Extended Employment Program Advisory Committee. These amendments reflect the reality that some personnel benefits cannot be offered to long-term employment program workers on a proportional basis but must be offered on an equal basis as those provided to rehabilitation facility staff. For example, time off to vote is a statutory right that must be given to all employees equally and the allotted time cannot be subdivided on the basis of the number of hours worked. Under the proposed rules the benefits that must be provided on an equal basis as those provided to facility staff are: military leave, jury duty, overtime

pay, voting time, and workers' compensation. It is reasonable and necessary to include the language "under applicable laws and personnel policies" to indicate the standard that will be applied in order to determine whether these benefits are being provided on an equal basis to workers and to rehabilitation facility staff. During the development of the proposed rules, the alternative of using the language "under applicable laws, collective bargaining agreements, and personnel policies" was considered. It was pointed out that the reference to "collective bargaining agreements" could be seen as an inappropriate attempt to extend benefits developed through collective bargaining with rehabilitation facility staff to extended employment program workers who are not represented by the staff members' bargaining units. Therefore, it was determined that the reference to "collective bargaining agreements" should be dropped from the proposed rules.

During the process of developing the proposed rules, alternatives were considered regarding "social security" in this subpart. Some organizations and individuals indicated that it might be logical to move the reference to "social security" in this subpart to the list of benefits that are provided on the same basis as benefits provided to rehabilitation facility staff. Other organizations and individuals indicated that it might be appropriate to delete "social security" from this subpart. DRS has determined that the question of any changes to the reference to "social security" in this subpart would be controversial and beyond the scope of the proposed rules, which deal with technical changes and changes to improve administration of the Extended Employment Program. Therefore, DRS is proposing to leave the reference unchanged in these proposed rules. The issue of "social security" as a fundamental personnel benefit will be dealt with in the Extended Employment Program revision project.

DRS is also proposing to delete "maternity leave" from the definition of fundamental personnel benefits. Instead, new language is proposed, under which rehabilitation facilities are to provide long-term employment program workers with leave as required by the federal Family and Medical Leave Act of 1993 and by Minnesota Statutes 181.940 to 181.943. This change is necessary and reasonable in order to conform to federal and state law. When the current rules were developed, "maternity leave" was a customary personnel benefit. However, federal and state law now provide for a greater variety of leave for parenting and other care of family members. The proposed rules are reasonable in that they state benefits that rehabilitation facilities are required to provide under the law. DRS believes that this change is appropriate and consistent with the intent of Minnesota Statutes, section 268A.07, subdivision 1:

> "A rehabilitation facility must, as a condition for receiving program certification, provide employees in a long-term employment program the personnel benefits prescribed in rules adopted by the commissioner of the department of jobs and training."

DRS believes that is it not necessary or reasonable for DRS to establish more detailed rules for the federal- or state-required leave. Other federal or state agencies have that rulemaking responsibility and authority.

Except for the increased scope of family or parenting leave under federal and state law, as opposed to the previous concept of "maternity leave," no benefits are added or deleted. The benefits are those described in DRS's 1985 report to the legislature on the implementation of the Legislature's 1983 appropriations bill rider, which first established the requirement for the provision of fundamental personnel benefits..

Subp. 16. Long-term employment program. It is necessary and reasonable to remove the reference to work activity from this definition, as explained in the discussion of the definition of "work activity" in this Statement of Need and Reasonableness.

Subp. 19. Nonemployment income. The deletion of this definition is necessary and reasonable because "nonemployment income" is being deleted as a separate weighted item in the disability index; and the definition is therefore not needed. "Nonemployment income" data was not used in any other reference in the rule other than in calculating the disability index See the discussion of "nonemployment income" 3300.5020, subpart 7, in this Statement of Need and Reasonableness.

Subp. 22. Participant, and **Subp. 22a. Participant productivity.** These definitions have been changed to "worker" and "worker productivity," respectively, to conform to statutory terminology, and therefore are renumbered as subparts 35 and 36 to conform to the alphabetical ordering of definitions.

Subp. 25. Rate of placement in competitive employment. The amendments to this definition are necessary and reasonable. They are based on the Management Information System Committee's recommendation to eliminate categorical exclusions ("participants not counted") based on age and physically degenerative disease from the calculation of this rate. The committee concluded that such categorical exclusions may have an unintended discriminatory effect and therefore should be eliminated as is proposed in part 3300.2450., subpart 1.

Subp. 26. Rate of retention in competitive employment. The reference to "participants not counted" (the exclusions on the basis of age or degenerative physical condition) is also deleted from this definition. The length of the retention period remains one year.

During the process of developing the proposed amendments to these rules, the Management Information System Committee recommended additional changes in the definition and the operational standards for calculating rate of retention in competitive

employment. After carefully considering the committee's recommendations and other alternatives, DRS has determined that it is not appropriate to make changes to this definition at this time.

Several alternatives were considered; these included reducing the period during which the worker "continued in competitive employment" to 90 days or 180 days. These alternatives were presented because many rehabilitation facilities have experienced difficulty in following up on former extended employment program workers' competitive employment for a full year. There have been instances where it has been difficult to locate individuals and to confirm employment, especially if the former extended employment program worker had changed employers. Another alternative considered was to eliminate rate of retention in competitive employment as an evaluation factor altogether.

DRS determined that it was inappropriate at this time either to significantly reduce the length of the retention period or to eliminate this factor completely. DRS believes the focus of competitive employment placement efforts should include integration of the worker into the competitive labor force for a significant period. DRS determined that it is necessary and reasonable to evaluate extended employment programs on their effectiveness in doing so. DRS acknowledges the concerns about the data collection and reporting requirements placed upon rehabilitation facilities, and the amount of rehabilitation facility staff time needed for follow-up on the employment status of persons who have been workers in extended employment programs. However, DRS believes that further examination of the issues and proposals for dealing with the issues is warranted, and that it is not appropriate to change the one-year period at this time

Subp. 27. Rate of transfer to long-term employment. It is necessary and reasonable to delete this definition. This factor was used in evaluating and calculating funding allocations for work activity and work component programs; it did no apply to the evaluation or funding of other programs. See the discussion of the definitions of "work activity program" and "work component program" for explanation of the deletion of references to those programs from the proposed rules.

Subp. 28. Rate of work and service in supported employment. The reference to "participants not counted" (the exclusions on the basis of age or degenerative physical condition) is also deleted from this definition. The changes to this definition are necessary and reasonable to conform the definition to the proposed changes in part 3300.2450, subpart 1.

Subp. 28a. Reconciliation period. DRS proposes this new definition, which is necessary in order to clarify in the rules the current practice regarding audits and adjustments, if any, due to reconciliation. A three-year cycle is necessary and reasonable to allow adequate time to audit rehabilitation facility extended

employment data and to make adjustments to allocations based on the comparison of audited data with reported data. This definition is added to clarify the cycle of 1) initial funding allocation, production of hours of work and service hours, and data reporting; 2) audit; and 3) adjustments, if any, to allocations based on reconciliation of reported and audited information. The current rule implies that the audit and reconciliation will be conducted and complete in the contract period. This revision is reasonable because it presents a clearer and more realistic time frame for completing the audit and reconciliation process, consistent with current operations.

Subp. 31a. Supported employment program. The proposed change in terminology from "community-based employment" to "supported employment" to the definition of "supported employment" is necessary and reasonable in order to conform the definition to the 1990 amendments to Minnesota Statutes, section 268A, subdivisions 11 and 13. The amendments to the statutes changed the term "community-based employment" and "community-based employment program" to "supported employment" and "supported employment program. "

Item B of the proposed definition is necessary and reasonable in order to assure that the rules specifically indicate that the opportunity for social interaction with people who do not have disabilities is an essential component of supported employment. The proposed language is based on Minnesota Statutes 268A.01, subdivision 13(3).

Item C of the proposed definition contains references to definitions in the federal regulations for supported employment services and the supported employment program funded under the Rehabilitation Act of 1973, as amended. It is necessary and reasonable to refer to these regulatory provisions. This addition to the rule reflects current practice. Contracts between DRS and the rehabilitation facilities that operate supported employment programs have contained references to these requirements in the federal supported employment regulations, beginning with the contracts for state fiscal year 1993.

Subp. 33. Work activity program. The proposed rules delete the definition of "work activity program" and all references to "work activity program" elsewhere in the rules. This change is necessary because Minnesota rehabilitation facilities have agreed to cease operation of separate work activity programs effective July 1, 1994. The end of "work activity" as a separate program will not reduce employment opportunities for persons with severe disabilities, however. It is expected that persons with disabilities currently working in work activity programs will be provided work opportunities in long-term employment or supported employment, or training opportunities in Day Training and Habilitation programs. Consequently the rules do not need to define or provide for the funding of work activity programs. The end of EE-funded work activity programs in Minnesota is the culmination of several years of changes regarding these programs on federal, state and local levels. The federal Fair Labor Standards Act no longer makes a distinction between work activity

programs and long-term employment programs. On the state and local level, increased opportunities for placement in supported employment and long-term employment have reduced the need for separate work activity programs, which have been viewed as offering fewer opportunities for integration.

Subp. 34. Work component program. The proposed rules delete the definition of "work component program," and all other references to that program and its funding. This change is necessary and reasonable to update the rules. Work component programs were last funded under the EE Program rules in state fiscal year 1990.

Subp. 35. Worker. The addition of this term in place of the term "participant" is necessary and reasonable in order to conform to the change in terminology because of 1989 statutory amendments that substituted "participant" for "worker" in Minnesota Statues 268A. It is reasonable for rule terminology to conform to statutory language in order to reduce the chance for confusion that can result from using two different terms with the same meaning.

3300.2150 CERTIFICATION REQUIREMENTS AND TYPES OF CERTIFICATES

Subp. 2. Full certificate. The new item E is necessary and reasonable to inform rehabilitation facilities of their statutory-required duties under the Americans with Disabilities Act. In item F, the references to the Employee Right to Know Act and the Minnesota State Building Code are corrected (by the Revisor of Statutes) to reflect new numbering that has occurred since these rules were originally adopted. Therefore, the changes in item F are reasonable because they update external references. The new item J under this subpart is necessary in order to inform rehabilitation facilities of their statutory duty under the Minnesota Human Rights Act to draft and complete an affirmative action plan. Also, the new item J reasonably requires all rehabilitation facilities to comply with the affirmative action plan requirements of the Human Rights Act even though their size may exempt them statutorily from compliance. This provision was recommended by the Extended Employment Program Advisory Committee. It is reasonable to require that all rehabilitation facilities should meet the same affirmative action requirements; by the nature of their mission, rehabilitation facilities should not appear to be avoiding complete compliance.

The new item L in this subpart is necessary and reasonable in order to inform rehabilitation facilities of their statutory duty under the federal Family and Medical Leave Act of 1993, and under Minnesota Statutes sections 181.940 to 181.943.

New items M, N, O and P in this subpart are added to inform rehabilitation facilities and the public of the following legal requirements:

M. state law on time off to vote

N. state and federal laws on jury duty leave

O. state and federal overtime pay laws, and

P. state and federal laws on military leave and reinstatement.

Rehabilitation facilities are required to follow these laws. They are referenced in the rule to clearly indicate facilities need to comply with all applicable state and federal laws.

Subp. 4. Probationary certification status. These modifications are necessary in order to clarify that noncompliance with nonquantifiable factors is a new ground for certificate probation. It is reasonable to add noncompliance with nonquantifiable factors because, in the existing rules, noncompliance with the nonquantifiable factors results in withdrawal of funding. (This provision has been referred to as the so-called "death penalty"). Under the proposed change, instead of an immediate withdrawal of funds by DRS, an approved written plan to bring the rehabilitation facility into compliance with the nonquantifiable factors within a reasonable time must be developed by the rehabilitation facility.

Subp. 5. Extension of certificate. This new subpart is needed in order to allow administrative flexibility in extending a program's certificate. It is reasonable to permit a program an extension under limited circumstances. For example, a natural disaster which prevents a program from continuing to operate should be accommodated in these rules. However, without the addition of this subpart DRS staff would have no opportunity to take such circumstances into account.

3300.2250 CERTIFICATION PROCEDURE

Subp. 5. Time limitation. This change is necessary and reasonable so that this subpart may accommodate the new extension of certificates. It is reasonable to limit the length of time extensions can be effective.

3300.2350 STANDARDS FOR STATE FUNDING

Subpart 1. Evaluation factors in general. The proposed changes are necessary and reasonable in order to add internal references for easier access to the definitions of terms. Also, the list of factors has been rearranged so that quantifiable factors are grouped together (proposed items A to G) and nonquantifiable factors are grouped together (proposed items H to K). The "rate of transfer to long-term employment" (previously item L) applied only to the work activity and work component programs and is therefore deleted. (See the discussion of the definitions

of "work component program" and "work activity program" for the need and reasonableness of this proposed deletion.) All other evaluation factors are retained.

Subp. 2. Nonquantifiable evaluation factors. It is reasonable and necessary to revise the reference to the nonquantifiable evaluation factors listed in 3300.2350, subpart 1, to conform to the reordering of the list in that subpart.

The proposed rules delete reference to the withdrawal of all allocated funds as a consequence of noncompliance with the nonquantifiable factors. This proposed amendment is necessary because the present rules regarding nonquantifiable factors are unduly harsh and cause substantial administrative problems. Nonquantifiable factors are very definite and compliance with them is either a "yes" or a "no." Therefore, the consequences of noncompliance under the current rules, i.e. total withdrawal of funds, can be severe. Total withdrawal of funds would result in the elimination or significant downsizing of a program operated by a rehabilitation facility, and would reduce employment opportunities for people with severe disabilities in the area served by that facility. This amendment seeks to give rehabilitation facilities an increased opportunity to correct defects before such severe sanctions are applied. The procedure to be followed in cases of noncompliance is now placement on probationary certification status instead of immediate withdrawal of funds. DRS is proposing a related amendment to 3300.2650, subpart 1, item C, to eliminate withdrawal of funds due to noncompliance with nonquantifiable evaluation factors. Furthermore, this amendment clarifies that an "audit" of nonquantifiable factors is not appropriate because these factors do not concern "auditable" numbers.

Subp. 3. Quantifiable evaluation factors. The proposed amendments in this subpart are technical changes. These changes are necessary and reasonable to revise the references to the evaluation factors listed in 3300.2350 subpart 1 to conform to the new ordering of that list. It is no longer necessary to distinguish between the quantifiable evaluation factors that apply to the supported employment and long-term employment programs, and the ones that apply to the work activity and work component programs, because the work activity and work component programs have been eliminated.

Subp. 4. Minimum standard for quantifiable evaluation factors. It is reasonable and necessary to delete this subpart. No extended employment programs have failed to meet the minimum standard for quantifiable evaluation factors during the time since the current EE Program rules were implemented. However, it is clear that the provision in this subpart is inappropriate. Some quantifiable evaluation factors -- most notably, "economic conditions" -- are entirely beyond the control of the rehabilitation facility. Other quantifiable evaluation factors -- for example, rate of placement in competitive employment, rate of work and service in supported employment, and rate of retention in competitive employment -- can measure rehabilitation facility performance in assisting people with severe

disabilities to achieve supported or competitive employment outcomes; however, those outcomes are also heavily dependent on local or regional economic conditions over which the rehabilitation facility has no control. The current rules' requirement to meet the "minimum standard," and the related provisions in 3300.2350, subparts 5 and 6 for funding probation (and withdrawal of funds after three continuous years of failure to meet the minimum standard), apply a sanction that is unreasonably severe, given that the quantifiable evaluation factors measure, in large part, the effects of conditions beyond the rehabilitation facilities' control.

Subp. 5. Audit and allocation adjustments. The proposed changes in this subpart are necessary and reasonable to improve the description of audit procedures in the rules. The current rule requirements are overly constraining in their time frames. The proposed changes for FAI reflect the process the agency has used in auditing FAI data in 1992. The proposed language also reflects changes regarding the withdrawal of funds for noncompliance with the nonquantifiable factors.

In the first sentence, "Before the end of each state fiscal year" is deleted. This change is reasonable and necessary. The phrase "before the end of each state fiscal year" could be taken to imply that audits would occur in the same year that hours of work and service, and other performance data, were produced. However, experience has shown that such a timeframe is not possible, because the reporting of production and performance data is not completed until the first quarter of the subsequent year. This change is consistent with the proposed new definition of "reconciliation period," 3300.2050, subpart 28a . The proposed changes also clarify that "The audit of data from quantifiable factors will be conducted each fiscal year and will cover the previous 12-month period." This language is reasonable because it is consistent with current practice. It also allows for the possibility of revising the "fiscal year" covered by the contracts between DRS and rehabilitation facilities to a 12 month period that does not necessarily coincide with the state fiscal year. The current requirement for contract years to coincide with the state fiscal year results in a time-consuming process of preliminary contracts and contract amendments. DRS and rehabilitation facilities may wish to pursue the development of a contract period that would eliminate the need for yearly contract amendments; the proposed language would allow such a system.

A reference to "generally accepted auditing standards" has been added to indicate the professional standards DRS uses in conducting the audit.

Items A and B are revised to clarify the scope of the audit. In item A, the "auditable" quantifiable factors described as "listed in subpart 1, items A to D" are:

* disability adjusted average hourly earnings paid to workers;

* rate of placement in competitive employment;

* rate of work and service in supported employment; and

* rate of retention in competitive employment.

The other quantifiable evaluation factors (program efficiency, disability levels, and economic conditions) are calculated from other data, and therefore are not audited separately.

It is proposed to delete "nonemployment income," for reasons described above in the discussion of the definition of "disability index, " 3300.2050, subpart 7.

References to noncompliance with the nonquantifiable evaluation factors, and references to the minimum standards, are being deleted from this subpart, for consistency with the proposed changes discussed in this Statement of Need and Reasonableness under 3300.2150, subpart 4, "probationary certification status," and 3300.2350, subpart 4, "Minimum standard for quantifiable evaluation factors."

In this subpart it is proposed to add language describing the nature of the audit of FAI data. The proposed language clarifies that the FAI audit will be limited to a random sampling of scores of workers who have entered the program since the programs's last FAI audit. An audit of a sample of FAI data on newly entered workers will be conducted only if a pattern of significant deviation from statewide averages (10 percent or more plus or minus) is found. This FAI audit change was recommended by the Disability Index Improvement Committee.

Subp. 6 New program evaluation. The proposed amendments to this subpart are necessary and reasonable in order to delete references to withdrawing funds for noncompliance with the nonquantifiable factors, for conformity with the changes in 3300.2150, subpart 4. The necessity and reasonableness of those changes was discussed previously in this Statement of Need and Reasonableness. New language in this subpart clarifies the development of a written plan for the new program's compliance with the nonquantifiable factors,. For new programs, the time frame for coming into compliance may not exceed "the 18-month period authorized by the provisional certificate." It is reasonable to allow the written plan to set a timeframe for coming into compliance, since different situations may take differing amounts of time to resolve. It is also reasonable to establish the 18-month period as an outside limit to the amount of time allowed for coming into compliance; in this regard the rules establish a standard and inform the public and rehabilitation facilities that noncompliance must be remedied in no more than 18 months. Denial of full certification and withdrawal of funds from the new program are the consequences of failure to comply with the nonquantifiable factors in the time specified in the written plan. A provisional certificate may be extended for the same reasons a probationary certificate may be extended. Those reasons are: when, through no fault of its own , a rehabilitation facility no longer meets the requirements for composition of its

governing body, accreditation by a national accrediting body, or a risk protection program. In addition, an extension is allowed when rehabilitation facility program operations are adversely affected or halted by a natural disaster or a material change in circumstance, or when the national accrediting body cannot schedule a timely accreditation review.

3300.2450 OPERATIONAL POLICIES FOR FUNDING STANDARDS

Subpart 1. Exclusions in calculating rates of placement in competitive employment, retention in competitive employment, and work and service in community based employment. The Management Information System Committee recommended this proposed change, which deletes the exclusions from calculations of rates of placement in competitive employment, retention in competitive employment, and work and service in community based employment. The committee determined, and DRS agrees, that the exclusions could be perceived as having a discriminatory effect and should be eliminated. These changes are necessary and reasonable in order to avoid even the appearance of noncompliance with state and federal statutory provisions prohibiting employment discrimination on the basis of age or disability, including Minnesota Statutes, section 363.03, subdivision 1, and the federal Americans with Disabilities Act. In addition, several rehabilitation facilities found it nearly impossible to obtain evaluations from independent professionals that would indicate that placement in competitive or community-based (i.e., supported) employment was "clearly improbable and undesirable." As a result, there was an uneven pattern of "exclusions," creating unintended effects on calculating rates under this subpart, and consequently having unintended effects on EE program allocations to rehabilitation facilities.

3300.2550 ALLOCATION OF FUNDS

Subp. 4. Total individual program allocation. This proposed change is necessary in order to specify a twelve-month time period in which performance for each program is evaluated. It is reasonable to use a twelve-month period as the time frame for measuring performance. At present, EE Program allocations to rehabilitation facilities for the extended employment programs are made via contracts for a state fiscal year. However, as discussed in the "Changes to Permit Flexibility in Administration" section of this Statement of Need and Reasonableness, DRS is proposing to delete references to "state fiscal year" or "year" from the rules in order to permit the exploration of a more streamlined system of developing contracts.

Subp. 5. Phase-in period and adjustment. It is reasonable and necessary to delete this subpart, which is no longer needed. The phase-in provisions ceased to apply after the allocations for state fiscal year 1989.

Subp. 6. New or expanded program funding. The proposed change is

necessary and reasonable in order to clarify that the commissioner will "consider" a new or expanded program for funding. The language in the existing rules could imply that a new or expanded program would be "accepted" for funding. Operationally, in a program with a finite state allocation, it is not always possible to "accept" every new or expanded program that applies, even when the new or expanded program might be needed. This change in language reflects the manner in which the DRS has handled applications for funding new or expanded programs.

Subp. 7. Reconciliation.
The proposed changes in this subpart are necessary and reasonable for consistency with changes made in other portions of the rules. The changes clarify that allocations are based on the "contracted" number of FTEs and on "reported' data. "Contracted" refers to the number of FTEs specified in the contractual agreement between DRS and a rehabilitation facility for each extended employment program the rehabilitation facility operates. "Nonemployment income data" is deleted, because of the proposal to delete it as a factor in the disability index. The statement regarding the timing of "adjustments" resulting from reconciliation is being deleted for consistency with the new definition of "reconciliation period," 3300.2050, subpart 28a, which reflects current practice.

3300.2650 WITHDRAWAL OF ALLOCATED FUNDS

Subpart 1. Criteria for withdrawal of allocated state funds.
DRS is proposing to delete two items in subpart 1. The first is the provision in former item C for the withdrawal of funds due to noncompliance with the nonquantifiable evaluation factors. The reason for this proposed deletion is discussed in this Statement of Need and Reasonableness under 3300.2350, subpart 2.

The second provision DRS proposes to delete, formerly item D, regards withdrawal of funds for failure to meet the minimum standard for quantifiable evaluation factors. The reason for this proposed deletion is discussed in this Statement of Need and Reasonableness under 3300.2350, subpart 4.

3300.3050 APPEAL PROCEDURE

DRS is proposing changes to this part in order to clarify the appeals procedure. In addition, DRS is proposing to change the terms "aggrieved party" and "appellant" to the simpler term "rehabilitation facility" throughout this part. It is reasonable and in keeping with state standards for rule writing to use the simpler term.

Subpart 1. Scope. DRS proposes technical amendments to this subpart to clarify the DRS actions which can be appealed. These proposed amendments are reasonable and necessary to clarify the cross-references to other parts and subparts of the rules. DRS is proposing no changes in what is appealable. The

change is only intended to clarify what can be appealed. DRS acknowledges that this proposed amendment is somewhat repetitive; however, the increase in clarity outweighs the need for brevity.

Subp. 2. Notice of intent to appeal. DRS proposes an amendment to this subpart to clarify when a written notice of intent to appeal must be sent to DRS. This change is proposed to clarify that the written notice of intent to appeal applies to a rehabilitation facility's appeal of any "appealable" action. This change is necessary and reasonable. The current rules do not clearly specify that a notice of intent to appeal must be sent to DRS when a rehabilitation facility is appealing either a denial of initial funding to a new or expanded program or adjustments to an allocation resulting from reconciliation. The proposed change is necessary and reasonable in order to assure that the same rights, responsibilities, timeframes, and processes apply to all instances of appeals under the rules. The proposed rules also change the starting point of the 30-day period for a rehabilitation facility to submit a written notice of intent to appeal. Under the proposed rules, the 30-day period begins when the rehabilitation facility receives written notice from DRS of the action the rehabilitation facility wishes to appeal. This change is necessary and reasonable to assure that the full 30-day period is available to a rehabilitation facility. Under the current rules, it is possible that a few days in the 30-day period might be "lost" due to delays in the mail.

Subp. 4. Contested case appeal. The proposed change specifies that timeframe for a rehabilitation facility to submit a written request for a contested case hearing (that is, a hearing before an administrative law judge). This change is necessary and reasonable in order to provide for timely resolution of appeals. The 15-day period is reasonable because it provides adequate time for a rehabilitation facility to consider the decision made by the commissioner's representative under subpart 3 and decide whether the rehabilitation facility wishes to request a contested case hearing. The 15-day period is consistent with the timeframe in which the commissioner's representative must make a decision under subpart 3. The proposed rules provide that the15-day period begins when the rehabilitation facility receives written notice of the decision of the commissioner's representative; this is consistent with the start of the 30-day period in proposed subpart 2.

A second proposed change adds a new requirement that DRS must initiate the request to the Office of Administrative Hearings for a contested case hearing within 15 days of receiving the request for a contested case hearing. DRS believes this is a reasonable timeframe which can assist in timely resolution of appeals. It is consistent with the timeframe proposed for a rehabilitation facility to ask DRS for a contested case hearing. The actual date of the hearing will be scheduled by the Office of Administrative Hearings.

SMALL BUSINESS CONSIDERATIONS IN RULEMAKING

When proposing rules, an agency must consider methods for reducing the impact of the proposed rules on small businesses potentially affected. The rehabilitation facilities certified to receive funding for extended employment programs may not, in the strictest reading of state law, be "small businesses" as defined in Minnesota Statutes, section 645.445. (That definition, in Minnesota Statutes 645.445, subdivision 2, provides that a "small business" "means a business entity organized for profit . . . ." All rehabilitation facilities certified and receiving funds under the EE Program are public or private nonprofit entities.) Nevertheless, the department has determined that it is reasonable and appropriate to consider the impact of the proposed rules on rehabilitation facilities as if they were small businesses because in many respects they function within their communities as small businesses, providing employment and goods or services. The department has considered each of the five methods listed in Minnesota Statutes 14.115, subdivision 2, clauses (a) through (e).

The first method at clause (a) refers to establishing less stringent compliance or reporting requirements for small businesses. The compliance requirements as regards rehabilitation facilities are unavoidable given the statutory objectives of evaluating the effectiveness of extended employment programs. Furthermore, the proposed rules must necessarily impose reporting requirements on rehabilitation facilities in order to review their budgets and expenditures and monitor their approved plans. The proposed amendments will, in general, retain the same compliance and reporting requirements except in the area of implementation of an affirmative action plan.

The second method is contained in clause (b). The department is required to assess the possibility of establishing less stringent schedules or deadlines for compliance or reporting requirements for small businesses. The proposed amendments will, in general, retain the same deadlines as in the present rules.

The third method at clause (c) requires the consideration of a consolidation or simplification of compliance or reporting requirements for small businesses. These rule amendments have greatly simplified compliance requirements for all rehabilitation facilities.

The fourth method at clause (d) is the establishment of performance standards for small businesses to replace design or operational standards. Since there are no design or operational standards contemplated by these rule amendments, this method does not apply.

The fifth method at clause (e) requires the department to consider exempting small businesses from any or all requirements of these proposed rule amendments. DRS does not believe that it can exempt rehabilitation facilities from the proposed

requirements, because Minnesota Statutes 268A.09 requires DRS to promulgate rules on the certification, evaluation, and funding of rehabilitation facilities.

FISCAL IMPACT ON LOCAL PUBLIC BODIES

Under the EE Program rules, 3300.2050, subpart 28b, local public bodies -- cities, towns or counties -- may operate rehabilitation facilities. One rehabilitation facility is currently operated by a county. Minnesota Statutes, 14.11, subdivision 1, requires agencies to consider the effect of implementing proposed rules on local public bodies if the estimated total cost to public bodies of implementing the rules exceeds $100,000 per year in either of the first two years of implementation. The Department has determined that Minnesota Statutes, 14.11, subdivision 1, does not apply because adoption of these amended rules will not result in additional spending by local public bodies in excess of $100,.000 per year for the first two years following adoption of the rules.

CONCLUSION

Based on the foregoing, the Department's proposed amendments to the rules are both necessary and reasonable. The Department of Jobs and Training recommends the adoption of these proposed rules.

_____ _____

Date

R. Jane Brown
Commissioner
Department of Jobs and Training

MINNESOTA DEPARTMENT OF
Jobs and Training

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March 29, 1994

Maryanne Hruby
Executive Director
Legislative Commission
to Review Agency Rules
55 State Office Building
100 Constitution Avenue
St. Paul, MN 55155

Dear Ms. Hruby:

I have enclosed a copy of the Statement of Need and Reasonableness for the department's proposed rules for the Extended Employment Program as required by Minnesota Statutes § 14.23.

For your information, this SONAR was mailed to the persons on the department's mail list on February 23, 1994. The Notice of Intent to Adopt Rules Without a Hearing was published in the March 28th State Register (18 S.R. 2108).

The fact that the SONAR was not mailed to you when it became available to the public just became known to me. If you have any questions please call me at 296-3574.

Sincerely,

Michael J. Fratto
Rules Coordinator