

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

DEPARTMENT OF PERSONNEL

A Code of Ethics for all Executive Branch State Employees

These rules are printed here in their adopted form without indication of changes from their proposed form. Readers are directed to consult 1 S.R. 92 for the proposed form of the rules.

Rules as Adopted

Chapter nineteen: Code of Ethics

Persl. 275 Policy

A. The observance of high ethical standards by State employees is essential to the conduct of free government. The employee holds his or her position as a public trust and any effort to realize personal gain through official conduct is a violation of that trust.

B. It is recognized that employees should have equal opportunity with all citizens to develop private, economic and social interests and that it is therefore necessary to distinguish between those minor and inconsequential conflicts which are unavoidable in a free society and those conflicts which are substantial and material and conflict with the employee's responsibility to the public.

C. It is further recognized that employees are granted certain rights to organize and participate in labor or employee organizations under Minn. Stat. §§ 179.61-179.77. These rules shall not be interpreted to apply to any activity which is protected by §§ 179.61-179.77 or agreements and practices thereunder nor to prevent a current or former employee from accepting employment with a labor or employee organization representing employees.

D. The standards of conduct for employees in the performance of their official duties set forth in this chapter are intended to identify potential conflicts of interest, eliminate actual conflicts of interest, improve standards of public service and promote and strengthen the faith and confidence of the people of the State in their government. It is further intended that these standards shall serve both as a guide for official conduct and as a basis for disciplinary action.

Persl. 276 Definitions

A. "Agency" means a department, commission, board, institution or other entity in the executive branch in which all positions are under the same appointing authority.

B. "Appointing Authority" means a person or group of persons empowered by the constitution, by statute or by lawfully delegated authority to make appointments to positions in state service.

C. "Business" means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual or any other legal entity which engages either in non-profit or profit-making activities.

D. "Confidential information" means any information obtained under government authority which has not become part of the body of public information and which, if released prematurely or in non-summary form, would provide unfair ecomonic advantage or adversely affect the competitive position of an individual or a business.

E. "Employee" means any classified or unclassified employee of the executive branch. Where specific provisions of Minn. Stat. Ch. 10A apply to employees and would conflict with any of these rules, the provisions of Minn. Stat. Ch. 10A will apply to that specific instance.

F. "Private interest" means any interest, including but not limited to a financial interest, which pertains to a person or business whereby such person or business would gain a benefit, privilege, exemption or advantage from the action of a state agency or employee that is not available to the general public.

Persl. 277 Acceptance of Gifts or Favors

An employee shall not directly or indirectly receive or agree to receive any payment of expense, compensation, gift, reward, gratuity, favor, service or promise of future employment or other future benefit from any source except the State for any matter or proceeding connected with or related to the duties of the employee unless otherwise provided by law. However, the acceptance of any of the following shall not be a violation of this rule;

1. Advertising gifts of nominal value having wide distribution.

2. Plaques or similar mementoes recognizing individual service in a field of specialty or to a charitable cause.

3. Payment or reimbursement of expenses for travel or meals, not to exceed actual expenses incurred, which are not reimbursed by the State and which have been approved in advance by the appointing authority as part of a work assignment.

4. Honoraria or expenses paid for papers, talks, demonstrations or appearances made by employees on their own time for which they are not compensated by the State.

Persl. 278 Use of Confidential Information

An employee shall not disclose confidential information, shall not use confidential information to further the employee's private interest, and shall not accept outside employment or involvement in a business or activity that will require him or her to disclose confidential informations.

Persl. 279 Use of State Property

An employee shall not use or allow the use of State time and supplies and state owned or leased property and equipment for his or her private interests or any other use not in the interest of the State, except as provided by law.

Persl. 280 Conflicts of Interest

A. An employee shall not use or attempt to use his or her position to secure benefits, privileges, exemptions or advantages for the employee or others different from those available to the general public.

B. An employee shall not accept other employment which will impair his or her independence of judgment in the exercise of the employee's official duties.

C. An employee shall not act as agent or attorney in any action or matter pending before the agency by which he or she is employed except in the proper discharge of official duties or on the employee's own behalf.

D. When an employee believes the potential for a conflict of interest exists, it is his or her duty to take action to avoid the situation. The employee should:

1. Cease the performance of duties that could create a conflict of interest and notify the appointing authority within one working day of such cessation.

2. Prepare a written statement describing the matter requiring action or decision and the nature of the possible conflict of interest.

3. Take either of the following courses of actions:

a. Deliver the statement to his or her appointing authority and request a clarification of the possibility of a conflict of interest. The appointing authority may request an advisory opinion from the Commissioner of Personnel or legal counsel. A copy of any advisory opinion issued by appointing authority shall be sent to the Commissioner of Personnel.

b. Request an advisory opinion directly from the Commissioner of Personnel by delivering the statement to the Commissioner. The Commissioner shall issue an advisory opinion within seven days and provide a copy to the employee and appointing authority.

4. If the employee, appointing authority or Commissioner determine that a conflict of interest exists, the employee shall, if possible, be relieved of the assignment, and the appointing authority shall assign the matter to another qualified employee who does not have a conflict of interest. If it is not possible to assign the matter to an employee who does not have a conflict of interest, interested persons shall be notified of the conflict and the employee may proceed with the assignment.

5. In determining whether a conflict of interest exists, the employee, appointing authority or Commissioner shall consider whether the situation involves:

a. The use for private gain or advantage of State time, facilities, equipment or supplies or the badge, uniform, prestige or influence of State office or employment;

b. Receipt or acceptance by the employee of any money or other thing of value from anyone other than the State for the performance of an act which the employee would be required or expected to perform in the regular course or hours of State employment or as part of his or her duties as an employee;

c. Employment by a business which is subject to the direct or indirect control, inspection, review, audit or enforcement by the employee;

d. The performance of an act in other than his or her capacity as an employee which may later be subject directly or indirectly to the control, inspection, review, audit or enforcement by the employee.

Persl. 281 Disciplinary Action

The rules of conduct set forth in this chapter shall be deemed conditions of employment in the State service. Violation of these rules of conduct shall constitute just cause for disciplinary action.

Persl. 282 Copy to Employees

Each appointing authority shall provide a copy of this chapter and any subsequent amendments to all current employees and to new employees at the time of appointment.

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS
ROOM 300 — 1745 UNIVERSITY AVENUE
ST. PAUL, MINNESOTA 55104
(612) 296-6910

February 22, 1978

Mr. Michael B. Miller
Special Assistant Attorney General
G-25 Administration Building
St. Paul, Minnesota 55155

Re: Adoption of Department of Personnel Code of Ethics

Dear Mike:

I noted in the State Register that the Department of Personnel has now adopted their Code of Ethics. In reviewing the published rules, I note that you allowed the rules to be adopted in a form directly contrary to Minn. Stat. § 15.052, Subd. 4, and Minn. Rule HE 108.

The pertinent parts of Minn. Rule HE 108, as it applies to this case, are: "Should the Chief Hearing Examiner find, after a review of the record, that the proposed final rule is substantially different from the rule which was proposed at the public hearing... The agency shall then either withdraw the proposed final rule or reconvene the rule hearing."

As you are well aware, since we have had many discussions on this matter, it is the position of this office, in view of a reading of both the statute and the rule, that once the Chief Hearing Examiner has found a substantial change to exist, the rule may not be adopted.

If you feel that there needs to be a change in Chapter 15 to clarify legislative intent, I am sure that we can, working together, come up with the appropriate language to amend Chapter 15. However, I doubt that we could accomplish this during the pending session.

RECEIVED
FEB 22 1978
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

Yours very truly,

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

DRH:sh
cc: J. Michael Miles
Bonnie Sims

AN EQUAL OPPORTUNITY EMPLOYER

364

Bonnie Sima
Special Assistant
Attorney General

February 7, 1978

Persl. 275-282 Code of Ethics for All Executive Branch State Employees

Attorney General

Barbara Lindsey Sims
Special Assistant
Attorney General

December 15, 1977

Michael B. Miller
Special Assistant
Attorney General

296-1692

Department of Personnel Rules/Code of Ethics for State Employees

The above-captioned rules are returned herewith for the following revisions:

280D.: "should" is vague and needs to be replaced with "shall"; and

280D.5.: the subsections of this section need to be connected by the words "and" or "or".

Also the effect of the listed items is unclear: does any (or all) of these definitely indicate that a conflict is present.

MBM:mb

Enclosure

STATE OF MINNESOTA

DEPARTMENT OF PERSONNEL

RECEIVED
AUG 5 1977
OFFICE OF HEARING
EXAMINERS

IN THE MATTER OF THE PROPOSED ADOPTION
OF RULES OF THE DEPARTMENT OF PERSONNEL
GOVERNING A CODE OF ETHICS FOR ALL
EXECUTIVE BRANCH STATE EMPLOYEES

STATEMENT OF NEED

The above captioned rules are new and are not amendments to existing rules of the Department of Personnel. However, the proposed Code of Ethics is substantially similar to the codes of ethics for state employees adopted, but not formally promulgated as rules, by the Civil Service Board in 1959 and by the Commissioner of Personnel and the Personnel Board in 1974.

The need to adopt these rules arises because of the need to implement Minn. Stat. §43.05 subd. 2(13) (1976) which directs the Commissioner of Personnel to promulgate a code of ethics for state employees. Effective government depends on public confidence in the integrity and impartiality of public employees. This confidence would be undermined if the public is not assured that the actions of state employees are free from influence by special interests or their own self interest. A code of ethics is therefore necessary to provide uniform, clearly defined standards of conduct for all state employees so that both the employees and the public well know what conduct is expected, what is prohibited, and that employees who deviate from the established standards will be subject to disciplinary action. By promulgating a code of ethics employees will be able to measure their conduct against clearly defined standards and they and the public will be able to help police the system and insure continued propriety and confidence in the system.

Minn. Rule Persl 275 outlines the public policy behind the rules to make it clear to both employees and the public the need for the code. By making employees and the public aware of the code's purpose both will be better able to apply the standards to specific situations and avoid possible conflicts.

Persl 276 is needed to clearly define the terms utilized in the code for those applying it and those subject to it so there can be no misunderstanding as to who is covered by the code and what conduct is prohibited.

Persl 277 prohibits the acceptance of gifts, favors or anything of value by public employees since such gifts, favors, etc. could influence the recipient, either consciously or unconsciously, to treat the donor more favorably than an individual or business which does not make such gifts. The difficulty of drawing and justifying an arbitrary line, and the confusion and misunderstanding which would result from such a line led to the determination to prohibit the acceptance of any gifts or favors. Even if such gifts do not or are not of sufficient value to influence the employee, permitting employees to accept such gifts may reduce public confidence in the integrity and impartiality of their government by supporting the belief, regardless of validity, that government decisions can be influenced by those who can best afford to make such gifts. However in view of the fact that employees should be able to engage in activity on their own time which does not conflict with their official duties, an exception has been provided to clarify that they may receive honoraria or expenses as a result of such activity.

Persl 278 prohibits the release of confidential information acquired by employees in the course of their employment to prevent the use of this information for personal gain or in a manner that could harm the individual or business providing the information. Since individuals and businesses are required to provide such information, the state has an obligation to insure it is not misused, otherwise, those required to provide the information will be reluctant to provide accurate and complete information.

DEPT. 15 Exhibit No. K
File No.
Date

Persl 279A is needed to prevent situations where an employee could be faced with divided loyalty, which could adversely affect his or her impartiality as the result of outside employment with a business which would be impacted by decisions of the state agency for which the employee worked even though the employee would not receive any personal gain as a result of the decision.

Persl 279B is needed to prevent situations where the employee would benefit personally from agency decisions. This rule regulates the outside employment which employees may accept to insure that an employee's loyalty is not divided between his or her obligation to their job self-interest. If employees are not prohibited from accepting outside employment with or having investments in businesses with which he or she may come into contact as a part of their official duties they may be influenced, either consciously or unconsciously, to make decisions which will benefit those interests. Even if not so influenced, such employment would give the appearance of partiality and thereby adversely affect public confidence.

Persl 279C is designed to make the provisions of A and B more specific and understandable and to provide standards to be utilized by the appointing authority in determining whether outside employment conflicts with a state job.

Persl 280A is needed because state employees are in a unique position to influence decision making and to provide benefits to others. This rule prohibits state employees from using their position to provide such privileges because such activity is unfair to others under state regulation and because the state should be impartial and even handed in all things.

Persl 280B is a generalized provision prohibiting state employees from engaging in activity which is incompatible with public employment. Public employment involves public trust and use of that employment for personal gain undermines that trust, encourages influence peddling and favored treatment for those able to provide the privileges thus undermining public confidence.

Persl 280C is necessary to insure that there is not any improper influence used in awarding state contracts and that proper contracting procedures will be followed.

Persl 280D is needed because to permit employees to appear before a state court or commission may, because of established working relationships, lead to undue influence on the decision maker or otherwise impair another employee's judgment. In addition, employees may have access to information not available to others which could provide an unfair advantage. This rule is designed to protect employees from undue influence or the accusation of prejudice and to insure impartial decisions by state officials.

Persl 280E is needed because permitting former employees to appear before their former agency would create the same problems of undue influence and use of inside information that are outlined above.

Persl 281 prohibits the use of state property which is paid for by the taxpayers from being utilized for private advantage. State owned buildings, supplies and equipment are provided through public funds to deliver services on an impartial basis to all citizens and any other use of state property may render it unavailable for its intended use and afford special advantage to individual employees or others.

Persl 282 is necessary to provide a procedure for employees to determine as soon as possible if contemplated conduct violates accepted behavior and thus avoid disciplinary action. It also provides a method for employees to avoid acting on a matter which would clearly be a conflict and thus subject themselves to disciplinary action. Since all possible situations which may arise cannot be foreseen in advance, a method for resolving whether a particular situation constitutes a conflict is necessary if the code is to be workable. Since behavior which may constitute a conflict in one employment situation may not be a conflict in another, it is necessary to provide for resolution of possible conflicts at the agency level whenever possible.

Persl 283 recognizes that agencies with unique problems may wish to establish additional standards of conduct which relate directly to those situations. To insure consistency and reasonableness, it is necessary to have such supplemental rules reviewed by a central authority.

Persl 284 provides that violation of the code ~~can~~ will provide just cause for disciplinary action. This is necessary to insure that these rules are more than mere platitudes without any real force and effect. This rule provides employees with notice that they must comply with the established standards of conduct and the public with a guarantee that they will be treated fairly and impartially by state employees.

Persl 285 will insure that all employees receive a copy of the standards of conduct with which they must comply in order to be apprised of the parameters of proper conduct.

Richard W. Session

Richard W. Session
Commissioner of Personnel

Dated: 8-5-77

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
ST. PAUL 55155

WARREN SPANNAUS
ATTORNEY GENERAL

TELEPHONE
(612) 296-6196

November 17, 1977

Mr. Michael B. Miller
Special Assistant Attorney General
G19K State Administration Building
50 Sherburne Avenue
St. Paul, Minnesota 55155

Dear Mike:

Attached for your approval are proposed Minn Rules Persl 275-282, the Code of Ethics for executive branch employees.

Sincerely,

Bonnie

Barbara Lindsey Sims
Special Assistant Attorney General

BLS:dag
Attachment

ADMIN 1000

STATE OF MINNESOTA

DEPARTMENT OF HEARING EXAMINERS

Office Memorandum

TO : D. GALLES
Income Tax Examiner

DATE: December 5, 1977

FROM : STEVE M. MIHALCHICK
Hearing Examiner

PHONE: 8112

SUBJECT: Code of Ethics

I received your comments on the Code today. I am unable to do much with them, however, because my Report was issued October 31, 1977, and Personnel adopted the final rules November 7, 1977.

Because many of your comments concern the legality of the rules, I am forwarding them to Michael Miller, Special Assistant Attorney General, who is currently reviewing the adopted rules for legality.

I might note that some of the matters you address were corrected in the final rules.

SMM/eag
CC: Michael Miller
Special Assistant Attorney General

RECEIVED
AUG 5 1977
OFFICE OF HEARING
EXAMINERS

STATE OF MINNESOTA

DEPARTMENT OF PERSONNEL

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF PERSONNEL GOVERNING A CODE OF ETHICS FOR ALL EXECUTIVE BRANCH STATE EMPLOYEES.

ORDER FOR HEARING

IT IS HEREBY ORDERED that a public hearing on the above-captioned rules be held in the Department of Personnel Large Conference Room, Third Floor, Space Center Building, 444 Lafayette Road, St. Paul, Minnesota 55101 on August 30, 1977 commencing at 9:30 a.m. and continuing until all persons have had an opportunity to be heard.

IT IS FURTHER ORDERED that a Notice of Hearing be mailed to all persons or representatives of associations or other interested groups who have registered their names with the Secretary of State for that purpose.

IT IS FURTHER ORDERED that the Notice of Hearing be published in the State Register.

Richard W Sessions
Commissioner

Date: June 24, 1977

DEPT. 15 Exhibit No. F
File No.
Date

RECEIVED
AUG 5 1977
OFFICE OF HEARING
EXAMINERS

STATE OF MINNESOTA

DEPARTMENT OF PERSONNEL

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF PERSONNEL GOVERNING A CODE OF ETHICS FOR ALL EXECUTIVE BRANCH STATE EMPLOYEES.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a public hearing in the above-entitled matter will be held in the Department of Personnel Large Conference Room, Third Floor, Space Center Building, 444 Lafayette Road, St. Paul, Minnesota 55101 on August 30, 1977 commencing at 9:30 a.m. and continuing until all persons have had an opportunity to be heard.

All interested or affected persons will have an opportunity to participate. Statements may be made orally and written materials may be submitted at the hearing. In addition, written materials may be submitted by mail to Steve Mihalchick, Hearing Examiner, Office of Hearing Examiners, 1745 University Avenue, St. Paul, Minnesota 55104, (612) 296-8112 either before the hearing or within 5 working days after the close of the hearing.

The proposed rules, if adopted, would provide a Code of Ethics to which all employees of the executive branch of the State will be required to adhere. Specifically the proposed rules govern the acceptance of gifts and favors, the use of confidential information, outside employment, the use of state property, conflicts of interest and actions to avoid conflicts of interest. Copies of the proposed rules are now available and one free copy may be obtained by writing to Richard Cottrell, Department of Personnel, 3rd Floor Space Center Building, 444 Lafayette Road, St. Paul, Minnesota 55101. Additional copies will be available at the door on the date of the hearing. The agency's authority to promulgate the proposed rules is contained in Minn. Stat. 43.05, subd. 2(13) (1976). A Statement of Need explaining why the agency feels the proposed rules are necessary and a Statement of Evidence outlining the testimony the department will be introducing at the hearing will be filed with the Office of Hearing Examiners at least 25 days prior to the hearing and will be available there for public inspection.

Please be advised that Minn. Stat., ch, 10A, requires each lobbyist to register with the Ethical Practices Board within five days after he commences lobbying. Lobbying includes attempting to influence rule making by communicating or urging others to communicate with public officials. A lobbyist is generally any individual who spends more than $250 per year for lobbying or any individual who is engaged for pay or authorized to spend money by another individual or association and who spends more than $250 per year or five hours per month at lobbying. The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota 55155, phone (612) 296-5615.

Richard W. Sessions
Commissioner

Date: June 24, 1977

DEPT.'S Exhibit No. G
File No.
Date

STATE OF MINNESOTA

Office Memorandum

DEPARTMENT PERSONNEL - 3RD FLOOR SPACE CENTER BUILDING

RECEIVED
AUG 5 1977
OFFICE OF HEARING EXAMINERS

DATE: July 18, 1977

PHONE: 296-8366

TO : Department Heads

FROM : Richard W. Session
Commissioner

SUBJECT: Hearing: Proposed Rules on Code of Ethics

The Department of Personnel will conduct a hearing under the Administrative Procedure Act on August 30, 1977, to review proposed rules establishing a Code of Ethics for employees in the Executive Branch of Minnesota state government.

In order that all state employees may be advised of this upcoming hearing and have an opportunity to comment and/or review the proposed rules prior to the hearing, the Office of Hearing Examiner has requested the posting of the attached notice, which is identical to the one published in the July 18, 1977 State Register.

For the convenience of interested employees, I am enclosing one copy of the proposed rules. Please post this notice and the proposed rules by July 25, 1977, leaving them available for inspection until August 30, 1977.

RWS:RC:cs

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AUG 5 1977
OFFICE OF HEARING
EXAMINERS

ANNOUNCEMENT REGARDING THE

HEARING ON A CODE OF ETHICS FOR

ALL EXECUTIVE BRANCH STATE EMPLOYEES

Whereas, the Commissioner of Personnel has determined that it is in the best interest of the State to allow time for state employees to present their views on the Proposed Code of Ethics for All Executive Branch State Employees without being required to utilize leave time, it is hereby announced that following the conclusion of testimony on the proposed rules on August 30, 1977, the hearing will be continued until (reconvened at) 7:00 p.m. on August 31, 1977, in Room 83, State Office Building, St. Paul, Minnesota, 55101 to permit affected state employees to present their views.

Richard W. Session
Commissioner of Personnel

RECEIVED
AUG 5 1977
OFFICE OF HEARING
EXAMINERS

STATE OF MINNESOTA

DEPARTMENT OF PERSONNEL

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF PERSONNEL GOVERNING A CODE OF ETHICS FOR ALL EXECUTIVE BRANCH STATE EMPLOYEES

AFFIDAVIT OF RECEIPT OF THE SECRETARY OF STATE'S LIST

Richard R. Cottrell, being duly sworn on oath deposes and says:

1) That he is an employee of the Department of Personnel of the State of Minnesota.

2) That on the 14th day day of July, 1977, he went to the Secretary of State's office for the State of Minnesota and requested a current list of all representatives of associations or other interested groups of persons who had registered their names with the Secretary of State for the purpose of obtaining notices of public hearings relating to the promulgation of rules pursuant to M.S. 15.0412.

3) That on the 14th day day of July, 1977, in response to the above request, the Secretary of State provided him with such a list, a copy of which is attached hereto and incorporated by reference.

Richard R. Cottrell

Further affiant sayeth not.

Subscribed and sworn to before me this 14th day of July, 1977

Notary public,

Ramsey County, Minnesota

My Commission expires 3-1-84

Denise A. Greene

DENISE A. GREENE
NOTARY PUBLIC — MINNESOTA
RAMSEY COUNTY
MY COMMISSION EXPIRES MAR. 1, 1984

DEPT. 'S Exhibit No. H

File No.

Date

STATE OF MINNESOTA

DEPARTMENT OF PERSONNEL

RECEIVED
AUG 5 1977
OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF PERSONNEL GOVERNING A CODE OF ETHICS FOR ALL EXECUTIVE BRANCH STATE EMPLOYEES

STATEMENT OF EVIDENCE

In addition to the "Statement of Need" which is available for inspection or purchase at the Office of Hearing Examiners, 1745 University Avenue, Room 300, St. Paul, Minnesota, and in support thereof the Department of Personnel will introduce the following evidence:

I. Testimony

Testimony will be presented explaining the proposed rules, the conditions which led to the need for the proposed rules including a summary of the history of prior codes of ethics, the need for and reasonableness of the proposed rules to provide guidelines for employee conduct, resolve questions regarding employee conflicts of interest, and increase public confidence in state government and state employees.

It is anticipated that Donn Escher and Richard Cottrell from the Department of Personnel and Roger Franke from the Governor's Office may testify on behalf of the Department in connection with the facts ennumerated above.

II. Documentary Evidence

We intend to introduce the following documentary evidence at the hearing in this matter:

A. Memoranda documenting the review by the Personnel Board of the proposed Code of Ethics.

B. The Rules of Conduct Relating to Public Service Ethics for the Classified Service of the State of Minnesota adopted by the Civil Service Board October 28, 1959.

C. Rules of Conduct Relating to Public Service Ethics for Employees of the State of Minnesota adopted by the Commissioner of Personnel and the Personnel Board in March, 1974 and related memorandum of John W. Jackson, Commissioner of Personnel dated May 20, 1974.

D. Memorandum of the Department of Administration relating to the Code of Public Service Ethics dated July 1, 1974.

E. Executive Order No. 142, establishing a Standard of Conduct for Officials and Employees of the Executive Branch of the State of Minnesota dated February 23, 1977.

F. Executive Orders of the Governor of Colorado dated September 13, 1966, May 28, 1974, July 25, 1975.

III. Statutes, Laws and Rules

The Department will be citing the following statutes, laws and rules:

Minn. Stat. §§10A.01 subd. 18, 10A.07, 43.05 subd. 2(13)(1977)
Minn. Stat. §15.06 as amended by Minn Laws 1977, Ch. 305 §1
Minn. Stat. §3.91(1971)
Minn. Laws 1974, Ch. 470 §43
Wis. Stat. §§19.41-.48
Wisconsin Administrative Code, Chapter Pers 24 (1975)

Richard W. Session
Richard W. Session
Commissioner of Personnel

Dated: 8-5-77

DEPT. 'S Exhibit No. J
File No.

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF PERSONNEL

In the Matter of the Proposed Adoption of Rules of the Department of Personnel Governing a Code of Ethics for all Executive Branch State Employees.

REPORT OF HEARING EXAMINER

The above-entitled matter came on for hearing in St. Paul, Minnesota on August 30 and 31, 1977, before Steve M. Mihalchick, a Hearing Examiner assigned by the Chief Hearing Examiner.

This is a rules hearing pursuant to Minn. Stat. Ch. 15, to determine whether proposed new Minn. Rules PERSL 275-285 [2 MCAR §§ 2.275-2.285] should be adopted.

The following persons appeared for the Department of Personnel (hereinafter, "Personnel"): Donn Escher, Assistant Commissioner; Richard Cottrell, Manager of Personnel Planning and Data Services; and Barbara Sims, Special Assistant Attorney General. Ray Bohn, Governor's Office, appeared for the Governor and spoke in favor of the proposed rules. Twenty-one other persons attending the hearings signed the hearing register. The hearing continued until all interested persons or groups had had an opportunity to participate.

Pursuant to Minn. Stat. § 15.0412, subd. 4, this Report shall be available for review to all affected individuals upon request for at least five days.

Personnel shall, if it proposes to adopt the rules as originally proposed or amended, submit the complete hearing record, including its Findings and Order, to the Chief Hearing Examiner no earlier than five days subsequent to the receipt of this Report. This submission shall clearly indicate any changes made to the rules as originally proposed, preferably in the format that will be submitted to the State Register for publication. The Chief Hearing Examiner shall complete his review and submit his report to Personnel on the issues of substantial changes in the rule and compliance with Minn. Stat. § 15.0412 within ten calendar days. Thereafter, Personnel shall be responsible for filing the rules with the Attorney General and notifying persons

who have indicated their desire to be notified on the hearing register or otherwise that the rules have been filed.

Based upon all the records and proceedings herein, the Examiner makes the following:

FINDINGS OF FACT

PROCEDURAL REQUIREMENTS

1. On June 27, 1977, Personnel filed the following documents with the Chief Hearing Examiner:

(a) A copy of the proposed rules;
(b) A proposed Order for Hearing; and
(c) A proposed Notice of Hearing.

2. On July 18, 1977, a Notice of Hearing and a copy of the proposed rules were published at 2 State Register 92.

3. On July 19, 1977, Personnel mailed the Notice of Hearing to all persons and associations who had registered their names with the Secretary of State for the purpose of receiving such notice. Additional notice was sent to all department heads for posting on employee bulletin boards.

4. On August 5, 1977, Personnel filed the following documents:

(a) The Order for Hearing;
(b) The Notice of Hearing as mailed;
(c) The Affidavit of Receipt of the Secretary of State's list;
(d) The Affidavit of Mailing;
(e) The Secretary of State's Certificate and list;
(f) A copy of a Notice of Intent to Solicit Outside Information published at 1 State Register 1579 (May 2, 1977), and the one comment that was received from the Department of Public Service following that notice.
(g) The Statement of Need;
(h) The Statement of Evidence, including the names of agency personnel and witnesses expected to testify; and
(i) Copies of the documentary evidence listed in the Statement of Evidence.

The documents were available for inspection at the Office of Hearing Examiners from the date of filing to the date of the hearing.

5. The record remained open through September 8, 1977 for the receipt of written comments and statements.

STATUTORY AUTHORITY

6. Minn. Stat. § 43.05, subd 2 (13), provides:

"[The Commissioner of Personnel shall:]

In conformance with the rule making provisions of chapter 15, promulgate a code of ethics establishing standards of conduct to be observed by state employees in the performance of their official duties."

7. Minn. Stat. § 43.055, provides:

"Whenever any power or authority is given to the commissioner of personnel by any provision of chapters 15A or 43, such power or authority shall extend to all departments [and agencies; (see Minn. Stat. § 43.01, subd. 21)] in the executive branch, but shall not extend to any subdivisions or employees in the judicial branch or legislative branch. The classified employees in the office of legislative auditor, the Minnesota state retirement system, and teachers association, however, shall be subject to the powers or authority of the commissioner of personnel."

8. At the hearing, Assistant Commissioner Escher noted that the statute gave no specifics regarding form or content for the standards of conduct. Lest there be any question that the lack of standards creates an unconstitutional delegation of powers by the Legislature, the observations of Professor Schwartz should be noted:

"During the past half century a major task of our developing administrative law was to legitimize the vast delegations of power made to administrative agencies, particularly during and after the New Deal period. The 1935 Schechter and Panama cases struck down the most important early New Deal measure on the ground that it contained excessive delegations of power because the authority granted under it was not restricted by a defined standard. Today the opinions in those cases seem written from another world. The courts have all but abandoned the view exemplified in them - that laws delegating power must be invalidated unless they contain limiting standards. Wholesale delegations have become the rule in our administrative law. The touchstone has become the 'public interest' criterion." Schwartz, Administrative Law: The Third Century, 29 A.B.A. Admin. L. Rev. 291 (1977).

GENERAL BACKGROUND

9. The rules proposed here are based primarily on a Code of Ethics first issued in 1959 by the Civil Service Board. That Board was abolished in 1973. In 1974, the new Personnel Board and the Commissioner of Personnel issued a Code of Ethics for employees of the State which, for all practical purposes, was the same as the Code issued by the Civil Service Board in 1959. In 1975, the Personnel Board, upon advice of counsel, ruled that the

Code of Ethics was issued without statutory authority and therefore had no force or effect. Following that ruling, the 1975 Legislature enacted Minn. Stat. § 43.05, subd. 2(13), quoted in Finding No. 6. No action was taken on promulgating the Code of Ethics until 1976. In February, 1977, Governor Perpich issued Executive Order No. 142, that established standards of conduct for officials and employees of the executive branch. The Governor has indicated that the Executive Order will be rescinded when the rules proposed here are adopted.

10. In addition to using the 1959 Code as a base, Personnel examined the effect of Minn. Stat., Ch. 10A, on the proposed Code and included provisions found in the Codes of other states - principally that of Wisconsin. Personnel also solicited public opinion during the drafting of these rules, but, as noted in Finding No. 4(f), only one public comment was received. That particular comment did not address the content of the Code of Ethics but requested that a particular agency be allowed to have its own Code of Ethics. After the Notice of this hearing was published, several comments from outside the Agency were received. In a number of cases, Personnel responded to those comments by suggesting modifications to the proposed rules at the hearing. (Dept. Ex. M) At and following the hearing, additional comments were received, and in its own post-hearing comments (Dept. Ex. P), Personnel has suggested some further changes to the proposed rules.

11. Some of the procedures outlined in the rules are based upon Personnel's belief that appointing authorities are, in most instances, the competent authority to resolve actual and potential conflicts of interest. This is because the appointing authority is held accountable by statute, and the Governor, to manage his agency with integrity and efficiency. Additionally, the appointing authority knows the operation of his agency, the work assignments of his employees and the clientele served. This knowledge, coupled with the fact that the proposed rules are part of the overall personnel rules, provides the necessary guidance for the appointing authority and the employee, as well as the legal framework for making proper decisions.

12. There were several comments that a number of provisions of the proposed rules were vague or lacked definition. Personnel stated at the hearing that legal counsel had advised them it would be improper to promulgate detailed specific standards of conduct for which no legislative policy had been formulated. Common Cause called that "an unsatisfactory and unacceptable excuse." (Pub. Ex. 12) For reasons already noted, (see Finding No. 8) the Examiner agrees that a statute lacking specific standards is no excuse for rules lacking specific standards. A rule that is unclear is unreasonable. Most of the specific comments that a particular provision is vague or unclear will be examined below, but the Examiner would note at this point that in many cases, comments that a provision is vague are really requests that the provision be rewritten so as not to apply to a situation that it clearly prohibits.

PERSL 275 -POLICY

13. As originally proposed, this rule consisted of three separate paragraphs stating the purpose and intention of the Code. This is necessary to make employees and the public aware of the Code's purpose and to assist in the application of the rules to specific situations. It would be helpful if, as a matter of form, the paragraphs were separately numbered as paragraphs A, B and C.

14. The provisions of this rule were copied in large part from the corresponding section of the Wisconsin Rules. As originally proposed, the first paragraph began with the following sentence:

> "The observance of high moral and ethical standards by state employees is essential to the conduct of free government."

At the hearing, Personnel suggested that this section should be modified by deleting the words "moral and", to delete any suggestion that the State intends to dictate the moral behavior of its employees. As modified, the paragraph is reasonable. Mr. Paul Forseth, one of the few state employees to appear on his own behalf at the hearings, submitted extensive comments after the hearings (Pub. Ex. 17) and offered suggested wording changes for

all the rules, including this one. Most of his suggested changes are non-substantial and several would be improvements to the language of the proposed rules. However, the Examiner will not comment directly on his suggestions unless a particular rule is found to be unreasonable. Nevertheless, Personnel should consider Mr. Forseth's suggestions for possible inclusion in the final rules.

15. The second paragraph states that all state employees should have equal opportunity with all citizens to develop private, economic and social interests and that it is necessary to distinguish between minor and inconsequential conflicts which are unavoidable and those conflicts which are substantial and material and conflict with the employee's responsibility to the public. At the hearing, AFSCME Council 6 argued that the proposed rules would interfere with the exercise of an employee's rights under the Public Employment Labor Relations Act (PELRA). For example, it would be possible to interpret this policy statement in such a way that the bargaining of employees for improved economic benefits would be a substantial and material conflict. The Union pointed out several other rules that could be construed as creating certain infringements on the right of collective bargaining. At the hearing, the Department stated that that was not its intention and suggested individual disclaimer clauses in each of the rules that might affect collective bargaining. In its post-hearing comments, Personnel suggested that instead of the separate disclaimer clauses, a general provision should be inserted in the policy section of the rule to read:

> It is further recognized that state employees are granted certain rights to organize and participate in labor or employee organizations under Minn. Stat. §§ 179.16-179.77. This rule shall not be interpreted to apply to any activity which is protected by §§ 179.16-179.77 nor to prevent a present or former employee from accepting employment with a labor or employee organization representing state employees.

This suggestion should be incorporated in the rules; it appears to satisfy most of the union's objections to the proposed rules that may conflict with collective bargaining rights. It is necessary to set it forth in this rule because those rights do

exist by law. The Examiner would suggest that the rule also contain a reference to agreements and practices under PELRA; otherwise, such practices as the use of State meeting rooms might still be prohibited. (See Finding No. 48)

16. The last paragraph of PERSL 275 states:

> "The standards of conduct for employees in the performance of their official duties set forth in this chapter are intended to eliminate conflicts of interest, improve standards of public service and promote and strengthen the faith and confidence of the people of this state in their government. It is further intended that these standards shall serve both as a guide of official conduct for the state employees and as a basis for disciplinary action."

At the hearing, Personnel suggested that the first sentence be modified by inserting the words "actual and potential" before the words, "conflict of interest". Personnel stated that this modification was necessary in order to provide for the disclosure of both a present conflict and a pending official action which might present a potential conflict of interest or the appearance of a conflict of interest. This change is not reasonable. It would be impossible to eliminate all potential conflicts of interest. A rule that so states sets an unobtainable goal. It would appear that what Personnel actually intended was to identify potential conflicts and eliminate actual conflicts. The rule should be modified to say just that or remain as originally proposed. The suggested modification would make it unreasonable.

PERSL 276 - DEFINITIONS

17. This rule is needed to clearly define the terms used in the rules so that the rules can be properly applied. It is difficult to meaningfully discuss some of the definitions out of the context of the rule in which they are applied. Therefore, four of the definitions will be discussed below:

PERSL 276 A. "Anything of value" (see Finding No. 23);

PERSL 276 E. "Business" (see Finding No. 29);

PERSL 276 F. "Confidential information" (See Finding No. 28); and

PERSL 276 H. "Personal and private interest" (see Finding No. 35).

18. The Department of Public Service suggested that it might be better to substitute the word "includes" for the word "means" in all the definitions. (Pub. Ex. 18) Each of the proposed definitions uses the word "means". For example, PERSL 276 D. states:

> "'Commissioner' means the State Commissioner of Personnel."

The term "means" is a limiting term. In other words, the term defined includes only the items listed in the definition. The term "includes" is a term of enlargement. In other words, the term defined includes the common usage of the term plus the items listed in the definition. The limiting term is by its nature more precise and thus generally preferable for use in rules except where an expansive definition is needed. Its use in the definitions in this rule is reasonable.

19. Proposed PERSL 276 B., C. and D. define "agency", "appointing authority" and "commissioner", respectively. Personnel stated that these definitions were reasonable because they are consistent with the definitions given in other portions of the Personnel rules. It is precisely because of that fact that these three definitions are not needed in this set of rules. Terms should be defined only if they are used in a special sense within the rules or if they are important to a clear understanding of the rules. Chapter 18 of the Personnel Rules, PERSL 201-248, contain definitions of words and terms to be applied throughout the Personnel Rules. The definition of "appointing authority" given in PERSL 204, and the definition of "commissioner" given in PERSL 207 are identical to the definitions proposed here. The definition of "agency" given in PERSL 202 is almost identical to the definition proposed here except that it is not limited to entities in the executive branch. That is a distinction without importance in these rules because the later definition of "employee" in PERSL 276 G. limits the application of the Code to employees in the executive branch. Further, the term "commissioner" appears only twice in the proposed rules, and if there is any possibility of confusing the Commissioner of Personnel with another commissioner,

it would be easier to state "commissioner of personnel" in those two places. Personnel has not demonstrated that PERSL 276 B., C. and D. are needed. Therefore, they should be deleted.

20. PERSL 276 G., as originally proposed, stated:

> "'Employee' means any classified or unclassified employee of the executive branch except constitutional officers or their deputies."

At the hearing, Personnel proposed to amend this Rule by adding the following sentence:

> "Where specific provisions of Minn. Stat. Ch. 10A apply to employees of the executive branch and would conflict with these rules, Minn. Stat. Ch. 10A will apply to those employees so covered."

Such a modification is necessary and reasonable. Minn. Stat. Ch. 10A, entitled "Ethics in Government", affects certain public officials who may also be employees in the executive branch. It contains provisions regulating conflicts of interest, representation of clients before state agencies, and disclosure of economic interests. Minn. Stat. § 10A.01, subd. 18, defines public official to mean any:

> "(a) Member of the legislature;
>
> (b) Person holding a constitutional office in the executive branch and his chief administrative deputy;
>
> (c) Member of a state board or commission which has rule-making authority, as 'rule' is defined in § 15.0411, subd. 3;
>
> (d) Person employed by the legislature as secretary of the senate, legislative auditor, chief clerk of the house, revisor of statutes or researcher or attorney in the office of legislative research;
>
> (e) Person employed by the executive branch in any position specified in § 15A.081; and
>
> (f) Member of the Metropolitan Council, Metropolitan Transit Commission, Metropolitan Sewer Board or Metropolitan Airports Commission."

Minn. Stat. § 15A.081 lists the commissioners and deputy commissioners of the various departments and similar positions in other state agencies. The employees who would also be subject to Ch. 10A are the constitutional officers and their deputies, some members of state boards and commissions and department heads and their deputies. These persons will be referred to in this Report as "10A employees".

Personnel's suggested modification is necessary to remove any overlap and conflict between the proposed rules and Chapter 10A. It is Personnel's intent that these rules apply to all employees, including 10A employees, except where they conflict with Chapter 10A. This is reasonable in light of the broad statutory charge given in Minn. Stat. § 43.05, subd. 2(13). As will be noted in more detail below, there are few substantive conflicts between the proposed rules and Chapter 10, although there are some procedural differences. Minn. Stat. § 10A.07 provides for the identification of conflicts of interest and their elimination by having the matter decided or acted upon by someone other than the public official having the conflict. That is very similar to proposed PERSL 282. Minn. Stat. § 10A.08 allows public officials to represent clients before boards or commissions provided such participation is disclosed to the Board of Ethical Practices within 14 days. If such an action is "against the State of Minnesota", such representation by non-10A employees would be prohibited under proposed PERSL 280 D. Minn. Stat. § 10A.09 requires public officials to file statements of economic interest upon assuming office. There is no similar provision in the proposed rules. (Which is reasonable because it would be impractical to have 30,000 such statements on file, and because it would not be a "standard of conduct" as Minn. Stat. § 43.05, subd. 2(13) requires.) Minn. Stat. § 10A.09 does, however, conflict with proposed PERSL 279 B. prohibiting personal investments in businesses which the employee may review or regulate. (The Examiner is recommending that PERSL 279 B. be deleted; see Finding No. 37).

Personnel presented no justification for excepting constitutional officers and their deputies from their originally proposed definition of employee. In light of the fact that such officers and deputies are 10A employees, and the clear intent of the statute to cover all executive branch employees, the exception is unreasonable. The statutory definition of "executive branch" in Minn. Stat. § 43.01, subd. 19, provides further support for not excepting the constitutional officers from the provisions of these rules. It states, in pertinent part:

"For purposes of Chapter 15A and 43, 'executive branch' means heads of all departments of government, elective or appointive, established by statute or constitution and all employees of such department heads which . . . are not defined as part of the legislative or judicial branches of government. The executive branch shall include the governor and his staff."

PERSL 277 - ACCEPTANCE OF GIFTS OR FAVORS

21. As originally proposed, this rule stated:

"An employee of a state agency shall not directly or indirectly receive or agree to receive any payment of expense, compensation, gift, reward, gratuity or anything of value from any source except the state of Minnesota for any matter or proceeding connected with or related to the duties of the employee unless otherwise provided for by law; however, honoraria or expenses paid for papers, talks, demonstrations or appearances made by employees on their own time for which they are not compensated by the State, shall not be deemed a violation of this section, provided such activity is approved in advance by the appointing authority."

22. This rule received more comment than all others combined, ranging from concern over complimentary luncheons provided by regulated industries in a private setting, to possible conflict with reimbursement for travel expenses for work assignments approved by the appointing authority. There was testimony presented that suggested the futility of prohibiting minor gifts. In response to these comments, Personnel, in its post-hearing comments (Dept. Ex. P), suggested that the rule be modified to read as follows:

"PERSL 277 - ACCEPTANCE OF GIFTS FOR FAVORS.

A. An employee of a state agency shall not directly or indirectly receive or agree to receive any payment of expense, compensation, gift, reward, gratuity or anything of value from any source except the State of Minnesota for any matter or proceeding connected with or related to the duties of the employee unless otherwise provided for by law. However, the acceptance of any of the following shall not be a violation of this rule:

1. Advertising gifts of nominal value having wide distribution.

2. Plaques or similar momentoes recognizing individual service in a field of specialty or to a charitable cause.

3. Payment or reimbursement of expenses for travel and/or luncheons, not to exceed actual expenses incurred which are not reimbursed by the State and which have been approved in ad-

vance by the appointing authority as part of a work assignment.

4. Honoraria or expenses paid for papers, talks, demonstrations or appearances made by employees on their own time for which they are not compensated by the State provided such activity is reviewed in advance by the appointing authority to insure that no conflict of interest exists."

23. Proposed PERSL 276 A. defines "anything of value" to mean "a gift, favor, service or promise of future employment or other future benefit." The term "anything of value" is used only in PERSL 277 and so it is not necessary to include the definition in a separate section that defines terms generally applicable throughout the rules. In fact, it is unreasonable to do so because it may be confusing to have to read PERSL 277, then refer to a definition in a separate section and then refer back to the qualifying provisions which Personnel has now suggested. The definition should be deleted from PERSL 276 A. and included in PERSL 277 by deleting the words "or anything of value" and inserting: ", favor, service or promise of future employment or other future benefit".

24. The rule as further modified by Personnel in its post-hearing comments is reasonable, except as noted in the next Finding. It essentially prohibits an employee from receiving additional compensation for duties that are part of his or her job and it eliminates some potential conflicts of interest by eliminating situations in which an employee would owe a debt of gratitude to a regulated person or industry. The originally proposed wording is almost identical to the provisions of the 1959 Code of Ethics and is similar to a provision in the Wisconsin regulations. It is also similar to the provisions of Minn. Stat. § 15.43, subd. 1(2), which makes it a misdemeanor for an employee involved in the purchasing or contracting process to accept anything of value except advertising novelties of nominal value having wide distribution. The question of the "insignificant item" has been reasonably addressed in the exceptions now proposed by the Department. Instead of assigning some arbitrary monetary value to these items, they are reasonably defined by type or purpose.

25. The Examiner finds that the last proviso of what is now

PERSL 277 A.4. is unreasonable. That proviso requires prior review by the appointing authority of activities undertaken by employees on their own time for which they are paid expenses or honoraria. The Minnesota School Boards Association commented on the administrative burden this would impose. (Pub. Ex. 11) Daniel McInerney raised an even more significant objection. (Pub. Ex. 3) He argued that the listed activities were protected by the First Amendment and stated:

> "The requirement of advance approval by some superior is essentially characterizable as a species of 'prior restraint.' Prescinding from arguments about 'chilling effects' of such a requirement, or 'the preferred position of First Amendment rights,' it is quite clear that the State must surmount some severe constitutional obstacles in order to deflect the argument that this advance approval requirement does not constitute prior restraint of freedom of expression. Lastly, for the State to even seek notification of the employee's carrying on such activities would require significant and convincing evidence to overcome the employee's right to privacy."

Having deciphered this statement, the Examiner generally agrees; further, the proviso adds nothing to these rules except red tape. Conflicts of interest are already prohibited by other sections of these rules, as is improper outside employment or activity.

26. It should also be noted that this rule applies to 10A employees. There was some discussion to the contrary at the hearing, but a review of Minn. Stat. Ch. 10A, reveals nothing that specifically affects the acceptance of gifts or favors.

PERSL 278 - USE OF CONFIDENTIAL INFORMATION

27. This section prohibits the disclosure of confidential information acquired by an employee because of his position, the use of such information to further his personal interest and the acceptance of outside employment or involvement in an activity which would require disclosure of confidential information. The rule, itself, is reasonable and what problems do exist are because of the definition of "confidential information."

28. As originally proposed, PERSL 276 F. stated:

> "'Confidential information' means information obtained under government authority which has not become part of the body of public information."

That is the definition contained in the Wisconsin regulations. Personnel stated that the intent of the rule was to prevent the premature release of information collected by a state agency that could enable a business or individual to gain an unfair economic advantage. However, the definition is vague and confusing and could apply to situations, as Mr. Forseth suggested, "of an employee carrying tales out of school." It was also confused with the same term as used in the Data Privacy Act. The confusion was recognized at the hearing and such terms as "insider information" were discussed. In its post-hearing comments (Dept. Ex. P), Personnel suggested that the definition be modified to read as follows:

> "'Confidential information' means information obtained under government authority which has not become part of the body of public information and which, if released prematurely or in non-summary form, would provide unfair economic advantage or adversely affect the competitive position of an individual or business."

Personnel stated that they believed this change would clarify that this rule is designed to prohibit the release of information such as trade secrets, possible new highway routes or the results of mineral exploration before the studies are completed. The Examiner agrees. It is difficult to think of a better word.

29. The definitions of "business" given in PERSL 276 E. relates to this rule and is reasonable because it covers all forms of organizations.

PERSL 279 - OUTSIDE EMPLOYMENT.

30. This rule is needed to prevent situations where employees could be faced with divided loyalties which could adversely affect their impartiality. The rule begins by a reasonable, general prohibition in PERSL 279 A. that:

> "An employee shall not accept other employment which will impair his/her independence of judgment in the exercise of his/her official duties."

Improper outside employment is actually a form of conflict of interest. While it is not unreasonable to put it in a separate rule, the Examiner would suggest that it be included as a separate section of the Conflict of Interest rule, PERSL 280.

31. PERSL 279 B. contained prohibitions on certain personal investments. It was noted at the hearing that including this section in the rule on outside employment was confusing. In its post-hearing comments, Personnel suggested that the provision be moved to PERSL 280, the general conflict of interest rule. It will be discussed below.

32. What was originally PERSL 279 C. listed four factors to be evaluated in determining whether outside employment and activity constitutes a conflict of interest. These provisions are needed as a guide to applying PERSL 279 C. With the exception of PERSL 279 C.3., they are reasonable. In fact, it would seeem appropriate to use these factors in all conflict of interest questions, not just outside employment.

33. PERSL 279 C.3. states:

> "Employment by an enterprise which is subject to direct or indirect control, review, audit or enforcement by the agency of which she/he is an employee."

An employee of the Department of Revenue pointed out that this would effectively prohibit all employees of the Department of Revenue from working part-time because that Department deals with every business in the state (Pub. Ex. 2). As PERSL 279 A. indicates, conflicts only exist when the employee's independence of judgment is impaired. Prohibiting employment by a business which the employee's agency affects, whether or not that particular employee may be involved in the agency's decision-making, is unreasonable. This defect may be cured by deleting the words "agency of which she/he is an" from PERSL 279 C.3. This section is also unreasonable because it contains the term "an enterprise" which is undefined and not used anywhere else in the Code. It should be replaced by the term "a business" which is reasonably defined in PERSL 276 E.

34. The Minnesota School Boards Association (Pub. Ex. 11) and Leo Bernat (Pub. Exs. 13 and 20) commented upon the effect of outside employment rule on state employees who also serve in appointed or elective positions in political subdivisions; particularly on school boards. The Minnesota School Boards Association

stated, "Some portions of the proposed rules create problems for those individuals who are state employees but who also serve as locally elected school board members and/or Association members." The application of the rule seems clear enough. If serving on a school board would impair the state employee's independence of judgment in the exercise of his state duties, then he must give up one of the positions. That may create a "problem" for the employee, but we can expect no less. However, this is not as harsh as it may seem because throughout these rules, the Examiner is recommending changes to narrow conflicts in actions of the employee rather than all the possible actions of his employing agency.

PERSL 280 - CONFLICT OF INTEREST

35. This rule addresses five different situations in which a conflict of interest may arise. PERSL 280 A. is needed because state employees are in a unique position to influence decision-making and to provide benefits to themselves or others. The proposed rule provides:

> "An employee of a state agency shall not use or attempt to use his/her position to secure special privileges or exemptions for himself/herself or others."

Two comments stated that "special privileges or exemptions" should be defined (Pub. Exs. 6 and 11). The language first appeared in the 1959 Code of Ethics. The Wisconsin regulations have a similar provision which provides,

> "No employe (sic) may use his public position or influence to gain unlawful benefits, advantages or privileges for himself, for the members of his im his immediate family, or for any other person."

Mr. Farseth suggested that the provision be rewritten to read as follows:

> "An employee of a state agency shall not use or attempt to use his or her position to secure special privileges, exemptions, or benefits for hiself/herself or for others, most particularly where this would involve an unequal application of the protections and benefits of the law."

Both the adjective "special" used in the proposed rule, and the adjective "unlawful" used in the Wisconsin regulation, are unclear and subject to numerous interpretations. Mr. Farseth's

suggestion comes closer to stating the purpose of the rule, but is still unclear. The rule is unreasonable as written and should be modified to clearly state that it is prohibiting the use of position to gain advantages not available to the general public. The Examiner would suggest that the rule be modified to read:

> "An employee shall not use or attempt to use his or her position to secure privileges, exemptions or benefits for himself or herself or others different from those available to the general public."

The definition of Personal and Private Interest, PERSL 276 H., requires the same change.

(NOTE: In an apparent attempt to be sexually non-offensive, Personnel has created several terms throughout these rules that are grammatically offensive. If Personnel is uncomfortable using the masculine pronoun to denote both genders, then it should at least use proper words such as "his or her"; "his/her" is not a word.)

36. As proposed at the hearing, PERSL 280 B. stated:

> "An employee of a state agency shall not engage in any transactions as representative or agent of the state with any business entity in which he/she has a direct or indirect financial interest."

As originally proposed, PERSL 279 B. states:

> "An employee of a state agency shall abstain from making or retaining personal investments in, or taking employment with, any business which is or which he/she has reason to be may be directly involved in decisions to be made by the employee, or that will otherwise create substantial conflict between the employee's duty in the public interest and any private interest."

As noted above, Personnel, in its post-hearing comments, decided to move PERSL 279 B. to the general conflict of interest rule, PERSL 280, and combine it with PERSL 280 B. (Ex. P). The suggested modification reads as follows:

> "An employee of a state agency shall not engage in any transactions as representative or agent of the state with any business entity in which he/she has a direct or indirect financial interest, nor make or maintain investments in any business which the employee directly reviews, regulates or licenses."

37. The additional provision prohibiting investments is unreasonable for several reasons. In the first place, the first prohibition on employees taking official action in matters involving a business in which they have an interest would, if properly

applied, prevent any conflict of interest. Secondly, the prohibition is unnecessarily broad. There are some employees whose official duties involves virtually every business in the state, such as employees of the Department of Revenue. This would effectively prevent them from making any investments. It is also unnecessarily broad in that it is not limited to what some have called "significant" investments. The Wisconsin statutes, define "significant" as owning or controlling directly, or indirectly, at least ten percent or $5,000 of the outstanding stock of or interest in a business. Minn. Stat. § 216A.035 states that no person shall be eligible to be a member of the Public Service Commission until he divests himself of any "significant" interest in a utility. Minn. Stat. § 10A.09, in effect allows any investment by 10A employees, but provides that any interest in a business of more than $2,500 must be disclosed. PERSL 279 B. should be deleted and, further, its provisions should not be added to PERSL 280 B.

38. There is a need for a rule prohibiting employees from taking official action in specific matters involving businesses in which they have an interest. However, the form in which the rule is proposed is unreasonable because the terms are unclear. For example, what are "transactions as representative or agent of the State"? And what is a "direct or indirect financial interest." This provision is also unreasonable because it is overly broad; it should prohibit transactions (whatever they may be) with a business in which the employee has a "significant" financial interest. However, to define "significant" at this point would be a substantial change requiring an additional hearing. PERSL 280 B. should be deleted, and a revised rule adopted at some future hearing.

39. PERSL 280 C. prohibits any business in which an employee has a "significant fiduciary relationship" from entering into any contract with any state agency unless the contract has been awarded through public notice, competitive bidding, or any other process provided by law. Personnel stated that this was necessary to insure that there is not any improper influence used in

awarding state contracts and that proper contracting procedures will be followed. The provision was copied from the Wisconsin Regulations that contain a definition of "significant fiduciary relationship", unlike the rules proposed here. The lack of a definition makes this rule unreasonable. Further, as the Department of Public Service pointed out, this rule purports to regulate business. It is not a standard of conduct for employees and is therefore beyond the authority of Personnel. Additionally, this provision is not needed because it doesn't add anything; no business, whether a state employee has an interest or not, may enter into a contract with the State except as provided by law.

40. PERSL 280 D., as modified by Personnel in its post-hearing comments (shown in underlining), provides:

> "No employee of any agency of the State of Minnesota may act as agent or attorney for the prosecution of any claim before any court, commission, or other tribunal against the State of Minnesota, nor should the employee aid or assist in the prosecution or support of any such claim otherwise than in the proper discharge of official duties as a state employee or elected official of a political subdivision nor receive a gratuity or any share of interest in any such claim. Nothing in this section shall be construed to prevent such an employee from pursuing a claim in his/her own behalf."

Personnel stated that this section is needed because to permit employees to appear before a state court or commission may, because of established working relationships, lead to undue influence on the decision-maker or otherwise impair another employee's judgment. In addition, employees may have access to information not available to others which could provide an unfair advantage. Personnel stated that it designed the rule to protect employees from undue influence or the accusation of prejudice and to insure impartial decisions by state officials.

It is apparent that the proposed does not address the stated need. That need could be met by a rule such as:

> "No employee may act as agent or attorney in any action or matter pending before the agency by which he is employed except in the proper discharge of official duties or on his own behalf."

Instead, it prohibits employee involvement in any claim against the state. The Commissioner of Personnel has no authority to deprive anyone of any legal action he has available through the

courts, and to suggest that any state employee would have any particular influence in any court or agency where he is not employed seems absurd. The broad prohibition against assisting others in claims leads to other absurdities: An employee could not advise a person who has been run over by a state car that he may file a claim against the state; an employee could not act as a witness in any claim against the state; an employee could not advise another employee that he or she had been the victim of discrimination within the agency. PERSL 280 D. is unreasonable and unnecessarily broad in its proposed form and must be deleted or modified to meet the need presented.

41. Assuming that PERSL 280 D. is modified as suggested by the Examiner above, the comments of the Minnesota School Boards Association and the Ethical Practices Board are still relevant. The Minnesota School Boards Association stated that the original language would prevent a state employee who was a local school board member from participating in a suit against a state agency, and that this was untenable because it would prevent the elected officials from fully performing their constitutional and statutory responsibilities in representing their constituency (Pub. Ex. 11). Personnel agreed with that and thus proposed the change underlined above. The Association's comments apply to the language proposed by the Examiner, for it would prohibit an employee from participating in any action or matter before the agency by which he is employed on behalf of the school board of which he is a member. That appears to be quite appropriate. There should be no exception for anyone. It is a conflict of interest that may require the person to choose between his obligations to the state and his obligations to his constituency. That cannot be allowed.

The Ethical Practices Board pointed out that PERSL 280 D., as originally proposed, was different from the provisions of Minn. Stat. § 10A.08 as implemented by Minn. Rules EC 500-507. Section 10A.08 states:

> "Any public official who represents a client for a fee before any board or commission which has rule-making authority in a hearing conducted under chapter 15, shall disclose his participation in the action to the [Ethical Practices] Board within 14 days after his appearance."

In other words, such representation is allowed but must be disclosed. There are very few situations in which the rule as suggested by the Hearing Examiner would conflict with § 10A.08. It could only happen when the state employee was a member of a board or commission and was representing a client for a fee before that same board or commission. It should be noted that board members and most commission members are not, by definition, state employees, although some state employees do serve on boards or commissions. This would be one of the few situations in which the provisions of Chapter 10A would apply instead of these proposed rules.

42. PERSL 280 E. states:

> "A former employee of an agency shall not represent a client in any proceeding before that agency for one year from the date of last employment with the agency."

Personnel stated that this rule is needed because permitting former employees to appear before their former agency would create the same problems of undue influence and inside information that are outlined in Finding No. 40. Personnel acknowledged that this provision restricts the future activities of employees but noted that the legislature placed an identical restriction on department heads and deputies in 1977. Laws 1977, Ch. 305, § 1, added a new subdivision 9 to Minn. Stat. § 15.06 that reads:

> "No former commissioner or deputy commissioner may, within one year after leaving the position of commissioner or deputy commissioner in a department or agency, appear or participate in proceedings of that department or agency representing the interests of private persons."

43. The Examiner requests that the Commissioner of Personnel, when considering what action to take on these proposed rules, scrutinize the following Findings particularly closely. This is the one section of the rules that places a prohibition on the Examiner that is significantly different from any already imposed on him as a lawyer by the Code of Professional Responsibility or by the requirements of Minn. Stat. § 15.052, subd. 1, that all Hearing Examiners be free of any political or economic association that would impair their ability to function officially in a fair and objective manner. The Examiner has attempted to be

unbiased in the following findings.

44. The Department of Public Service pointed out that Personnel has no power over former employees and that if anything, the provision should read: "No agency shall permit any former employee to represent . . ." (Pub. Ex. 18). Even in that form, the rule is not a standard of conduct for state employees, and therefore, it is not authorized by statute. It can also be argued that the proposed rule goes beyond the legislative intent. The 1977 law applies only to commissioners and their deputies; the Legislature could easily have included constitutional officers, members of boards and commissions, and other state employees had that been intended.

45. As anticipated by Personnel, one employee did object that this section would be unduly burdensome on state employees who choose to leave state employment for the private sector (Pub. Ex. 1). He stated that it is reasonable to assume that a state employee would seek employment in the private sector in the same field. In a similar vein, the Department of Public Service stated:

> "The inability for staff members of the department or commission to contribute to a utility's rate case for one year after leaving the employ of the department could seriously limit our recruitment efforts. Personnel employed as rate and financial analysts devote nearly 100% of their time to rate case matters. If the door to private industry is closed to them for a year, it seriously affects their career opportunities. What experience they do gain, would be useful only to their public employment. Presently, our recruitment efforts are hampered by our inability to compete salary-wise with private industry. Closing the door to future employment in the private (regulated) sector adds to the problem.
>
> "On the other hand, we are cognizant of the concern over the seeming 'revolving door' between the regulator and the regulated industry. Perhaps there is justification for concern over undue influence being exerted by prior commissioners and/or staff upon the present commissioners but is the provision (prohibiting a person from applying the experience and knowledge acquired in state employ to private enterprise) fair and equitable?
>
> "This issue is not one peculiar to the Minnesota Department of Public Service and the Public Service Commission. It is a national issue, being investigated at the federal level. Perhaps the Department of Personnel can delete this provision until all the arguments for and against have been given the attention they demand."

46. One comment (Pub. Ex. 6) pointed out that the provision differs from Minn. Stat. § 271.18. That section makes it a gross misdemeanor for any former employee of the Department of Revenue to, within one year after his employment is terminated, act as counsel, attorney or agent in connection with any claim or proceeding pending in the department or, at any time after termination of employment, to so act in connection with any claim or proceeding of which he has knowledge acquired during his employment. The statute is similar to the Code of Professional Responsibility which prevents, without time limit, a lawyer who is a former public official from representing a private client in any matter in which he previously participated as a public employee. The statute and the Code of Professional Responsibility are reasonable because they limit the prohibition to matters in which the person had or may have had "inside" information. And they are enforceable; in one case by criminal prosecution, in the other by disbarment proceedings. The rule proposed here is not so limited and it is not enforceable. For all these reasons, PERSL 280 E. should be deleted.

PERSL 281 - USE OF STATE PROPERTY

47. PERSL 281 states:

> "An employee shall not use or allow the use of state time, property, supplies, or equipment, including property leased by the State, for his private interests, except as provided by law or for any other use not in the interests of the Stateof Minnesota."

This rule is needed to prevent the use of State property paid for by the taxpayers from being used for private advantage. Personnel stated that it is common practice for employers to forbid the use of property, equipment and facilities for personal use and that the rule is therefore a usual and reasonable condition of employment. An almost identical rule appears in the Wisconsin Regulations.

48. There was little comment on this rule. The union suggested that the rule would prohibit the use of state meeting rooms for union meetings which is presently allowed (Pub. Ex. 7). As far as the Examiner can determine, the use by unions of state

meeting rooms is not a right granted by PELRA. That is a practice that has developed because it is reasonable for employees to meet after working hours at or near the place they work. Even the broad exception proposed by the Department in PERSL 275 would not clearly apply to this situation. Thus, the Examiner suggested the further modification to PERSL 275 (see Finding No. 15).

49. The wording of the proposed rule is awkward; especially the placement of the last clause, which looks like an afterthought. The Examiner would suggest that the rule be modified to read as follows:

> "An employee shall not use or allow the use of State time, property, supplies or equipment for his private interests or any other use not in the interest of the State, except as provided by law."

PERSL 282 - ACTION TO AVOID POSSIBLE CONFLICT

50. In its post-hearing comments (Dept.Ex. P), Personnel summarized the comments on this rule as follows:

> Comments on this rule were of three types:
>
> 1. How quickly must the employee notify the appointing authority after ceasing to perform duties because of possible conflict of interest?
>
> 2. Must the notice of possible conflict be in writing?
>
> 3. Why isn't there a provision for a central repository for advisory opinions and a separate body to render opinions?
>
> In response to Question 1, the department believes that more direction would be advisable and revised language submitted that specifies the time period in which various options must be completed so that the matter will be resolved as expeditiously as possible and the work of the agency will not be disrupted.
>
> With regard to Question 2, we believe that it is necessary for the protection of the employee (against possible charges of non-performance of duties) that the notice of conflict be in writing.
>
> The issue of a separate investigatory body was addressed in the covering memorandum and we will not repeat what was said.* The intent at the time the rules were drafted was that the Commissioner of Personnel would receive a copy of all advisory opinions. This intent was not clearly spelled out in the rule and we propose a modification along with a restructuring of Persl 282C to better emphasize that there are optional courses of action available to employees. We therefore propose the following language:
>
> > Persl 282: ACTION TO AVOID POSSIBLE CONFLICT: When an employee believes the potential for conflict of interest exists in relation to the discharge of his/her official duties, and is required to take an action prohibited of this

chapter, it is his/her duty to take action to avoid this situation. The employee should:

A. Cease the performance of duties that would create a conflict of interest and notify the appointing authority within one working day of ceasing to perform the duties.

B. Prepare a written statement describing the matter requiring action or decision, and the nature of the possible conflict of interest with respect to such action or decision.

C. The employee may then choose either of the following courses of action:

1. Deliver copies of this statement to his/her appointing authority, request clarification of the possibility for conflict of interest, and be guided by the opinion so rendered. The appointing authority may, in turn request an advisory opinion from the Commissioner or legal counsel.

2. Request an advisory opinion directly from the Commissioner by delivering copies of the statement to the Commissioner.

A copy of any advisory opinion issued by an appointing authority shall be sent to the Commissioner. Copies of any opinion issued by the Commissioner will be sent to the proper appointing authority."

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*In its cover letter to Department's Ex. P, Personnel made the following statement regarding a separate investigatory body:

"The comment was made that a separate investigatory body should be established to render opinions on the Code: that is not possible. Minnesota Statutes do not authorize the Commissioner of Personnel to establish separate investigatory bodies, if indeed we had the funds to do so. There is nothing in statute that permits the Commissioner to delegate part of his authority to another agency which precludes the Ethical Practices Board for this purpose, except for employees specifically referenced in Minn. Stat. Chapter 10A."

51. As the Ethical Practices Board pointed out, Minn. Stat. § 10A.07, provides a different procedure by which 10A employees may remove themselves or be removed from making an official decision or taking an official action if a conflict of interest exists. (Pub. Ex. 8) Personnel's modification of the definition of employee offered at the hearing (See Finding 20) reasonably resolves this problem; 10A employees would follow the procedures of § 10A.07.

52. Some of the questions as to the length of time were not directed at how soon an employee must notify his appointing au-

thority, but rather, how long would it take the Commissioner of Personnel to issue an opinion? (Pub. Ex. 18) Personnel's proposed changes do not address that question. In Minn. Stat. § 43.28, employees of the classified service are required to take a leave of absence upon assuming any elected public office, other than state or federal public office, or upon becoming a candidate for any elected public office if, in the opinion of the Commissioner of Personnel, such office or candidacy "conflicts with his regular state employment." (Employees assuming state or federal elected office must take a leave of absence.) This section requires all requests for opinions of the Commissioner to be in writing and delivered by registered mail and further requires that the Commissioner issue his opinion within seven calendar days of receipt of the request. Since this statute already requires the Commissioner to issue some conflict of interest opinions within seven calendar days, it would be unreasonable to require any other period for other conflict of interest opinions; just as it is unreasonable to not specify any time period. This time frame should not impose any undue burden on personnel because it is unlikely that any great number of conflict of interest opinions will be requested. Since it has been operating, the Ethical Practices Board has issued only two advisory opinions on conflicts of interest. They are Advisory Opinion No. 25, adopted September 29, 1975, and Advisory Opinion No. 36, adopted October 11, 1977. It might be argued that there are far more state employees than there are public officials subject to Chapter 10A. However, the fact is that the public officials under Chapter 10A are far more likely to encounter situations involving potential conflicts of interest because of their positions of authority and decison-making. At any rate, without a specific time limit on the Commissioner of Personnel requiring prompt opinions, it would be quite possible for the operation of state government to grind to a halt.

53. In modifying Persl 282, Personnel omitted, apparently by error, the following provision of the originally proposed rules:

"If it is determined that a conflict exists, the employee shall be relieved of the assignment and the appointing authority shall assign the matter to another qualified employee who does not have conflict."

Without this provision, there is no guidance to the employee or his appointing authority as to what to do if a conflict does exist. However, this section is unclear in two aspects. First, who is to make the determination and what if the employee, appointing authority and Commissioner of Personnel have different opinions. It would seem that if any of the three believes a conflict exists, the situation should be avoided. The employee's opinion is most important because he is the only one who can actually know whether the particular situation will improperly influence his decision. In fact, the whole system depends upon him raising the question in the first place. The appointing authority's opinion and that of the Commissioner are also important, especially as they relate to the appearance of the conflict of interest. The second difficulty with this provision is that it makes no provision for situations in which it would be impossible to assign the matter to another employee. Such situations may arise for non-10A employees, though certainly no often. Minn. Stat. § 10A.07, subd. 2, states that the public official's superior shall assign the matter, if possible, to another employee who does not have a potential conflict of interest. Minn. Rule EC 304(a)(2)(bb) states that where the public official having the potential conflict of interest is required by law to determine the matter, he shall so notify all affected parties known to him by providing these parties with copies of the conflict of interest statement. Failure of the rule proposed here to address these matters makes the rule unreasonable. It should be modified.

PERSL 283 - ADDITIONAL REGULATORY PROVISIONS

54. This rule states that any agency wishing to adopt additional regulatory provisions affecting the conduct of employees must do so by the rule-making procedure and further requires the approval of the Commissioner of Personnel prior to adoption. This provision was added at the request of the Department of Public Service. At the hearing, Personnel stated that it recognizes that

agencies with unique problems may wish to establish additional standards but that to insure consistency and reasonableness, it is necessary to have such supplemental rules reviewed by a central authority. No agency of this state can adopt rules without statutory authority. The only agency in this state that has authority to adopt a Code of Ethics is the Commissioner of Personnel, and he has no authority to grant rule-making authority to other agencies. This rule must be deleted because it is beyond the statutory authority of the Commissioner. In its post-hearing comments, the Department of Public Service (Pub. Ex. 18) asked, "Is internal policy-making subject to a formal rules procedure?" The reference is apparently to Minn. Stat. § 15.0412, subd. 3 (1976), which provided:

> "Each agency shall adopt rules setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties. Procedures concerning only internal management which do not directly affect the rights of or procedures available to the public need not be adopted as rules."

Laws 1977, Ch. 443, § 2, amended this subdivision to read:

> "Each agency shall adopt rules setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public."

Codes of Ethics for State employees directly affect the rights of and procedures available to the public; thus, they are "Rules". Unfortunately, the Department of Public Service has spent a great deal of time and effort and has drafted an excellent Code of Ethics. The Examiner would suggest that many provisions of that Code be included in future amendments of these rules; especially provisions relating to ex parte communications while cases are pending.

PERSL 284 - DISCIPLINARY ACTION

55. As proposed at the hearing, this rule provided:

> "The rules of conduct hereinabove set forth shall be deemed conditions of employment in the state service. Violations of these rules of conduct shall constitute just cause for disciplinary action. Employees who are disciplined under the provisions of this chapter shall have access to the grievance procedures outlined in Persl 176."

In order for these rules to be effective, they must be enforceable. A reasonable means of achieving this is through the same disciplinary procedure used for any other violation of personnel standards. The union suggested that the rule would deny union members access to the union grievance procedures. Personnel stated it was their intent that any disciplinary action resulting from the application of these rules would be grievable in the same manner as all other disciplinary actions. Therefore, in their post-hearing comments, they recommended that the last sentence of the proposed rule be deleted. The Examiner agrees that this change results in a rule that reasonably represents Personnel's intent without conflicting with any bargaining rights.

PERSL 285 - COPY TO EMPLOYEES

56. This rule requires every appointing authority to provide a copy of the Code and any amendments to all current employees and to new employees at the time of appointment. This rule is reasonable and necessary to insure that all employees are aware of the rules and have an opportunity to conduct their affairs in accordance with them.

GENERAL COMMENTS

57. Common Cause offered the following statement at the hearing:

> "Such a code of ethics should be so clearly written that those who are to be governed by it will easily understand that is expected of them. If questions of interpretation do arise, the code should provide procedures for seeking legally binding advisory opinions from an independent body. It should also provide that this independent body will receive and investigate complaints alleging violations of this code of ethics. Penalties should be provided for proven violations and an appeal procedure should be included." (Pub. Ex. 12)

Having pronounced these standards, Common Cause said the proposed rules fell short.

58. The Ethical Practices Board suggested that a code of ethics should include provisions for the following:

> "1. Definitive statement regarding do's and dont's for state employees;
>
> 2. Recognition of the fact that potential conflicts of interest will occur for state employees;

3. A procedure whereby a state employee may be removed prior to official decision or action which may involve a conflict of interest;

4. A central place where statements of conflict of interest and representation disclosure are filed for public viewing and photocopying services are available;

5. That administrative agency as well as an interpretative body or agency to clarify through interpretation, upon request, areas of confusion in the code;

6. A board or agency to receive complaints regarding possible violations of the code;

7. Readily understood penalties for violations; and an

8. Appeal procedure." (Pub. Ex. 8)

59. No doubt, the rules as originally proposed suffered from many of these deficiencies. However, it is the view of this Examiner that modifications can be made to the proposed rules that will result in a clear, meaningful and workable Code of Ethics. Attached to this Report is a Code of Ethics that incorporates the Findings made above as well as some grammatical and organizational revisions that the Examiner believes to be appropriate. While some of the changes are major, it is the view of the Examiner that they are not substantial as that term is applied in Minn. Rule HE 108. That is, they do not (1) affect classes of persons not represented at the hearing; (2) go to a new subject matter of significant substantive effect; (3) make major substantive changes not raised by the original notice of hearing, or (4) result in a rule fundamentally different from that contained in the Notice of Hearing. There are some changes or additions which should be made in the future, but which, at this point, would be substantial changes. There should be a provision for an agency, probably Personnel, to give advisory opinions on hypothetical questions, and there should be an agency, again probably Personnel, to receive complaints and make investigations. Provisions concerning investments, ex parte communications, elected postiions (as opposed to outside employment) and application of the rules to Board members should be considered. The Examiner fails to comprehend the statements that the Code is unenforceable or that penalties are not clear. Disciplinary action,

including possible discharge, is a very real and very clear penalty to State employees. So, too, is the threat of being convicted for a misdemeanor for violating the Code. These procedures have appeal mechanisms. Common Cause's suggestion that a code should provide procedures for seeking "legally binding advisory opinions" deserves some further comment. The quoted phrase is internally inconsistent; that is, an advisory opinion is never legally binding. Even the Ethical Practices Board's advisory opinions are not binding in regard to Minn. Stat. Ch. 10A. If an employee seeks an opinion from his appointing authority, or from the Commissioner of Personnel, and he follows the advice given in that opinion, he should not be subject to disciplinary action. If, however, he decides to proceed contrary to the opinion, then it still must be determined whether the conflict of interest or prohibited action actually occurred. This may be done through the grievance procedure, or through the disciplinary action appeal procedure, as appropriate. The advisory opinion would be given no special weight during such proceedings.

CONCLUSIONS

1. Due, timely and adequate notice of the hearing was properly served and published by the Department of Personnel. All other substantive and procedural requirements have been fulfilled.

2. The Department of Personnel has demonstrated its statutory authority to adopt the proposed rules.

3. Except as noted in the Findings, the Department of Personnel has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts.

4. Many of the deficiencies noted may be cured by non-substantial changes to the proposed rules. Where such changes are not possible, deletion of the defective section will not render the remaining rules invalid.

5. The suggestions made by the Examiner are not intended in any way to prevent the Department of Personnel from making its own non-substantial changes and improvements to the proposed rules.

RECOMMENDATION

The Hearing Examiner recommends that the proposed rules be modified as suggested in the Findings and the attached revision and that, so modified, they be adopted.

Dated this 31st day of October, 1977.

STEVE M. MIHALCHICK
Hearing Examiner

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF PERSONNEL

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF PERSONNEL GOVERNING A CODE OF ETHICS FOR ALL EXECUTIVE BRANCH STATE EMPLOYEES.	REPORT OF THE CHIEF HEARING EXAMINER

WHEREAS, hearings were held on August 30 and 31, 1977, before Steve M. Mihalchick, a Hearing Examiner of the State Office of Hearing Examiners, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. § 15.052, Subd. 3, was issued to the Department of Personnel on October 31, 1977; and

WHEREAS, the Department of Personnel submitted the rules as proposed to be adopted pursuant to Minn. Stat. § 15.052, Subd. 4, and Rule HE 107, to the Chief Hearing Examiner; and

WHEREAS, the Chief Hearing Examiner, on November 15, 1977, submitted his Report to the Department of Personnel; and

WHEREAS, the Department of Personnel submitted the rules to the Attorney General for final adoption, who then suggested that certain of the rules be amended prior to adoption; and

WHEREAS, the Department of Personnel has resubmitted the rules as amended to the Chief Hearing Examiner for review prior to resubmitting to the Attorney General; and

WHEREAS, a review of rule Persl. 280 D. (5) indicates, and the Chief Hearing Examiner so finds, that the rule as proposed to be finally adopted is substantially different from the rule as originally proposed and discussed at the hearing in that it now makes the items listed actual conflicts of interest, whereas the rule as proposed listed them merely as considerations; and

WHEREAS, the Chief Hearing Examiner finds that the rest of the final proposed rules are not substantially different from those proposed at the public hearings.

NOW, THEREFORE, upon receipt of this Report, the Department of Personnel shall withdraw rule Persl. 280 D. (5) or, if it chooses to amend the rule, it should amend the rule as it was at the time of the initial submission to the Chief Hearing Examiner, or if it chooses to amend it differently, should resubmit the rule to the Chief Hearing Examiner for his review. The Department of Personnel has the responsibility of submitting the complete hearing record and the rules as adopted by the Department to the Attorney General and to publish in the State Register, all pursuant to Minn. Stat. § 15.0412, Subd. 4.

Dated this 30th day of
December, 1977.

DUANE R. HARVES
Chief Hearing Examiner

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF PERSONNEL

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF PERSONNEL GOVERNING A CODE OF ETHICS FOR ALL EXECUTIVE BRANCH STATE EMPLOYEES.)

REPORT OF THE CHIEF HEARING EXAMINER

WHEREAS, hearings were held on August 30 and 31, 1977, before Steve M. Mihalchick, a Hearing Examiner of the State Office of Hearing Examiners, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. § 15.052, Subd. 3, was issued to the Department of Personnel on October 31, 1977; and

WHEREAS, the Department of Personnel has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, Subd. 4; and

WHEREAS, the Department of Personnel has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, Subd. 4, and Rule HE 107; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearings and that the Department of Personnel has met all requirements of Minn. Stat. § 15.0412, Subd. 4.

NOW, THEREFORE, upon receipt of this Report, the Department of Personnel has the responsibility of submitting the complete hearing record and the rules as adopted by the Department to the Attorney General and to publish in the State Register, all pursuant to Minn. Stat. § 15.0412, Subd. 4.

Dated this 15th day of November, 1977.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

STATE OF MINNESOTA

DEPARTMENT OF PERSONNEL

IN THE MATTER OF THE PROPOSED ADOPTION
OF RULES OF THE DEPARTMENT OF PERSONNEL
GOVERNING A CODE OF ETHICS FOR ALL
EXECUTIVE BRANCH STATE EMPLOYEES.

FINDINGS OF FACT

The above-entitled matter came on for hearing in St. Paul, Minnesota on August 30 and 31, 1977, before Steve M. Mihalchick, a Hearings Examiner assigned by the Chief Hearing Examiner.

The following persons appeared for the Department of Personnel (hereinafter, "Personnel"): Donn Escher, Assistant Commissioner; Richard Cottrell, Manager of Personnel Planning and Data Services; and Barbara Sims, Special Assistant Attorney General. Ray Bohn, Governor's Office, appeared for the Governor and spoke in favor of the proposed rules. Twenty-one other persons attending the hearings signed the hearing register. The hearing continued until all interested persons or groups had had an opportunity to participate.

Hearing Examiner Mihalchick prepared the Report of the Hearing Examiner (hereinafter "Report"), dated October 31, 1977 pursuant to Minn. Stat.§ 15.052 Subd. 3 and Minn. Rules H.E. 106.

Based upon all the records and proceedings herein, the Commissioner makes the following:

FINDINGS OF FACT

1. He adopts Findings 1 - 18 and 20 - 59 of the Report, which findings relate to procedural requirements, statutory authority, the need for rules governing a Code of Ethics for All Executive Branch State Employees, the nonsubstantial modifications and the reasonableness of the proposed rules.

2. He adopts Finding 19 insofar as it relates to proposed rule Persl 276D defining "Commissioner". He declines to adopt those portions of the finding relating to proposed rule Persl 276B and C defining "agency" and "appointing authority".

Proposed Persl 276B defining "agency" and 276C defining "appointing authority" are necessary and reasonable to clearly define these terms as used in the rules so that affected employees will understand their meaning and effect and so that the rules can be properly applied. Although these definitions are contained in other portions of the Personnel rules it is reasonable and necessary to include them in proposed Persl 276 since pursuant to proposed Persl 282 a copy of rules Persl 275 - 282 will be given to each employee. While every employee will therefore have a copy of these rules they may not have ready access to the other Personnel rules which contain the definition of these terms and may be confused as to their meaning.

3. He makes the following additional findings: (which are cross referenced to the findings in the Report).

4. He finds that proposed rule Persl 275D should be modified to include "identify potential conflicts" as suggested in Finding No. 16 of the Report rather than remain as originally proposed since this modification further clarifies the rule.

5. He adopts the modification of proposed rule Persl 280D as suggested in Finding No. 40 of the Report. The rule as modified is reasonable and necessary to prevent undue influence on the decision maker or otherwise impair the employee's judgment. To delete the rule would be unreasonable.

6. He adopts the Hearing Examiner's modification of proposed rule Persl 279 (Finding No. 49) but retains in the adopted language the reference to leased property which was in the rule as originally proposed and which is necessary for clarity. The State utilizes considerable leased property and equipment. By retaining the word "leased" in the proposed rule, those governed by the rule will not have to guess at its meaning.

7. In adopting most of the Report he has proceeded to make the changes as proposed by the Hearing Examiner including the substitution of language (he or she for he/she) and the reorganization of the rules as follows:

a. proposed rule Persl 279A and C is incorporated into proposed rule Persl 280.

b. proposed rule Persl 281 is renumbered Persl 279.

c. proposed rule Persl 282 is incorporated into proposed rule Persl 280.

d. proposed rule Persl 284 is renumbered Persl 281.

e. proposed rule Persl 285 is renumbered Persl 282.

CONCLUSIONS

1. He adopts Conclusions 1 and 2 of the Report.

2. He adopts Conclusion 3 but also finds proposed rules Persl 276 B and C as noted in the findings necessary and reasonable.

3. He adopts Conclusions 4 and 5.

Dated: November 7, 1977.
5:00 P.M.

Richard W. Session
Commissioner of Personnel