

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

Minnesota State Department of Education
Capitol Square ☐ 550 Cedar Street ☐ St. Paul, Minnesota 55101

Phone: 296-3377

RECEIVED
MAR 16 1983
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

March 15, 1983

Office of the Attorney General
G-25 State Administration Bldg.
50 Sherburne Avenue
St. Paul, MN 55155

Dear Sir:

I am writing with regard to the proposed adoption of Rules of the Department of Employee Relations governing the State Personnel System, specifically 2MCAR § 2.332.

My comment is not in reference to the legality of proposed Rule 2MCAR § 2.332, but rather to the injection of the pronoun "she" on page 2, line 14, of Section A of the Rule.

The Department of Employee Relations has been removing gender references in its Rules over the past few years as Rules were promulgated or amended. It seems inappropriate to revert to previous practice in this new Rule. I suggest you have the department delete the pronoun "she" and insert in lieu thereof the words "the commissioner."

Sincerely,

Donn H. Escher

Donn H. Escher, Director
Office of Employee Relations

DHE:ww
cc: Mark Sundquist, Manager
Training and Development
Department of Employee Relations

SF-00006-02

STATE OF MINNESOTA

Office Memorandum

DEPARTMENT: EMPLOYEE RELATIONS - 3RD FLOOR SPACE CENTER BUILDING

TO : Mike Miles, Special Assistant Attorney General

DATE: 3/14/83

FROM : Mark Sundquist, Manager Training and Development — Mark L Sundquist

PHONE: 296-8933

SUBJECT: Proposed Personnel Rules

Attached is the packet of information on Personnel Rules that we are promulgating. The rules have been approved by the Chief Hearings Examiner and are ready for legal review by the Attorney General. Attached are the following materials:

RECEIVED
MAR 1 [illegible] 1983
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

1. Rules as Adopted (4 copies).
2. Order Adopting Rules (2 copies).
3. Order for Hearing.
4. Notice of Hearing.
5. Affidavit of Mailing Notice of Hearing.
6. Mailing List Certificate.
7. Rules as Proposed (copy of 7SR pp. 745-746).
8. Hearing Examiners Report.
9. Chief Hearing Examiners Reports.
10. Agency's Findings of Fact and Conclusion.
11. Statement of Need and Reasonableness.
12. Record (audio tape).
13. Certificate of Compliance with Rule Making Procedures.
14. Affidavit of Mailing Notice to Attorney General.
15. Notice of Submission to the Attorney General.

MLS:cm

Attachment

RECEIVED
MAR 16 1983
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

Our File No. 891

RULE REVIEW CHECKLIST

DATE RULE RECEIVED 3-16-83
DATE FOR REVIEW 3-28-83
DATE DUE 4-5-83

Adopted w/a hearing ✓
Adopted w/o hearing
Temporary rule

Approved 4-8-83 Disapproved Returned to Agency

Resubmitted Due
Approved Disapproved Returned to Agency

Date filed w/Secretary of State Revisor approved 4/11/83 disapproved

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✓ Rule as Adopted repealed rule is existing rule on same subject

✓ Rule as Proposed See SR.

✓ Order Adopting 2.21.83 Date

N/A Notice of Intent to Solicit Outside Opinion

✓ Order for rulemaking unsigned
12.16.82 date of Hearing

N/A Certificate of Board's Authorizing Resolution

✓ Notice of rulemaking
✓ Sufficiency

✓ Affidavit of Mailing Notice or rulemaking
11.16.82 At least 30 days prior to hearing/~~adoption~~

✓ Mailing list Certificate

✓ Publication in State Register
11.15.82 At least 30/~~20~~ days prior to hearing/~~adoption~~

✓ Hearing Examiner's Report

✓ Chief Hearing Examiner's Report(s)
1.18.83 Approving H.E.'s Report
2.24.83 Approving agency action

✓ Agency's Findings of Fact

N/A LCRAR Report or agency Affidavit

N/A Certificate of Board's Resolution Adopting Rules

N/A Order Approving Incorporation by Reference

✓ Statement of Need and Reasonableness

N/A Petition for Adoption of a Rule

Record (includes transcript or tape, exhibits, comments received by agency, requests for a hearing, and other relevant materials)

✓ Certificate of Compliance w/Rulemaking Procedures

✓ Affidavit of Mailing Notice of Submission to Attorney General

? Notice of Submission to the Attorney General
Misstates AG comment period as "20" days - should be "10"

✓ comment to Atty. Gen

SF-00006-02

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : NINA ROTHCHILD, Commissioner of Employee Relations

DATE: April 8, 1983

Attn: STEVE GUNN
Special Assistant Attorney General

FROM : TED A. MARTINEZ TAM
Special Assistant
Attorney General

PHONE: 296-4692

SUBJECT: In the Matter of the Proposed Adoption of Rules of the State Department of Employee Relations Governing the State Personnel System, 2 MCAR §§ 2.308, 2.331, 2.332, and 2.371

Enclosed herewith are the rules you have submitted for approval. These rules have been approved by this office and filed with the Secretary of State. Please note that they have not been filed with the State Register. This must be done promptly by your agency.

Upon receipt and before transmittal to your agency, however, it is important that you recheck these rules as to:

1. Affixation of stamps of the Attorney General and Secretary of State;

2. Coverage by these stamps of all rules submitted; and

3. Inclusion of all pages to the rules in the approved set.

If you have any questions in this regard, please contact me.

Encs.

TAM/ls

cc: Ms. Kathy Burek
Mr. Duane Harves

AG copy

Department of Employee Relations

Adopted Rules Governing the State Personnel System (2 MCAR SS 2.308, 2.331, 2.332, 2.333, and 2.371)

Rules as Adopted

2 MCAR S 2.308 Temporary designation of positions in the unclassified service.

The commissioner may authorize the temporary designation of a position in the unclassified service in accordance with Minnesota Statutes, section 43A.08, subdivision 2a for a period not to exceed three years. After considering the documentation submitted by the appointing authority, the commissioner shall determine whether the position is classified or unclassified.

2 MCAR S 2.331 Test accommodations for applicants who are handicapped.

Applicants who are handicapped may request that an examination process be altered to accommodate their handicaps. The applicant shall indicate on the standard application form prescribed in 2 MCAR S 2.320 the handicapping condition which substantially limits one or more major life activities and the specific accommodation desired.

The commissioner shall consider the following in reviewing requests for test accommodations: whether the content and form of the examination would make the requested accommodations necessary; whether the requested accommodations would compromise the validity or job-relatedness of the examination; and whether the requested accommodations can reasonably be made. The commissioner shall decide whether to admit the applicant to the examination if it is open to application and to make the requested accommodations or to deny the request for accommodations. If the commissioner denies the request for accommodations the applicant shall be offered the choice of participating in the competitive examination process if it is open for application or, if the commissioner determines that the

applicant meets the eligibility criteria specified in Minnesota Statutes, section 43A.10, subdivision 8, of participating in a qualified handicapped examination in accordance with 2 MCAR S 2.332.

2 MCAR S 2.332 Qualified handicapped examination.

A. Criteria for offering. The commissioner may offer applicants whose handicaps are so severe that they cannot be accommodated in the competitive examination process a qualified handicapped examination in accordance with Minnesota Statutes, section 43A.10, subdivision 8. A qualified handicapped examination shall consist of an on-the-job trial work experience of up to 700 hours. The commissioner ~~may~~ shall approve a qualified handicapped examination ~~after-determining-whether~~ if she determines that not all of the standard examination requirements need to be met for some positions in the class and whether the job duties or procedures can be altered so that the applicant could perform the essential duties of a position in the class.

See comment to AG. HE 16

B. Placement. A candidate admitted for a qualified handicapped examination must be given a list of agencies having positions in the class and written authorization by the commissioner to seek a vacant position in the class. The candidate, with the help of a placement and referral specialist in a rehabilitation program recognized by the state, may contact the agencies to develop a suitable placement. The commissioner in accordance with Minnesota Statutes, section 43A.10, subdivision 8 shall authorize an examination in any position determined suitable by the candidate, counselor, and appointing authority.

C. Completion or termination of examination. A qualified handicapped examination may be successfully completed at any time during the 700 hours of work experience if the appointing authority notifies the commissioner that the candidate can satisfactorily perform the essential duties of the position and is eligible for probationary appointment in accordance with Minnesota Statutes, section 43A.13, subdivision 6. A qualified

handicapped examination may be terminated at any point during the 700 hours of work experience, except for the first 30 scheduled work days from the date of the start of the examination, if the appointing authority notifies the commissioner that the candidate cannot satisfactorily perform the essential duties of the position. A candidate terminated from a qualified handicapped examination ~~may~~ shall be authorized to seek placement in other positions in the class if the commissioner decides that the candidate's inability to perform was limited to duties essential to the specific position in which he or she was placed but which are not essential for other positions in the class. HE 20

2 MCAR S 2.333 Notice.

The commissioner shall notify an applicant who is handicapped and, upon request, provide a written statement of the reasons for the decision, of any of the following decisions:

A. To provide or deny a request for test accommodations except when the test accommodation is unnecessary due to the examination format.

B. To admit or deny admission to a competitive or qualified handicapped examination.

2 MCAR S 2.371 Unclassified appointments.

Appointing authorities may make appointments to unclassified positions authorized in accordance with statute. Unclassified appointments do not require public notice. Unless otherwise specified in a statute, an appointing authority may appoint to an unclassified position any person he or she considers qualified~~, but~~. For persons appointed to positions for which compensation is established under Minnesota Statutes, section 43A.18 subdivisions 1, 2, and 3, the appointing authority shall submit the person's resume to the commissioner. HE 23 No employee ~~may~~ shall serve in positions authorized under 2 MCAR S 2.308 performing the same function in the same agency for more than three years in total. HE 24

APPROVED AS TO LEGALITY

April 8 1983

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

BY Ted A. Mondale
SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
APR 12 1983

Joan Anderson Growe
Secretary of State

10:50AM

STATE OF MINNESOTA

DEPARTMENT OF EMPLOYEE RELATIONS

In the Matter of the Proposed Adoption of Rules of the State Department of Employee Relations Governing the State Personnel System, 2 MCAR §§ 2.308, 2.331, 2.332, and 2.371

ORDER ADOPTING RULES

The above-entitled matter came on for hearing before Hearing Examiner Phyllis A. Reha on the 16th day of December, 1982, at 9:00 A.M. in the Main Conference Room, Third Floor, Space Center Building, 444 Lafayette Road, St. Paul, Minnesota after proper notice required by Minnesota Statutes 15.0412 was served upon all persons, associations, and other interested groups registered with the State Department of Employee Relations for that purpose.

After affording interested persons an opportunity to present written and oral data, statements and arguments, hearing all of the testimony, considering all of the evidence adduced and upon the records, files, and proceedings herein and applicable statutory standards or criteria, and confirming the need for and reasonableness of the above-captioned rules,

NOW, THEREFORE, IT IS ORDERED that these rules identified as 2 MCAR §§ 2.308, 2.331, 2.332, and 2.371 are adopted this 21st day of February, 1983, pursuant to authority vested in me by Minnesota Statutes section 43A.04, subd. 3.

STATE OF MINNESOTA

Nina Rothchild

Nina Rothchild
COMMISSIONER OF EMPLOYEE RELATIONS

STATE OF MINNESOTA

DEPARTMENT OF EMPLOYEE RELATIONS

In the Matter of the Proposed Adoption
of Rules of the State Department of Employee Relations ORDER FOR HEARING
Governing the State Personnel System

IT IS ORDERED this 29th day of October, 1982, that a public hearing on the proposed rules captioned above be held in the Department of Employee Relations Offices, 3rd Floor Space Center Building, 444 Lafayette Road, St. Paul, Minnesota on December 16, 1982, commencing at 9:00 A.M., and continuing until all representatives of associations or other interested groups or persons have had an opportunity to be heard.

IT IS FURTHER ORDERED, that notice of said hearing be given to all persons who have registered their names with the State Department of Employee Relations for that purpose and be published in the State Register.

STATE OF MINNESOTA

Barbara L. Sundquist
COMMISSIONER OF EMPLOYEE RELATIONS

Department of Employee Relations
In the Matter of the Proposed Adoption of
Rules of the State Department of Employee Relations Governing the State Personnel System,
2 MCAR §§ 2.308, 2.331, 2.332, 2.333, and 2.371

NOTICE OF HEARING

Notice is hereby given that a public hearing will be held pursuant to Minnesota Statutes section 15.0412, subdivision 4, in the above-entitled matter in the Department of Employee Relations, Main Conference Room, 3rd Floor Space Center Building, 444 Lafayette Road, St. Paul, Minnesota on December 16, 1982, commencing at 9:00 A.M. and continuing until all persons or representatives of associations or other interested groups have had an opportunity to be heard concerning adoption of the proposed rules captioned above by submitting either oral or written data, statements, or arguments. Statements or briefs may be submitted without appearing at the hearing.

These rules govern the temporary designation of positions in the unclassified service, examinations for applicants with handicaps and appointments to the unclassified service. A copy of the proposed rules is attached to this Notice.

Authority for the adoption of these rules is contained in Minnesota Statutes section 43A.04, subdivision 3 (1981 supp.). Additionally a Statement of Need and Reasonableness that describes the need for and reasonableness of such provision of the proposed rules and identifies the data and information relied upon to support the proposed rules has been prepared and is available from Mark Sundquist upon request. The rule hearing procedure is governed by Minn. Stat. §§ 15.0411-15.0417 and 15.052 and by 2 MCAR 2.101-2.113 (Minnesota Code of Agency Rules). Questions about procedures may be directed to the Hearing Examiner, Richard C. Luis, Minnesota Office of Administrative Hearings, 400 Summit Bank Bldg., 310 - 4th Avenue South, Minneapolis, MN 55415, telephone (612) 341-7610.

Persons interested in these rules may appear at the hearing or provide written comment to the Hearing Examiner up to 5 working days after the hearing. This period may be extended to no longer than 20 calendar days if ordered by the Hearing Examiner at the hearing. The proposed rules may be modified as a result of the hearing process.

Any person may request notification of the date on which the Hearing Examiner's Report will be available, after which date the agency may not take any final action on the rules for a period of five working days. Any person may request notification of the date on which the hearing record has been submitted (or resubmitted) to the Attorney General by the agency. If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the Hearing Examiner (in the case of the Hearing Examiner's Report), or to the agency (in the case of the agency's submission or resubmission to the Attorney General). 8

Notice is hereby given that 25 days prior to the hearing, a Statement of Need and Reasonableness will be available for review at the agency and at the Office of Administrative Hearings. This Statement of Need and Reasonableness will include a summary of all the evidence and argument which the agency anticipates presenting at the hearing justifying both the need for and the reasonableness of the proposed rule or rules. Copies of the Statement of Need and Reasonableness may be obtained from the Office of Administrative Hearings at a minimal charge. 9

One free copy of this Notice and the proposed rules may be obtained by contacting Mark L. Sundquist, 3rd Floor Space Center Building, 444 Lafayette Road, St. Paul, Minnesota 55101, 296-8933. Additional copies will be available at the door on the date of the hearing. 36

Minn. Stat. Ch. 10A requires each lobbyists to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 (1979 Supp.) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or asociation to spend money, who spends more than five hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or 6

(b) Who spends more than $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, Saint Paul, Minnesota 55155, telephone (612) 296-5615.

STATE OF MINNESOTA

Barbara L. Sundquist

Barbara L. Sundquist
COMMISSIONER OF EMPLOYEE RELATIONS

Rules as Proposed (all new material)

2 MCAR S 2.308 Temporary designation of positions in the unclassified service.

The commissioner may authorize the temporary designation of a position in the unclassified service in accordance with Minnesota Statutes, section 43A.08, subdivision 2a for a period not to exceed three years. After considering the documentation submitted by the appointing authority, the commissioner shall determine whether the position is classified or unclassified.

2 MCAR S 2.331 Test accommodations for applicants who are handicapped.

Applicants who are handicapped may request that an examination process be altered to accommodate their handicaps. The applicant shall indicate on the standard application form prescribed in 2 MCAR S 2.320 the handicapping condition which substantially limits one or more major life activities and the specific accommodation desired.

The commissioner shall consider the following in reviewing requests for test accommodations: whether the content and form of the examination would make the requested accommodations necessary; whether the requested accommodations would compromise the validity or job-relatedness of the examination; and whether the requested accommodations can reasonably be made. The commissioner shall decide whether to admit the applicant to the examination if it is open to application and to make the requested accommodations or to deny the request for accommodations. If the commissioner denies the request for accommodations the applicant shall be offered the choice of participating in the competitive examination process if it is open for application or, if the commissioner determines that the applicant meets the eligibility criteria specified in Minnesota Statutes, section 43A.10, subdivision 8, of participating in a qualified handicapped examination in accordance with 2 MCAR S 2.332.

2 MCAR S 2.332 Qualified handicapped examination.

A. Criteria for offering. The commissioner may offer applicants whose handicaps are so severe that they cannot be accommodated in the competitive examination process a qualified handicapped examination in accordance with Minnesota Statutes, section 43A.10, subdivision 8. A qualified handicapped examination shall consist of an on-the-job trial work experience of up to 700 hours. The commissioner may approve a qualified handicapped examination after determining whether all of the standard examination requirements need to be met for some positions in the class and whether the job duties or procedures can be altered so that the applicant could perform the essential duties of a position in the class.

B. Placement. A candidate admitted for a qualified handicapped examination must be given a list of agencies having positions in the class and written authorization by the commissioner to seek a vacant position in the class. The candidate, with the help of a placement and referral specialist in a rehabilitation program recognized by the state, may contact the agencies to develop a suitable placement. The commissioner in accordance with Minnesota Statutes, section 43A.10, subdivision 8 shall authorize an examination in any position determined suitable by the candidate, counselor, and appointing authority.

C. Completion or termination of examination. A qualified handicapped examination may be successfully completed at any time during the 700 hours of work experience if the appointing authority notifies the commissioner that the candidate can satisfactorily perform the essential duties of the position and is eligible for probationary appointment in accordance with Minnesota Statutes, section 43A.13, subdivision 6. A qualified handicapped examination may be terminated at any point during the 700 hours of work experience, except for the first 30 scheduled work days from the date of the start of the examination, if the appointing authority notifies the commissioner that the candidate cannot satisfactorily perform the essential duties of the position. A candidate terminated

from a qualified handicapped examination may be authorized to seek placement in other positions in the class if the commissioner decides that the candidate's inability to perform was limited to duties essential to the specific position in which he or she was placed but which are not essential for other positions in the class.

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The commissioner shall notify an applicant who is handicapped and, upon request, provide a written statement of the reasons for the decision, of any of the following decisions:

A. To provide or deny a request for test accommodations except when the test accommodation is unnecessary due to the examination format.

B. To admit or deny admission to a competitive or qualified handicapped examination.

2 MCAR S 2.371 Unclassified appointments.

Appointing authorities may make appointments to unclassified positions authorized in accordance with statute. Unclassified appointments do not require public notice. Unless otherwise specified in a statute, an appointing authority may appoint to an unclassified position any person he or she considers qualified, but shall submit the person's resume to the commissioner. No employee may serve in positions authorized under 2 MCAR S 2.308 performing the same function in the same agency for more than three years in total.

Repealer. 2 MCAR S 2.010 is repealed.

In the Matter of the Proposed Adoption
of Rules of the State Department of
Employee Relations Governing the State
Personnel System
2MCAR § 2.308, 2.331, 2.332, 2.333 and 2.371

AFFIDAVIT OF MAILING

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

I, Dawn Walker, being first duly sworn deposes and say:

That on the 12th day of November, 1982, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Notice of Hearing by depositing in the State of Minnesota Central Mail System for United States mailing at said City of St. Paul, a copy thereof, properly enveloped, with postage prepaid, on all persons and associations who have requested that their names by placed on File with the State Department of Employee Relations for the purpose of receiving notice of the proposed adoption of rules by this agency.

Dawn M Walker
Dawn Walker

Subscribed and sworn to before me
this 12th day of November, 1982.

Christine F Goodwill

CHRISTINE F. GOODWILL
NOTARY PUBLIC - MINNESOTA
DAKOTA COUNTY
MY COMMISSION EXPIRES NOV. 18, 1982

STATE OF MINESOTA

COUNTY OF RAMSEY

CERTIFICATE

In the Matter of the Proposed Adoption
of Rules of the State Department of
Employee Relations Governing the State
Personnel System

I hereby certify that the list of persons, associations, and other interested groups who have requested, pursuant to Minn. Stat. 15.0412, subd. 4, that their names be placed on file with and maintained by the State Department of Employee Relations for the purpose of receiving notice of the proposed adoption of rules by this agency is accurate and complete as of 9:00 A.M., this 12th day of November, 1982.

Mark L Sundquist

Mark L. Sundquist
Training & Development Manager

(e) Paid expert witness whose testimony is requested by the body before which he is appearing, but only to the extent of preparing or delivering testimony;

(f) Stockholder of a family farm corporation as defined in Section 500.24, subd. 1, who does not spend over $250, excluding his own travel expenses, in any year in communicating with public officials; or

(g) Party or his representative appearing to present a claim to the legislature and communicating to legislators only by the filing of a claim form and supporting documents and by appearing at public hearings on the claim.

Any questions should be directed to the State Ethical Practices Board, Room 41, State Office Bldg., 435 Park Street, St. Paul, MN 55155, (612) 296-5148.

Notice: Any person may request notification of the date on which the hearing examiner's report will be available, after which date the agency may not take any final action on the rules for a period of five working days. Any person may request notification of the date on which the hearing record has been submitted (or resubmitted) to the Attorney General by the agency. If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the hearing examiner (in the case of the hearing examiner's report), or to the agency (in the case of the agency's submission or resubmission to the Attorney General).

Notice is given that 25 days prior to the hearing, a statement of need and reasonableness will be available for review at the Insurance Division and at the Office of Administrative Hearings. This statement of need and reasonableness will include evidence justifying both the need for and the reasonableness of the proposed rules. Copies of the statement of need and reasonableness may be obtained from the Office of Administrative Hearings at a minimal charge.

One free copy of this notice and the proposed rules may be obtained by contacting Ms. Nancy Myers, Insurance Division, 500 Metro Square Building, St. Paul, MN 55101, (612) 296-8591. Additional copies will be available at the door on the date of the hearing.

Thomas L. O'Malley
Temporary Commissioner of Insurance

Department of Employee Relations

Proposed Rules Governing the State Personnel System (2 MCAR §§ 2.308, 2.331, 2.332, 2.333, and 2.371)

Notice of Hearing

Notice is hereby given that a public hearing will be held pursuant to Minnesota Statutes section 15.0412, subdivision 4, in the above-entitled matter in the Department of Employee Relations, Main Conference Room, 3rd Floor Space Center Building, 444 Lafayette Road, St. Paul, Minnesota on December 16, 1982, commencing at 9:00 a.m. and continuing until all persons or representatives of associations or other interested groups have had an opportunity to be heard concerning adoption of the proposed rules captioned above by submitting either oral or written data, statements, or arguments. Statements or briefs may be submitted without appearing at the hearing.

These rules govern the temporary designation of positions in the unclassified service, examinations for applicants with handicaps and appointments to the unclassified service. A copy of the proposed rules is attached to this Notice.

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Barbara L. Sundquist
Commissioner of Employee Relations

Rules as Proposed (all new material)

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2 MCAR § 2.332 Qualified handicapped examination.

A. Criteria for offering. The commissioner may offer applicants whose handicaps are so severe that they cannot be accommodated in the competitive examination process a qualified handicapped examination in accordance with Minnesota

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

Statutes, section 43A.10, subdivision 8. A qualified handicapped examination shall consist of an on-the-job trial work experience of up to 700 hours. The commissioner may approve a qualified handicapped examination after determining whether all of the standard examination requirements need to be met for some positions in the class and whether the job duties or procedures can be altered so that the applicant could perform the essential duties of a position in the class.

B. Placement. A candidate admitted for a qualified handicapped examination must be given a list of agencies having positions in the class and written authorization by the commissioner to seek a vacant position in the class. The candidate, with the help of a placement and referral specialist in a rehabilitation program recognized by the state, may contact the agencies to develop a suitable placement. The commissioner in accordance with Minnesota Statutes, section 43A.10, subdivision 8 shall authorize an examination in any position determined suitable by the candidate, counselor, and appointing authority.

C. Completion or termination of examination. A qualified handicapped examination may be successfully completed at any time during the 700 hours of work experience if the appointing authoity notifies the commissioner that the candidate can satisfactorily perform the essential duties of the position and is eligible for probationary appointment in accordance with Minnesota Statutes, section 43A.13, subdivision 6. A qualified handicapped examination may be terminated at any point during the 700 hours of work experience, except for the first 30 scheduled work days from the date of the start of the examination, if the appointing authority notifies the commissioner that the candidate cannot satisfactorily perform the essential duties of the position. A candidate terminated from a qualified handicapped examination may be authorized to seek placement in other positions in the class if the commissioner decides that the candidate's inability to perform was limited to duties essential to the specific position in which he or she was placed but which are not essential for other positions in the class.

2 MCAR § 2.333 Notice.

The Commissioner shall notify an applicant who is handicapped and, upon request, provide a written statement of the reasons for the decision, of any of the following decisions:

A. To provide or deny a request for test accommodations except when the test accommodation is unnecessary due to the examination format.

B. To admit or deny admission to a competitive or qualified handicapped examination.

2 MCAR § 2.371 Unclassified appointments.

Appointing authorities may make appointments to unclassified positions authorized in accordance with statute. Unclassified appointments do not require public notice. Unless otherwise specified in a statute, an appointing authority may appoint to an unclassified position any person he or she considers qualified, but shall submit the person's resume to the commissioner. No employee may serve in positions authorized under 2 MCAR § 2.308 performing the same function in the same agency for more than three years in total.

Repealer. 2 MCAR § 2.010 is repealed.

Department of Health
Environmental Health Division

Proposed Rules Governing Registration of Engineers and Construction of Monitoring Wells

Notice of Intent to Adopt Rules without a Public Hearing

Notice is hereby given that the Commissioner of Health proposes to adopt the above-entitled rules without a public hearing. The commissioner has determined that the proposed adoption of these rules will be noncontroversial in nature and has elected to follow the procedures set forth in Minnesota Statutes section 15.0412, subdivision 4h (1980).

Persons interested in these rules shall have 30 days after publication in the *State Register* to submit comments on the proposed rules. The proposed rules may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change in the proposed language.

Unless seven or more persons submit written requests for a public hearing on the proposed rules within the 30-day comment period, a public hearing will not be held. In the event a public hearing is required, the agency will proceed according to the provisions of Minnesota Statutes section 15.0412, subdivisions 4-4f.

STATE OF MINNESOTA)
(ss.
COUNTY OF HENNEPIN)

DOER-83-001-PR

Donna L. Day being first duly sworn, deposes and says that at the City of Minneapolis, county and state aforementioned, on the 18th day of January, 1983, she served the attached REPORT OF THE HEARING EXAMINER

OAH Docket No. DOER-83-001-PR

by depositing in the United States mail at said city of Minneapolis, a true and correct copy thereof, properly enveloped, with first class postage prepaid, and addressed to the individuals named on the attached mailing list.

Donna L. Day

Subscribed and sworn to before me
this 18th day of January, 1983.

Eileen A. Gaiovnik

EILEEN A. GAIOVNIK
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Commission Expires Jun. 8, 1988

DOER-83-001-PR

Nina Rothchild, Commissioner
MN Department of Employee Relations
3rd Floor, Space Center Building
444 Lafayette Road
St. Paul, MN 55101

Mr. Donn H. Escher
Director, Employee Relations
7th Floor, Capitol Square Bldg.
St. Paul, MN 55101

Ms. Mary A. Hartle
Department of Human Rights
500 Bremer Tower
7th & Minnesota Streets
St. Paul, MN 55101

Ms. Susan Lasoff
State Council for Handicapped
208 Metro Square
7th & Robert Streets
St. Paul, MN 55101

DOER-83-001-PR

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF EMPLOYEE RELATIONS

In the Matter of the Proposed Adoption of Rules
of the State Department of Employee Relations
Governing the State Personnel System.

REPORT OF THE
CHIEF HEARING EXAMINER

The above-entitled matter came on for review by the Chief Hearing Examiner pursuant to the provisions of Minn. Stat. § 14.15, subds. 3 and 4 (1982) which provide in part:

> If the [hearing examiner's] report contains a finding that the proposed rule is substantially different from that which was proposed at the public hearing, or that the agency has not met the requirements of sections 14.13 to 14.18 it shall be submitted to the chief hearing examiner for approval. If the chief hearing examiner approves the finding of the hearing examiner, he shall advise the agency of actions which will correct the defects, and the agency shall not adopt the rule until the chief hearing examiner determines that the defects have been corrected. If the chief hearing examiner determines that the need for and reasonableness of the rule has not been established pursuant to section 14.14, subdivision 2, and if the agency does not elect to follow the suggested actions of the hearing examiner to correct that defect, then the agency shall submit the proposed rule to the legislative commission to review administrative rules for the commission's advice and comment. The agency shall not proceed to adopt the rule until it has received and considered the advice of the commission; provided, that the agency is not required to delay adoption longer than 30 days after the commission's receipt of the agency's submission.

Based upon a review of the record in this proceeding, the Chief Hearing Examiner hereby approves the Report of the Hearing Examiner in all respects.

In order to correct the defects enumerated by the Hearing Examiner, the agency shall either take the action recommended by the Hearing Examiner or reconvene the rule hearing if appropriate. If the agency chooses to reconvene the rule hearing, it shall do so as if it is initiating a new rule hearing, complying with all substantive and procedural requirements imposed on the agency by law or rule.

If the agency chooses to take the action recommended by the Hearing Examiner, it shall, prior to submitting the rules to the Attorney General for review, submit to the Chief Hearing Examiner a copy of the rules as initially published in the State Register, a copy of the rules as proposed for final adoption in the form required by the State Register for final publication, and a copy of the agency's Findings of Fact and Order Adopting Rules. The Chief Hearing Examiner will then make a determination as to whether the defects have been corrected and whether the modifications in the rules are substantial

changes.

Should the agency make changes in the rules other than those recommended by the Hearing Examiner, it shall also, prior to submitting the rule to the Attorney General, submit the complete record to the Chief Hearing Examiner for a review in regard to substantial changes.

Dated: January 18, 1983.

DUANE R. HARVES
Chief Hearing Examiner

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF EMPLOYEE RELATIONS

In the Matter of the Proposed Adoption of Rules of the State Department of Employee Relations Governing the State Personnel System.

REPORT OF THE HEARING EXAMINER

The above-entitled matter came on for hearing before Phyllis A. Reha, Hearing Examiner, from the State Office of Administrative Hearings on December 16, 1982, at 9:00 a.m. in the main Conference Room, Third Floor, Space Center Building, 444 Lafayette Road, St. Paul, Minnesota.

This is a rulemaking proceeding conducted pursuant to Minn. Stat. Ch. 14 to determine whether the Commissioner of the Department of Employee Relations (Commissioner) has statutory authority to adopt the rules proposed and whether they are necessary and reasonable and may be adopted.

Members of the agency panel appearing at the hearing included: Richard Brainerd, Deputy Commissioner, Personnel Bureau; Julie Vikmanis, Manager of Recruitment and Examination; and Patrick Herndon, Assistant Director of Equal Opportunity Division. The mailing address of each agency panel member is Third Floor, Space Center Building, 444 Lafayette Road, St. Paul, Minnesota 55101. The agency was not represented by counsel.

Approximately 10 persons attended the hearing, five of them signed at the Hearing Register, and no one spoke at the hearing, although the hearing continued until all persons present were given an opportunity to be heard. One written comment was filed from a member of the public. This document was submitted at the hearing and marked as Public Exhibit No. 1. The hearing record closed on December 23, 1982. The record remained open for five working days following the hearing to permit written statements concerning the proposed rules. No comments were received from the Agency or members of the public prior to the close of the hearing record.

The Commissioner of Employee Relations must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 (1982), this Report has been submitted to the Chief Hearing Examiner for his approval. If the Chief Hearing Examiner approves the findings of this Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Hearing Examiner determines that the defects have been corrected. However, in those instances where the Chief Hearing Examiner identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Hearing Examiner's recommendations to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the recommendations, she may submit the pro-

posed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment. Provisions relating to this submission to the Commission may be found in Minn. Stat. § 14.15, subd. 4 (1982).

If the Commissioner elects to adopt the recommendations of the Hearing Examiner and makes no other changes and the Chief Hearing Examiner determines that the defects have been corrected, then the Commissioner shall submit the rule to the Attorney General for review of form and legality. If the Commissioner makes changes in the rule other than those recommended by the Hearing Examiner, then she shall submit the rule, with the complete record, to the Chief Hearing Examiner for a review of the changes before adopting it and submitting it to the Attorney General. Procedures relating to this subsequent review by the Chief Hearing Examiner are set forth in Minn. Stat. § 14.16 (1982).

When the Commissioner submits the rule to the Attorney General, she shall give notice on the day of submission to all persons who requested that they be informed of the submission to the Attorney General.

Based upon all the testimony, exhibits and written comments, the Hearing Examiner makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On October 29, 1982, the agency filed the following documents with the Chief Hearing Examiner:

   A. A copy of the Proposed Rules.

   B. The Order for Hearing.

   C. The Notice of the Hearing Proposed to be Issued.

   D. The estimated length of the agency's presentation.

2. On November 15, 1982, the Notice of Hearing and a copy of the Proposed Rules were published at 7 State Register 744-746.

3. On November 12, 1982, the agency mailed the Notice of Hearing to all persons and associations who had registered their names with the agency for the purpose of receiving such notice.

4. On November 22, 1982, the agency filed the following documents:

   A. The Notice of the Hearing as mailed.

   B. The agency's certification that its mailing list was accurate and complete.

   C. The Affidavit of Mailing the Notice to all persons on the agency's list.

   D. The names of the agency personnel who would represent the agency at the hearing, and a statement of the number of persons expected to attend the hearing and an estimation of the length of the hearing.

   E. The Statement of Need of and Reasonableness.

   F. A copy of the November 15 State Register containing the proposed rules.

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

5. The record remained open through December 23, 1982, or five working days following the hearing, for the receipt of written comments and state-

ments.

Nature of the Proposed Rules and Statutory Authority

6. The above-captioned rules are newly proposed rules of the Department of Employee Relations. Rule 2 MCAR § 2.308 deals with temporary designation of positions in the unclassified service and is proposed to specify the criteria the Commissoner will use in temporarily authorizing positions to be placed in the unclassified service in accord with Minn. Stat. § 43A.08, subd. 2A; and also specify the maximum length of time a person may occupy such positions. Rule 2 MCAR § 2.371 provides an explanation of the direct appointment aspects of unclassified positions.

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

7. The authority of the Department of Employee Relations to promulgate and adopt these rules is Minn. Stats. § 43A.04, subd. 3.

Minn. Stat. § 43A.04, subd. 3 (1982) reads:

> "Subd. 3. Rules. The commissioner shall promulgate rules pursuant to the administrative procedure act to implement the provisions of Laws 1981, Chapter 210 which directly affect the rights of or processes available to the general public. The rules shall have the force and effect of law and shall include but are not limited to:
>
> (a) The processes for determining the extent of competition for filling vacancies, for recruiting applicants, for conducting competitive open examinations, for ranking candidates and maintaining competitive open eligible lists;
>
> (b) The process for effecting noncompetitive and qualifying appointments;
>
> (c) The process for temporary designation of positions in the unclassified service and for effecting appointments to the unclassified service;
>
> (d) A statewide affirmative action program to include requirements for Agency affirmative action plans, statewide policies and procedures, reporting requirements, accountability and responsibility of employees in the executive branch, and overall objectives of the program;
>
> (e) Conditions under which moving and other expenses may be authorized and paid prior to appointment to persons who have accepted state employment;
>
> (f) Establishment of procedures and rates of reimbursement

governing payment of travel expenses for members of boards and commissions and other persons providing services to the state; and

(g) Procedures for administration of the code of ethics for employees of the executive branch.

The Hearing Examiner finds that the Agency has proven that it has the statutory authority to adopt the proposed rules.

Discussion of Proposed Rules

8. 2 MCAR § 2.308.

§ 2.308 authorizes the Commissioner to temporarily designate positions in the unclassified service when the positions are expected to be of limited duration. There was no comment or question regarding this rule provision, however. The Hearing Examiner notes that the use of the word "may" in the first line of the proposed rule permits the Commissioner's discretion to authorize the temporary designation of a position in the unclassified service when the positions are expected to be of limited duration. The use of the word "may" in this rule is appropriate as it is consistent with the permissive language of Minn. Stat. § 43A.08, subd. 2(a).

9. The statute does not set a maximum limit for these positions. § 2.308 establishes a maximum limit of three years. The three years is based on a similar rule established in 1974 (previous 2 MCAR § 2.010). The Examiner finds that this rule is reasonable and necessary to inform the public of the maximum length of time a person may occupy such positions.

10. 2 MCAR § 2.331.

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

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

12. At the hearing, the Department noted one typographical error in this rule as published in the State Register. The word "on" immediately following the 2 MCAR § 2.320 citation in the second sentence of § 2.331 should be deleted. The inclusion of this word was an obvious mistake. The deletion of the word does not change the meaning of that sentence and consequently, the correction of the error does not result in a substantial change.

13. The Examiner finds the Statement of Need and Reasonableness presented at the hearing by the agency demonstrates that this rule is needed and reasonable as proposed.

14. 2 MCAR § 2.332.

§ 2.332 specifies how qualified handicapped examinations will be administered. It provides that qualified handicapped examinations will be

made available only to persons who meet the requirements of Minn. Stat. § 43A.10, subd. 8 and sets forth the procedures the parties involved will follow in the examination process.

15. There was no comment or question either at the hearing or in writing with regard to this rule provision. The Examiner notes, however, that in two instances, the rule grants the Commissioner unbridled discretion and decision-making. This has been done through the use of the term "may". The attempt to provide the Commissioner with discretion or flexibility in her decision-making are violative of Minn. Stat. § 14.02, subd. 4, which requires an agency to establish by rule "every agency statement of general applicability and future effect . . . adopted to implement or make specific the law enforced or administered by the [the agency]." Thus, agency flexibility and discretion must be achieved by careful, complete selection of criteria that are not impermissibly vague, but are sufficiently broad to provide agency flexibility. Predictability and non-discriminatory application of the rules must be achieved and made available to all applicants who meet the stated criteria. Upon compliance with the stated criteria, the Commissioner's action must be certain.

16. In § 2.332A, in the first and third sentences, there is no reason stated for the exercise of the Commissioner's discretion. As written, this rule could be interpreted to permit the Commissioner to make a decision not to allow an otherwise qualified handicapped individual to participate in a qualified handicapped examination in accordance with Minnesota Statutes. To correct the defect and to avoid any ambiguity in the interpretation of this rule, the "may" in the first and third sentences must be changed to "shall." If there is some reason for the exercise of the Commissioner's discretion in this rule provision, a reason or some criteria for the Commissioner's action must be set forth in the rule.

17. § 2.332B, provides the placement procedure for a candidate admitted for a qualified handicapped examination. The second sentence of this provision states that the candidate "may" contact the agencies to develop a suitable placement. The use of the term "may" in the context of this sentence is permissible and obviously indicates that the candidate is not required to contact agencies to develop a suitable placement but is permitted to do so.

18. § 2.332C sets forth the duration and termination of a qualified handicapped examination. Since the statute provides that a qualified handicapped examination shall consist of "up to 700 hours" (Emphasis added), it is necessary to define in rule how the discretion will be administered. This rule provision provides in part, that "a qualified handicapped examination may be terminated at any point during the 700 hours of work experience, except for the first 30 scheduled work days from the date of the start of the examination . . . .". This rule provision further provides that it is the appointing authority who must notify the Commissioner that the candidate can satisfactorily perform the essential duties of the position and is eligible for the probationary appointment.

19. § 2.332C received no adverse comments and is found to be both needed and reasonable. The use of the word "may" in the second sentence of the pro-

vision in the context of this sentence is permissible as it is consistent with the permissive language of the statute. Although the statute provides that a qualified handicapped examination shall consist of "up to 700 hours", it is necessary to establish a minimum time period in which the handicapped candidate is assured of an opportunity to demonstrate his or her skills free of the possibility of determination. Thirty days is a reasonable amount of time to ensure fair test opportunity. Thereafter, it is reasonable to accept the assessment of the appointing authority through the assigned supervisor conducting the on-the-job test, including termination of the test for unsatisfactory performance by the candidate. The appointing authority through his/her supervisors must conduct the on-the-job trial work experience and is the only person in a position to judge the candidate's success or failure on the particular job.

20. § 2.332C, also provides that a candidate terminated from a qualified handicapped examination "may" be authorized to seek placement in other positions in the class if certain conditions are met. It is reasonable to offer the handicapped candidate who fails a qualified handicapped examination an opportunity to retest through another on-the-job placement, if certain conditions are met. This rule provision provides those conditions and the Examiner finds that the conditions specified have been shown to be needed and reasonable. However, once the handicapped candidate has met the conditions, no reason is stated for the exercise of the Commissioner's discretion to deny the candidate to seek placement in other positions in that class. As written, this rule could be interpretated to permit the Commissioner to make a decision not to allow a candidate to seek placement in other positions in that same class even when the criteria have been met. To correct the defect, the "may" must be changed to "shall" in the third sentence of this rule provision. changed p. 3.

21. 2 MCAR § 2.333.

§ 2.333 requires the Commisioner to notify applicants of decisions the Commisioner makes regarding test accommodations and competitive and qualified handicapped examinations which directly affect handicapped applicants and to provide written statements of the reasons for the decisions. The rule is necessary and reasonable as it requires the Commissioner to notify the handicapped public of decisions affecting them and to provide justification for the decisions made. It puts accountability into the process. This rule provision received no negative comment and is necessary and reasonable as written.

22. 2 MCAR § 2.371.

§ 2.371 describes the latitude appointing authorities have in making appointments to the unclassified service. The first sentence of the rule states that appointing authorities "may" make appointments to unclassified positions authorized in accordance with statute. The second sentence provides that unclassified appointments do not require public notice. The third sentence provides that, unless otherwise specified in a statute, an appointing authority "may" appoint to an unclassified position any person he or she considers qualified, but shall submit the person's resume to the commissioner. The use of the word "may" in the first and third sentences is per-

missible as it is consistent with the language of the statute. The statute must be construed to mean that the Legislature intended the Commissioner's authority to make unclassified appointments to be permissive and not mandatory. The second sentence is needed to inform members of the public that appointments to the unclassified service are exempt from requirements of public notice and are distinguishable from merit-based selection requirements of the classified service.

23. The Director of Personnel from the State University System suggested that this rule be amended to exclude State University System unclassified faculty and administrative positions from the requirement that resumes of all unclassified appointments be submitted to the Commissioner of Employee Relations. Three reasons underlie this request:

1. The resumes and related demographic materials are readily available on an as needed basis from the State universities.

2. Unlike many unclassified positions, these positions are widely advertised, providing an opportunity for qualified members of the public to provide.

3. There are over 2,400 such positions within the system — the logistics of both providing the resumes and of storing them in the Department of Employee Relations would cause unnecessary administrative workload and increased expense.

The effect of this change would read as follows:

"2 MCAR § 2.371. Unclassified Appointments.

Appointing authorities may make appointments to unclassified positions authorized in accordance with statute. Unclassified appointments do not require public notice. Unless otherwise specified in a statute, an appointing authority may appoint to an unclassified position any person he or she considers qualified. <u>For persons appointed to positions for which compensation is established under Minn. Stat. §§ 43A.18, subd. 1, 2, and 3, the appointing authority</u> shall submit the person's resume to the Commissioner. No employee may serve in positions authorized under 2 MCAR § 2.308, performing the same function in the same agency for more than three years in total."

so amended p. 3

The agency testified at the hearing that it wished to adopt the proposed amendment. The agency states that its failure to include such an exception in this rule provision was an oversight on its part. The proposed amendment is consistent with the intent of the statute. Since the persons appointed to positions established under Minn. Stat. § 43A.18, subd. 1, 2, and 3 are widely publicized unlike most other unclassified positions, it is unnecessary to have the requirement that resumes of persons appointed to these positions be submitted to the Commissioner of Employee Relations. Adoption of the proposed amendment by the agency would not result in a substantial revision of the rule as originally published in the State Register.

24. The use of the word "may" in the last sentence of the proposed rule, however, is improper. The rule as written imposes a three year maximum on the employment of any one person to perform the same function in the same agency. As written, this rule could be interpreted to permit the Commissioner to make

a decision to permit a person to serve longer than three years. To correct the defect, the "may" must be changed to "shall". changed P. 3.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSION

1. That the Department of Employee Relations gave proper notice at the hearing in this matter.

2. That the agency has fulfilled the procedural requirements of Minn. Stat. § 14.14, subds. 1 and 2 (1982) and all other procedural requirements of law or rule.

3. That the agency has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirement of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50(i) and (ii)(1982), except as noted in Findings 15, 16, 20, and 24.

4. That the agency has demonstrated the need for and reasonableness of the rules by presentation of facts in the record within the Minn. Stat. §§ 14.14, subd. 2 and 14.50(iii)(1982).

5. That the amendments and additions to the proposed rules which were suggested by the agency after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3 (1982) and 9 MCAR §§ 2.110A and 2.111 (1980 Ed.).

6. That the Hearing Examiner has suggested action to correct the defects cited in Conclusion 3 as noted in Findings 15, 16, 20 and 24.

7. That due to Conclusion 3, this Report has been submitted to the Chief Hearing Examiner for his approval pursuant to Minn. Stat. § 14.15, subd. 3 (1982).

8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. That a Finding or Conclusion of Need and Reasonableness in regard to any particular rule subsection does not preclude and should not discourage the agency from further modification of the proposed rules based upoon an examination of the public comments, provided that no substantial changes made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in the rules hearing record.

Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted consistent with the foregoing Findings and Conclusions.

Dated: January 17, 1983.

Phyllis A. Reha

PHYLLIS A. REHA
Hearing Examiner

PAR:dd
Taped

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

AFFIDAVIT OF SERVICE

Eileen A. Gaiovnik, being first duly sworn, deposes and says that on the 24th day of February, 1983, at the City of Minneapolis, County of Hennepin, State of Minnesota, she served the attached Report of the Chief Hearing Examiner, DOER-83-001-PR unstamped, by placing in the designated tray to be collected by messenger for delivery to the central mailing station of the Department of Administration a true and correct copy thereof on the individual named below.

~~all persons at the addresses shown on the attached mailing list~~

Eileen A. Gaiovnik

Subscribed and sworn to before me this 24th day of February, 1983.

Donna L. Day

DONNA L. DAY
NOTARY PUBLIC-MINNESOTA
HENNEPIN COUNTY
My Commission Expires Jan. 25, 1989

Ms. Mina Rothchild
Commissioner
Department of Employee Relations
3rd Floor, Space Center Building
444 Lafayette Road
St. Paul, Minnesota 55101

DOER-83-001-PR

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF EMPLOYEE RELATIONS

In the Matter of the Proposed Adoption of Rules of the State Department of Employee Relations Governing the State Personnel System.

REPORT OF THE CHIEF HEARING EXAMINER

WHEREAS, a hearing was held on December 16, 1982 before Phyllis A. Reha, a Hearing Examiner of the State Office of Administrative Hearings, on the above-entitled matter in compliance with the rule-making provisions of Minn. Stat. Ch. 14 (1982); and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. § 14.50, was issued to the Department and;

WHEREAS, the Department has now determined to adopt rules; and

WHEREAS, the Department has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. §§ 14.16, 14.51, and 9 MCAR § 2.111; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearing and that the Department has cured the defects in the rule as required.

NOW, THEREFORE, upon receipt of this Order, the Department 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 if approved by the Attorney General.

Dated: February 24th, 1983.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

STATE OF MINNESOTA

DEPARTMENT OF EMPLOYEE RELATIONS

In the Matter of Proposed Adoption
of Rules of the State Department of Employee Relations Governing the State Personnel System, 2 MCAR §§ 2.308, 2.331, 2.332 and 2.371.

FINDINGS OF FACT AND CONCLUSIONS

The above-entitled matter came on for hearing before Hearing Examiner Phyllis A Reha on the 16th day of December, 1982, at 9:00 A.M. in the Main Conference Room, Third Floor, Space Center Building, 444 Lafayette Road, St. Paul, Minnesota, after proper notice required by Minnesota Statutes # 15.0412 was served upon all persons, associations, and other interested groups registered with the State Department of Employee Relations for that purpose.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having considered all of the evidence adduced upon the records, files, and proceedings herein, I find the following:

1. Adopt findings 1 through 7 of the Hearings Examiner's report which findings relate to the procedural requirements and statutory authority for the proposed rules.

2. Adopt findings 8 through 24 of the Hearings Examiner's report which findings relate to the need for the non-substantial modification of and reasonableness of the proposed rules. The following changes are being made:

   a. As to paragraph 12, deletion of the word "on" immediately following the 2 MCAR 2.320 citation in the second sentence of 2 MCAR 2.331 as printed in the State Register.
   b. As to paragraph 16, the criteria used by the Commissioner to determine if applicants will be offered a Qualified Handicapped examination, the third sentence is revised to read "the Commissioner shall approve a Qualified Handicapped examination if she determines that not all of the standard examination requirements need to be met for some positions in the class and whether the job duties or procedures can be altered so that the applicant could perform the essential duties of a position in the class. This change limits the discretion of the Commissioner in that if these two criteria are met the Commissioner must approve a Qualified Handicapped examination.
   c. As to paragraph 20, the "may" in the third sentence of 2 MCAR 2.332 C is changed to "shall".
   d. As to paragraph 23, 2 MCAR 2.371 is amended to eliminate the requirement to submit resumes of individuals appointed to unclassified positions to those positions established under Minn. Stat. 43A.18, Subd. 1, 2, and 3.
   e. As to paragraph 24, the "may" in the last sentence of 2 MCAR 2.371 is changed to "shall".

3. Adopt conclusions 1 through 9 of the Hearings Examiner's report.

STATE OF MINNESOTA

Nina Rothchild

Nina Rothchild
COMMISSIONER OF EMPLOYEE RELATIONS

Dated: February 21, 1983

STATE OF MINNESOTA
DEPARTMENT OF EMPLOYEE RELATIONS

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

STATEMENT OF NEED AND REASONABLENESS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In the Matter of the Proposed Adoptions of Rules of the State Department of Employee Relations Governing the State Personnel System 2 MCAR 2.308, 2,331, 2.333 and 2.371

STATEMENT OF COMPLIANCE WITH RULEMAKING PROCEDURES

I Steven M. Gunn, do hereby declare that I have examined the rules and all related documents and that, based on my examination and my personal familiarity with the applicable procedures, the Administrative Procedure Act, the rules of the Office of Administrative Hearings, and the rules of the Attorney General have been followed. Any exceptions are noted below.

Steven M. Gunn 3/7/83

Steven M. Gunn, Special Assistant
Attorney General

In the Matter of the Proposed Adoption of Rules of the State Department of Employee Relations Governing the State Personnel System 2 MCAR 2.308, 2,331, 2.333 and 2.371

AFFIDAVIT OF MAILING NOTICE OF SUBMISSION TO THE ATTORNEY GENERAL

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Mark Sundquist, being first duly sworn, deposes and says:

That on the 14th day of March, 1983, in the City of St. Paul, County of Ramsey, State of Minnesota, he served the attached Notice of Submission to the Attorney General by depositing in the State of Minnesota Central Mail System for United States mailing at said City of St. Paul, a copy thereof, properly enveloped, with postage prepaid, on all persons and associations who requested notice that the rules in the above- entitled matter have been submitted to the Attorney General.

Mark L Sundquist
Mark L. Sundquist
Training & Development Manager

Subscribed and sworn to before me this 14 day of March, 1983.

Christine F. Goodwill

CHRISTINE F. GOODWILL
NOTARY PUBLIC-MINNESOTA
DAKOTA COUNTY
MY COMMISSION EXPIRES DECEMBER 6, 1989

STATE OF MINNESOTA

DEPARTMENT OF EMPLOYEE RELATIONS

In the Matter of the Proposed Adoption of Rules of the State Department of Employee Relations Governing the State Personnel System 2 MCAR 2.308, 2.331, 2.333 and 2.371

NOTICE OF SUBMISSION TO THE ATTORNEY GENERAL

Pursuant to your request and in accordance with Minnesota Statutes, section 15.0412:

PLEASE TAKE NOTICE that the above-captioned rules have been submitted to the Office of the Attorney General on this date March 14, 1983, for review as to form and legality. Pursuant to 1 MCAR # 1.206 B., the Attorney General will not approve the rules for at least 20 calendar days after receipt to allow any person or association time to comment on the legality of the rules, after which that Office will complete its review. If you desire to comment on the legality of the above-captioned rules, you should direct your comments to the Office of the Attorney General, G-25 State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155, telephone (612) 296-7030. Please note that the above-cited rule of the Attorney General also provides that a copy of any written comments submitted to the Attorney General must be submitted simultaneously to this agency.

Attached is a copy of the rules as submitted to the Attorney General, showing changes made in the proposed rules after the Hearing and before submission to the Attorney General. If you have questions you may contact Mark Sundquist, Training & Development Manager (296-8933), Department of Employee Relations, 444 Lafayette Road, St. Paul, MN 55101

Mark L Sundquist

Mark L. Sundquist
Training & Development Manager