

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF EMPLOYEE RELATIONS

In the Matter of the Proposed  
Adoption of Department of Employee  
Relations Rules Relating to Local  
Government Pay Equity Compliance,  
JUDGE  
Minnesota Rules, Parts 3920.0100 to  
3920.1300.

REPORT OF THE  
ADMINISTRATIVE LAW

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on November 14, 1991 at 9:00 a.m. in Room 10, Ground Floor, State Office Building, 435 Park Street, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to receive public comment; to determine whether the Minnesota Department of Employee Relations ("the Department") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules; to determine whether the proposed are needed and reasonable, and; to determine whether or not modifications to the rules proposed by the Department after initial publication constitute impermissible substantial changes.

Catherine M. Keane, Special Assistant Attorney General, Government Services Section, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, appeared on behalf of the Department. The Department hearing panel consisted of the following persons: Linda M. Barton, Commissioner, Minnesota Department of Employee Relations, Faith Zwemke, Pay Equity Coordinator, Dr. Charlotte Striebel, Department Consultant, and Bonnie Watkins, Communications Director.

Approximately 75 people attended the hearing. Sixty-three of these persons signed the hearing register and 17 persons provided oral testimony.

The following persons made oral comments at the public hearing: Jerry Serfling, AFSCME Council No. 14; Charles Sprafka, Association of Minnesota

Counties; Margaret Boyer, Child Care Workers Alliance; Dave Erickson, Minneapolis Building Trades; Tim Connors, I.U.O.E. Local No. 49; Jeanette Sobania and Jim Genellie, Consortium of Metro Cities, Marge Adkisson, Minnesota Library Association; Greg Bastien, Law Enforcement Labor Service; Dennis Bible, City of Minneapolis; Miriam Kragness, R.O.I. Consultants; Robert O'Connor, I.M. O'Connor and Associates; Dede Wolfson, Pay Equity Coalition; Aviva Breen, Commission on the Economic Status of Women; Nina Rothchild, former Commissioner, Minnesota Department of Employee Relations; Bernard Steffen, Association of Minnesota Counties; and Joel Jamnik, League of Minnesota Cities.

Written comments relating to the proposed rules were submitted to the Administrative Law Judge by the following individuals, organizations and local government agencies: County of Nobles, Department of Personnel; City of Northfield; City of West St. Paul; Independent School District No. 77, Mankato, Minnesota; Board of Education, Sleepy Eye Public Schools, Independent School District No. 84; St. Paul Public Schools, Office of Superintendent, Independent School District No. 625; City of Waseca; City of Willmar; County of Anoka; City of Hopkins; City of Plymouth; St. Louis County Civil Service Department; City of Moorhead; Commission on the Economic Status of Women; City of Hutchinson; City of New Brighton; City of Cottonwood; Sauk Centre Public Schools; Minnesota Teamsters Public and Law Enforcement Employees Union, Local No. 320, Minneapolis, Minnesota; State Representative Wayne Simoneau; Association of Minnesota Counties; American Federation of State, County and Municipal Employees, AFL-CIO, Minnesota Council No. 65, Hibbing, Minnesota; Minnesota AFSCME Council No. 14, Twin Cities Metropolitan Area; the League of Women Voters of Minnesota; Rice Memorial Hospital, Willmar, Minnesota; Willmar Municipal Utilities; Minnesota Nurses Association; International Union of Operating Engineers of Minnesota; Minnesota Hospital Association; Minneapolis Building and Construction Trades Council, AFL-CIO; League of Minnesota Cities; Alice Cowley, Becker, Minnesota; Mary C. Kuehn, no address given; R. Richard Helms, St. Paul, Minnesota; Nina Rothchild, Mahtomedi, Minnesota; East Metro Women's Council, Lake Elmo, Minnesota; and The Consortium of Metro Cities, consisting of the following cities: Anoka, Blaine, Brooklyn Center, Brooklyn Park, Champlin, Eden Prairie, Fridley, Hopkins, Maple Grove, Maplewood, New Brighton, New Hope, Orono, Plymouth, Prior Lake, Richfield, Robbinsdale, Rosemount, St. Anthony Village, and St. Louis Park (hereinafter "Metro Cities").

A total of 22 exhibits were made a part of the record at the public hearing. Exhibits 1 through 14 were submitted by the Department and Exhibits 15 through 22 were submitted by public commentators.

The record remained open for the submission of written comments for ten days following the date of the hearing to November 25, 1991. Pursuant to Minn. Stat. § 14.15, subd. 1 (1990), three business days were allowed for the filing of responsive comments. At the close of business on December 2, 1991, the rulemaking record closed for all purposes. The Administrative Law Judge received 32 timely written comments from interested persons during the comment period. Three untimely written comments were returned and not considered. The Department submitted written comments responding to matters discussed at the hearing and making changes in the proposed rules.

The Commissioner of the Minnesota Department 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 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse 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 Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the

Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, she must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commissioner elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then she shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Commissioner files the rule with the Secretary of State, she shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

#### FINDINGS\_OF FACT

##### Procedural Requirements.

1. On September 27, 1991, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.
- (f) A Statement of Additional Notice.

2. On October 14, 1991 , a Notice of Hearing and a copy of the proposed Rules were published at 16 State Register 893.

3. On October 11, 1991, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

4. On October 17, 1991, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of 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) An Affidavit of Additional Notice.

(e) The names of personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.

(f) A copy of the State Register containing the proposed rules.

(g) All materials received following a Notice of Intent to Solicit Outside Opinion published in the State Register at 15 S.R. 2568, June 3, 1991, and a copy of the Notice.

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 period for submission of written comment and statements remained open through November 25, the period having been extended by order of the Administrative Law Judge to ten (10) calendar days following the hearing. The record closed on December 2, 1991, the third business day following the close of the comment period.

Small Business Considerations in Rulemaking,

6. Minn. Stat. § 14.115, subd. 2 provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. The proposed rules relate to political subdivisions and other local public bodies acting as employers. The proposed rules have no impact on small businesses as defined in Minn. Stat. § 14.115, subd. 1. The Administrative Law Judge finds that the requirements of Minn. Stat. § 14.115 do not apply to the proposed rules.

Impact on Agricultural Land,

7. Minn. Stat. § 14.11, subd. 2 (1990), imposes additional statutory requirements if the proposed rules have a "direct and substantial adverse impact on agricultural land in the state." The Administrative Law Judge finds that the proposed rules will not have a direct and substantial adverse impact on agricultural land in the state.

Nature of the Proposed Rules-and Statutory Authority

8. The proposed rules establish standards for determining compliance with the local government Pay Equity Act. Minn. Stat. §§ 471.991 - 471.999 (1990) hereinafter referred to as the "Pay Equity Act." The Minnesota Legislature enacted the Pay Equity Act in 1984 requiring all the state's political subdivisions to establish "equitable compensation relationships." The law was modeled after a 1982 law requiring pay equity for state employees. The Pay Equity Act is designed to address the problem of sex-based wage disparities. The disparities are present in dual pay structures, with one pay pattern for jobs performed mostly by men and another pattern, with lower pay, for jobs performed mostly by women. Every political subdivision is required to establish equitable compensation relationships between female-dominated, male-dominated, and balanced classes of employees in order to eliminate sex-based wage disparities in public employment. The Pay Equity Act defines equitable compensation relationship to mean that the compensation for female-dominated classes is not consistently below the compensation for male-dominated classes of comparable work value.

9 . The Pay Equity Act applies to an estimated 163,000 employees and 1,600 political subdivisions In the State of Minnesota, primarily cities , counties and school districts. All jurisdictions were required to achieve pay equity by December 31, 1991, seven years after the original law was passed by the Legislature.

10. Beginning in 1984, the Minnesota Department of Employee Relations was directed by the Legislature to provide technical assistance and guidance to the political subdivisions. As part of its technical assistance program, the Department issued a number of publications providing information on how political subdivisions can reform their compensation structures so as to accomplish equitable compensation relationships in their compensation plans. The guidebooks were published in 1984 and were revised in 1990 to address legislative changes. The Department has held numerous seminars to explain and assist political subdivisions.

11. The Department assembled an Advisory Committee consisting of persons whose interests were directly affected by the proposed rules -- public employers and organizations representing public employers, employee representatives, organizations and individuals with a sincere and dedicated interest in the subject of these proposed rules. After a process of negotiation and compromise among these dedicated "opposed" interests, these rules were proposed.

Fiscal Note,

12. Minn. Stat. § 14.11, subd. 1 requires a fiscal note if a proposed rule will require local public bodies to incur costs higher than \$100,000 in either of the two years immediately following the adoption of a rule. Minn. Stat. § 14.11, subd. 1 provides in part as follows:

If the adoption of a rule by an agency will require the expenditure of public money by local public bodies, the appropriate notice of the agency's intent to adopt a rule shall be accompanied by a written statement giving the agency's reasonable estimate of the total cost to all

local public bodies in the state to implement the rule for the two years immediately following adoption of the rule if the estimated total cost exceeds \$100,000 in either of the two years.

13. The Department states in its Pay Equity SONAR that the rule does not require any additional expenditures by local public bodies and therefore no fiscal note is required. Pay Equity SONAR at 5.

14. Several commentators have taken issue with the Department's assertion that the proposed rule will not cause local public bodies to incur expenses in excess of the standard cited above. The City of Waseca in its comments provided as follows:

The Department states that no fiscal impact analysis is required. If the Department is allowed to change the methodology employed for the past seven years to achieve

to compliance with the law, many cities will incur costs  
to have their studies revamped, their plans revised, and  
to appear for hearings after being found in non-compliance  
by the department. Only the department can advise  
whether a plan is in compliance given that it has  
created a proprietary test for compliance rather than an  
understandable, linear relationship test that would a  
allow local governments to bring their plans into  
compliance. Most units of local government rely on consultants to  
develop their plans for pay equity compliance. Those  
jurisdictions will incur additional expense to comply  
with new rules. An additional expense would relate to  
the inability to run the department's program and  
distribute it. Under the model used for the past  
seven years a determination of compliance could be  
ascertained using a personal computer and off the shelf spread  
sheets. Many municipalities may be unable to run the  
department's program on their own equipment.

15. The St. Paul Public Schools also assert that the proposed  
rules will have a fiscal impact in excess of \$100,000. In its comments the St. Paul  
Schools provided as follows:

While it proves difficult to accurately estimate the  
actual cost related to the addition of this new  
requirement, it is easy to see that providing higher  
levels of pay sooner to those employees progressing  
through range steps would produce substantial costs to  
this jurisdiction and many others. The cost to St.  
Paul Public Schools would easily exceed \$100,000 in either  
of the two years immediately following the adoption of  
this rule, if the salary schedule test remains intact. The  
Department of Employee Relations in their Statement of  
Need and Reasonableness (SONAR) which supports these  
proposed rules, declared that, "These rules do not  
require any additional expenditures. Therefore, no  
fiscal note is required." (SONAR p. 5). The  
expectations that complying with the proposed Salary Schedule Test  
would not require any additional expenditures is simply  
not consistent with the predictable effect of the  
proposed rule discussed here.

16. The Metro Cities also challenged the Department's assertion that the proposed rules will not require any additional expenditures:

The department must be assuming that all jurisdictions are in compliance and will therefore not have to make any additional payments to any class of employees in the next two years. The proposed statistical analysis method is not identical to the method used in the 1990 guidebook. It is reasonable to assume that adoption of these rules will require a number of jurisdictions to make changes in their compensation systems since these systems are probably based on the 1990 guidebook. These costs could easily exceed \$100,000.

17. Finally, the Civil Service Department of St. Louis County also challenged the Department's assertion that local public bodies will not have costs as a result of these rules in excess of \$100,000.

18. The Department's response to these challenges is that any additional expenditures of public money by jurisdictions to establish equitable compensation relationships are "required by the pay equity law itself" and "not by the adoption of these proposed rules."

19. The Department's argument that it is the Pay Equity Act itself that has caused local jurisdictions to incur costs for establishing equitable compensation relationships does not respond to the primary argument being made by the St. Paul Public Schools and the other commentators above. They assert that criteria and tests newly introduced by the proposed rule will cause jurisdictions to incur additional costs. Jurisdictions that have succeeded in achieving equitable compensation relationships and others well on their way to accomplishing the same according to Department guidelines in effect prior to the proposed rules may have to incur additional costs as a result of the new rules to be in compliance.

20. Thus, the Department's assertion that the Pay Equity Act is the sole cause of additional expenses for jurisdictions is not supported by the record. The Department has failed to respond to the claim that newly introduced tests and criteria will have an additional fiscal impact upon jurisdictions.

21. The Department included the following paragraph in the Notice of Public Hearing relating to fiscal impact:

Adoption of these rules will not result in additional spending by local public bodies in excess of \$100,000 per year for the first two years following adoption under the requirements of Minnesota Statutes Section 14.11.

The Administrative Law Judge finds that this statement is inadequate to satisfy the requirements of Minn. Stat. § 14.11, subd. 1.

22. There are 1,600 political subdivisions in Minnesota. Because many may be affected, the Administrative Law Judge finds that the proposed rules will require statewide expenses exceeding \$100,000 by local public bodies. The Department should have informed the jurisdictions that the rules could result in additional expenses exceeding \$100,000.

23. The Administrative Law Judge concludes that the Department's failure to include a Fiscal Note in the Notice of Hearing constitutes a defect in the rule that will require republication or renote of the proposed rules with an adequate Fiscal Note in the Notice of Hearing.

#### Reasonableness of the Proposed Rules.

24. The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the

statute. Broen Memorial home v. Minnesota-Department of Human Services, 364 N.W.2d 436, 440 (Minn. Ct. App. 1985); Blocker Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn. Ct. App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured\_Housing Institute v., Petersen, 347 N.W.2d 238, 244 (Minn. 1984). In support of the adoption of the proposed rules the Department has prepared a Statement of Need and Reasonableness (SONAR). The Department has relied on its SONAR and testimony at the public hearing addressing the highlights of the proposed rules as its primary affirmative presentation of the need and reasonableness of the proposed rule. The agency has also submitted substantial comments following the hearing to supplement the presentation at the public hearing.

25. The Findings in this Report do not address each part of the proposed pay equity rules, rather the Findings primarily address those parts that received significant public commentary or for which changes have been made since publication in the State Register on June 3, 1991. After careful review and consideration of the Department's Statement of Need and Reasonableness and based upon the Department's oral presentation at the hearing, the Administrative Law Judge finds that the Department has affirmatively established the need and reasonableness of each part of the proposed rule except as otherwise qualified or determined by the following Findings and Conclusions.

26. The rule was initially published in the State Register on June 3, 1991 at which time the agency sought public comment regarding the proposed rule. The same rule without change was published in the State Register again on October 14, 1991 as a part of the notice for the hearing that occurred on November 14, 1991. In response to comments received from the solicitation of outside opinion and comments received during this rulemaking proceeding, the agency has proposed some changes to the rule. The Administrative Law Judge

finds that each of the proposed changes is needed and reasonable and does not constitute a substantial change.

27. As previously indicated, this Report will not discuss each rule part. A part not commented on in this Report is hereby found to be needed and reasonable and does not exceed the statutory authority for the promulgation thereof.

#### ANALYSIS OF RULE PART\$ -GENERATING SIGNIFICANT PUBLIC COMMENTARY

Objections Regarding Implementation of New criteria-And Tests Contained- in the Proposed Rules.

28. The Pay Equity Act requires jurisdictions to have a fully implemented compensation structure that provides equitable compensation relationships by December 31, 1991, unless the Commissioner of Employee Relations approves a later date. Minn. Stat. § 471.9981, subd. 1. Since approximately August, 1984 the Department has provided guidance and technical assistance to local jurisdictions for implementing pay equity. The Department has provided a document called "A Guide to Implementing Pay Equity in Local

Government" Initially Issued in August, 1984 and supplemented finally in September, 1990. In June 1991, the Department published the proposed rules. The proposed rules contain a number of criteria and tests of what constitutes "equitable compensation relationships" that had not been previously published by the Department.

29. Numerous commentators have objected to the Department making changes at this late date because the changes go to the heart of the method of determining what constitutes compliance (equitable compensation relationships). Many jurisdictions expressed frustration over the fact that their compliance with the Pay Equity Act would be judged by standards which will not be finalized until January 1992, at least one month after they have submitted their reports. The jurisdictions expressed concern that the Department had made changes in the compliance standards at the eleventh hour, making it infeasible or impossible for a jurisdiction to comply.

30. The County of Nobles commented that:

The timing of the rules is patently impossible . . . the final form of the rules cannot be known until January. However, local governments must be in compliance by December 31.

The City of Cottonwood commented that "we are frustrated by the fact that we are expected to comply with pay equity requirements when the rules have not been finalized." Dennis Bible, of the City of Minneapolis, indicated that the City of Minneapolis would have to reopen its collective bargaining agreements in order to meet the new salary range test. The St. Paul Public Schools in its comments pointed out that meeting the new salary range test would be infeasible and that it would take several years to achieve compliance with the requirements of that new test. The City of Waseca expressed concern about a change that required the inclusion of the weighted male regression line in the statistical model. The City of Waseca commented as follows:

For the past seven years local governments have conducted studies and implemented pay plans using a straightforward regression model that compared the components of a

reasonable relationship as defined in the statutes.  
There is no authority or reason for the Department to suddenly shift to a weighted model from its previous position of a relationship between the value of the job and the pay for the job as contemplated by the statutes.

Robert M. O'Connor testified regarding these issues at the public hearing and in his written comments he provided as follows:

It is also important to note that the proposed compliance test used methodologies that are significantly different from those required since 1984. After several years of efforts to achieve compliance according to those requirements, the proposed rules will now hold the agencies retroactively accountable for a completely different set of requirements. For example, since 1984 local government agencies have been instructed by DOER to calculate one overall regression line, with no weighting

of classes based on the number of employees in them. Hundreds of agencies invest in significant dollars to redesign the pay systems and negotiate and implement changes. They will now be evaluated using possibly dozens of lines, with each job class weighted by the number of employees in the class.

31. The Metro Cities also objected on the basis of timing and changes in the proposed rules, stating:

We would like to support the testimony of Robert O'Connor that there are significant differences in the new rules from what jurisdictions have been basing their compensation plans on in the past. The new rules do not give jurisdictions any time to adjust to the new factors prior to being found not in compliance.

The Metro Cities identified numerous "new factors" included in the rule for the first time in 1991. They include the following:

- Inclusion of part-time positions
- Inclusion of benefits
- Mini regression lines
- Inclusion of years to maximum salary
- Weighting of lines
- Salary range test
- Exceptional service pay
- No more credit for "sore thumbs"

32. Other comments by the City of New Brighton, County of Anoka, Sauk Center Public Schools and the Minnesota School Boards Association expressed concern about the timing as well as concern over the new criteria contained in the rule. The commentators have asked that the Department delay the date on which a jurisdiction would have to comply with the new criteria.

33. In its comments the Department responded by acknowledging that there were changes in the proposed rules but because the Department had made every

effort to solicit input and inform affected parties "it is fair to require jurisdictions to comply with these proposed rules." The Department explained as follows:

I n i t i a l l y , i t should be noted that wh i I e the ru I  
e s do  
include some change from the Department's guidelines on  
pay equity, throughout the rule process, the Department  
ha s s tr ived to be a s con s i s tent as pos s ib I e with  
those  
guidelines. For example, the Department's 1990 Guidebook  
listed 18 common questions from jurisdictions and the  
proposed rule provides almost identical answers to 16 of  
those questions.

The Department also noted that the changes were considered by the Advisory Committee and only addressed areas of compensation that jurisdictions should have been paying attention to anyway. The Department concluded that all affected parties have had fair notice of the proposed rules and ample opportunity to comment.

34. The Administrative Law Judge finds that jurisdictions have been reorganizing their compensation structures to eliminate sex-based wage discrimination since 1984 applying guidelines and directions of the Department disseminated to jurisdictions by way of the Department's "A Guide to Implementing Pay Equity in Local Government."

35. The Administrative Law Judge finds that several of the criteria and tests introduced by the proposed rules represent a departure from previous guidelines or directions from the Department. Application of the criteria or tests to a jurisdiction's compensation plan may render the jurisdiction out of compliance even in circumstances where the jurisdiction complied according to criteria and tests that the Department used before the proposed rules.

36. The criteria or tests were first presented formally with the publication of the proposed rules in June 1991. Jurisdictions will have had less than one-half year to comply with the newly introduced criteria and tests.

37. This timing difficulty conflicts with the Department's responsibility to promulgate the rule which it believes is the most appropriate solution to the problem of pay inequity. The Department is entitled to fashion a rule which reflects its policy judgments of what is best, regardless of the prior guidelines.

38. The Administrative Law Judge concludes that the Department's proposed rules have been demonstrated to be needed and reasonable on their face.

39. It would be premature for the Administrative Law Judge to decide

whether the application of the rules to any particular set of facts is appropriate or not. The Commissioner has discretion to establish an alternative date in Minn. Stat. § 471.9981, subd. 6(a). The impact of the delays resulting from the earlier findings regarding the fiscal note, and the difficulties of applying these rules to December 31, 1991 conditions, raise questions about the enforcement of these rules. Those questions cannot be answered at this time.

40. The Administrative Law Judge has discussed the reasonableness of several of the criteria and tests introduced by the proposed rules in other parts of this Report. Unless otherwise indicated or qualified the Administrative Law Judge has found each of the newly introduced criteria and tests needed and reasonable.

Part 3920.0100 Subpart 2, "Benefits.

41. The rule must define "benefits" because benefits are included in the term "compensation" which is defined in subpart 3 of this part. The proposed

rule originally defined benefits as follows:

"Benefits" means insurance programs to which a jurisdiction contributes on behalf of an employee. Benefits does not include pensions.

42. The City of Hutchinson, Nobles County, Minnesota Nurses Association, Minnesota AFSCME Councils 14 and 65 and the Metro Cities objected to this definition for a number of different reasons. For example, the City of Hutchinson opposed the definition because it asserted that insurance and other benefits are matters outside the normal definition of compensation and therefore should not be included in these rules. Nobles County pointed to the fact that the Department has not previously included benefits, therefore, including benefits in the rule at this time was arbitrary and capricious.

43. The Metro Cities in their comments thought that the definition was confusing and failed to recognize the complexity of the various benefit plans currently in place in local units of government. Metro Cities further explained that as the language now stands all sorts of insurance premiums could be included, for example, health, life, dental, short-term disability, long-term disability, et cetera. The Metro Cities proposed that subpart 2 be deleted and the following substituted for it:

Subpart 2. Benefits. "Benefits" means the dollar amount of the maximum contribution of a jurisdiction toward health insurance for which an employee is eligible. "Benefits" does not include salary or the jurisdiction's contribution to a pension plan, federal social security, federal Medicare, unemployment compensation insurance, workers compensation insurance, or liability insurance.

44. The Minnesota Nurses Association thought that the definition was much too narrow and did not include a number of "benefit" items that the Minnesota Nurses Association considered as being compensation such as severance pay, deferred compensation programs, vacation pay and sick pay.

The Nurses Association believed that excluding these items from benefits would allow a local government the opportunity to provide these items to male-dominated classes and deny them to female-dominated classes and thus

create a loophole to disadvantage female classes. Similar to the Minnesota Nurses Association, AFSCME Councils 65 and 14 believe that the exclusion of items that are customarily considered as benefits enables a recalcitrant employer to manipulate the definition in favor of male-dominated classes.

45. At the public hearing the Department proposed to change the definition as follows:

Subp. 2. Benefits. "Benefits" means health insurance or health self-interests programs to which a jurisdiction contributes on behalf of an employee or an employee plus dependents. Benefits does not include pensions\_\_life insurance, dental insurance , disability insurance or other insurance program.

46. The Department has decided to limit the definition of benefits for

pay equity purposes for the following reasons. Reporting benefits is the most complex part of the reporting process because jurisdictions will have to compare benefits available to male-dominated classes and benefits available to female-dominated classes of comparable work value to determine whether benefits must be included in their implementation report filed with the Department. Limiting benefits to only health insurance simplifies reporting and eases the administrative burden on the Department and on jurisdictions. Manipulation of the other insurance programs such as life and disability in order to maintain sex-based compensation disparity is not very likely because of the small investment that local governments have in these other insurance programs and because of other checks and balances. Defining benefits so as to include health insurance allows the agency or department to capture the most significant part of the jurisdiction's benefit package which is health insurance. Under the Department-managed public employment insurance program (PEIP) which offers insurance programs to local governments in Minnesota, in 1991, 94 percent of the total premiums paid by local governments under the PEIP were for health insurance as opposed to life, disability, dental, or accidental insurance components. Since health insurance is such a large component of the insurance programs made available to employees it is reasonable to define "benefits" as health insurance.

47. The changes to the section made by the Department clarify the Department's intention to limit benefits to health insurance and to exclude other kinds of insurance such as life, dental, disability, et cetera from the kinds of insurance programs considered as benefits. The inclusion of health self-insurance programs and contributions for an employee's dependents have been added to clarify that these are included in the definition of benefits.

48. The Administrative Law Judge finds that the limitation of benefits to health insurance is reasonable because it simplifies reporting by local government units and simplifies the administrative collection of this information by the Department. The limitation is also reasonable because health insurance constitutes 94 percent of the insurance contributions made by

local government units. Therefore, limiting the insurance to health insurance captures 94 percent of the money spent on benefits by local government units.

It is also reasonable to exclude pensions from the definition of benefits because the amount paid by local government units for pensions is often determined by law and therefore a jurisdiction has no control over the amount of these contributions.

49. The Administrative Law Judge finds the definition of benefits is needed and reasonable and the changes which specify what types of insurance are not covered are reasonable and do not constitute a substantial change.

50. The Administrative Law Judge notes that benefits is one of the "newly introduced" criteria. The Administrative Law Judge believes that these should be adopted because they represent the Department's policy judgments.

Minn. Rules Part 3920.0100, subpart 3. Compensation

51. The rule defines "compensation" to clarify what is meant by that word in the statute and in the proposed rule. Compensation is a part of the "equitable compensation relationship" concept of the statute. The Department maintains that the proposed definition includes all the significant components

of compensation over which jurisdictions have some control and which could be influenced by past or present sex-biased practices. Under the definition of compensation only three components are included as compensation; they are salary, exceptional service pay, and benefits.

52. The Minnesota Nurses Association and AFSCME Councils 14 and 65 opposed the narrow definition of compensation for the same reasons that they opposed the narrow definition of benefits -- that is, as the Minnesota Nurses Association pointed out, the narrow definition of compensation would provide another opportunity for an employer to pay male-dominated classes at a separate rate in order to avoid pay equity. The AFSCME Councils 14 and 65 expressed a similar concern about the limited definition of compensation.

5 3 . Each of the components of compensation, salary, exceptional service pay and benefits, is further limited and defined in the rules. The Department explained that it excluded overtime pay, shift differentials, and uniform allowances from the definition of compensation on the basis that it would be difficult for a jurisdiction to manipulate these payments as a way to maintain class-wide, sex-based rate disparities. The Department also excluded these items from compensation for the following reasons: (a) There is no proof that these items of compensation have had any significant impact on the overall compensation differences between male-dominated and female-dominated classes; (b) It would be administratively difficult for jurisdictions to report and administratively difficult for the Department to monitor these items of compensation; and (c) The Advisory Committee consensus was that reporting and monitoring these payments were unnecessary and cumbersome.

54. At the public hearing, the Department proposed a change in the definition of compensation as follows:

Subp. 3. Compensation. "Compensation" consists of salary, exceptional service pay, and benefits. Compensation does not include overtime pay, shift differentials, or uniform allowances, as defined in items A to C. Compensation also excludes any other payments not defined as salary, benefits, or exceptional service pay-

A. "Overtime pay" means payment to employees for services performed in excess of the normal work period and when the payments are required by applicable state and federal overtime laws. by an applicable collective bargaining agreement.- or by written personnel policies.

55. This amendment acknowledges that both exempt and nonexempt employees may receive overtime pay pursuant to a personnel policy or collective bargaining agreement. The amendment acknowledges that in various situations, overtime is paid to exempt employees because of an agreement or policy and not as a means to discriminate or to hide sex-based wage disparities. The Department argues that it is reasonable to exclude these payments for the same reasons that payments of overtime are made as a result of state and federal overtime laws.

56. The Minnesota Hospital Association objected to the inclusion of

benefits particularly health insurance as a component of compensation. The Minnesota Hospital Association reasoned that the purpose of the pay equity law is to eliminate sex-based wage disparities in public employment. It is not reasonable to include health insurance as a part of compensation because health insurance is a function of an employee's work status -- full-time or part-time and not a function of an employee's sex. The Hospital Association further argued that adding health benefits as a part of compensation at this late date seems to change the rules in the middle of the process.

57. The Administrative Law Judge finds the definition of compensation needed and reasonable for the reasons articulated above. The Administrative Law Judge also finds the change to include exempt employees is reasonable and does not constitute a substantial change.

58. The Minneapolis Building and Construction Trades Council commented at the hearing and also in its written comments that it was unclear whether the definition of compensation would exclude other items of payment that its members received that it believed should also be excluded. Other items that should also be excluded are various types of availability "on-call" pay and tool allowances. In the comments after the public hearing the Department pointed out that such items would be excluded from compensation as noted in the definition. The definition notes that compensation "excludes any other payments not defined as salary, benefit or exceptional service pay."

Minn. Rules Part 3920.0100, Subpart 5. "Employee."

59. Several commentators expressed some concerns regarding the proposed definition of "employee." In part the rule incorporates the definition of employee contained in Minn. Stat. Ch, 179A (the Public Employer Labor Relations Act, hereinafter PELRA) which states with some exceptions that an employee is anyone working 14 or more hours per week and more than 67 calendar

days in a year. The Metro Cities expressed concern over the impact this definition would have on its member cities reporting of benefits for its employees. Metro Cities explained that several of its member Cities used the services of students. Member cities sometimes employ a class of employees (i.e., students) that may work over 67 days and 14 hours per week but still are considered for purposes of health insurance part-time seasonal employees. Including benefits for this category of employees would require that a city alter its method of classifying these employees. The Metro Cities recommended that Minn. Rules pt. 3920.0100, subp. 5, be revised to state as follows:

This definition of employee applies only to the determination of salaries and not benefits.

60. The City of New Brighton also expressed concern about the inclusion of part-time employees in pay equity reports. The City stated as follows:

Our concerns address the issue of requiring cities to include part-time employees in pay equity plans. Since the initial passage of the pay equity law, most cities have prepared plans based upon salaries and benefits of full-time employees only. The proposed rules, guidelines, and tests that DOER is intending to use in order to determine compliance required that cities also

include part-time employees in their equity plans. Therefore, we do not feel that the scope of pay equity plans need to include part-timers to effectively accomplish its purpose. Because part-time employees are generally not covered by fringe benefits, the validity of statistical comparisons with full-time employees for "equity" purposes is questionable.

61. The opposite concern was expressed by other commentators. At the public hearing, AFSCME representative Jerry Serfling, Margaret Boyer, representing the Child Care Workers Alliance, opposed the exclusion of any part-time workers from the benefits of the Pay Equity Act. Mr. Serfling explained that even the PELRA definition of employee allows continuous discrimination in wages and benefits for those persons who cannot be represented by a union, usually those persons who work part-time or are seasonal. He argued that use of the PELRA definition encourages employers to utilize non-represented part-time workers.

62. Responding to these concerns the Department indicated that it was necessary for it to use a cutoff point because it would be administratively difficult to include all employees. The Department further asserts that it is reasonable to use the PELRA cutoff point because the Legislature intended to blend the Pay Equity Act and PELRA together. With respect to the Metro Cities' and League of Minnesota Cities concern regarding the application of benefits to part-time and seasonal employees, the Department asserts that a jurisdiction will not be automatically out of compliance as a result of the application of benefits to part-time and seasonal employees. In response to a similar concern expressed by the Minnesota School Boards Association the Department explained in a letter (Exhibit 12A) as follows:

Jurisdictions will not automatically be out of compliance because they do not offer benefits to part-time employees.

These are the circumstances which might lead to a non-compliance finding: (1) part-time employee classes are more likely to be female-dominated than male-dominated; (2) part-time employee classes do not include any full-time employees eligible for health insurance; (3) there are male classes within ten percent above or below the part-time female classes; (4) the comparable male classes do receive health insurance; and (5) the health insurance contribution amounts, when added

to salary maximums for all employee classes, are large enough to show a consistent pattern of lower compensation for female classes than for male classes.

63. The Department asserts that it is reasonable and necessary to examine benefits for all eligible classes of employees to determine whether there may be sex-based disparities in benefits which affect total compensation.

The Administrative Law Judge finds that the Department has justified the definition of employee by an affirmative presentation of facts; the proposed definition of employee is needed and reasonable.

Minn. Rules part 3920.0300 subpart 5 F. (1) Reporting minimum and maximum Salary.

64. This section requires that for classes with an established hourly wage, jurisdictions must multiply the minimum and maximum hourly wages by 173.3 to determine the minimum and maximum monthly wage. The Minneapolis Building and Construction Trades Council argues that the proposed rule for calculating monthly salary would penalize employees in the construction building trades. Because employees in the construction-building trades do not have year-round employment, and often have work that is seasonal or intermittent, they often receive a higher hourly wage. Multiplying the hourly rate by 173.3 would seriously inflate the earnings on the reporting form. The Minneapolis Building and Construction Trades Council recommended that an alternative be used. Instead of using the salary calculation proposed by the Department, the monthly salary reported for a job class would be the base hourly rate multiplied by the "average" straight time hours worked per month by employees in a class.

65. The Department in its final comments has chosen to reject this alternative. The Department explained as follows: "The fact that certain traditionally male-dominated classes may earn a greater salary for working less time than female-dominated classes earn for more "permanent" work, is not a good reason to diminish the earnings of seasonal or intermittent workers for purposes of determining equitable compensation relationships by averaging time and reporting only base salary." The Administrative Law Judge finds the Department's decision reasonable and appropriate. The rule, as proposed by the Department, has been demonstrated to be reasonable.

Minn. Rule-PArt-3920.0100, SubArt 9 ant 3920.0200. Jurisdiction .

66. Jurisdiction refers to the "political subdivision" "public employer" or "governmental subdivision" responsible for establishing equitable compensation relationships under the Pay Equity Act.

67. The Department received comments regarding the proposed definition

of "jurisdiction." The comments also are relevant to part 3920.0200 which governs how the Department determines the responsible jurisdiction and in particular subpart 3 which addresses the evidence the Department will consider in making that determination. Marge Adkisson representing the Minnesota Library Association proposed that the definition be changed so that the jurisdiction responsible for establishing pay equity is also the jurisdiction with the "final authority to adopt or veto the budget." The Minnesota Hospital Association suggested that additional factors such as salary-setting authority and whether bargaining units are separate from the city and county should be considered in determining the appropriate jurisdiction for pay equity.

68. The Department declined to adopt the proposal that the standard to be used in determining the responsible jurisdiction be the jurisdiction with "actual salary setting authority." The Department explained that it preferred to hold the entity with "final budgetary approval authority" responsible for pay equity because it is this entity which ultimately is in the best position

to establish equitable compensation relationships. Finally, the Department also declined to accept the suggestion that it define responsible jurisdiction along bargaining unit lines. (For example, a hospital employee may be in a different bargaining unit than a corresponding city or county employee. Is this sufficient reason to exclude hospital employees from the city or county's pay equity report?). The Department stated as follows:

Many jurisdictions - even those without charitable hospitals - must negotiate and bargain with several different bargaining units and exclusive representatives. The fact that there are separate and different bargaining units does not necessarily mean that there are different "employers".

Finally, all jurisdictions are required to establish equitable compensation relationships across the entire jurisdiction and not simply within bargaining units. The purpose of this requirement is clear. Because bargaining units are frequently organized by job type, many of which have traditionally been male or female-dominated, many gender-based pay inequities could be perpetuated if pay practices were otherwise determined by bargaining units.

69. The City of Willmar along with affiliated government entities Willmar Municipal Utilities and Rice Memorial Hospital - proposed that the definition of responsible jurisdiction and evidence to be considered in determining the responsible jurisdiction allow for separate pay equity reporting when "the final budgetary approval authority is actually only a veto power over the hospital board and the utility commission actions." This circumstance was precisely the relationship between Rice Memorial Hospital, Willmar Municipal Utilities and the City of Willmar. Rice Memorial Hospital and Willmar Municipal Utilities establish budgets, setting salaries for employees, and negotiate with various collective bargaining units. They submit their budgets to the city council which only has the authority to veto a proposed budget. Comments from each of the entities, the City of Willmar, Willmar Municipal Utilities and Rice Memorial Hospital emphasized that they were three distinct operating entities, each operating under its own pay equity program.

70. Comments from the City of Luverne also expressed some concern about the method the Department had proposed to determine the responsible jurisdiction. The City of Luverne suggested that the Department's proposed definition as the entity with "final budgetary approval" was too broad and suggested that a Definition include the entity that "effectively controls wages" to take into consideration the "realities" of the existence of joint powers agreements.

71. The Department has chosen to define the responsible jurisdiction as it is defined in PELRA, In PELRA, it is defined as the entity having final budgetary approval authority. The Department has proposed to use the PELRA definition because of the interrelationship between PELRA and the Pay Equity Act. However, unlike the PELRA definition the Department's proposed definition includes charitable hospitals based upon the recommendation of the Attorney General's office.

72. The Department has proposed an amendment to their definition which in part adopts recommendations made by the Minnesota Library Association and the City of Luverne relating to joint powers agreements and "final budgetary approval." The amendments also address charitable hospitals. The amendment is as follows:

Subp. 9. Jurisdiction. "Jurisdiction" means a political subdivision, governmental subdivision, or public employer responsible for achieving equitable compensation relationships under Minnesota Statutes, sections 471.991 to 471.999. For purposes of pay equity compliance, jurisdiction means a public employer as defined by Minnesota Statutes, section 179A.03, subdivision 15, clause (c), except that jurisdiction also includes-may also include charitable hospitals as defined by Minnesota Statutes, section 179.35, subdivision 2.

If a charitable hospital does not have final budgetary approval authority for employees in the hospital, the jurisdiction for purposes of parts 3920.0100 to 3920.1300 is defined as the public employer with final budgetary approval authority for employees in that hospital. If the governing board -of -A joint power 5 agepcy -does not have final budgetary approval authority for employees in the joint powers agency. The jurisdiction for purposes of parts 3920.0100 to 3920.1300 is defined as the public employer with final budgetary approval authority for employees in that joint powers agency.

73. The Administrative Law Judge finds that the Department's proposed definition of jurisdiction and amendments to the definition are reasonable and that the change does not constitute a substantial change.

Minn. Rules Part 3920.0300 Subpart 6. Comparison of Ben of Benefits

74. Jurisdictions are required to compare benefits received by male-dominated and female-dominated classes of comparable work value. The purpose of this comparison is to determine whether or not a female-dominated class or classes receive different benefits that represent a disadvantage to female-dominated class or classes. The Department asserts in its pay equity

SONAR that this subpart is needed to insure that the benefits component of compensation is evaluated in accordance with the law's overall standard that "compensation for female-dominated classes is not consistent with or below the compensation for male-dominated classes of comparable work value.

75. The Metro Cities oppose this method of benefit comparison and suggest that the comparison of benefits be done by comparing groups of bargaining units and unrepresented employees instead of comparing benefits across the entire jurisdiction. The Metro Cities explained that this method of comparison more accurately reflects the reality of the way benefit packages are established. The Metro Cities explained as follows:

This subpart does not reflect the way benefits are

commonly established in the collective bargaining process where differences in the way in which benefits are structured in different cities. Inclusive, negotiating packages are being designed to reflect the actual cost to the employer for the total of salaries and benefits. Employees in different bargaining units might agree to different rates of increases in salary and benefits which amount to the same increase in cost to their employer. This is especially true with the advent of flexible spending accounts. . . .

For cities where at least one group of employees represented by a union pay equity compliance should be judged bargaining unit by bargaining unit and separately for all non-union employees, not across the city as a whole.

76. The Metro Cities recommend that the proposed subpart 6 be deleted and replaced with the following language:

Subpart 6. Benefits. the jurisdiction must report by bargaining units and by unrepresented employee groups if the jurisdiction's contribution limit for benefits is different for any female-dominated classes within the respective groups.

If differences exist, and if differences represent a disadvantage for any female-dominated class, the jurisdiction must report the following information for all classes in each affected group bargaining unit or man-union employees):

A. Eligibility or lack of eligibility for benefits; and

B. The dollar value of benefits prorated to determine monthly value.

77. The Department responded in its post-hearing comments that comparisons based on bargaining units is inconsistent with the pay equity law. The Department further stated that limiting comparisons to intra-bargaining unit compensation is inconsistent with the law's broad policy goal to "establish equitable compensation relationships between male-dominated, female-dominated, and balance classes of employees in order to eliminate sex-based wage disparities in public employment in the state." Minn. Stat. § 471.992, subd. 1. The Department further stated that modifying the comparison in this matter would allow employers to discriminate with respect to benefits or total compensation between and among various unions or

unrepresented groups. The Department concluded that depending upon the gender dominance of the classes within the bargaining units or unrepresented groups, gender discrimination could be present and perpetuated.

78. The Administrative Law Judge finds that the Department's comparison and proposed method of comparison of benefits is reasonable and consistent with the Pay Equity Act.

Minn. Rules Part 3920.0400, 3920.0500. 3920.0600 and 3920.0700,  
Compliance  
review, Statistical analysis, Tool, AlternAtive Analysis test and  
other tests.

79. The central focus of this rule are the methods used for  
determining  
whether a jurisdiction has complied with the Pay Equity Act's  
requirement of  
establishing equitable compensation relationships. The tests used  
for making  
such a determination are contained in these parts. In order for a  
jurisdiction to be in compliance it must pass a "statistical  
analysis test"  
described in Minn. Rules Part 3920.0500, or an "alternative  
analysis test"  
described in 3920.0600, depending on the number of male-dominated  
classes and  
depending on whether or not a jurisdiction has salary ranges,.  
In addition,  
all jurisdictions must pass each of the "other" tests described in part  
3920.0700. If a jurisdiction fails any of the tests that apply to  
it, then  
the Department must find the jurisdiction not in compliance.

Failure-,to Include the Computer Program in the Proposed\_Rule Does Not  
Constitute a Defect.

80. In applying the statistical analysis test described in section  
3920.0500, the Department will use a computer program to combine  
data and  
perform the required calculations.

81. Numerous parties to this proceeding have recommended  
that the rules  
not be approved because the Department did not publish in the  
State Register  
or otherwise make available the actual computer program which the  
Department  
will use to perform the statistical analysis test. Numerous  
jurisdictions  
have questioned the integrity of the Department's compliance  
decisionmaking  
based on a computer program that has not been subject to scrutiny  
or otherwise  
validated by the rulemaking process. Without the program parties  
argue that  
they cannot determine whether the program is valid for all  
applicable sets of  
data. All the jurisdictions participating in this proceeding by  
providing  
oral or written comments, have expressed reservation, concern and  
lack of

confidence in the Department's compliance determination process because of the Department's failure to make available the computer program. The Metro Cities have recommended that the rulemaking process be suspended until the computer program is made available.

82. The Department contends that despite the fact that the actual computer program it will use to make compliance decisions has not been published, it has nevertheless published the entire compliance rule. The Department argues that the entire statistical analysis process is described in great detail in the rule, part 3920.0500. The computer program is simply the tool the Department will use to perform the analysis (or the calculations) described in the rule. Therefore, the Department asserts that it is not required to publish the computer program in the rule or incorporate it by reference.

83. The Department explained that it is in the process of making changes to the computer program, converting the program into a format that would be understandable and useful to most of the jurisdictions. Moreover, the program is still being revised to take into consideration the changes to the rule that have been made in this rulemaking proceeding. When the rule revisions are

final, the computer program will be distributed to all those persons who are interested in obtaining it. The Department explained that it is not making any changes in the computer program which would cause a change in the statistical analysis rule itself.

84. The Administrative Law Judge finds that the computer program that performs the statistical analysis required by Minn. Rule pt. 3920.0500, is not before the Administrative Law Judge at this time and has not been offered for review and evaluation by the parties in this proceeding. The Administrative Law Judge finds that this pre-enforcement challenge to the use of the computer program is premature.

85. The Department can only use the mathematical computations data described in the statistical analysis test as set forth in the rule. Thus, if the computer program interprets or adds to the mathematic computations in the rule, then the Department may be subject to a challenge that it is ignoring its own rule or is using an unpromulgated interpretive rule. However, this proceeding is not the appropriate time to determine whether the computer program measures what it purports to measure, whether the program's use for the data sets combined is valid, or most important, whether the program only measures or combines data in the manner specifically identified in the statistical analysis test rule. These are applications issues which are more appropriate for an enforcement-type proceeding. What is at issue in this proceeding is the need and reasonableness of the rule itself, not the program.

#### Challenges to the Validity of the Statistical Model.

86. The Administrative Law Judge has considered all arguments, assertions and claims regarding the statistical model including any that are not specifically discussed in this Report. Except as otherwise qualified or limited hereafter, the Administrative Law Judge finds that the statistical model used by the Department for the statistical analysis test is reasonable and needed and consistent with the Pay Equity Act.

Adoption of the validity of the Statistical Model.

87. Minn. Rules 3920.0500, subp. 2, establishes that an underpayment ratio of 80% or more as the basic definition of "not consistently below." If the rate of male underpayment is at least 80% of the rate of female underpayment, then the jurisdiction passes the statistical test.

88. The Minnesota Teamsters and AFSCME Councils 14 and 65 objected to the use of the 80% rule for determining the "consistently below" standard. They argued that the 80% underpayment ratio standard would allow employers to underpay and discriminate against a significant percentage of female classifications. The Department responded that the 80% standard for the underpayment ratio is the same as the "four-fifths rule" used as a federal standard in employment discrimination cases. The Department also argued that the standard is reasonable because it sets the level of acceptable difference which is used in related law and because it allows jurisdictions flexibility for incorporating non-gender-related influences into pay processes. The Administrative Law Judge finds that the use of the 80% standard for

establishing what constitutes "not consistently below" is reasonable and needed.

#### Use of thy W-ei ghted Male\_Regression Line

89. In the analysis of data determining predicted pay, the statistical model utilizes a weighted male regression line in Minn. Rule part 3920.0500, subpart 4 C. The International Union of Operating Engineers, Local No. 49, opposed the use of weighted male regression lines stating that weighting the lines by the number of male employees has no intrinsic value in the fitting of a linear regression line to represent the relationship between job evaluation ratings and salary. Singling out male classes for this treatment is inconsistent with the intent of the Legislature. The City of Waseca expressed its opposition to the use of weighted male regression lines as follows:

The use of a male only, weighted regression analysis does not comport with the statutory charge to establish reasonable relationships between classes. A weighted regression analysis by the number of persons in a job class has nothing to do with paying persons based on the value of the job performed in relationship to what other jobs are paid. That is, the purpose of the statute is to have the job valued, not to value the number of persons in a particular job category.

St. Louis County and the Metro Cities also opposed the use of the weighted male regression line.

90. Whether or not to use weighted male regression lines was an issue of controversy in the advisory committee meetings. After substantial discussion the conclusion was made that the regression line should be weighted. The Department stated a number of reasons for this decision in its Pay Equity SONAR at page 39, including (1) concept of class has little meaning without the reference to the existence of employees in class; (2) if the Department used an unweighted line, class size could easily be manipulated to a degree that would defeat the purpose of the law; and (3) the Legislature did not intend the Department to ignore employees in classes because it required jurisdictions to report the number of employees in classes as a part of the original report. After consideration of the arguments on the issue the

Administrative Law Judge is persuaded that the Department has acted reasonably by weighting the regression line. The Administrative Law Judge finds that the weighted regression line used for the determination of predicted pay has been demonstrated to be needed and reasonable.

use of the Statistical Analysis Test in Jurisdictions with and without Salary Ranges.

91. The League of Minnesota Cities has expressed a concern about the application of the statistical analysis to jurisdictions where some classes have salary ranges and some do not. The League of Minnesota Cities argues that it is unreasonable and inconsistent to apply the statistical analysis in these cases because the statistical analysis treats reported salaries as "maximums." The League suggests that the rule be modified so that the

computer model first be used for purposes of screening into compliance as many jurisdictions as possible under this method. It then proposes that with jurisdictions where there are only four to five male classes, the alternative analysis should be used where there are no salary ranges for 20 percent or more of the classes.

92. The Department declined to adopt this suggestion. The Administrative Law Judge finds that the Department has explained a reasonable rationale for its decisions regarding which analysis should apply to various types and sizes of jurisdictions in the Department's SONAR at pages 28-34. The Administrative Law Judge finds that the Department's decision to not adopt the League of Minnesota Cities suggestion is reasonable.

#### Use of Balanced Classes in the Statistical Analysis Test.

93. The Metro Cities have recommended inclusion of balanced classes in the statistical analysis, specifically in the calculation of the regression lines. Metro Cities cite the law's reference to balanced classes in Minn. Stat. § 471.992, subd. 1, and the "reasonable relationship" language in Minn. Stat. § 471.993, subd. 2 as support for its proposal.

94. The Department responded in its comments that balanced classes are excluded from the statutory definition of "equitable compensation relationship" and excluded from the plans local governments were required to develop. The Department further argues that an "all-jobs" regression line other than a male jobs regression line would have a dramatic impact on equitable compensation relationships. Instead of comparing female compensation to male compensation, the Department would be comparing female compensation to a standard which could already have incorporated sex-based wage disparities.

95. The Administrative Law Judge finds that the Department's decision to not use balanced classes in the calculation of regression lines is reasonable and appropriate.

Expanding-the Window for Predicted Pay Determination.

96. In order to determine predicted pay for the female class being analyzed, the Statistical Analysis Test requires that a window be drawn which includes at least 1/5 of all the male classes of comparable job value in the jurisdiction. Minn. Rule pt. 3920.0500, subpart 4, item A, subitem (4), authorizes that the window drawn for comparison of male and female classes be expanded to ensure that classes of dissimilar job value will be compared. Dave Erickson, representing the Minneapolis Building and Construction Trades Council, testified at the public hearing recommending deletion of the requirement that windows include one-fifth of male classes in the jurisdiction. He stated that this procedure would "ensure that classes of dissimilar value will be compared" and that it would "skew the line upward."

97. The Department responded stating that its procedure was preferable because it allows for averaging of pay for male classes with less emphasis on the compensation for any one male class. The Department explained that this is one of the provisions which reduces pressures on the collective bargaining

Minn. Rule part 3920.0700 subpart 4 Salary Range Test

103. Several commentators expressed concern regarding the proposed salary range test. The salary range test is one of the "other" tests that all jurisdictions must pass. This test measures the length of time required for female-dominated classes to reach the maximum of the applicable salary range as compared to male-dominated classes. The Department explains in its pay equity SONAR that it is possible for a jurisdiction's compensation structure to pass both the statistical analysis and alternative analysis tests yet still assign consistently lower compensation to female classes by manipulating movement through pay ranges. Neither of these tests measures or evaluates how classes of employees move through salary ranges. Minn. Stat. 471.9981, subd. 5a(6) requires a jurisdiction to include in its implementation report the "amount of time and employment required to qualify for the maximum" of a salary range. In order to give this requirement effect, the Department argues that it is necessary to utilize the salary range test.

104. The St. Paul Public Schools opposed the salary range test because the test contained disqualifying criteria not previously considered by the Department. In addition, St. Paul Public Schools argued that the salary range test conflicts with the Pay Equity Act and the Minnesota Public Employment Labor Relations Act (PELRA), Minn. Stat. §§ 179A.01 - 179A.30. In support of the conflicts argument, the St. Paul Public Schools explained that the speed of movement toward a maximum salary range is a subject that is routinely negotiated in labor contracts and is not a sex-based wage disparity. The St. Paul Public Schools provided the following comments:

The Department of Employee Relations before the recent rulemaking process did not suggest that years to range maximums would be or could be considered in their compliance determination.

Discussions surrounding pay equity have addressed pay levels, levels of benefits and the corresponding work values. It seems neither feasible nor reasonable to require jurisdictions to alter salary structures to comply with a test that was not proposed until this year and will not be adopted until after the reporting

deadline.

In St. Paul Public Schools, there are approximately 30 bargaining units, and by law the School District must bargain any changes to the structure of compensation. The Minnesota Public Employment Labor Relations Act (PELRA), Minn. Stat. § 179A.01 - 179A.30 requires public employers to meet and negotiate with the good faith intent of entering into an agreement on the terms and conditions of employment. The Pay Equity Act and Minn. Stat. § 471.992, Equitable Compensation Relationships, states that the Pay Equity Act is subject to the bargaining requirements of PELRA. Each employee organization has its own individual philosophy and needs regarding bargaining issues. Some organizations bargain for greater distance between new hire and maximum salary, and others bargain for less difference. The differences

include not only pay levels, but the number of steps in a range and the number of years to progress through that range. Any difference in years to maximum salary between male-dominated and female-dominated classes is related to bargaining unit preference, and bears only a coincidental relationship to the gender of the incumbents. In a jurisdiction without the obligation to bargain these changes, the circumstances may be different.

The St. Paul Schools went on to conclude that the salary range test should be eliminated from the rules because the concept is newly introduced and cannot possibly be compared with for the January 1 1992 compliance report. As an alternative the St. Paul Public Schools recommend that the requirement be phased in over a specified period of time such as three bargaining cycles. This would allow jurisdictions to incorporate compensation structure issues into their bargaining positions in an attempt to effect the necessary changes.

105. A substantially similar argument was made at the public hearing by Dennis Bible, Director of Labor Relations for the City of Minneapolis. He asserted that the salary range test is "new" to the pay equity compliance scheme and represents a departure from the Department's past practice. He said that originally salary ranges were not "significant" and now they are of "substantial import." He argued that had the City of Minneapolis known this, it could have tried to remedy the problem in the last contract negotiations, but now its only option is to reopen negotiations. He recommended that the Department postpone the implementation of the salary range test.

106. The League of Minnesota Cities also opposed the salary range test asserting that it was inconsistent with the Pay Equity Act's requirement that the Pay Equity Act be subject to good faith bargaining between employers and employees under PELRA. The League of Minnesota Cities stated as follows:

Differences in salary range length are almost always a

undo result of collective bargaining. There is no support in the law to indicate that the Legislature intended to differences between employees due to good faith collective bargaining. In fact, quite the opposite is true and this is reflected in the law itself and in the SONAR.

There is specific language in the Pay Equity Act stating that it is "subject to sections 179A.01 to 179A.25" (Minn. Stat. § 471.992, subd. 1). If this were not true, this would be a less persuasive argument. You will note that in section VI, 3920.0100, subpart 5, 1 2 of the SONAR, DOER agrees that there is an "intentional interaction" between MPELRA and the Pay Equity Act due to the direct reference of being "subject to the sections 179A.01 to 179A.25" and six other references to MPELRA and the Pay Equity Act. That should indicate that allowance must be given for variations in pay (and benefit) practices due to collective bargaining.

107. In response to these objections to the salary range test, the

Department argued that the salary range information is required to be contained in the implementation reports of the jurisdiction as a result of a change in the law made by the Legislature in 1990. The Department further stated that:

Because this information must be reported, it must be concluded that the Department must evaluate this information when making determinations about whether jurisdictions have established "equitable compensation relationships

It is true that in its current form, the salary range test was not included in any of the Department's guidebooks on pay equity. However, jurisdictions have known since the law was amended in 1990 that they would be required to report the amount of time required to reach the maximum. Therefore, they were on notice that this information would be evaluated in some way.

108. In addition, the Department noted that information regarding the salary range test was made available at training sessions in the Fall of 1990 and that earlier guidebooks noted that "pay structure" was an important aspect of the achieving equitable compensation relationships.

109. The Administrative Law Judge finds that the proposed salary range test is reasonable and consistent with the Pay Equity Act and that it is necessary to apply the salary range test to compensation plans that have passed the statistical and alternative analysis test.

110. The Administrative Law Judge finds that the salary range test represents a departure from previous guidelines or directions from the Department. From 1984 until 1991, the salary range test was not considered by the Department. Application of the salary range test to a jurisdiction's compensation plan may render the jurisdiction out of compliance, even in circumstances where the jurisdiction complied according to criteria and tests that the Department used before these proposed rules.

111. The salary range test was first presented formally by the Department in the publication of the proposed rules in June 1991. Jurisdictions will have had less than one-half year to bring their compensation structures into compliance with the salary range test.

112. The salary range test represents the Department's policy judgment of what constitutes the best rule. As such, it can be adopted so long as the Department demonstrates its reasonableness, which has been done in this case.

113. Questions of the reasonableness of enforcing the test under the timing circumstances of this rule must be deferred until a later case, after the uncertainties of Departmental (and possibly legislative) choices have been resolved. See Finding 39, above.

114. The Metro Cities also expressed reservations regarding the salary range test. The Metro Cities proposed that the salary range test should not apply to female or male-dominated classes across the jurisdiction but should instead apply only to classes of employees in bargaining units or groups of

classes among unrepresented employees. In response to this proposal the Department explained that modifying the test in this manner would allow employers to discriminate with respect to movement within salary ranges between and among various unions or unrepresented groups. Depending upon the gender dominance of the classes within the bargaining units or unrepresented groups, gender discrimination could be present and perpetuated even if there was no apparent discrimination in the frequency or amount of underpayment of compensation based upon the evaluation of the salary range maximums done in the alternative or statistical analysis test. Finally, the Department argued that the proposal would also be inconsistent with the Pay Equity Act. The Pay Equity Act does not provide for an evaluation of a jurisdiction's pay practices within individual bargaining units or unrepresented groups only. Instead, the Pay Equity Act contemplates that a jurisdiction must establish equitable compensation relationships across the entire jurisdiction.

115. The Administrative Law Judge finds that the Department's explanation of its basis for rejecting the Metro Cities salary range proposal is reasonable.

Minn. Rules Parts 3920.0800 and 3920.0900, Compliance Notification - Reconsideration,

116. The International Union of Operating Engineers Local No. 49 asserts that the Pay Equity Act and in particular Minn. Stat. § 471.992 specifically refers to collective bargaining and market considerations in its establishment of equitable compensation relationships. The International Union of Operating Engineers Local No. 49 argues that this language requires the Department to include strikes, lockouts and collective bargaining history as possible factors before a decision of noncompliance is reached and that these factors should also be considered "constraints" under Minn. Rule 3920.0900, subp. 9G. That provision allows a jurisdiction to demonstrate "constraints" that have impaired its ability to establish equitable compensation relationships.

117. The Department responded stating that Minn. Stat. § 471.9981, subds.

5A, and 6, suggest that whether a jurisdiction is determined to be in compliance is based upon implementation reports analyzed and evaluated by the Commissioner of Employee Relations. The Department argued that no requirement is made that the Commissioner evaluate the impact of collective bargaining agreements or market considerations in the initial determination of compliance. With respect to the constraints question, the Department stated that on reconsideration, pursuant to proposed Minn. Rule pt. 3920.0900, subp. 9G, there is no limit or limitation on the "constraints" that a jurisdiction may demonstrate. Therefore, if it desires a jurisdiction may demonstrate various market considerations and collective bargaining history as constraints it has faced.

118. All the commentators representing jurisdictions subject to these rules and the Association of Minnesota Counties, the League of Minnesota Cities, the Metro Cities, and Mr. Robert M. O'Connor, expressed concerns about the compliance notification process and in particular about the timing of the Department's compliance notification as provided by part 3920.0800. In addition, several of these commentators also have requested that the Department consider factors other than a jurisdiction's compensation relationships before issuing a finding of noncompliance. At the hearing Mr.

Bernard E. Steffen, representing the Association of Minnesota Counties and Anoka County, proposed an amendment to the rule that would allow informal pre-compliance conferences. The following language was proposed as an amendment to Minn. Rule 3920.0800, subpart 3:

Subpart 3. Jurisdictions not in compliance. If a jurisdiction is not in compliance, the department must send an initial determination of noncompliance to the jurisdiction along with a detailed description of the basis for the finding and specific recommended actions to achieve compliance. Following this initial determination, the department and the jurisdiction may meet in an effort to reach an agreement on a plan to achieve compliance following the event that the jurisdiction and the department agree that the jurisdiction is in compliance, the department shall issue a notice of compliance. In the event that the jurisdiction is not in compliance and the parties shall detail the specific actions to be taken, an estimated cost of compliance, a date by which compliance must be achieved to the jurisdiction, and a date by which the jurisdiction must submit a revised report for reexamination by the department.

In the event that the parties are unable to reach an agreement on a plan to achieve compliance, the department must provide a detailed description of the basis for the finding, specific recommended actions to achieve compliance, an estimated cost of compliance, a date by which compliance must be achieved to avoid a penalty, and a date by which the jurisdiction must submit a revised report for reexamination by the department.

The revised report must consist of the same information required in the original implementation report, except the information must be revised to be current as of the date by which compliance must be achieved to avoid a penalty. A date by which the jurisdiction must submit a revised report must be 30 days after the date by which compliance must be achieved to avoid a penalty.

In setting the date by which compliance must be achieved to avoid a penalty, the department must consider the basis for the noncompliance finding and the actions recommended to achieve compliance.

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The proposed precompliance conference would allow a jurisdiction to respond to a proposed finding that it was not in compliance before the finding goes into effect. The concern expressed by the commentators is that the publication of

a finding of noncompliance would lead to adverse publicity and have negative effect on employee relations. As Mr. Steffen stated in his written comments:

In local government, the initial determination sends the strongest message to citizens. In the sphere of local politics, an accusation by one public body against another is tantamount to a determination of guilt. Such an accusation is politically embarrassing and lowers the morale of citizens and employees. The accusation also encourages private discrimination lawsuits alleging that the jurisdiction's salary practices have disparate impact on women. See Minn. Stat. § 471.997 (1990). The fact that noncompliance with the mathematical test will result in an accusation of noncompliance with the statute also makes it more difficult to negotiate pay systems with the employees represented by unions.

119. Several commentators argued that in order to avoid this, a jurisdiction should have an opportunity to present defenses for not achieving equitable compensation relationships such as market factors, recruitment and retention difficulties before it is found out of compliance.

120. In response the Department concluded that these parties were requesting that the Department consider factors other than a jurisdiction's actual compensation relationships as a part of its initial determination. The Department declined to accept the proposal, on the basis that the proposal was inconsistent with the framework established by the Pay Equity Act for making compliance decisions. The Department argued that the Pay Equity Act contemplates that the initial compliance decision will be based solely upon the basic compensation information submitted in a jurisdiction's implementation report. Minn. Stat. §§ 471.9981, subd. 5A and subd. 6A. The Department explained that the Pay Equity Act contemplates three separate steps in the compliance determination and review process: (1) compliance determination; (2) reconsideration; and (3) requests for suspension of penalty. The Department further explained that the statute also specifies the evidence the Department may consider at each step. For these reasons, the Department concluded that it could not agree to consider evidence other than a jurisdiction's actual compensation relationships in making its initial compliance determination.

121. Although the Department declined to accept the pre-compliance conference type proposals recommended by the jurisdictions, it did acknowledge the concerns by jurisdictions that they could be determined not in compliance based upon a "data entry error" by the Department. To alleviate this concern the Department proposed to include a "data review" step in the initial compliance process. The Department proposes to amend part 3920.0400 by inserting a new subpart as follows:

Subpart 3. Data review Before completing the compliance review the department must mail to each jurisdiction a printout showing the data derived from jurisdictions implementation report which will be used  
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in determining compliance for that jurisdiction the department may- not make a compliance decision for a period of 14 days after the date shown on the printout.

mailed to the jurisdiction. If a jurisdiction submits period that any of those data are in error the department must review the data and correct any bona fide data entry error(s) before making a compliance decision.

The Department explained that the proposed amendment allows jurisdictions to point out data errors and if the jurisdiction's concerns are bona fide the Department will correct the error.

122. The Administrative Law Judge finds that the Department's refusal to adopt a precompliance conference proposal as recommended by commentators is reasonable. The Administrative Law Judge has considered the arguments raised in support of the precompliance conference proposal. After consideration, the Administrative Law Judge is persuaded that the Pay Equity Act does not contemplate conferences of this kind at the initial stage of the process. Therefore, the Department's decision is reasonable and consistent with the Pay Equity Act.

123. The Department's proposed amendment would allow "data review" prior to a determination of compliance by the Department to ensure that no jurisdiction will be found out of compliance simply because of a data entry error on the part of the Department. The amendment is reasonable and adequately addresses the "data entry error" concerns expressed by several of the commentators. The amendment does not constitute a substantial change.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

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

2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subs. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule, except as noted at Findings 21-23.

3. That the Department has demonstrated its statutory authority to adopt

the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) (ii).

4. That the Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. That the amendments and additions to the proposed rules which were suggested by the Department 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, and Minn. Rule 1400.1000, Subp. 1 and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusion, 2 as noted at Findings 21-23.

7. That due to Conclusion 2, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

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 Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above.

Dated this \_\_\_\_\_ day of December, 1991.

ALLEN E. GIES  
Administrative Law Judge

