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PERSL #1379

TO: HR Directors/Designees
Affirmative Action Officers

FROM: Cal R. Ludeman
Commissioner

RE: **Clarification of 43A.191, Subd. 1. Affirmative Action Officers.**

The State of Minnesota is committed to building a richly talented and diverse workforce. Recognizing this commitment, and during this difficult budget time of layoffs and reorganizations, it is important that there is common understanding of statutory requirements related to staffing issues -- what the law requires and where there is some discretion. An area of particular concern to ACCESS is the impact of budget cutting on AAO's and the statutory requirements related to that work. The following guidelines will provide information to agencies in order that they meet the requirements of the law while understanding the flexibilities within that law.

STATUTE:

43A.191 Agency affirmative action programs.

Subdivision 1. Affirmative action officers. (a) Each agency with 1,000 employees or more shall have at least one full-time affirmative action officer, who shall have primary responsibility for developing and maintaining the agency's affirmative action plan. The officer shall devote full time to affirmative action activities. The affirmative action officer shall report administratively and on policy issues directly to the agency head.

(b) The agency heads shall assign affirmative action officers or designees for agencies with fewer than 1,000 employees. The designees shall report administratively and on policy issues directly to the agency head.

(c) An agency may not use authority under section [43A.08](#), subdivision 1a, to place the position of an agency affirmative action officer or designee in the unclassified service.

Statutory Requirement

- An agency with 1,000 or more employees must have at least one full time AAO.

Guideline: This may mean that the agency has a position in the AAO class series, or it may mean that the agency has a position in a different class. The technical name of the class the agency places the position in is not important. However, what is important in either case is that full time duties of that position are in the area of affirmative action.

Statutory Requirement

- AAO shall have primary responsibility for developing and maintaining the AA plan.

Guideline: This language is understood to mean that the AAO is responsible for actually drafting and/or updating the plan, submitting it to DOER for review, and making sure the plan meets all requirements.

Statutory Requirement

- AAO shall devote full time to affirmative action activities.

Guideline: “Activities” is understood to have a rather broad application - from developing and implementing plans for addressing areas of underutilization identified by the AA plan to duties such as internal audits, recruiting, retention, training, outreach, and workforce planning. These activities may be extended beyond such traditional affirmative action concepts (e.g., persons of color, persons with disabilities, gender) to include diversity based concepts (e.g., age issues, workers comp and transgender/transsexual related issues).

Statutory Requirement

- Affirmative Action Officer shall report administratively and on policy issues directly to the agency head.

Guideline: Based on a verbal interpretation from the AG’s office, a dotted line to the agency head will suffice as long as the direct report is to the Deputy or Assistant Commissioner level. It is important to recognize that this provision is an attempt to avoid conflict of interest issues related to agency HR responsibilities that may arise if the AAO is required to make difficult decisions (e.g., substantiate/not substantiate allegations of harassment or discrimination, “toe the line” on affirmative hiring, etc.). We strongly suggest that agency heads carefully consider this when designating their AAO.

Statutory Requirement

- Agency heads of an agency with 1,000 or fewer shall assign affirmative action officers or designees. The designees shall report administratively and on policy issue directly to the agency head.

Guideline: Full time responsibilities are not required and the employee’s primary job duties do not have to be affirmative action. Although smaller agency AAO’s/Designees must also report directly to the agency head administratively and on policy issues these positions may have a dual reporting structure since they may not devote full time to AAO activities.

Statute does not dictate particular number/level of staff beyond minimums as stated above. For example, it is 1 per agency over 1000--not 1 per 1000 employees. There is no requirement to have or maintain a particular job class level.

Summary

All agencies must comply with the clear requirements of the law. This means that agencies may not choose to terminate an affirmative action program, nor fail to designate a person who is responsible for these duties, for any reason. Having no AAO whatsoever violates the law and therefore is unacceptable. However, there is no requirement that agencies must follow related to: 1) who is appointed as AAO/Designee, 2) the number of positions beyond the one AAO or Designee or 3) the class and level of those positions. During this time of budget crisis, agencies need to consider how to address and meet legal requirements in the most efficient and effective way. That may mean fewer staff dedicated to these responsibilities, a downward allocation in the class of the existing position, broader definition of responsibilities, a delegation of some duties in agencies of less than 1,000 employees, and any number of other creative means. While agencies still must meet the statutory requirements, they may decide to start looking at meeting these requirements in a different way.