July 1996

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Financial Audit Division Office of the Legislative Auditor State of Minnesota

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STATE OF MINNESOTA OFFICE OF THE LEGISLATIVE AUDITOR

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JAMES R. NOBLES, LEGISLATIVE AUDITOR

Representative Ann H. Rest, Chair Legislative Audit Commission

Members of the Legislative Audit Commission

Mr. Wayne Simoneau, Acting Commissioner Department of Employee Relations

We have completed a special review of personnel transactions that modified or created classified position rights for some employees that also held unclassified positions. Certain transactions were brought to our attention by three complaint letters. In early December 1995, a series of newspaper articles also questioned some of the same personnel transactions.

We conducted a preliminary review of the issues, and on December 22, 1995, decided that they warranted more extensive study. The responsible state agencies defended the legality and propriety of the personnel transactions. Nevertheless, we found certain aspects of the transactions to be troubling. We felt it was important to determine the extent that similar transactions may have occurred and to understand the effects on the state employees and their agencies. We also believed it was necessary to independently assess compliance with state law.

This report is intended for the information of the Department of Employee Relations, the other state agencies affected by these transactions, and the Legislative Audit Commission. This restriction is not intended to limit the distribution of this report, which was released as a public document on July 3, 1996.

John Asmussen, CPA

Deputy Legislative Auditor

James R. Nobles
Legislative Auditor

End of Fieldwork: April 12, 1996

Report Signed On: June 25, 1996

SUMMARY

State of Minnesota

Office of the Legislative Auditor
Centennial Office Building • St. Paul, MN 55155
612/296-4708

Special Review: Creating or Modifying Employment Rights For Unclassified Employees

Public Release Date: July 3, 1996

No. 96-26

The Office of the Legislative Auditor has conducted a special review of a personnel practice that enhanced or created classified position rights for several top management employees that either currently hold or once held unclassified positions.

Our objectives in conducting this study, were to address the following questions:

How widespread has the practice been and what types of employees have benefited from it? Did the transactions comply with state law and related personnel rules and regulations? What effect did these transactions have on the state employees and their agencies? Did any employees exercise their rights and realize benefits to which they were not entitled? What were the consequences for the employing agencies?

Conclusions

We found 15 cases of state agencies executing transactions that changed the classified position rights of state employees after they had taken a leave of absence to accept an unclassified position. In 11 cases, the transaction was executed to preserve the employees' classified position rights. Although the state does not have an established procedure to guide state agencies in these circumstances, we concluded that their actions were reasonable to preserve a right that the employees had previously earned. In four other cases, however, state agencies either created or enhanced the classified position rights for an employee. We question whether these four transactions were consistent with the intent of the statutory authority that permits these personnel transactions. The four employees were, however, selected for these classified positions based on merit. The employees had extensive state experience and possessed qualifications that suited them for the classified positions.

We recommend that the Department of Employee Relations develop an administrative procedure for preserving the classified position rights of unclassified employees. These transactions are subject to certain risks and errors that should be addressed by the procedure. Also, many of the transactions were executed under the direction of the same personnel director--indicating that the availability of these transactions is not readily recognized throughout state government. Furthermore, the department should consider the propriety of enhancing or creating classified position rights for unclassified employees, put in place procedures that ensure any potential conflicts of interest are resolved, and reevaluate the method of computing service toward satisfying probationary periods.

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Audit Participation

The following members of the Office of the Legislative Auditor prepared this report:

James Nobles	Legislative Auditor
John Asmussen, CPA	Deputy Legislative Auditor
Tom Donahue, CPA	Audit Manager
Marla Conroy, CPA	Investigator
Jean Mellett, CPA	Investigator

Exit Conference

We discussed the results of this special review with the following state officials at an exit conference on May 23, 1996:

Department of Employee Relations:

Karen Carpenter Depu

Deputy Commissioner

Chris Goodwill

Manager of Administrative Services

Department of Transportation:

Barbara Sundquist

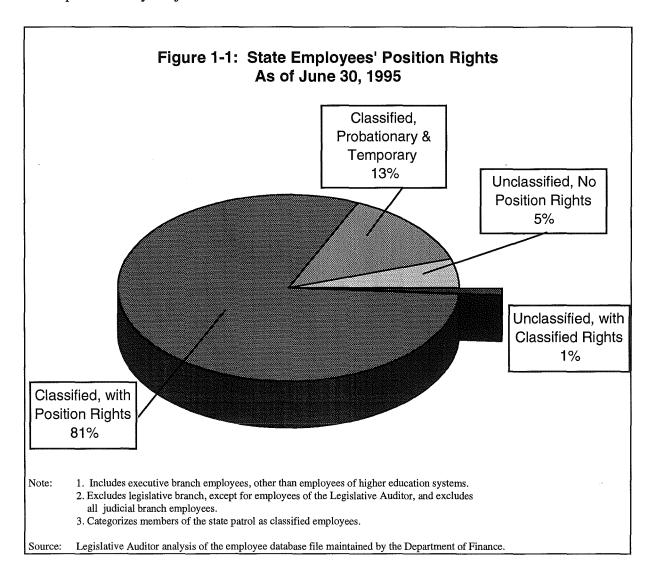
Director, Financial and Administration Division

The draft was also reviewed by officials from the Department of Human Services.

Chapter 1. Background

There are two distinct categories of state employees: classified and unclassified. Classified employees occupy most state positions. As shown in Figure 1-1, only about six percent of state positions are designated for unclassified employees. The general distinction between the two categories is that classified positions are subject to two provisions that do not apply to most unclassified positions:

- Candidates for classified positions are selected according to an established merit-based selection process that is controlled by the Department of Employee Relations.
- After serving a probationary period, a classified employee can be removed from a position only for just cause.



As a general rule, employees in unclassified positions serve at the discretion of the appointing authority. Minn. Rule 3900.9100 allows that "unless otherwise specified in a statute, an appointing authority may appoint to an unclassified position any person he or she considers qualified." The rule also relieves agencies of the requirement to make a public notice prior to filling an unclassified position. Unclassified employees essentially serve at-the-will of the appointing authority who can terminate the employment relationship at any time without justification. There are some exceptions to this rule. Chief executive officers of the state regional treatment centers, for example, may only be removed for just cause. Also, technically, Minnesota law considers members of the state patrol to be unclassified employees. However, the appointment process and position rights extended to the state patrol are equivalent to the classified service. Therefore, for purposes of this report, we included members of the state patrol with classified employees.

The classified service was designed to protect against the risks of the "spoils system" whereby appointing authorities could hire and fire all employees solely at their discretion. Prior to classified service, politicians had unlimited authority to award government jobs to supporters, irrespective of their qualifications. The classified service was created to establish a merit-based personnel system. It was designed to ensure that most government employees were chosen based on their qualifications, rather than their connections to politicians.

The increased role of unions in state government has diminished the importance of the state's classified service. Union participation has helped ensure that employees have the prerequisite skills in order to be hired for government jobs. Likewise, the unions protect their members against unjust employment termination.

The value of the classified service is most evident for career managerial employees who are not union members. It provides some permanence to the management of state agencies and allows the continued delivery of important government services, even during a change in elected officials.

The unclassified service allows elected officials and other appointing authorities the unilateral discretion to select employees for certain key positions. Most top managers of state agencies such as commissioners, deputies, and assistant commissioners serve in unclassified positions. The resulting combination of classified and unclassified managers allows for a balance between continuity of services and the capacity to initiate gubernatorial policy change.

Probationary Periods for Classified Positions

Classified employees are required to serve a mandatory probationary period prior to gaining the protection associated with position rights. Minn. Stat. Section 43A.02, Subd. 32, defines a probationary period as "part of the examination process," and says it means "a working period following unlimited appointment to a position in the classified service, during which the employee is required to demonstrate the ability to perform the duties and fulfill the responsibilities of the position." Minn. Stat. Section 43A.16 amplifies the requirements for classified employees to serve probationary periods:

Subdivision 1. **General**. All unlimited appointments to positions in the classified service except as provided in this subdivision shall be for a probationary period the duration of which shall be determined through collective bargaining agreements or plans established pursuant to section 43A.18 but which shall not be less than 30 days of full-time equivalent service nor more than two years of full-time equivalent service...

Subdivision 2. **Termination during probationary period**. There is no presumption of continued employment during a probationary period. Terminations or demotions may be made at any time during the probationary period subject to the provisions of this section and collective bargaining agreements or plans established pursuant to 43A.18.

If during the probationary period an employee with permanent status is dismissed for inability to perform the duties of the new position or for other cause not related to misconduct or delinquency, the employee shall be restored to a position in the employee's former class and agency.

The compensation plans permit the probationary period to be, in effect, waived if the employee has served sufficient time in another classified or unclassified position of equal or higher ranking. For example, Chapter 7 of the Managerial Plan provides:

Computation of Time on Probation. The probationary period begins on the day of unlimited appointment and includes all time in the agency in the class and in any subsequent appointments to comparable or higher related classes or related unclassified positions but not time on layoffs or unpaid leaves exceeding ten consecutive work days.

This provision and similar provisions in other compensation plans make it possible for an employee to gain position rights to a classified position without performing the duties of the classified position because time in other positions is counted toward the probation requirement.

What Positions Are Filled With Unclassified Employees

Our analysis focused on nearly 2,000 unclassified employees, mostly in the executive branch, as of June 30, 1995. Additional unclassified employees fill all positions of the judicial branch and the legislative branch, except for most positions with the Legislative Auditor's Office. Again, because state patrol employees are granted position protection, our analysis included them as classified employees. Our analysis excluded employees of the state higher education systems. The law considers most higher education employees to be in unclassified positions, although most faculty members may gain position rights through the tenure system. Table 1-1 shows some employment statistics for the state agencies that had over 10 unclassified employees in our analysis.

Table 1-1: Employees by Agency As of June 30, 1995

State Agency	Total Employees	Unclassified Employees	% Employees Unclassified
Attorney General	448	332	74%
Human Services	6,848	310	5%
Transportation	5,160	204	4%
Health	1,106	99	9%
Public Safety	1,833	94	5%
Natural Resources	3,065	69	2%
Pollution Control Agency	800	57	7%
Governor	49	49	100%
Corrections	3,341	48	1%
Administration	854	44	5%
Economic Security	1,992	41	2%
Iron Range Res & Rehab Bd	148	40	27%
School for the Arts	70	40	57%
Revenue	1,498	37	2%
Finance	178	34	19%
Education	625	31	5%
Trade & Economic Development	243	28	12%
Housing Finance	157	25	16%
Employee Relations	191	23	12%
Higher Educ Coord Bd	54	23	43%
Long Range Planning	84	22	26%
State Lottery	210	22	10%
Labor & Industry	389	- 21	5%
Veterans Homes	806	18	2%
Commerce	263	18	7%
Investment Board	25	17	68%
Workers Comp Court of Appeals	22	14	64%
Office of Environmental Assistance	67	14	21%
Zoological Gardens	217	14	6%
Military Affairs	322	13	4%
Public Service	130	11	8%
Human Rights	60	11	18%
Agriculture	488	11	2%
54 Other Agencies	1,012	132	13%
OT OTHER MEDICION	1,012	102	1070
Totals	<u>32,755</u>	<u>1,966</u>	<u>_6%</u>

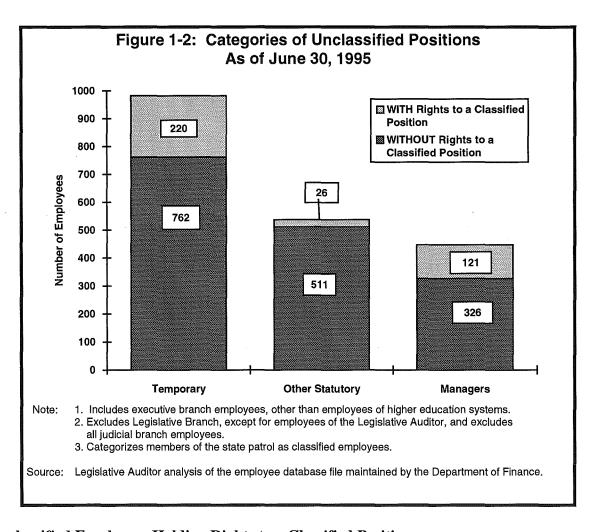
Note:

- 1. Includes executive branch employees, other than employees of higher education systems.
- Excludes legislative branch, except for employees of the Legislative Auditor, and excludes all judicial branch employees.
- 3. Categorizes members of the state patrol as classified employees.

Source: Legislative Auditor analysis of the employee database file maintained by the Department of Finance.

Minn. Stat. Section 43A.08 outlines the criteria necessary for a position to be placed in unclassified service. Unless a position meets the established criteria, it is deemed to be a classified position. As summarized in Figure 1-2, we identified three broad categories of unclassified positions:

- 982 temporary positions, as authorized by Minn. Stat. Section 43A.08, Subd. 2a, are unclassified. This provision, however, is reserved "for professional, managerial, or supervisory positions which are fully anticipated to be of limited duration."
- 537 other statutory positions are also designated as unclassified. Attorneys and legal
 assistants in the Attorney General's Office and positions in the Governor's Office account for
 over 300 of these other unclassified positions.
- 447 top management positions, including elected officials, agency heads, deputies, and assistant commissioners are unclassified. Minn. Stat. Section 43A.08, Subd. 1a, also allows appointing authorities to create additional unclassified positions, but one of its principal requirements is that the position "be designated as part of the agency head's management team."



Unclassified Employees Holding Rights to a Classified Position

Minn. Stat. Section 43A.07, Subd. 5, recognizes that there are many qualified employees in the classified service that may be appointed to serve in the unclassified service. It provides some limited means of assuring that if an employee accepts an appointment to the unclassified service,

the employee has the right to return to a position comparable to the employee's prior classified position. Specifically, Minn. Stat. Section 43A.07, Subd. 5, provides:

An employee who is granted a leave of absence from a position in the classified service to accept a position in the unclassified service shall retain an inactive classified service status. Upon request, during the unclassified appointment or within 60 days of the end of the unclassified appointment, the employee shall be reappointed in the agency from which the employee was granted the leave, to a classified position comparable to that held immediately prior to being appointed to the unclassified position.

In order to secure this assurance, however, the appointing authority must grant the classified employee's request for a leave of absence. Appointing authorities are not bound to grant a leave of absence. The bargaining agreements and compensation plans establish the conditions for an employee's return from a leave of absence. For example, Chapter 6 of the Managerial Plan provides that an employee is

... entitled to return from an approved leave of absence to a vacant position in the same class and agency. If a vacant position in the manager's class is not available, the appointing authority may offer the manager a vacant position in a different class of comparable duties and pay for which s/he is qualified. If no vacant position is available and/or offered, the layoff provisions apply.

Of the nearly 2,000 unclassified employees in our analysis, 367 of them also held rights to a classified position as of June 30, 1995. Particularly for managerial positions and temporary assignments, there is a significant amount of mobility between classified and unclassified positions. As shown in Figure 1-2, a substantial proportion of the unclassified employees in those two categories hold rights to a classified position. In most cases, that indicates that the employee had previously worked in the classified position and then taken an approved leave of absence to accept the unclassified position.

Temporary Assignments to Unclassified Positions

Half of the unclassified positions in our analysis were established as temporary appointments pursuant to Minn. Stat. Section 43A.08, Subd. 2a. Minn. Rule 3900.1300 further defines a temporary appointment as being "for a period not to exceed three years." Minn. Rule 3900.9100 imposes the additional limitation that employees serving in temporary unclassified positions shall not be "performing the same function in the same agency for more than three years in total." As shown in Table 1-2, 220 employees in temporary unclassified positions, or about 22 percent of them, also held rights to a classified position. These temporary assignments present state agencies with a mechanism for staffing special projects that are anticipated to be of a limited duration.

Table 1-2: Temporary Unclassified Employees
As of June 30, 1995

State Agency	Temporary Unclassified Employees	Employees With Rights to a Classified Position	% With Classified Rights
Attorney General	0	0	-
Human Services	265	80	30%
Transportation	185	33	18%
Health	92	10	11%
Public Safety	15	2	13%
Natural Resources	45	1 7	38%
Pollution Control Agency	51	12	24%
Governor	0	0	-
Corrections	16	4	25%
Administration	33	5	15%
Economic Security	24	14	58%
Iron Range Res & Rehab Bd	37	0	-
School for the Arts	2	0	-
Revenue	24	10	42%
Finance	28	6	21%
Education	18	4	22%
Trade & Economic Development	11	3	27%
Housing Finance	14	1	7%
Employee Relations	11	4	36%
Higher Educ Coord Bd	0	0	-
Long Range Planning	18	0	_
State Lottery	- 12	3	25%
Labor & Industry	14	6	43%
Veterans Homes	9	2	22%
Commerce	6	0	-
Investment Board	0	0	-
Workers Comp Court of Appeals	1	0	-
Office of Environmental Assistance	11	1	9%
Zoological Gardens	7	0	-
Military Affairs	3	0	-
Public Service	2	0	=
Human Rights	6	3	50%
Agriculture	5	0	-
54 Other Agencies	17	0	-
Totals	<u>982</u>	<u>220</u>	<u>22%</u>

Note:

- 1. Includes executive branch employees, other than employees of higher education systems.
- Excludes legislative branch, except for employees of the Legislative Auditor, and excludes all judicial branch employees.

Source: Legislative Auditor analysis of the employee database file maintained by the Department of Finance.

We found no instances where employing agencies had to take action to preserve, enhance, or create classified position rights for an employee who was serving in a temporary unclassified position. Apparently, these 220 employees had all served full probationary periods in their classified positions prior to being appointed to the temporary unclassified positions. The short duration of these appointments presents a limited risk that the employee's classified position

rights would erode or be imperiled by a reorganization. Other than recording scheduled salary increases for these employees' classified positions, the employing agencies did not have to record any other activity for these positions on the state payroll/personnel system.

Other Statutory Unclassified Positions

Table 1-3 shows the state agencies that have other unclassified positions authorized by Minn. Stat. Section 43A.08. These positions are placed in unclassified service because of the unique circumstances of a job or an agency. For example, the entire staff of the Governor's Office is comprised of unclassified employees.

Only 26 of these 537 other unclassified employees held the rights to a classified position. This relatively low incidence is understandable. Many of these unclassified positions do not offer a natural career opportunity for employees that are in classified positions. For example, about half the positions are comprised of lawyers and legal assistants in the Attorney General's Office. Other state agencies do not employ legal staff in classified positions that are candidates for the Attorney General's staff. For the most part, the Attorney General provides exclusive legal representation for state agencies. Likewise, since the Governor's Office has no classified positions, its unclassified employees do not have an opportunity to acquire classified position rights from their employing agency. As shown, in Table 1-4, three employees of the Governor's Office do hold rights to classified positions, but their rights relate to positions they held in another state agency prior to joining the Governor's staff.

We found no instances where employing agencies had to take action to preserve, enhance, or create classified position rights for an employee who was serving in one of these other unclassified statutory positions. To the best we could determine, 26 employees in this group of unclassified employees held classified position rights, but had served full probationary periods in their classified positions prior to being appointed to the unclassified position.

Table 1-3: Other Statutory Unclassified Employees
As of June 30, 1995

State Agency	Other Unclassified Employees	Employees With Rights to a Classified Position	% With Classified Rights
Attorney General	276	10	4%
Human Services	17	1	6%
Transportation	Ö	ó	-
Health	1	Ö	-
Public Safety	57	Ö	-
Natural Resources	6	ő	•
Pollution Control Agency	1	ŏ	-
Governor	35	3	9%
Corrections	13	1	8%
Administration	1	Ò	•
Economic Security	i	1	100%
Iron Range Res & Rehab Bd	Ó	Ò	
School for the Arts	33	2	6%
Revenue	2	1	50%
Finance	0	0	-
Education	0	Ō	-
Trade & Economic Development	. 1	1	100%
Housing Finance	0	0	-
Employee Relations	2	1	50%
Higher Educ Coord Bd	10	0	-
Long Range Planning	1	1	100%
State Lottery	1	· 1	100%
Labor & Industry	1	1	100%
Veterans Homes	2	0	•
Commerce	1	0	-
Investment Board	10	0	-
Workers Comp Court of Appeals	8	0	-
Office of Environmental Assistance	1	0	-
Zoological Gardens	0	0	-
Military Affairs	8	0	-
Public Service	1	0	-
Human Rights	1	0	-
Agriculture	1	0	-
54 Other Agencies	45	2	4%
Totals	<u>537</u>	<u>26</u>	<u>5%</u>

Note:

Source: Legislative Auditor analysis of the employee database file maintained by the Department of Finance.

^{1.} Includes executive branch employees, other than employees of higher education systems.

^{2.} Excludes legislative branch, except for employees of the Legislative Auditor, and excludes all judicial branch employees.

Managers: Classified or Unclassified?

The distinction between classified and unclassified managerial positions is often blurred. Minn. Stat. Section 43A.08, Subd. 1a, extends much greater discretion for many appointing authorities to establish managerial positions as unclassified, rather than classified. As shown in Table 1-4, nearly 40 percent of the state's 1,150 managers serve in unclassified positions. The proportion of managers that are unclassified, however, varies widely between state agencies. This variance is often attributable to the size of the agency. By definition, an agency's top managers will serve in unclassified positions. Small agencies typically have few managers in addition to top management, resulting in a relatively high percentage of unclassified managers. Conversely, large agencies have a far greater need to add managers beyond top management. As a result, larger agencies tend to have a lower percentage of their managers in unclassified positions.

Appointing authorities have filled a significant number of the state's top management positions with persons who have previous experience with state government. Of the 447 unclassified managers, 121 of them also held rights to a classified position indicating prior work experience in that classified position.

As discussed in Chapter 2, however, we identified 15 cases where state agencies took action to preserve, enhance, or create classified position rights for unclassified managers. In these 15 cases, the employees had not served in the classified positions for a full probationary term prior to being granted the rights to the position.

Table 1-4 shows the state agencies that have manager positions.

Table 1-4: State Managers As of June 30, 1995

State Agency	Total Managers	Unclassified Managers	% Mgrs Unclassified	Uncl Mgrs w/CP* Rts	% w/CP* Rights
State Agency					
Attorney General	56	56	100%	3	5%
Human Services	135	28	21%	17	61%
Transportation	140	19	14%	10	53%
Health	48	6	13%	1	17%
Public Safety	32	22	69%	0	-
Natural Resources	87	18	21%	11	61%
Pollution Control Agency	25	5	20%	3	60%
Governor	14	14	100%	0	-
Corrections	71	19	27%	11	58%
Administration	57	10	18%	4	40%
Economic Security	67	16	24%	5	31%
Iron Range Res & Rehab Bd	5	3	60%	0	-
School for the Arts	5	5	100%	0	-
Revenue	35	11	31%	6	55%
Finance	35	6	17%	2	33%
Education	27	13	48%	1	8%
Trade & Economic Development	28	16	57%	5	31%
Housing Finance	14	11	79%	3	27%
Employee Relations	12	10	83%	6	60%
Higher Educ Coord Bd	13	13	100%	0	-
Long Range Planning	8	3	38%	0	-
State Lottery	15	9	60%	2	22%
Labor & Industry	21	6	29%	4	67%
Veterans Homes	14	7	50%	1	14%
Commerce	20	11	55%	2	18%
Investment Board	8	7	88%	0	_
Workers Comp Court of Appeals	5	5	100%	2	40%
Office of Environmental Assistance	2	2	100%	1	50%
Zoological Gardens	10	7	70%	2	29%
Military Affairs	3	2	67%	0	-
Public Service	12	8	67%	Ō	_
Human Rights	4	4	100%	1	25%
Agriculture	21	5	24%	ò	2070
54 Other Agencies	101	7 0	69%	18	26%
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Totals	<u>1,150</u>	<u>447</u>	<u>39%</u>	<u>121</u>	<u>27%</u>

^{*} CP = Classified Position

Note:

Source: Legislative Auditor analysis of the employee database file maintained by the Department of Finance.

^{1.} Includes executive branch employees, other than employees of higher education systems.

Excludes legislative branch, except for employees of the Legislative Auditor, and excludes all judicial branch employees.

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Chapter 2. Preserving, Enhancing, or Creating Classified Position Rights for Unclassified Employees

Chapter Conclusions

We found 15 cases of state agencies executing transactions that changed the classified position rights of state employees after they had taken a leave of absence to accept an unclassified position. In 11 cases, the transaction was executed to preserve the employees' classified position rights. Although the state does not have an established procedure to guide state agencies in these circumstances, we concluded that their actions were reasonable to preserve a right that the employees had previously earned. In four other cases, however, state agencies either created or enhanced the classified position rights for an employee. We question whether these four transactions were consistent with the intent of the statutory authority that permits these personnel transactions. The four employees were, however, selected for these classified positions based on merit. The employees had extensive state experience and possessed qualifications that suited them for the classified positions.

We recommend that the Department of Employee Relations develop an administrative procedure for preserving the classified position rights of unclassified employees. These transactions are subject to certain risks and errors that should be addressed by the procedure. Also, many of the transactions were executed under the direction of the same personnel directorindicating that the availability of these transactions is not readily recognized throughout state government. Furthermore, the department should consider the propriety of enhancing or creating classified position rights for unclassified employees, put in place procedures that ensure any potential conflicts of interest are resolved, and reevaluate the method of computing service toward satisfying probationary periods.

Objectives

In conducting this study, we addressed the following questions:

- How widespread were transactions to preserve, enhance, or create classified position rights for unclassified employees?
- Did the transactions comply with state law and related personnel rules and regulations?

What effect did these transactions have on the state employees and their agencies? Did
any employees exercise their rights and realize benefits to which they were not entitled?
 What are the consequences to the employing agencies?

Methodology

We reviewed the appropriate laws and bargaining unit provisions governing the classified and unclassified service. In order to conduct the review we obtained data from the Department of Finance regarding employees who concurrently held rights to both a classified and an unclassified position as of June 30, 1995. We reviewed the employment history of the 367 unclassified employees identified in Chapter 1 as holding classified position rights. We performed a more extensive review of the transactions that indicated employees' classified position rights had been changed or created after the employees had assumed their unclassified positions. We interviewed several human resource administrators in state agencies and asked about their experiences with granting classified position rights to unclassified employees. For certain transactions, we obtained the department's explanations and documentation.

Conclusions

We found that there were not widespread occurrences of transactions to preserve, enhance, or create classified position rights for unclassified employees. As shown in Chapter 1, we analyzed data on 367 unclassified employees that also held rights to a classified position; and, we only found 15 cases where the employee's classified position right had been changed after the employee took a leave of absence to accept the unclassified position. Although the incidence of these transactions is not high, the transactions present the potential for certain risks and errors that need to be addressed. Findings 1 - 3 offer further analysis of these problems.

It is also worth noting that we received complaint letters that objected to the propriety and fairness of 8 of the 15 transactions. We suspect that these complaint letters came from other state employees who were upset about the transactions. After these transactions were revealed in the newspaper articles, other state employees telephoned our office and complained about the perceived favoritism associated with these transactions. The concerns raised by these employees underscores the need for the state to develop clear policies and procedures to govern these transactions.

1. State agencies have inadequate guidance for executing transactions to preserve the classified position rights of unclassified employees.

There are certain factors and circumstances that imperil the classified position rights held by unclassified employees. State agencies periodically find it necessary to reorganize and revise their personnel structures. In other cases, there may be action pending for an employee's classified position, such as a promotion or reclassification, when the employee is presented with an opportunity to fill an unclassified position. Rather than allow an employee's rights to

deteriorate or be eliminated, state agencies have sometimes acted to preserve the employee's rights to a classified position.

We found 11 cases where state agencies processed personnel transactions to preserve the classified position rights of an unclassified employee. These 11 transactions occurred after the employees had taken a leave of absence from their classified position to accept an unclassified position. The circumstances that prompted the agencies to take these actions included:

- In two cases, the employee had been promoted to a new classified position, but was still serving the probationary term when the employee accepted an unclassified position. In both cases, the agency counted the employee's service in the unclassified position toward satisfying completion of the classified position's probationary term. The Managerial Plan does permit probation to be satisfied in this manner.
- In four cases, state agencies had begun the process to promote or reclassify an employee into a higher ranking classified position, but had not completed the process when the employee accepted an unclassified position. In these four cases, the agencies continued to pursue the promotion or reclassification transactions and ultimately completed the transactions at a later date. The four employees remained in their unclassified positions, but had their classified position rights upgraded to the higher ranking classified position. Again, the agencies counted the employees' service in the unclassified positions toward satisfying completion of the classified positions' probationary terms.
- In five cases, state agencies had reorganized or instituted changes that either eliminated or threatened an unclassified employee's classified position rights. In those cases, the agencies transferred the employee's classified position rights to another comparable position in the agency. A comparable position is deemed to be within one salary series of the former position.

The 11 employees affected by these personnel transactions held unclassified managerial positions. Managers are often in a position to exert significant influence over personnel transactions. The state has a code of conduct that prohibits managers from improperly using their authority to have transactions processed for themselves. Moreover, we did not find evidence that any of the managers exercised undue influence to have a beneficial transaction processed on their behalf. These were unusual transactions, however, that were not readily understood by agency employees or the public. For example, one transaction involving the commissioner of a state agency received widespread public attention. There was suspicion that this commissioner had received favorable treatment. We found, however, that this transaction merely preserved the commissioner's rights to a classified position. The new position was in the same salary series and recorded at the same salary amount as the old position. This case illustrates the need, though, for the state to have appropriate policies and procedures that will both ensure the transaction is legitimate and reassure the public of its propriety. Possibly, the Department of Employee Relations should have to approve any transactions that would change the classified position rights of an unclassified managerial employee.

There are other state employees who have been on extended leaves of absences from a classified position while serving in an unclassified position. It is probable that the employing agencies had undergone some reorganization that had threatened these employee's classified position rights. Yet, the availability of a personnel transaction to preserve the position rights of the employees has not been clearly communicated to either the agencies or the employees. Several of the personnel transactions were executed under the direction of the same personnel director -- indicating that the availability of these transactions is not readily recognized throughout state government.

In addition, there were problems with how these transactions were recorded on the state personnel system -- particularly the salary amounts were prone to errors. The state personnel plan for managers establishes that a manager's salary upon returning from a leave of absence "shall be placed in the current salary range at a rate of pay which is comparable to the placement of his/her rate of pay in the salary range prior to the leave of absence. A manager may be placed at a higher rate of pay in the range with the approval of the Commissioner of Employee Relations." Three of the 11 transactions did not affect the employee's rate of pay as recorded on the state personnel system. Most of the other transactions recorded a salary that was \$3-4,000 higher than the employee's previous classified position. In two cases, however, the agency recorded the employees' new classified positions at salaries over \$15,000 higher than the employees' former classified positions. The salaries recorded for these two positions do not comply with the provisions of the Managerial Plan. There are also questions about the accuracy of the salary amounts recorded for the other positions. Furthermore, the personnel plan provides that an employee's salary for the classified position is to be determined when the employee returns from the leave of absence. Therefore, it was premature to adjust the salaries for these positions, because the employees remained in their unclassified positions. A transaction to preserve an employee's position rights should not be used to adjust the salary for the position.

Recommendations

- We recommend that the Department of Employee Relations establish a policy and procedure for state agencies to preserve the classified position rights of unclassified employees.
- Employee Relations should review the salary calculations for the 11 cases.
- 2. We question whether four transactions were consistent with the intention of the statutory authority for granting classified position rights.

The Department of Transportation (Mn/DOT) processed personnel transactions that enhanced the classified position rights for two long-term employees. The Department of Human Services created position rights for two employees who had no previous work experience in a classified position. The decisions to place these four employees in new classified positions were all based on merit, and the employees are well qualified for the classified positions to which they were granted the rights. Nevertheless, we question whether the transactions were consistent with the intent of the law that permits unclassified employees to maintain classified position rights.

The two transactions initiated by Mn/DOT affected long-term employees who had been in unclassified positions for many years. Both employees had over 25 years of experience with state government. The employees have held unclassified positions since 1979 and 1987. The department concluded that the classified position rights for these employees had deteriorated significantly over the past several years. It also felt that the employees had foregone many promotional opportunities for classified positions while holding their unclassified positions. Therefore, it determined that these transactions would be beneficial in order to retain valuable employees in the unclassified service.

The effect of these transactions on the employee's classified salaries appears to be rather dramatic. One transaction upgraded the employee's classified position by six salary series and recorded a salary increase to the position rights of over \$30,000. The other transaction upgraded the employee's classified position by five salary series and a corresponding salary increase of over \$17,000. In both cases, the transactions essentially eliminated any difference between the employee's unclassified salary and the salary recorded for their classified positions. It is unlikely, however, that if these transactions had not been executed, the department would substantially upgrade these employees' classified salaries had they chose to return to their classified positions in the future.

The two Mn/DOT transactions present the same problems as the previously discussed transactions to preserve employees' classified position rights. Furthermore, these two transactions raise the question about the propriety of an agency enhancing an employee's classified position rights while remaining in the unclassified service. Minn. Stat. Section 43A.07, Subd. 5, provides that, "An employee who is granted a leave of absence from a position in the classified service to accept a position in the unclassified service shall <u>retain an inactive classified service status</u> [emphasis added]." We question whether a transaction that significantly upgrades an employee's classified position rights complies with this legal provision.

In two other transactions, the Department of Human Services created classified position rights for employees who had previously held only unclassified positions. Both employees had over ten years of state experience before accepting assistant commissioner positions with the department. One employee had previously held a position as an attorney for the Office of the Attorney General. By statute, legal positions within the Attorney General's Office are to be unclassified. The other employee had previously held a position as a chief executive officer (CEO) for a regional treatment center administered by the Department of Human Services. Again, state law directs that these CEO positions be in the unclassified service, even though CEOs can only be removed for just cause. Nonetheless, these employees did not hold classified positions when accepting positions as assistant commissioners. Accordingly, they were not eligible for classified position rights under Minn. Stat. Section 43A.07, Subd. 5.

Because these employees lacked prior classified service, the department allowed them to compete for and be selected for classified positions in the department. Clearly, both employees were qualified for the classified positions. The department did not, however, require either employee to actually perform the duties of the classified positions. In one case, the employee had been an assistant commissioner for nine months when granted the classified position rights.

The employee continued to serve as an assistant commissioner without interruption. The other employee was named to both the classified position and the assistant commissioner position on the same day. The employee immediately took a leave of absence from the classified position and assumed the duties of the assistant commissioner position. The classified position for the former attorney was recorded at a salary of about \$10,000 higher than the employee's salary at the Office of the Attorney General. The classified position for the CEO was recorded at a salary of about \$10,000 lower than the unclassified CEO position.

We question whether these two transactions processed by the Department of Human Services are within the intent of Minn. Stat. Section 43A.07, Subd. 5. To create classified position rights for employees who had not previously served in the classified service is a significant extension of this legal provision. As shown in Chapter 1, only 367 of nearly 2,000 employees in unclassified positions also hold rights to a classified position. The transactions processed by the Department of Human Services for the two employees discussed above present the possibility that an additional 1,600 unclassified employees could be granted rights to classified positions.

Recommendations

- The Department of Employee Relations should review the four personnel transactions for compliance with existing law and personnel procedures.
- If the Department of Employee Relations determines that these transactions are allowable, it must either establish a procedure to govern similar transactions or seek a legislative change to clearly authorize these transactions.
- 3. Under certain circumstances, employees were granted rights to classified positions without being required to perform those position duties during a probationary term.

A common characteristic of the 15 cases that we discussed in Findings 1 and 2 was that the employees did not have to serve full probationary terms and demonstrate that they could effectively perform the specific duties of the new classified positions. A provision in the state personnel plans allowed the employees to count the time in their unclassified positions toward satisfying the required probationary term of their new classified positions. In some cases, the employing agencies argued that an employee was performing the essential duties of both the unclassified and classified positions concurrently. In most cases, however, the employee was serving in a higher ranking unclassified position and not required to perform the specific duties of the new classified position.

Classified employees are required to serve a mandatory probationary period prior to gaining the protection associated with position rights. Minn. Stat. Section 43A.16 provides that:

All unlimited appointments to positions in the classified service except as provided in this subdivision shall be for a probationary period the duration of which shall be determined through collective bargaining agreements or plans established pursuant to section 43A.18 but which shall not be less than 30 days of

full-time equivalent service nor more than two years of full-time equivalent service . . .

The compensation plans permit the probationary period to be, in effect, waived if the employee has served sufficient time in another classified or unclassified position of equal or higher ranking. For example, Chapter 7 of the Managerial Plan provides:

Computation of Time on Probation. The probationary period begins on the day of unlimited appointment and includes all time in the agency in the class and in any subsequent appointments to comparable or higher related classes or related unclassified positions but not time on layoffs or unpaid leaves exceeding ten consecutive work days.

The reason for this provision is not clear to us. It and similar provisions in other compensation plans compromise the express legal requirement contained in Minn. Stat. Section 43A.16. It is reasonable to presume that the law contemplated that an employee would perform the duties of the classified position during the probationary term. Yet, these cases provided examples of where that presumption was not valid.

Furthermore, we question whether it is reasonable to combine the provision on "Computation of Time on Probation" with the ability to establish classified position rights for unclassified employees. The effect of that combination is that employing agencies have extensive authority to create or enhance classified position rights for their unclassified employees.

Recommendation

• The Department of Employee Relations should reevaluate the criteria contained in the employment plans and bargaining agreements that defines service satisfying the completion of a probationary period.

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Minnesota Department of Employee Relations

Leadership and partnership in human resource management

June 14, 1996

James Nobles
Legislative Auditor
Office of the Legislative Auditor
1st Floor Centennial Bldg.
658 Cedar Street
St. Paul, Minn. 55155

Dear Jim Nobles:

Thank you for the opportunity to respond to your audit report concerning "Creating or Modifying Rights for Unclassified Employees". I appreciate your incorporating into this report the suggestions made from my staff and others prior to producing a final version.

Employee Relations agrees that although statute may not clearly state the intent or reflect past or current practices, in the cases identified there were no inappropriate transactions processed, nor were any of the transactions illegal.

All individuals who were affected possessed the necessary state experience and qualifications and were appointed to their classified positions based solely on merit.

Employee Relations will review all these recommendations to develop or clarify existing administrative procedures as they relate to leave return rights for classified employees.

Specifically, in response:

Finding #1 - "State agencies have inadequate guidance for executing transactions to preserve the classified position rights of unclassified employees".

Recommendation

• The Department of Employee Relations establish a policy and procedure for state agencies to preserve the classified position rights of unclassified employees.

Response

• Employee Relations will review the language in the commissioner and managerial plans to see if clarification is needed in the provisions relating to individual's return rights from an unclassified leave. Language in collective bargaining agreements would have to be addressed during the contract negotiation process.

Recommendation

• Employee Relations should review the salary calculations for the 11 cases.

Response

• Verification of an individual's salary upon return from a leave of absence is done at the point the individual returns from their leave of absence by the employee's agency and Employee Relations. In these 11 cases the salary will be reviewed at the time the leave ends as is currently done for all other situations in state government.

Finding #2 - We question whether four transactions were consistent with the intention of the statutory authority for granting classified position rights.

Recommendation

• The Department of Employee Relations should review the propriety of these four personnel transactions.

Response

• Employee Relations has reviewed these four transactions and the other seven cases identified. We believe these transactions are legal and follow the intent of our laws, and that none of the agencies processed inappropriate transactions.

Recommendation

• If the Department of Employee Relations determines that these transactions are allowable, it must either establish a procedure to govern similar transactions or seek a legislative change to clearly authorize these transactions.

Response

• Employee Relations, as previously stated, is allowing these transactions to stand. We also agree to establish a procedure for future similar transactions.

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Finding #3 - Under certain circumstances, employees were granted rights to classified positions without being required to perform the position duties during a probationary term.

Recommendation

• The Department of Employee Relations should reevaluate the criteria for service that satisfies the completion of a probationary period.

Response

• Employee Relations agrees to look at this provision.

If you should have any questions or need further clarification on any of our responses, please feel free to contact Karen Carpenter, Deputy Commissioner at 296-3095.

Sincerely,
Dayre Liveren

Wayne Simoneau Commissioner

can/l-nobles